A CRITICAL ANALYSIS OF THE IMPACT OF CHANGING TRENDS IN LEGISLATION
ON THE MANAGEMENT OF FAMILY BUSINESSES

BY

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Paper presented in partial fulfillment of the requirements for the degree Master in Business Administration at the Port Elizabeth Technikon.

Promoter: Prof G Maas
Date: November 2003
DECLARATION

I, Gaynaé Tuck, hereby declare that:

- the work in this dissertation is my own original work;

- all sources used or referred to have been documented and recognized; and

- this dissertation has not been previously submitted in full or partial fulfillment of the requirements for an equivalent or higher qualification at any other recognized education institution.

ACKNOWLEDGEMENTS
The successful completion of this study would not have been possible without the support, advice, assistance and encouragement of others.

I should like to record my sincere thanks and appreciation to the following:

- Prof G Maas, my promoter, for his professional and constructive guidance during the course of my research efforts.

- Ms Debbie Box for her assistance with the final presentation of this document.

- My husband, Roy and our children Cydney, Robyn and Justin for their sacrifice, support and understanding.
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CHAPTER 1
BACKGROUND TO RESEARCH

1.1. INTRODUCTION

A business needs to be dynamic and adjustable to survive in the ever-changing marketplace in which it operates. The environment is no longer merely the immediate domestic business environment within which the specific business operates but also, with the advent of information technology and globalisation, overseas markets. This is true for all businesses and no less so in respect of family businesses.

Balshaw (2003:23) lists the many issues which impede family businesses as, amongst others:

- Unresolved family and personal issues;
- Dysfunctional relationships;
- Poor communication;
- Lack of commitment;
- No succession plan or timetable;
- Inability of the senior generation to relinquish control;
- No unifying vision or dream in the family;
- Open conflict;
- Nonexistent decision-making and governance structures;
- Lack of transparency and openness;
- Failure to plan strategically.
In addition to this the business must be aware of and react to the changing circumstances in the environment.

1.1.1. The Environment

The “environment” is a general term for many diverse influences. Various writers have attempted to create frameworks to understand the environment of organizations in an attempt to identify key issues and ways of coping with change and the complexities involved. Johnson and Scholes (2002:98) present the following model to good effect:

**FIGURE 1**

**LAYERS OF THE BUSINESS ENVIRONMENT**
The outermost layer consisting of general environmental factors which impact on all organizations, is referred to as the macro-environment. Within the macro-environment lay industries or groups of organizations who produce the same products or services. Within this group are influences from the threat of new competitors and substitute products as well as the pressure of the bargaining power of suppliers and buyers. Porter has illustrated this in his Five Forces Model (See Figure 2).

**FIGURE 2**  
**PORTER’S FIVE FORCES MODEL**

![Five Forces Model Diagram](image_url)
Many writers have developed various types of frameworks which can be utilized to analyse future trends in the political, economic, social, technological, environmental and legal spheres of an organizations existence. The PESTEL framework is one which will be discussed. It is useful in identifying factors, called structural drivers, which have a particular influence on the organization under scrutiny.

Porter’s model illustrates the organization vying with the traditional competitor within the same industry and the pressures exerted by new competitors entering the industry with substitute services and products competing for a share of the market. It also illustrates the bargaining power of suppliers and buyers who exert their own form of pressure. Organisations are inextricably linked to their supply and distribution chains and are part of a network of organizations who need to co-operate with each other in order to survive. These organisational fields influence the industry and the strategic groups and markets within that industry.

One will find organizations, within the industry itself, which have similar characteristics but can be differentiated from other groups. Motor vehicle manufacturers who are traditionally competitors may enter into a joint venture, for example, in capturing a specialized portion of the export market. The concept of markets and how they are structured is important to these groups.

There many diverse and complex factors which have an influence on an organization and its planned strategy. The PESTEL framework categorises environmental influences into six main groups:

- political,
- economic,
- social,
- technological,
- environmental,
- legal.

This is by no means an exhaustive list but form a good basic framework from which to conduct an investigation of relevant influences. Some factors may be more important to certain organizations than others and other factors totally irrelevant.
As indicated above the framework is useful in identifying the factors, called structural drivers, which will have a particular influence on the organization under scrutiny. The creation of scenarios, or possible future circumstances in which the organization may find itself, provides the opportunity to plan for each possible set of circumstances ahead of time.

It is important to realize when using this framework that it is the combined effort of these separate factors which is important and not each one individually. With the passing of time circumstances arise which may affect the structure of an industry or sector. These are what are referred to as structural drivers.

The most important environmental influence for the purposes of this study is the “legal” factor. South Africa’s legal system has since 1994 undergone fundamental changes which influence the interpretation of past and existing legislation as well as the trend of legislation still to be passed. The scope of this change will be discussed in some detail in chapters 2 and 3 of this document as the audience to whom this document is aimed will largely have either no or little legal background and will otherwise not appreciate the true impact of the changes which have affected the legal system since 1994.

The Pestel framework is illustrated on the following page in Table 1:
### TABLE 1  
THE PESTEL FRAMEWORK

<table>
<thead>
<tr>
<th>MACRO-ENVIRONMENTAL INFLUENCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. What environmental factors are important to the organization?</td>
</tr>
<tr>
<td>2. Which of these are most important at the present time?</td>
</tr>
<tr>
<td>3. In the next few years?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>POLITICAL</th>
<th>ECONOMIC FACTORS</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Government stability</td>
<td>• Business cycles</td>
</tr>
<tr>
<td>• Taxation policy</td>
<td>• GNP trends</td>
</tr>
<tr>
<td>• Foreign trade regulations</td>
<td>• Interest rates</td>
</tr>
<tr>
<td>• Social welfare policies</td>
<td>• Money supply</td>
</tr>
<tr>
<td></td>
<td>• Inflation</td>
</tr>
<tr>
<td></td>
<td>• Unemployment</td>
</tr>
<tr>
<td></td>
<td>• Disposable income</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SOCIOCULTURAL FACTORS</th>
<th>TECHNOLOGICAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Population demographics</td>
<td>• Government spending on research</td>
</tr>
<tr>
<td>• Income distribution</td>
<td>• Government and industry focus on technological effort</td>
</tr>
<tr>
<td>• Social mobility</td>
<td>• New discoveries/development</td>
</tr>
<tr>
<td>• Lifestyle changes</td>
<td>• Speed of technological transfer</td>
</tr>
<tr>
<td>• Attitudes to work and leisure</td>
<td>• Rates of obsolescence</td>
</tr>
<tr>
<td>• Consumerism</td>
<td>• Levels of education</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ENVIRONMENTAL</th>
<th>LEGAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Environmental protection laws</td>
<td>• Monopolies legislation</td>
</tr>
<tr>
<td>• Waste disposal</td>
<td>• Employment law</td>
</tr>
<tr>
<td>• Energy consumption</td>
<td>• Health and safety</td>
</tr>
<tr>
<td></td>
<td>• Product safety</td>
</tr>
</tbody>
</table>

It is important to realize strategically when using this framework, that it is the combined effort of the factors which is significant and not each one individually. Circumstances may arise with the passing of time which may affect the structure of an industry or sector. These are structural drivers. This paper concentrates specifically on the legal factor in the South African context.

There is a global tendency towards a convergence of markets. Closer contact due to ease of travel and communication via the Internet has created between communities across the world similar needs, trends and tendencies. Countries themselves encourage free trade between nations and encourage global traders. Global operations are able to be more cost efficient. Industries previously difficult to enter are now more accessible if the organization can find a central cheap source of raw materials and then locate to where labour rates are low. Global competition is becoming now more the issue than local rivalry. The macro-environment now extends beyond the national borders of the organizations location. The impact globalisation has on the strategic plans of a particular organization must be considered in each individual instance.

1.1.2. The Legal Revolution

The Constitution of South Africa is set in a particular historical context – the demise of an unjust regime and the birth of a new order based on the values of humanity (*ubuntu*) and social justice (Kentridge and Spitz:1999:11-2). The function of this Constitution is “to provide a continuing framework for the legitimate exercise of governmental power” whilst the task of it's Bill of Rights is “the unremitting protection of individual rights and liberties.”

The interim and final Constitutions possess three features unprecedented in South African constitutional history (Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman:1998:1-1). Firstly, the constitution entrenches constitutional supremacy and a sovereign Bill of Rights. Legislative and executive acts of government can now be declared invalid if they are found to violate fundamental human rights. Secondly there was
the creation of nine new provinces and the distribution of political power between the national government and provincial governments. Finally, was the establishment of a Constitutional Court with final jurisdiction over constitutional matters and the reworking of the jurisdictions of the Supreme Court of Appeal, the High Court and other courts to accommodate constitutional issues. Creation of these new courts raises new possibilities in the field of judicial remedies and in the structuring of the relationship between the judiciary and the legislative and executive branches of government.

It is this final piece of legislation which has dramatically changed the mindset of the South African legislator from its traditional historical thought processes and is destined to influence all future legislation. The following will have to be considered when drawing up new legislation:

- the rights of equality;
- freedom of association;
- access to information;
- economic activity;
- labour relations;
- property;
- land;
- socio-economic;
- environmental rights.

These will affect the interpretation of new and old legislation and effect the relationships between individuals and between individuals and the State. This new approach to legislation will inevitably impact on businesses and their management.
1.1.3. The Family Business Phenomenon

Balshaw (2003:26) refers to data sourced from the South African Department of Trade and Industry and South African Revenue Services which reveals that out of a total of 1,42 million active businesses in South Africa, 84 percent are, broadly defined, family businesses. There are an estimated 330 000 active companies and close corporations and 870 000 active individuals, including sole proprietors or partnerships, which fall in the broad definition of a family business. This data excludes much of the large informal sector in South Africa. United States data indicates that in that country family businesses employ 59 percent of the workforce and create at least 78 percent of new jobs (Family Business Review, Vol 9, No 2, Summer 1996). In South Africa small and medium enterprises provide approximately 57 percent of jobs in the South African economy and contribute about 35 percent of South Africa’s gross domestic product (Erwin: 2002). About 80 percent of these businesses could be classified as family businesses (Ackerman:2001:325).

The influence these businesses can and will have on the South African economy and the creation of future job opportunities is clear. These statistics and the spirit of the constitution should be paramount to the government in both supporting business, especially family business and providing them with the freedom to grow. Balshaw states (2003:28), “Capital seeks out returns where returns are the highest and family businesses use their democratic right to vote with their feet.” The author provides examples of an absurdity which exists at present with reference to some 46 forms which an emerging family business would have to submit annually to the South African Revenue Services!

Against this background, it is clear how important it is to look at the impact which trends in legislation are having on the management of family businesses. These businesses have a
particular and unique goal – that of “keeping the business in the family” or at the very least under its control. It is important that these businesses be aware of the demands of their environments and aware of the consequences which these demands may have on their unique goal. Knowledge of the increasing demands of the legislature on businesses in general can assist them in making well-considered and planned decisions on matters such as, amongst other things, the form of legal entity which the business should take or the maximum growth which should be allowed before more onerous obligations need to be satisfied.

1.2. STATEMENT OF RESEARCH PROBLEM

The research problem to be considered is:

What, if any, effects have recent trends in legislation in South Africa had on the management of businesses and with specific reference to family businesses?

1.2.1. Subproblems

In order to develop a research strategy to deal with and solve the main problem, the following sub-problems have been identified:

a) What does a literature study identify as the factors having the most influence on recent legislation?

b) What does the research literature indicate are the trends in recent legislation which effect the management of family businesses in particular?

c) Analyse these trends and their effect on the management of family businesses.
1.3. DEMARCATION OF THE RESEARCH

Demarcation of research serves the purpose of making the research topic manageable. This research is limited to selected legislation of Parliament passed in South Africa since 1994 which has had a particular effect on the management of family businesses within this country's borders. No consideration has been directed towards provincial or municipal legislation.

No attention has been directed towards taxation and finance legislation. These are a field of study on their own and better dealt with by a specialist in the field of accounting.

1.4. DEFINITION OF SELECTED CONCEPTS

1.4.1. Family Businesses

Family businesses are difficult to define and identify objectively. Criteria have included factors such as percentage ownership, active family members’ involvement in management, voting control, control over strategic direction, involvement of more than one generation, and attitude of family members toward the business (Balshaw:2003:24). This broad definition requires families to have some degree of control over the strategic direction of the business and an intention that it remain in the family, and a narrow definition requiring multigenerational involvement in the management and day-to-day operations of the business.
It is not essential for purposes of this research document to select a specific definition. Reference will be made in analyses to the varying impact certain legislation will have on the various forms of family businesses. Shanker and Astrachan (1996:107) postulate a narrow definition which defines a family business as one held by members of the same family to shape and/or pursue the formal or implicit vision of the business and where there is an intention by family members to hand the business over to the next generation to manage and/or control in the future.

1.5. SIGNIFICANCE OF THE RESEARCH

Few academics, government agencies or data gathering agencies regarded family businesses as distinct entities until recently. The difficulty in defining and identifying family businesses has added to this problem. In addition information about family businesses is not readily available due to their unwillingness to disclose personal information. Family businesses have as previously indicated a unique objective – preserving the business for future generations. The primary objective in this study is to explore the influence which trends in recent legislation may have on this sector in South Africa. The ultimate aim is to identify possible areas of impact and the magnitude thereof and to formulate recommendations and strategies to assist family businesses in addressing these issues.

No previous research on this topic has been traced despite reference to various sources. This paper is, therefore, exploratory in nature but will hopefully serve as the foundation for more detailed and specific research in future.
Chapter 1 serves as an introduction to the study and presents the purpose, methodology and objective of the study. The demarcation of the field of study is set with a definition of the most important terms and an overview of the structure of the thesis.

Chapter 2 relates a brief history of South African law and the change in the approach to legislation since the advent of the 1993 Constitution and Bill of Rights in South Africa. The final Constitution is discussed together with its interpretation and provisions. It discusses what the final Constitution says about statutory interpretation and how this may have changed the approach to statutory interpretation, which has prevailed until now. The implications of constitutional supremacy and the place and meaning of judicial review of legislation in a democratic society is discussed. The implications of the South African courts purposive and value based approach for the structure of constitutional analysis is examined. Questions of interpretation in relation to the final Constitution are, in conclusion, considered.

Chapter 3 concentrates on the fundamental rights specifically identified and enshrined in the Bill of Rights. These are discussed in broad outline with reference to their importance in relation to existing and future legislation.

Chapter 4 considers specific legislation passed and the magnitude of the impact these Acts may have on the various forms of family businesses. Individual legal concepts and the interpretation given to these in recent case law will thereafter be considered.
Chapter 5 is a critical analysis of the factors identified in the study of the Constitution and the Bill of Rights as well as specific legislation and important court decisions. Strategies to overcome some of the perceived problems are explored.

A summary, conclusion and recommendations of the research will be presented in Chapter 6. Any limitations to the present study will be highlighted and recommendations made.
CHAPTER 2
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

2.1. INTRODUCTION

This chapter begins with a brief history of South African law to sketch the background illustrating the impact of the change in the approach to legislation since the advent of the 1993 Constitution and Bill of Rights in South Africa. A discussion of the provisions of the final Constitution follows and specifically those which deal with the interpretation of the Bill of Rights and the Constitution. Provisions concerning statutory interpretation and how this may have changed the approach to statutory interpretation, which has prevailed until now is considered. The implications of constitutional supremacy and the place and meaning of judicial review of legislation in a democratic society is discussed in conjunction with the limitation imposed on fundamental rights. The implications of the South African courts purposive and value based approach for the structure of constitutional analysis is examined. Consideration of these provisions will clarify whether the Constitution has, or will have, any effect on legislation, both existing and to be promulgated, as well as fundamental common law principles.

2.2. AN HISTORICAL OVERVIEW OF SOUTH AFRICAN LAW

A legal system is one of the cultural products of a community and is, like the community itself, the product of its history. Geographical, political and religious factors all contribute to
its development. The South African system is not a mere collection of legal rules and is, largely, not codified. Consequently its historical background is of importance.

South African law is based on Roman law. Roman law can safely be traced back to the sixth century (Van Warmelo:1976:20) and has formed the basis of most western legal systems. In the uncodified South African legal system it is still one of the authoritative sources of law (Hosten, Edwards, Nathan and Bosman:1977:133). After the fall of the Roman Empire and through the succeeding centuries Roman law did not die out in Europe (Hosten et al:1980:141). In fact the twelfth century saw a resurgence of interest in the Roman system in Europe and it was eventually Roman law, which was accepted in Germany and the Netherlands (Hosten et al:1977:149).

In 1652 Jan van Riebeeck, an employee of the Vereenigde Geoctroyeerde Oost-Indische Compagnie (VOC) took possession of the Cape of Good Hope as a refreshment station. The governing organ of the United Netherlands delegated its sovereign power, including that of maintenance of law and order, over its dependency in the Cape to the Dutch East India Company. The state of jurisprudence in the Cape at the end of the eighteenth century was a crude form of the Roman-Dutch law practiced in the Netherlands. Evolutionary changes took place as a result of developments at the primary source in Holland or by legislative changes introduced in the Cape itself (Hosten et al:1977:194).

The British were to occupy the Cape on two occasions in the periods 1795-1803 and 1828-1910. Certain English rules of law and terminology as well as selected principles and concepts were accepted during this period (Hosten et al:1977:202). This pot-pourri of Roman-Dutch and English law was in varying degrees assimilated by the Voortrekker republics as well. When the British imposed their public law on the Cape in 1806 the
principle that Parliament could operate unfettered already dominated English law. Judicial review of Parliament’s legislation was not unknown by the time self-government was granted to the Cape and Natal legislative supremacy was the defining feature of British parliamentarism. The Boer republics established in the mid-nineteenth century sought alternative powers of constitutionalism. The drafters of the Orange Free State Constitution of 1854 turned to the constitution of the USA and adopted rigid rules of amendment and guaranteed rights of peaceful assembly, petition, property and equality before the law (Dugard:1978:18). There was no specific provision for judicial review. It was accepted “as an inherent feature of the Constitution” that the Supreme Court had such power of review.

The British colonies consolidated on 31 May 1910 as a union with legislative powers under the British crown. The Union Constitution of 1909 followed the English tradition in adopting parliamentary sovereignty – the renowned Westminster parliamentary system. Nevertheless the legislature was not completely free of external restraints. A uniform system of law had to be created while preserving the Roman-Dutch common law but also allowing for modifications to keep pace with the changing needs of society (Hosten et al:1977:207-208). Considerable legislation emanated from the Union parliament. A great deal was modeled on English law (Hosten et al:1977:210). A movement towards the scientific study of Roman-Dutch law followed after 1916 with the creation of the Universities of Cape Town and Stellenbosch.

The rise of parliamentary sovereignty was finally secured with the adoption of the 1961 Republican Constitution (Republic of South Africa Act 32 of 1961). The South African Amendment Act 1 of 1958 provided that “[n]o court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by parliament” indicating that the government was determined to secure parliamentary sovereignty. The call for an
entrenched bill of rights by the Natal Provincial Council was rejected by Prime Minister Verwoerd on the basis that it would be untenable as “no suggestion was made as to how rights could be effectively guaranteed without sacrificing the sovereignty of Parliament” (Ellison Kahn: The New Constitution 1962 supplement to Hahlo and Kahn SA: 2).

Statutes are interpreted by South African courts against a background of an existing substratum of common law. A characteristic of the Romanist-orientated South African common law is its flexibility. Despite being capable of being moulded to suit prevailing conditions, our common law displays a distinct thread of continuity with the past (Hosten et al:1977:224).

South African courts have accepted the rule of *stare decisis* or the idea of treating past court decisions as authoritative or imperative. This promotes legal certainty. Statutes are the prime source of law. There is no principle of law whereupon a judge’s acceptance of a legal sovereign can be grounded. Judges during the period of the Union and the Republic up until 1994 regarded the statute as law-constitutive whether morally good or bad (Hosten et al:1977:246-247). The Constitution of the time secured the dominance of parliamentary sovereignty to the exclusion of the courts from substantive review. Only sections 108 and 118 of Act 32 of 1961 allowed limited testing powers to the courts in respect of the procedure required in any change to the equality of the then two official languages, English and Afrikaans.

*Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11 recognized the principle that “Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will”. It is this view that made it possible for the African voters to be removed
from the common voters roll by the Republic of Natives Act 12 of 1936. Indirect representation of Africans in Parliament was abolished on 30 June 1960. A scheme which sought to extend franchise rights to the African majority within geographically bound and fragmented entities, led to the denationalization of the majority of black South Africans.

The most important factor in tempering the doctrine of supremacy of parliament was that once a court of superior standing had stated what parliament meant in a certain statute, they superimposed their interpretation of that piece of legislation binding the lower courts to that judgment until either the appellate division intervened or parliament amended the disputed statute. Statute law is what judges rule it is (Hosten et al:1977:252). Statutes deal with a wide variety of values and concerns including national and social security, sanctity of the individual and property, social welfare and morality. Policy considerations of the ruling party will have a strong influence on the type of legislation passed. It is this factor which led to apartheid. Little latitude exists for the manipulation of these policies through the traditional rules of interpretation.

In the face of increasing internal resistance and international isolation the South African government reincorporated the Indian and Coloured communities in order to broaden its social base. The result was the tricameral legislature distinguishing between “own” and “general” affairs in the 1983 Constitution. Resistance and rebellion led to the imposition of repeated states of emergency. The unbanning of the ANC and other banned organizations in February 1990 laid the ground for the Convention for a Democratic South Africa (CODESA) to negotiate a democratic transition. This collapsed in mid-1992 but the consequences of the inevitable social upheaval, mass action and escalating violence led to a series of bilateral negotiations and the formation of a multi-party negotiating forum.
They compiled the interim Constitution that came into effect on 27 April 1994 in South Africa’s first non-racial democracy.

The CODESA talks involved party representatives. The interim Constitution was the product of negotiation and compromise between parties with competing interests and conceptions of how South Africa ought to be governed. A new process began in 1993 providing for a negotiating Council to discuss and decide upon reports from technical committees whose role it was to clarify and present alternatives and issues to be negotiated. This resulted in the interim and final Constitutions. The interim Constitution failed to comply with certain constitutional principles. The offending provisions were recast by the Constitutional Assembly and the Court certified the Constitution in December 1996 (Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended Text of the Constitution of the Republic of South Africa, 1996 1997(2) SA 97 (CC)). The significance of this judgment lies in the degree to which the Constitutional Court was able to assert itself on the protection of constitutional democracy.

It is the rise and dominance of parliamentary sovereignty that is considered by Chaskalson (1999:2-1) to have shaped South Africa’s modern constitutional history. Consensus on the adoption of a justiciable Constitution, as one of the defining features of a democratic South Africa, may be understood as a response to the historical experience of parliamentary sovereignty in the Apartheid era (Dugard:1978:37).

2.3. THE CONSTITUTION: INTERIM AND FINAL

2.3.1. Background
The interim constitution is still relevant to certain disputes which come before the courts but these become less with the passing of time. These provisions are of interest to legal representatives but not of significance to this research and not discussed.

The introduction to the final Constitution indicates the need to create a new social order within South Africa, one based on equality, fundamental human rights and freedom. There is a clear statement of the values underlying the Constitution. As far as is possible the courts have, in interpreting the Constitution, recognized the importance of the historical context of the Constitution and commitments made to nation building, reconciliation, reparation and reconstruction (Chaskalson et al:1999:11-2).

The legal and territorial boundaries of South Africa shifted with the acceptance of the new Constitution and it was superimposed on existing law and legislation. Many provisions control the exercise of governmental power, the division of powers between the State and the provinces. These issues are of importance to parties within the state and the implications for private litigants should not be overlooked. These sections determine which laws will be binding in cases of conflict between national, provincial and local legislation. They place procedural and substantive limits on the exercise of state power. Legislative and administrative or executive acts, which exceed these limits, are, in most cases, ultra vires and invalid. Private parties affected by legislation or official conduct will frequently have a direct interest in the enforcement of these non – Bill of Right provisions. Provincial and local governments have limited legislative powers via the final Constitution.

The Constitution establishes the structure of government, allocates the powers of local, provincial and national government, and regulates the relationship between the three. It sets up the mechanisms of representative democracy at each of these levels. It creates and defines the powers of the legislature, the executive and the judiciary, and deals with
the separation of powers of the three branches of government. It regulates the conduct of
government (\textit{S v Makwanyane} 1995(3) SA 391 (CC); \textit{Chaskalson et al}:1998:11-11). The
primary function of the Constitution is to provide a guide to the transition from apartheid to
democracy. Chapter 3 governs the relationship between government and private persons.
The Bill of Rights provides the mechanism by which individuals and minority groups can
challenge decisions by the democratic majority.

The Constitution is sovereign and not the legislature.

2.3.2. Scope

The court will in any constitutional litigation need to decide whether it should apply the
interim or final Constitution. The general rule will be that the Constitution to be applied is
that which was in force when the cause of action in the case arose. This general rule is
subject to a series of exceptions. Item 17 provides:

\textit{“All proceedings which were pending before the final Constitution took effect, must be
disposed of as if the final Constitution had not been enacted, unless the interests of justice
require otherwise.”}

The final constitution came into operation on 4 February 1997.

Where it is clear that the matter was not pending when the final Constitution came into
operation the matter must be disposed of in terms of the final Constitution. Where a
matter arises after 4 February 1997 regarding the constitutionality of a statute passed
before that date, the statute may be attacked in terms of both the interim and final
Constitution but would be justiciable by the High Court in terms of the structures created by the final Constitution. Where the constitutionality of a statute passed after 1997 is at issue, it is justiciable in terms of the final Constitution only.

The final constitution identifies six kinds of entity entitled to the protection of the rights enshrined therein: citizens, persons, children, juristic persons, workers and employers. It speaks almost exclusively about “persons” as being the beneficiaries of fundamental rights. The term covers citizens and aliens. Legally resident aliens receive constitutional protection, illegal aliens receive only diminished levels of protection. The use of the term “persons” and not “individuals” leaves room to interpret this to include juristic persons. Interim Constitution section 7(3) makes the commitment that juristic persons are entitled to protection “where, and to the extent that, the nature of the rights permits”.

Some rights are clearly not designed to benefit corporations. Whether a juristic person has the benefit of a right is, however, not an issue of application but of interpretation. Corporations, as a matter of logic, have neither conscience nor religion, are not citizens or children, have neither life nor human dignity, nor need protection from torture and detention without trial. A corporation could invoke these rights as a defence. They should benefit from rights such as freedom of the press, rights to property and economic activity. Some debate surrounds the question of whether equality rights extends to juristic persons. Woolman (1998:10-10) raises the argument that extending the right in this manner will undermine the right to equality – the amelioration of the discriminatory effects of apartheid and ensuring a more egalitarian future society. It is suggested that this restrictive approach ought to be rejected as it suppresses questions such as: are some corporations being discriminated against in some circumstances?
2.4. INTERPRETATION OF THE CONSTITUTION

The preamble to the Act sets the tone of the constitution. The interpretation of this Act requires consideration of the historical context of the constitution and the commitment it makes to nation building, reconciliation, reparation and reconstruction.

Section 15 of this Act provides that:

“Notwithstanding the fact that the Afrikaans text of the principal Act is the signed text, the English text of the Act shall, for the purposes of its interpretation, prevail as if it were the signed text.”

This is a sensible approach as the Constitution was drafted in English.

Ambiguity in one text can be resolved by reference to the unambiguous wording in the alternative text (S v Maroney 1978(4) SA 389 (A)).

The Constitution contains various definitions of terms mainly used in the Act itself. In Zantsi v The Council of State (Ciskei) and others 1995(4) SA 615 (CC) reference was made to the Interpretation Act 33 of 1957 for assistance. The Constitution is the supreme law of the land but the Interpretation Act is one of the few which still influences it.

There is a presumption of constitutional validity. An interpretation consistent with the Constitution is to be preferred. The effect of the Act appears to be that where laws have been interpreted in a manner contrary to the Constitution they must now be interpreted so as to comply with it. Even though this interpretation may have been rejected in the past.
Where any sensible interpretation contravenes the Constitution then it is simply invalid (Chaskalson:1998:11-4). Interpretation upholding the underlying values and commitments of the Constitution rather than the intention of its drafters or a decoding of the written text is preferred (Chaskalson:1998:11-6;11-7).

Public international human rights law is also specifically included in human rights adjudication in South Africa as well as comparative foreign case law.

A court must have regard to the spirit, purport and objects of the enshrined fundamental rights. Points of statutory, common and customary law regarded as settled, can now be re-evaluated. The same process in interpreting the Bill of Rights is extended to the interpretation of any law – even private law (Du Plessis v De Klerk supra). Even where litigants do not claim the infringement of a fundamental right, and where the Constitution is not of direct application to the dispute between the parties, the values and principles underlying it must influence the way in which the matter is determined. The Bill of Rights is widely worded leaving room for explicit value judgments in its interpretation.

All courts are bound to uphold and protect the Constitution and the entrenched fundamental rights.

It has been acknowledged all over the world that there is a difference between statutory and constitutional interpretation. The former requires an understanding of the ordinary meaning of the words unless there are clear indications to the contrary. The Constitution was drafted in a broad and ample style. Contrary to a statute, a constitution is aimed at providing a continuing framework for the future and cannot easily be repealed or amended. It has to be dynamic to adapt to realities unimagined by its drafters.

It is suggested by Kentridge and Spitz (1996:11-15) that the difference between interpreting a bill of rights and a constitution as a whole is more a difference of degree than
a difference in kind. The wider wording of a bill of rights allows for value judgments, whereas the words of the provisions of the constitution indicate the meaning. Interpretation aims at giving effect to constitutional values.

The Constitution is the supreme law against which the products of legislation and actions of the executive are to be measured. The role of the judiciary and its powers has been expanded. The ability to declare laws passed in accordance with the wishes of the majority of the electorate invalid creates a tension which Kentridge and Spitz (1996:11-16B) quote Bickel as referring to as the countermajoritarian dilemma. It is this dilemma which comes to the fore in the judgment on the constitutionality of the death penalty as a competent sentence for murder in *S v Makwanyane and another (supra)*. It is this dilemma which requires that close attention be paid to the scope and exercise of judicial review.

The following theories are attempts to address the problem of the countermajoritarian dilemma:

i. The Originalist Interpretation

An approach aimed at establishing and enforcing the original intent of the drafters of the Constitution can minimize the risk that judges impose their own value judgments.

ii. The Political Process Theory

This theory allows protection of the interests of those individuals and groups otherwise excluded from political process due to their minority of numbers. The function of the courts is seen as one of correcting the defects in the political process and perfecting democracy.

iii. Value-based Interpretation
This approach recognizes the value-laden nature of constitutional review and requires the court to give expression to the values which underlie constitutional guarantees. The role of courts is not to make social policy but reinforce principle. The legislature gives expression to the majority will and the courts protect minority rights which may be countermajoritarian in nature.

Kentridge AJ in *S v Zuma 1995(2) SA 642 (CC)* expressed the view that a purposive approach to interpretation is appropriate. A right should be ascertained by an analysis of the purpose of the guarantee and the interests it was meant to protect. Kentridge points out in the *Zuma*-case, that regard must be had to the legal history, traditions and usages in South Africa in order to fully understand the purposes of its Constitution.

The Constitution allows specifically for reference to foreign human rights case law due to the lack of South African law in this sphere. The importance of indigenous South African values, African law and legal thinking should not be overlooked.

The South African Constitution, unlike many other countries, is not a mere formalization of a historical consensus of values. It retains from the past that which is defensible and rejects the repressive aspects.

A purposive interpretation will not always coincide with a liberal and generous interpretation. The particular context within which a right is claimed will assist in deciding whether it should be construed broadly or restrictively.

Certain provisions enjoin the courts to give expression to the values embodied in the Constitution. Kentridge AJ in the *Zuma*-case cautions against the abandonment of principles of law which have lasting value and the neglect of the language used in the Constitution. Differences of opinion on this aspect between Constitution Court judges are more differences of emphasis than of principle. Some view clarity of language as
conclusive of the meaning of the provision, whereas others see the language used as the outer perimeters within which the expression of constitutional values is ultimately confined.

Reference has been made in the opening paragraphs of this chapter to amendments which had to be made to the proposed final Constitution before it was certified by the Constitutional Court. The approach of the courts to the interpretation of these clauses in the draft Constitution is important as a reference for future interpretation problems.

It is an accepted rule of interpretation that where an ordinary statute is concerned one can only read into it something by implication if it is necessary to do so to give effect to the statute as it stands. The Constitutional Court has already indicated that in respect of the Constitution, a power cannot be implied if it contradicts an express provision of the Constitution.

2.5. LIMITATION OF CONSTITUTION

Section 33 (1) of the interim Constitution and section 36(1) of the final Constitution serve the following purposes:

- they underline that the rights enshrined in the Constitution are not absolute;

- they affirm that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the values reflected in the rights themselves;

- the test allows for open and candid consideration of competing fundamental values;

- they establish a test determining the extent to which branches of government may limit our constitutionally protected rights.
When contemplating litigation the assessment of the constitutionality of any action will often involve fundamental rights analysis. This takes place in three stages: application, interpretation and limitation (Chaskalson et al:1998:1-4). In the first stage the court must decide whether the legal relationship in question is subject to review based on the Bill of Rights. If the court believes the Bill of Rights applies to the legal relationship, it must decide whether the applicants right has been infringed, and in the third stage whether the limitation placed on the right is justifiable. The questions and factors the court will consider during this analysis are reflections of the wording of the sections themselves. It is to be noted that only laws of general application may limit the rights entrenched in the Bill of Rights.

Section 36(1) of the final Constitution provides for a balancing test to judge whether a limitation is “reasonable and justifiable in an open and democratic society based upon human dignity, freedom and equality”. Factors to be taken into account include

- the nature of the right;
- the importance of the purpose of the legislation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose;
- less restrictive means to achieve the purpose.

The limitation clause involves a balancing or comparison of competing rights, values and interests. Sometimes one right will simply outweigh another, for example, an individuals right to life outweighing the states interest in the death penalty for the sake of revenge and communal catharsis (Makwanyane-case supra). Where one right does not outweigh another, a test of reasonableness is sometimes a solution. Often it is an impossible task.
For example, the destruction of a unique environment with the purpose of creating much needed employment through the development of an industrial site cannot be compared and balanced successfully.

Fundamental rights interpretation is often seen as a two-fold process of determining the meaning of a particular provision and deciding whether the applicant’s constitutional right or freedom has been infringed. The most controversial feature of this is that a judge may strike down a democratically arrived at law or action because he/she believes it infringes a fundamental right. It is suggested by Chaskalson (1998:11-7) that a purposive approach to interpretation, which recognizes the pressures and limits of the constitutional text, provides the most compelling response to the majoritarian difficulties posed by judicial review of democratically enacted laws.

In both Constitutions a limitation may be effected only in terms of a law of general application. The actual meaning of these terms is unclear. They must be interpreted in light of the limitations clause which functions as a reminder that the rights enshrined in the Bill of Rights are not absolute. The clause permits legal restrictions on rights when the object behind the restriction is designed to reinforce the values which underpin the Constitution (openness, democracy, human dignity, freedom and equality) and that the clause allows for open consideration of competing public, private and constitutional interests. The interpretation of these terms will often turn on sociological, economic or psychological evidence. Such evidence must be led to test the validity of a law or act, which impairs fundamental rights (Chaskalson et al:1998:1-6).

The Constitution has no provision similar in terms to section 232(3) of the interim Constitution, however the presumption of the constitutional validity of existing legislation applies even in the absence of such a provision (De Lange v Smuts NO & others 1998(3) SA 785 (CC)).
The General Provisions chapter deals with international law and its importance in South African legal practice. Norms and values of international law are incorporated into the interpretation techniques of South African laws. Courts must prefer any reasonable interpretation, which is consistent with international law over one that is not. This may effect previous interpretations of legislation.

Section 39(1) makes interpretation of the Bill of Rights important at every level of the application of the law. Section 39(2) uses the words “must promote” meaning to further or advance. An even stronger obligation is imposed.

Consideration must be given to the relief to be claimed when contemplating constitutional litigation. Much legislation on the statute books at the time of transition was clearly unconstitutional. A court may

- Interpret the legislation to conform to the Constitution;
- Strike the legislation down entirely or in part;
- Or give the unconstitutional law temporary validity to allow the appropriate legislature the time to propose a solution itself (interim Constitution 98(5) and final Constitution section 172(10(b)(ii)).

A court exercising constitutional jurisdiction may also have the power to read into a law words, which it does not contain in order to remedy its validity.

2.6. SUPREMACY AND JUDICIAL REVIEW

Section 34 of the final Constitution provides:
“Everyone 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.”

Legislation which prevents or inhibits the judicial resolution of a dispute or impedes a person’s constitutional right to have disputes resolved, may be challenged in respect of the access to courts clause. A contractual provision requiring a dispute to be referred to an administrative tribunal was unsuccessfully challenged in Carephone (Pty) Ltd v Marais NO & others 1999(3) SA 304 (LAC). A provision prohibiting appeals against the decision of an arbitral tribunal unless otherwise agreed by the parties was similarly unsuccessfully challenged in Patcor Quarries CC v Issroff & Others 1998(4) SA 1069 (SE).

The Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996 removed all provisions which constituted a barrier to access to the courts.

Article III of the American Constitution limits the judicial power of the federal courts to “cases” and “controversies”. In order for a matter to be justiciable in terms of the US Constitution it must “present a real and substantial controversy which unequivocally calls for adjudication of the rights” asserted (Pol v Ullman 367 US 497 at 509, 81 SCt 1752(1961)). The US Supreme Court has interpreted “case or controversy” as limiting the jurisdiction of courts to the resolution of “concrete disputes”. The SA Constitution requirement of a “dispute that can be resolved by the application of law” may introduce similar barriers to litigation (Cabinet of the transitional Government for the territory of SWA v Eins 1988(3) SA 369(A) at 387I).
Features to examine in deciding whether a particular issue is appropriate to be resolved by the courts are:

i. Whether the plaintiff has standing to claim the relief;

ii. Whether the dispute is ripe for determination;

iii. Whether the issue is moot in that the dispute is resolved;

iv. Whether the subject matter is appropriate for judicial action.

The first three are concerned with procedural justiciability. They are barriers for resolution by the court and based on principle that the function of the courts is not to determine academic or hypothetical issues. The fourth requires a decision as to whether the dispute falls within the jurisdiction of the courts at all. This aspect is rooted in the notion of separation of the legislative, executive and judicial branches of government (Loots:1998:8-3).

Traditionally South African courts have adopted a restrictive attitude to the issue of standing, requiring a person who approaches the court for relief to have an interest in the sense of being personally adversely affected by the wrong alleged. A plaintiff or applicant who is not able to establish an interest is said to lack “standing” or “locus standi”. A notable exception to this rule was in *Wood & others v Odangwa Tribal Authority & another* 1975(2) SA 294 (A). The Appellate Division allowed church leaders to claim an interdict in the interest of a large, vaguely defined group of persons who feared they would be illegally arrested, tried and subjected to summary punishment on account of their political affiliations.
The provisions of section 38 of the final Constitution in respect of the enforcement of rights entrenched in Chapter 2 radically changed the common law rules of standing. Persons who may approach the court now are:

i. Anyone acting in their own interest;

ii. Anyone acting on behalf of another person who cannot act in their own name;

iii. Anyone acting as a member of, or in the interest of, a group or class of persons;

iv. Anyone acting in the public interest;

v. An association acting in the interest of its members.

Notably section 38 applies only in actions claiming relief in respect of the infringement of rights entrenched in Chapter 2 of the final Constitution. In all other matters the common law rules of standing continue to apply. *Wildlife Society of Southern Africa & others v Minister of Environmental Affairs & Tourism of Republic of South Africa & others* 1996(3) SA 1095 (Tk) expressed the view that even at common law an association having as its main objective the promotion of environmental rights should have *locus standi* to apply for an order compelling the state to comply with its obligation to enforce conservation legislature. This is an example of the development of the common law in accordance with principles of the Bill of Rights.

2.7. APPLICATION OF THE CONSTITUTION

The interim Constitution resulted in debate concerning the horizontal or vertical applicability of the entrenched rights. *Du Plessis & others v De Klerk & another* 1996(3) SA 850 (CC) considered this question.
One alternative was to follow a vertical approach. Protection would then extend solely to the legal relationships between state and the individual (the state having superior authority over the individual, hence the reference to the “vertical” approach). Another was to follow an horizontal approach (individuals being on an equal footing, hence the reference to “horizontal”). Both relationships between state and individuals and between individuals are then subject to review for conformity with rights as set out in Chapter 3.

Both verticalists and horizontalists agree on the following:

I. Statutes, when relied upon by the state, are subject to constitutional review;

II. Statutes, when relied upon by a private party in a private dispute, is subject to constitutional review;

III. The common law, when relied upon by the state, is subject to constitutional review.

Both debate, however, whether the common law, when relied upon by a private party in a private dispute, is subject to constitutional review. The Du Plessis –case came down firmly on the side of verticality. This may have settled matters as regards the interim Constitution. The drafters of the final Constitution have included provisions which lean unequivocally towards horizontality.

The verticalist approach can be criticized in the following aspects:

i. This view concludes that if a case involves legislation the Bill of Rights will apply, if common law applies, then it will not. If the applicable law is a combination of statutory and common law it may be completely fortuitous as to whether the rights are applicable to all or part of the case.

Furthermore it could happen that one province legislates in respect of a certain aspect of the law, making fundamental rights applicable to litigation on this aspect,
whilst another province does not, leaving the common law applicable and fundamental rights not.

Where the state relies on common law principles these will be subject to review. The distinction between legislation and private law does not insulate it from the effects of the Constitution.

ii. The distinction between legislation and common law in the fundamental rights chapter leads verticalists in a “neurotic search for the state”. In Baloro & others v University of Bophuthatswana & others 1995(4) SA 197 (B) the court found that where a private party:

(a) serves a public function;

(b) is so entwined with public action that it becomes equated with the public domain;

(c) is encouraged, authorized or approved by the state in such a way as to make the state responsible for its acts;

then the fundamental rights chapter applies. Courts in some jurisdictions may seek to restrict the application of this chapter whilst others may seek to expand its applicability.

iii. Verticality promotes the assumption that the common law reinforces the existing distributions of wealth and power, are neutral between individuals and does not offend the Constitution. This may be acceptable in a country with a large middle class but the same shall certainly not follow in a country where the divisions of wealth and power are extreme.

iv. The roots of the vertical approach can be sought in natural law jurisprudence, positivist jurisprudence or even constructivist theory. The detail of these theories
are of interest only to the jurist. The important point is that if a distinction is to be made between the type of actions which should be subject to review, then those reasons should be clearly stated rather than a cosmetic distinction between statutory and common law.

v. Reference was made in the interim constitution to executive and legislative organs of state but not the judiciary. Verticalists argue that the fundamental rights chapter does not bind the courts because there was a desire to protect common law relationships from constitutional attack. The protection against retrospectivity and the requirement of speedy sentencing, being charged within 48 hours of arrest, providing a public trial and the like must apply to the judiciary. It is difficult to contrive an explanation why some fundamental rights apply to them and others not.

The final Constitution subjects all law to direct constitutional scrutiny. Section 8 reads as follows:

“(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

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

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

This must be read together with section 39 which enjoins the court to create new causes of action and remedies where such are lacking in order to protect and promote fundamental rights.

“(1) When interpreting the Bill of Rights, a court, tribunal or forum

   (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

   (b) must consider international law; and

   (c) may consider foreign law.

(2) 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.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

A change in the final version of the Bill of Rights relating to freedom of trade, occupation and profession is that protection is limited to every citizen and not every person. The implication is that non-citizens are only allowed to trade or work in this country at the discretion of the national government.
Section 8(1) (supra) resolves all debate regarding vertical and horizontal application. The court must formulate and articulate a new common law rule consistent with the provisions of the Constitution even in cases where no express rule exists governing a private relationship.

The phrase “…if, … it is applicable …” in section 8(2) (supra) revives interpretation problems. One interpretation is that a right will apply to a natural or juristic person unless it expressly protects only certain kinds of relationships. Alternatively the court could exclude rights such as rights to property, housing, and so forth from application to private relationships and ask whether the remaining rights should be used to alter the parameters of the private relationship. It is submitted by Woolman (1998:10-59) that irrespective of the interpretation a court is always going to have to decide whether the right in question covers a particular kind of relationship or practice.

The purpose of sections 8(3)(a) and (b), contrary to the principle that the Constitution is the supreme law, is an attempt to make existing common law the basis for any analysis of the constitutionality of particular rules of common law and limit the alterations which can be made to it. It is presumed that the Constitutional Court will read these sections as complimentary to Sections 8(1) and (2).

Section 39(2) reads -

“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.”
This section states that a court “must promote” the spirit of the Bill of Rights. The injunction is imperative rather than permissive and clearly empowers the Bill of Rights with direct horizontal application.

A third interpretation suggested by Woolman (1999:10-62) is that section 39(2) enjoins a court to apply the values of the Bill of Rights into the interpretation and development of law even where constitutional rights are not of importance.

Under the interim Constitution the courts were reluctant to give a wide interpretation of the terms “organ of state”, “statutory bodies” and “functionaries”. The courts generally applied a “control test” and considered whether the person or institution was subject to the direct control and supervision of the state or not (Direct Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting 1996(3) SA 800 (T). This allowed institutions created and supported by the government to operate without fear of constitutional sanction.

The final Constitution refers to institutions and individuals exercising “public power” or engaging in a “public function”. They need not be an intrinsic part of government nor subject to the effective control of legislative or executive bodies. If the state has created the conditions for the exercise of a power or function then such institutions and individuals will be held accountable for their actions as if part of “government”. This prevents the state from creating bodies and avoiding constitutional scrutiny. Public powers and private powers are also equated. In accordance with this new approach the court in Mistry v Interim National Medical and Dental Council of South Africa 1998(7) BCLR 880 (CC) never even questioned whether inspectors of the Medical and Dental Council were products of legislation or whether these actions were to be measured by constitutional standards of behaviour.
Section 8(1), therefore, appears to make the Bill of Rights applicable to all law and all disputes before a court with constitutional jurisdiction. If there is a statute or common law on the subject an analysis of rights is required. There may, however, not be clear common law governing the relationship. This situation requires an application analysis. Section 8(2) makes all fundamental rights applicable to relationships between natural persons, juristic persons or both where, given the nature of the right, it is applicable to the relationship. If the court finds that there has been a violation of a right and this violation is not justifiable under the limitation clause, then the court is obliged to craft a new rule of common law giving effect to such right in accordance with the values of the Bill of Rights.

2.8. CONCLUSION

The modern concept of a constitution is that of a formal written instrument or a “social contract” drafted by an assembly representative of the people and accorded public assent through ratification by a special procedure (Devenish:1998:3). Constitutions order political authority and the exercise of power in a state and matters of procedure. A constitution is the product of the unique history and political situation of the country in which it operates. To fulfil its purpose the norms and values of the constitution must become the foundation of the way of thinking of the people and organizations in a country. These values affect all the spheres of life regulated by the law – even that of business. A court may take public opinion into account when interpreting the provisions of the constitution but it cannot be dictated to by public opinion since it must subject itself to the prescriptions of the constitution. As emphasized in  S v Makwanyane (supra) “there would be no need for
This chapter has attempted to illustrate the fundamental shift in many accepted legal values occasioned by the Constitution as the impact thereof is often not fully appreciated by the non-legally trained person.

Both the constitutional provisions and the Bill of Rights itself will have far-reaching consequences, many of which are yet inconceivable. The true impact will become clear as the need arises for consideration of the interpretation of existing legislation and the principles of common and customary law. South African courts are historically conservative in their development of the law. It will no doubt take several decades before this can be judged objectively.

The following chapter will discuss the Bill of Rights with specific reference to individual rights and their applicability to business.

CHAPTER 3
THE BILL OF RIGHTS

3.1. INTRODUCTION

The previous chapter gave an historical overview of South African law followed by the background and scope of the interim and final constitutions. The interpretation, limitation and field of application of the final constitution was discussed. In conclusion the provision for judicial review of legislation was researched.

This chapter discusses the various fundamental rights relevant to business, and explores the interpretation and application thereof with particular reference to natural persons doing constitutional adjudication” if public opinion were decisive. The purpose of a bill of rights is to protect vulnerable individuals and minorities whose cause may not be popular as far as public opinion is concerned.
business for their own account or in the form of a legal entity. This would include family businesses in the form of a sole proprietorship, a close corporation or a company. The aim of the discussion is to illustrate the impact that the entrenched right may have on the interpretation of both legislation and the common law as it was prior to 1996 and how these developments influence the manner in which businesses are run in the future.

Following the Second World War and the establishment of the United Nations the political philosophy of human rights gained support and was expressed in diverse international declarations and treaties (Devenish:1998:43). Despite their involvement in the establishment of the United Nations, South Africa remained antagonistic to these developments due their policy of apartheid and was only to change irrevocably with the introduction of the interim Constitution and then the final Constitution of 1996.

Certain universally accepted fundamental rights and civil liberties were embodied in the South African Bill of Rights. Section 7 reads:

“(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

3.2. THE RIGHT TO EQUALITY

The Constitution refers to the need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms. There is an
aspiration towards the achievement of a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

Limitations on these rights must be “justifiable in an open and democratic society based on freedom and equality”. The basic values of freedom and equality are concepts which have been debated for generations. The extent to which government may legitimately intervene in the lives of its citizens is debated daily in parliaments around the world. Kentridge (1998:14-2) notes that liberty and equality are at odds. Entrepreneurial freedom is limited by legislation setting minimum terms and conditions of employment and requiring employers to bargain collectively with employees. The Constitution is a compromise between competing visions of a just society. Equality is not only a principle in itself but a tool of national reconciliation and reconstruction – substantive equality.

3.2.1. Substantive Equality

Equality symbolically the most important right in the Constitution, is a highly problematic concept riddled with difficulties particularly because it must be modified by affirmative action (Devenish:1997:47). Equality is not only a matter of likeness but also a matter of difference. Kentridge (1999:14-3) refers to various authorities which require distinctions to be made between groups and individuals to accommodate their different needs and interests in to satisfy this principle. Kentridge notes at that to treat alike those who are like (the similarly situated test) is and has been recognized by countries such as Canada as being an inadequate judge of which situations are similar and which are not. The Canadian courts have adopted an approach aimed at establishing the content of the law, its purpose, and the impact on the people to whom it applies and whom it excludes. Assessing claims in their factual, textual and historical context, has been emphasized. The value of the contextual approach has been considered in matters such as President of the Republic of South Africa v Hugo 1997(4) SA 1(CC) where it was recognized that formal equality of treatment (simply treating all persons in exactly the same way) will often result in reinforcing rather than redressing social disadvantage. A substantive approach to equality
accepts that past discrimination will have lasting effects on the present and as a result inequality needs to be redressed and not just removed. This results in those who were deprived in the past receiving an “unequal” share of present resources. The contextual approach helps identify differences which require differential treatment. These considerations are particularly relevant to the compilation of management teams and competing “white” and “black” family business.

The South African Constitution grants equality guarantees and the promise of protection from discrimination in two separate sections. They are, therefore, not synonymous. Kentridge argues (1999:14-7) every instance of unfair discrimination is a denial of either (and sometimes both) equality before the law or equal protection of the law but not every denial of equality before the law or equal protection of the law is necessarily an instance of unfair discrimination. The latter two instances and the right to freedom from discrimination are three distinct and separate rights.

The Constitutional Court has emphasized the complexity of the issues involved in the concept of equality and the need for circumspect development.

Equality before the law requires that the rule of law should apply equally to all persons. In Qozeleni v Minister of Law and Order and another 1994(3) SA 625 (E) the right of an accused in a criminal matter to access records and documents relevant to the case was recognized to enable both parties to have equal access to the others evidence especially in view of the powerful position of the state. Fairness demands that the state bear the full burden of proving the guilt of an accused. Civil litigants are dealt with in a similar manner. Fairness does not require that the burden of proof rest only upon the plaintiff. The defendant in certain instances also bears the onus of proof. In Harksen v Lane NO and others 1998(1) SA 300 (CC) the court considered whether section 21 of the Insolvency Act is inconsistent with section 8. This section allows the Master of the High Court, and thereafter the trustee of an insolvent estate, to divest the spouse of an insolvent of all his or her property and then places the onus on the solvent spouse to prove that the property should not be dealt with as part of the insolvent estate. The relationship between spouses allows for collusion and such a spouse is affected in a manner not allowed in respect of other parties related to the insolvent. The court held that there was a rational connection
between the differentiation (the treatment of the spouse of an insolvent) and the purpose behind the legislation.

It is simplistic to assume that inequality can be remedied effectively by treating all persons in an identical way. Some forms of inequality may not result from unfair discrimination. There is permissible and impermissible discrimination. This accommodates the view that discrimination may have a different quality in different contexts. There is not only protection for those historically disadvantaged. Unfair discrimination “principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity” (Prinsloo –case supra). In the case of President of the Republic of South Africa v Hugo (supra) it was emphasized that that which is found to be unfair in one context may not necessarily be unfair in a different context. A court will have regard to the group that is disadvantaged, the nature of the power in terms of which the discrimination was affected, and the nature of the interests affected by the discrimination. The more vulnerable the group adversely affected, the more likely the discrimination will be held to be unfair.

3.2.2. Equality and Corporations

The discrimination will be judged to be unfair or not depending largely on whether the fundamental human dignity of the discriminated group is affected or if it is affected adversely in some comparably serious way (Prinsloo-case supra). The fundamental human dignity of a corporation cannot be impaired, it may be adversely affected in some comparably serious way by discrimination. This may rarely occur but the possibility cannot be precluded.

Kentridge (1998:14-48) suggests that a statute adversely affecting corporations with black members would allow for individual members to claim for racial discrimination suffered by them. If the corporation is directly affected it should be able to make a similar claim. Affirmative action programmes which take the form of subsidies, tender quotas and contract compliance measures favouring corporations owned by black persons. It would be unduly formalistic to deny the corporation the right which the members would have had before incorporation. Substantive equality requires that the merits of the claim should be considered in view of the values the equality clause seeks to advance.
Section 9 of the final constitution is formulated as follows:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

The first provision of the final Constitution presents equality as a goal to be achieved. A substantive conception of equality is promoted. Section 9(4) binds not only the state and all its organs but also all persons to the clause prohibiting discrimination. The nature of the right and its correlative duty will decide whether natural persons and juristic persons other than the state and its organs will be bound.

New grounds of pregnancy, marital status and birth have been added to those of section 8(2) of the interim Constitution in the equivalent section 9(3).

The limitation clause (section 36(1)) details five factors which, together with all other relevant factors, must be taken into account in determining whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity,
equality and freedom. The test remains a weighing up of competing values and an 
assessment based on proportionality requiring the balancing of different interests.

3.3. HUMAN DIGNITY

The final constitution reads:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

It is an open question whether the protection of section 10 will be extended to juristic 
persons. Whether a juristic person is capable of exercising or enjoying this right must still 
be decided by our courts.

The court would have to ignore the word “human” in the title as not being true to the 
language. Juristic persons do not have feelings to hurt or bodily integrity to infringe. 
Furthermore, a purposive approach favours limiting the protection of the right to human 
persons. This approach must have regard to the legal history, traditions and usages of our 
country. Personality rights have in the past been extended to juristic persons under the 
actio injuriarum (Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1979(1) SA 
441 (A)) and, under appropriate circumstances, the same approach may be taken in 
respect of this right.

3.4. PRIVACY

Section 14 of the final Constitution reads,

“Everyone has the right to privacy, which includes the right not to have 
(a) their person or home searched; 
(b) their property searched; 
(c) their possessions seized; or 
(d) the privacy of their communications infringed.”

In common law privacy was not a right recognized in respect of artificial persons. The 
Tommie Meyer –case cited above recognized an action for defamation and this
development has progressed to a recognition of a right to privacy (Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another 1993(2) SA 451 (A)). It would seem reasonable that juristic persons should have a right to informational privacy.

3.5. FREEDOM OF RELIGION

The relevance of this right in respect of juristic persons has been indicated by the S v Lawrence; S v Negal; S v Solberg 1997(4) SA 1176 (CC).

The court was asked to find whether the provisions of the Liquor Act 27 of 1989 were unconstitutional in terms of this right. Ms Solberg held a grocer’s wine license in terms of the Liquor Act and had sold wine on a Sunday at a Seven Eleven store in contravention of that Act. Sunday is a “closed” day in terms of this act and a grocer’s license does not permit the sale of liquor on a Sunday, as well as Good Friday and Christmas Day. Five judges decided that the choice of days with specific significance for Christians was an infringement of the right to freedom of religion. Three judges held that the limitation was not justifiable in terms of the limitation clause of the interim Constitution, while two held that it was justifiable. Four judges, however, held that the definition of a “closed day” was not an infringement of the right to freedom of religion. The division amongst the judges does not give clear guidance for a prospective litigant in respect of this right.

3.6. EXPRESSION

Section 16 of the final Constitution reads

“(1) Everyone has the right to freedom of expression, which includes

(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

The final Constitution creates a uniform standard of justification. It specifically includes the freedom to receive and impart information or ideas as part of the freedom of expression. Academic expression is also protected alongside freedom of scientific research. The guarantee of impartiality and diversity of opinion protected by the interim Constitution is not similarly protected in the final Constitution and this aspect is left to legislation to handle. Section 16 provides for a limited number of exclusions which alter the structure and substance of freedom of expression analysis. Section 15(1) left it to the courts to determine the appropriate approach to defining the limits of the application of the section. Section 16(2) has determined a definitional approach. The result is that section 16(2) exhaustively enumerates the only exclusions from section 16(1). These will be the only forms of expressive activity unprotected by the Constitution.

Companies and close corporations also speak and express themselves. The nature of the right appears to permit application to juristic persons. It is submitted by authors such as Marcus and Spitz (1999:20-16) that the focus should be on the nature and value of the speech itself and not the identity of the speaker.

Commercial expression can be broadly defined as speech proposing a commercial transaction. This includes commercial advertising of goods and services for sale as well as unlawful competition and trade boycotts. The common law of unlawful competition limits
commercial expression in various respects. Wrongfulness is an element of the delict of unlawful competition and is determined in terms of the *boni mores* of society.

Truthful comparative advertising is likely to enjoy constitutional protection submit Marcus and Spitz (1998:20-53). The regulation of advertising by the professions either by statute or self-regulation by professional codes of conduct may now require justification under the limitation clause.

3.7. FREEDOM OF ASSOCIATION

Section 18 of the final Constitution reads,

“Everyone has the right to freedom of association.”

This right addresses political, cultural and economic associations as well as reinforcing the claim to associational freedom of disadvantaged groups. The concept is a wide one and easier to establish which associations would not enjoy constitutional protection. Two are obvious: criminal associations and those which threaten constitutional order.

A full discussion of all spheres of association protected fall outside the framework of this study and emphasis is placed specifically on economic associations.

It is recognized in many constitutional countries that the state is entitled to place substantial limitations upon economic associations. Business associations control the distribution of important social public goods and must be subject to the rules of fair play. Where economic regulations infringe on membership policies or internal affairs, the
constitutional attack is likely to be based on the deprivation of rights in property rather than associational rights according to Woolman (1998:22-10).

3.8. ACCESS TO INFORMATION

Section 32 of the final Constitution and Item 23 Schedule 6 of the final Constitution reads:

“(1) Everyone has the right of access to
   (a) any information held by the state; and
   (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

The separate entrenchment of this access to information as a right rather than as a component of freedom of expression or a right of administrative justice, emphasizes its importance. It is said that there is a fundamental connection between access to information and South Africa’s effort to create a constitutional democracy based fundamentally on the principle of openness (Qozeleni v Minister of Law and Order supra). The right endorses the theme which runs through the entire constitution, that of accountability and transparency of government resulting in a new political morality (Devenish:1997:80).

The right applies to all information held by the state and its organs in any sphere of government, excepting the judiciary (section 293(b)(ii)). Private parties fall outside the
scope of the section. To trigger the duty to provide the information a request is required.

Issues which the legislature needs to address include

- the definition of information;
- how does the requester identify the information requested;
- at what point can s/he approach the courts?

Limitations exist to the access permitted as it is only allowed “in the exercise or protection of any of their rights”. A strict interpretation would require the information to be necessary, personally and specifically relevant to the person asserting the right to access to information. A wider interpretation would require it to be reasonably required (*Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996(1) SA 283 (C); *Nortje v Attorney-General (Cape)* 1995(2) SA 460 (C)), and only relevant to the exercise or protection of the protected right (*Khala v Minister of Safety and Security* 1994(4) SA 218 (W); *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997(4) SA 174 (T)). The courts seem to have settled on the wider interpretation (*Van Niekerk v City Council of Pretoria* 1997(3) SA 839 (T)). There is also the possibility though that the right to access will be limited to instances where information is required for purposes of litigation.

The aspect of personal relevancy underlines an access to information clause and the party wishing to prevent access to the information should bear the onus of proof.

Various grounds which may validly limit section 32(1) include:

- Law enforcement and criminal procedure;
- State communications;
- National security;
- Privacy;
- Trade secrets/confidential business information;
- Legal professional privilege.
Of particular interest to this study is the fact that courts have granted access to tender documents to allow a failed tenderer to determine whether its rights to just administrative action have been violated (Aquafund (Pty) Ltd v Premier of the Western Cape 1997(7) BCLR 907(C); ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd 1998(2) SA 109 (W); SA Metal Machinery Company Ltd v Transnet Ltd 1999(1) BCLR 58 (W)). Courts have limited the right to access where such is requested for use in further legal proceedings and in instances where there is commercially confidential information, particularly where tenderers have not granted permission for its disclosure (Goodman Bros (Pty) Ltd v Transnet Ltd 1998(8) BCLR 1024 (W)).

3.9. ECONOMIC ACTIVITY

This right rarely finds protection in constitutional instruments.

Section 26 of Act 200 of 1993 provides:

“(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunities for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.”

The terms “economic activity” and “livelihood” are not defined. Various constitutional courts of the world have attempted this exercise and the following has evolved:

(a) Economic activity is the freedom of establishment: the right to enter a market and to carry on economic activity without permission, and the freedom to establish a location;
(b) It is the freedom of contract: the right of persons to choose with whom they wish to trade as well as the content of such transactions.

Provision is made for a market driven economy, motivated by economic realities (Van Aswegen: 1994 THRHR: 448). It is generally accepted by politicians that economic growth is essential for the realization of social and economic justice in South Africa. The role of the informal sector is recognized as important in reversing growing unemployment. A free market is essential for attracting significant foreign investment and business to South Africa. The economy needs to be transformed in a way that serves the need for growth and attainment of social and economic justice for all South Africans especially persons disadvantaged by apartheid (Devenish:1997:65).

Walton’s Stationary Company (Pty) Ltd v Fourie & another 1994(1) SA BCLR 50(O) concerned the contract between an employee and her employer. The former undertook that in the event of her leaving the latter’s employ she would not, for a period of 6 months, and within a radius of 80 kilometres of a specific point, be employed directly or indirectly in the marketing of the same product in which the latter traded. Ms Fourie, immediately after her resignation from the applicant, took up employment with its direct competitor within the 80 kilometre area. Applicant sought to enforce the restraint of trade clause. Ms Fourie contended that the clause was contrary to the spirit of section 26. The presiding judge observed that Section 26(1) confirmed the common law position allowing all persons the right to enter into contracts and travel freely in pursuit of a livelihood. He added, however, that the freedom of commercial activity did not mean that an individual could not temporarily waive such a right. The enforceability of the restriction would depend on public interest. The traditional approach in Magna Alloys and Research (SA)(Pty) Ltd v Ellis 1984(4) SA 874 (A) which regarded such a restraint of clause prima facie valid and
enforceable unless conflicting with public interest, was confirmed. Davis (1998:29-11) criticizes the judgment for ignoring the nature and scope of section 26.

The cases of *S v Lawrence; S v Negal; S v Solberg* 1997(4) SA 1176 (CC) have stated that to maintain the proper balance between the roles of the legislature and the courts section 26(2) should be construed as requiring only that there be a rational connection between the legislation and the legislative purpose sanctioned by the section.

A failure to meet the internal requirements of section 26(2) (the need to design rationally with the clear objective of promoting the protection or improvement of the quality of life and other objectives) does not do away with the test in section 33(1) limitation clause.

The judge in *Prokureурсорде van Transvaal v Kleynhans* 1995(1) SA 839(T) found that section 26 was not an unlimited right especially in instances where professional integrity was at issue.

In *Kotze and Genis (Edms) Bpk v Potgieter en andere* 1995(3) BCLR 349 (C) the constitutionality of a restraint of trade clause was again raised. The court followed the *Walton*-decision without considering the effect of the provisions of section 35(3) on the traditional principles set out in the *Magna Alloy* – case supra.

Several applicants have been successful in establishing a *prima facie* breach of the rights granted in section 26(1). An applicant operating a casino with a business license from the local authority who was subsequently charged under the Gambling Act successfully obtained an interdict restraining the Minister from closing the casino pending the decision of the Constitutional Court. The outright ban on gambling in the Gambling Act was a *prima*
facie breach of section 26(1) rights concluded the judge in Sound Prop 1239CC t/a 777 Casino v Minister of Safety and Security 1996(4) SA 1086 (C). He concluded in light of section 26(2) that the balance of convenience weighed against the conduct of uncontrolled, unlicensed and unregulated gambling pending finalization of the action.

Van Dijkhorst J in Directory Advertising v Minister for Posts and Telecommunications 1996(3) SA 800 (T) gave more meaning to section 26(1) in stating “Free economic activity … means the right to strive to be a millionaire, to strive to attain maximum profits within the normal constraints of economic life. These constraints in commerce and industry include limitations of capital, resources, labour and frustrations like strikes, deteriorating markets, calamities and the vicissitudes of foreign exchange. The constraints include self-imposed ones like contractual restraints of trade.” It was found that section 26 did not give the applicant a right to obtain commercial information from another commercial enterprise.

Van Schalkwyk J in Knox D’Arcy Ltd and another v Shaw and another 1996(2) SA 651 (W) concluded that, “The Constitution does not take a meddlesome interest in the private affairs of individuals … As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage.”

Davis (1998:29-14) expresses regret at the courts reluctance to allow the common law to cohere with the fundamental values enshrined in the Constitution. He draws attention to the German Constitution which, while recognizing the free and voluntary nature of contracts between private parties, also required that the principle of self-determination be expressed and that there be an equal balance of power between the contracting parties so as to prevent the contract becoming an instrument of suppression.
Section 22 provides “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

Generally the world over it is the regulation of the practice of a profession which is considered easier to justify than the limitation of entry into the profession itself. This section was tested and an appeal court in Van Rensburg v South African Post Office Ltd 1998(10) BCLR 1307(E) found that the power of the government to place restrictions on the practice of a particular trade, occupation or profession is necessary or desirable as long as these are reasonable.

Courts have thusfar not expressed an opinion as to whether this section refers to corporate bodies. Davis (1999:29-19) submits that section 22 can only apply to individuals due to the reference to every “citizen”.

3.10. LABOUR RELATIONS

Under the final Constitution

- the right to strike has been broadened;
- employers’ recourse to the lock-out has been excluded;
- the right to collective bargaining has been reformulated;
- statutory recognition for union security arrangements has been provided;
freedom of association and organizational rights has been specified clearly.

Greater protection is granted to employees.

Section 23 reads as follows:

“(1) Everyone has the right to fair labour practices.

(2) Every worker has the right
   (a) to form and join a trade union;
   (b) to participate in the activities and programmes of a trade union;
       and
   (c) to strike.

(3) Every employer has the right
   (a) to form and join an employers’ organisation; and
   (b) to participate in the activities and programmes of an employers’
       organization.

(4) Every trade union and every employers’ organisation has the right
   (a) to determine its own administration, programmes and activities;
   (b) to organise; and
   (c) to form and join a federation.

(5) Every trade union, employers’ organisation and employer has the right to engage in
    collective bargaining. National legislation may be enacted to regulate collective bargaining.
To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).”

As previously stated the final Constitution applies to all law, binding all organs of the state, the legislature, executive and the judiciary. Section 8(2) provides for horizontal application making the conduct of private citizens susceptible to scrutiny. This includes the labour relations right.

The issue of horizontal application will rarely be of importance as there is existing labour legislation which deals with most labour issues. The following would be subject to scrutiny:

- The Labour Relations Act;
- Subordinate legislature such as regulations under the Occupational Health and Safety Act, wage determinations under the Wage Act;
- Industrial Council agreements;
- Arbitration awards under the Labour Relations Act;
- Employment contracts to which the state is a party;
- Unfair labour practice determinations by the labour courts (considered state actors as they exercise powers granted by statute).

The conduct of private employers and employees becomes indirectly reviewable.
Potential areas for application relate to the duty to bargain which has been excluded from legislation, employment issues beyond the perimeters of the employer-employee relationship, and other employer-employee issues regarded as fair labour practices but not covered by legislation.

The Labour Court is required to interpret issues in compliance with the Constitution. Once a dispute has been adjudicated by the Labour Court it is appropriate to approach the Constitutional Court. Only in instances where the state is the employer does the Labour Court not have sole jurisdiction over constitutional matters but concurrent jurisdiction with the High Court.

As with other rights in the Constitution, labour rights are not absolute and are subject to the section 36 limitation clause.

It is suggested by Brassey (1998:30-40) that, although the Bill of Rights may change the manner in which labour cases are presented and the reasoning leading to the conclusions, the actual outcome of these will not change dramatically. This he ascribes to the fact that our labour law is largely in line with the aspirations of the Bill of Rights and because the desire of the Constitutional Court to leave matters as defined by the Labour Court rather than effect changes.

3.10.1. Individual Labour Rights

- Fair labour practices
This right is broad and rather vague. Matters of leave, hours of work and pay are dealt with by collective bargaining process. The rights of minority individuals are protected by the minimum standards set in legislation such as the basic Conditions of Employment Act. The content of the right to fair labour practice has still to be fully determined by the court and it has been submitted by Cooper (1998:30-19) that fair labour practices should relate to rights disputes only.

- **Entry into employment**

An industrial court has no authority over actions in respect of prospective employees. The Constitutional Court does. A decision by the state not to employ a particular or a certain group of employees can be reviewed.

There is no statute prohibiting discriminatory hiring as of 1993.

Statutory restrictions on employment will be subject to constitutional scrutiny as they constitute unequal treatment, an unfair labour practice or intrusion into economic activity.

- **Terms of employment**

The protection against servitude and forced labour prevent the conscription of labour for state projects (Brassy and Cooper:1998:30-5). Conscripts are paid a wage but the right may be viewed as infringed. The state will be able to raise a justification argument under section 33(1). This right will also assist civil servants in respect of their service regulations and employment contracts. The courts will fall back on the common law principle of *contra bonos mores* in deciding these issues as well as those related to restraint on competition
The provisions of legislation such as the Basic Conditions of Employment Act 3 of 1983 are protected.

- **Employment relations**

The 1995 Labour Relations Act also protects applicants for employment against unfair discrimination. There are two exceptions which could constitute infringements of the fair practice right. If this right is found only to encompass employee’s work opportunities, security and discipline, and protection from unfair discrimination, then those sections of the 1995 LRA affecting these issues will be subject to constitutional scrutiny. The exceptions providing for positive discrimination in the interests of affirmative action and discrimination based on the inherent requirements of the job should be found constitutional if they can be adequately justified. The 1995 LRA also deals with dismissal issues for fair reason and with fair procedure.

3.10.2. **Collective Labour Rights**

- **Union organization**

Section 27(2) of the interim constitution protects the right of workers to form and join trade unions. Statutory restrictions, such as requiring registration of unions, are likely to be viewed in a dim light.

The right of employees to join non-labour organizations is protected but may be limited if democratically justifiable. An example are judges, magistrates and even some civil servant’s right to join a political organization.
The freedom of association is the means by which workers protect themselves from the greater economic power of employers and the political power of the state. The scope of the right to association has been specifically defined to include the right to join organizations and related rights such as to bargain collectively and to strike.

In addition to guaranteeing the right to form and join a union as well as for both employer and employees to participate fully in their respective organizations, the final Constitution also allows for the determination of their own administration, programmes and activities and to form and join federations. The two groups are protected from legislative and executive interference as well as interference from each other.

- **Union security arrangements**

The final Constitution recognizes union security arrangements contained in collective agreements. Consequently if the freedom not to associate is found to exist, union security provisions will not as a matter of course be unconstitutional. Whether this limitation will be found justifiable remains to be seen.

Agency shops are subject to controls under the 1995 LRA and are likely to be found to be constitutional whilst closed shops, because of the compulsion to join a particular union or be dismissed, may not be found so, depending on their form.

- **Right to organize**

The final Constitution grants the right to organize. In respect of trade unions this includes
• the recruiting of members;
• the granting of stop-order facilities;
• access to necessary information to ensure that bargaining is meaningful, and the like.

Various ILO Conventions protect the right of workers
• to participate in union activities outside working hours;
• hold union meetings;
• have access to places of work, to communicate with management, to collect union dues and to gain access to information for collective bargaining purposes (Cooper:1998:30-28).

This right gives rise to potential conflicts with the right to privacy and freedom of expression.

Despite the historically disadvantaged position of domestic workers the right to organize has not been extended to them to protect the right to privacy and property in the domestic home. It is suggested by Cooper that this limitation is justified (1998:30-29).

Restrictions on the right of union representation in organizations with fewer than ten union members is an infringement on the right to organize (section 14(1) and (2) of the 1995 LRA). Small business is concerned about over-regulation. It remains to be seen whether this limitation to the right to organize will be found to be justifiable. The more restrictive approach to the right to economic activity in the final Constitution may indicate that this limitation is not justifiable.

• Collective bargaining
The final Constitution recognizes the right of trade unions and employers to engage in collective bargaining. The interim Constitution gave the right to bargain collectively. The implication is that the right granted by the final Constitution does not include a reciprocal duty to bargain but merely an obligation not to interfere with the exercise of the right. The distinction is a fine one and the wording of the section inconclusive. The right to regulate collective bargaining by way of legislation may also be seen as an indication that collective bargaining is a freedom rather than a right.

The interim Constitution allowed only for employers organizations to bargain and not single employers. The final Constitution rectified this position.

Collective agreements drawn up by bargaining councils and which bind non-parties to the agreement infringe on the rights of non-parties to collective bargaining and the right to strike. It remains to be seen whether the court will find these infringements to be justified or not. The 1995 LRA section 23 provides for agreements which may include non-parties. The majoritarian requirement and the promotion of stable collective bargaining may ensure their constitutional survival.

- **Right to strike**

The final Constitution does not link the right to strike to a specific purpose, thus broadening the scope of the right to strikes for socio-economic purposes but not for political. This concept is recognized internationally but the court surprisingly did not come out in favour of the recognition of this right (*Business South Africa v Congress of South African Trade Unions and another* (1997) 18 ILJ 474 (LAC). The 1995 LRA places certain restrictions on socio-economic strikes. These are infringements on the general right to strike they would
probably be justified given the far-reaching impact such activities could have on the general public.

The 1995 LRA allows parties by means of a collective agreement to agree not to have the right to strike. This provision may be valid as the employees are represented by a registered trade union and not influenced as an individual employee. The view may be different in respect of non-parties who are bound by such an agreement as they are denied one of their fundamental rights.

Section 65(1)(b) of the 1995 LRA prohibits an individual from taking part in a strike where there is an agreement (either individual or collective) to refer the issue for arbitration. Where this applies to an individual employee this is not likely to be found to be in compliance with the spirit of the Constitution.

The 1995 LRA provides that a person may not strike where a party has the right to refer the issue for arbitration or to the Labour Court. This is because strike action is regarded as a method of last resort for the resolution of problems.

Workers are protected against unfair dismissal and granted immunity from civil liability in circumstances where they follow all the strike procedures.

- **Lock-outs**

Few constitutions worldwide entrench the right to the lock-out. The court found that the employer has a range of other methods at his disposal to exercise economic power against workers. These include dismissal, the employment of alternative or replacement
labour, the unilateral implementation of new terms and conditions of employment and the exclusion of workers from the workplace (*Certification of the Constitution of the Republic of South Africa, 1996* 1996(4) SA 744(CC)).

The 1995 LRA contains reference to the recourse to a lock-out, however, the lack of recognition by the Constitution means that employers have no constitutional protection against legislative curtailing of the lock-out.

The effect of a lock-out may be deemed a suspension of employment and can be problematic for employers. The approach of our courts in the future is uncertain.

- **Picketing**

Section 17 of the final Constitution grants everyone the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. The picketing of private employers by their employees falls outside the ambit of the constitution. Legislation to regulate such activities does not and such legislation is subject to scrutiny.

Section 69(1) of the 1995 LRA regulates picketing where it is the form of a trade union right. The limitation of this regulation excluding the individual's right may be justifiable considering the disruptive effect on the public and ensuring that people calling the picket can be held accountable. The 1995 LRA allows for picketing on the employers premises only with their consent, although this may not be withheld unreasonably. The CCMA is authorized to assist parties with setting picketing rules and in circumstances where the employer has unreasonably withheld permission to picket on their premises.
• **Closed shop**

Consideration should be given to the antithesis of the right to association. In respect of employees full trade union membership is often a prerequisite to employment. The Canadian court has accepted in principle that the freedom *from* association (the right to chose not to associate with) is embodied under this right. The approach to be taken by our courts is as yet unknown.

• **Right to bargain**

The right to bargain collectively is entrenched and for the first time includes civil servants. This right is not absolute in that a limitation may be both reasonable and justifiable under the limitation clause in a democratic state based on freedom and equality.

It is common in South Africa that a single union be acknowledged as a result of statutory recognition as the exclusive bargaining agent for the employees for which it was recognized. There are differing decisions on this aspect from the labour courts but it seems that this is accepted as a legitimate manifestation of the majoritarian principle (*Natal Baking and Allied Workers Union v BB Cereals* (1989) 10 ILJ 870 (IC)). It is not probable that it will be accepted by the courts that such a union would not also have a right and duty to represent the interests of the minority of employees as well.

3.11. **INDIGENOUS LAW**

A Western European style of law has long had official support and the resources that accompany such recognition. Indigenous law has only been recognised in limited fields.
Some Constitutional Court judges have expressed the view that African jurisprudence has an important role to play in the development of the new constitutional legal order in South Africa (S v Makwanyane supra), the Constitution does little to create a unified, national legal system. The Constitution attempts to establish an order based on individual freedom and equality while traditional leadership rests on patriarchal and authoritarian foundations, rather than democratic values, rules and customs that discriminate against women.

The interim Constitution provided that the traditional authority and customary law could not be written out of the final Constitution but recognition in that document is slight. Indigenous law is recognized but subject to supervision by the legislature and the courts. The Bill of Rights applies to all aspects of customary law. The collective right to cultural integrity limits reform of customary law and requires its application where appropriate.

The 1996 Bill of Rights applies directly to private and juristic persons in certain circumstances. It applies to all law including statutory customary law and non-statutory customary law where the state seeks to rely on its terms. Whether it is applicable as between individuals will depend on the wording of the provisions and whether there is a reciprocal duty to uphold the rights of others.

Section 8(2) of the final Constitution reads:

“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

This requires that the following be established
(i) Does a particular right bind individuals?
The scope of the right would have to be explored.

(ii) If so, to what extent?
This requires that the duty to uphold the rights of others be established.

Of importance to this research is the fact that rules of customary law focus on gender discrimination. Particularly with regard to succession, women cannot inherit and an estate always devolves to a male heir. In *Mthembu v Letsela and another 1997(2) SA 936 (T)* the court, assuming that the Bill of Rights did apply, found that the gender based system of succession did not violate fundamental rights or unfairly discriminate against women as the right to succeed to the estate carried with it a duty to support and maintain dependant members of the household. Women were not seen to be disadvantaged by the system.

The Constitution values membership of collective cultural institutions and requires their protection. The Constitution values individual rights and freedoms. The interpretation must be that cultural institutions and practices are respected only in so far as they are compatible with the fundamental rights set out in the Constitution.

The limitations clause and its implications must also be considered. It is suggested by Currie (1998:36-27) that the Constitution will be interpreted in the light of international law and constitutional provisions designed to prevent discrimination.

3.12. CONCLUSION

This chapter has discussed the content specific fundamental rights which are relevant to business. The research has indicated various instances in which the approach of the
courts to long established principles has adapted to the fundamental values entrenched in the Bill of Rights. It will be shown in chapters to follow how these serve to guide and indicate the direction in which other disputes will be settled in future litigation and make it easier for management to plan their methods of future management confident that they are acting within the parameters and spirit of the law. It is important to realize that public opinion is not the yardstick by which constitutional rights are interpreted but rather the rights themselves. This is but one reason why it is important to keep up to date with the utterances of the Constitutional Court. Disputes take years to reach the Constitutional Court and the law is conservative in its development of these principles.

The following chapter will discuss specific pieces of legislation passed since 1998 which have a particular influence on business and in particular family business.
CHAPTER 4
SPECIFIC LEGISLATION

4.1. INTRODUCTION

The previous chapter discussed several specific fundamental rights and their content. These are rights which have an impact specifically on business and juristic persons.

Several pieces of legislation which have been passed by the legislature after 1994 are summarized in this chapter. The content of this legislation is explained to disclose the benefits and duties imposed. This is by no means a reflection of the amount of legislation considered by Parliament in this period. Isolated legislation has been chosen which has a specific impact on the management of a business, hence the choice of legislation which has had particular effect on the record-keeping duties of a business, the imposition of new duties on business in respect of their business relationships, the allowances made for the lawful monitoring of business communications, and particularly the employment equity requirements imposed by Parliament. Each piece of legislature has been summarized, greater detail has been given in some instances as to the exact requirements of the Act under discussion with a view to establishing the goals which the legislature wishes to achieve and the degree of the obligation placed on the business.

4.2. FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001.

The purpose of this legislation is set out in the preamble thereto and reads as follows:
“To establish a Financial Intelligence Centre and a Money Laundering Advisory Council in order to combat money laundering activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.”

The Financial Intelligence Centre (FIC) and Money Laundering Advisory Council (MLAC) were established on 1 February 2002. The Minister was granted the power to make regulations which were duly published and came into effect on 3 February 2003.

The principal objective of the FIC is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities. Other objectives of the FIC are:

(a) to make information collected by it available to investigating authorities, the intelligence services and the South African Revenue Service to facilitate the administration and enforcement of the laws of the Republic;

(b) to exchange information with similar bodies in other countries regarding money laundering activities and similar offences (section 3).

In order to achieve this the FIC must:

(a) process, analyse and interpret information disclosed to it, and obtained by it, in terms of this Act;

(b) inform, advise and co-operate with investigating authorities, supervisory bodies, the South African Revenue Service and the intelligence services;

(c) monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance by them of their duties and their compliance with the provisions of this Act;

(d) retain the information referred to in paragraph (a) in the manner and for the period required by this Act (section 4).

Section 17 of the Act provides for the establishment of a Money Laundering Advisory Council whose function it is, in terms of section 18, to advise the Minister on policies and
best practices to identify the proceeds of unlawful activities and to combat money laundering activities. The MLAC is to advise the Centre concerning the performance of its functions; and act as a forum in which the Centre, associations representing categories of accountable institutions, organs of state and supervisory bodies can consult one another.

The Act defines certain entities as accountable institutions and imposes certain obligations on them to keep records of their clients and to report suspicious or unusual transactions. Certain administrative systems must be in place to do this and employees must be appointed and trained to deal with these obligations. Accountable institutions are listed under Schedule 1 to the Act of which the following are examples:

- An attorney as defined in the Attorneys Act, 1979 (Act No. 53 of 1979).
- A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act No. 57 of 1988).
- A person who carries on a “long-term insurance business” as defined in the Long-Term Insurance Act, 1998 (Act 52 of 1998), including an insurance broker and an agent of an insurer.
- A person who carries on a business in respect of which a gambling licence is required to be issued by a provincial licensing authority.
- A person who carries on the business of dealing in foreign exchange.
- A person who carries on the business of lending money against the security of securities.
- A person who carries on the business of rendering investment advice or investment broking services, including a public accountant as defined in the Public Accountants and Auditors Act, 1991 (Act 80 of 1991), who carries on such a business.
- A member of a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act 1 of 1985).
These persons or institutions are to be supervised by their professional bodies which include

- The Registrar of Companies as defined in the Companies Act 61 of 1973.
- The Estate Agents Board established in terms of the Estate Agents Act 112 of 1976.
- The Public Accountants and Auditors Board established in terms of the Public Accountants and Auditors Act 80 of 1991.
- The National Gambling Board established in terms of the National Gambling Act 33 of 1996.
- The JSE Securities Exchange South Africa.
- The Law Society of South Africa.

Reference is also made in the Act to “reporting institutions” which are defined under Schedule 3 as

- A person who carries on the business of dealing in motor vehicles.
- A person who carries on the business of dealing in Kruger rands.

Business transactions of an accountable institution are negatively affected and even prohibited unless the prescribed steps to establish and verify the identity and the validity of the authority of the client or the person on whose behalf s/he is acting, have been taken.

A business relationship means an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis. A transaction is that which is concluded between a client and an accountable institution in accordance with the type of business carried on by that institution.

Business relationships existing before this Act took effect are subject to this identification and verification procedure.

It may be that this identification and verification process must be complete on first contact with a client, failing which the business has to be turned down. The regulations provide for an exemption. Preparatory steps with a view to establishing a business relationship before
verifying the identity of a client may take place on condition that all steps in order to do the verification will be completed before the institution concludes a transaction.

Section 22 requires the accountable institution to keep record of the identity of the client; or the person acting on his behalf. Record must also be kept of the manner in which the identity was established; the nature of that business relationship or transaction; the amount involved; and the parties to that transaction.

Records can be kept in electronic form and even outsourced but there must be free and easy access to them. The responsibility to comply with these requirements rests with the accountable institution. Records must be kept for at least five years from the date on which the business relationship is terminated or on which the transaction is concluded.

The records are of extreme importance. A certified extract of any such record, or a certified print-out of any extract of an electronic record, is on its production before a court admissible as evidence of any fact contained in it.

An authorised representative of the FIC has access during ordinary working hours to any records kept by or on behalf of an accountable institution and may examine, make extracts from or copies of, any such records. These powers may only be exercised, except in the case of records which the public is entitled to have access to, by virtue of a warrant issued in chambers by a judicial officer. Such a warrant may only be issued if it appears from information on oath or affirmation that there are reasonable grounds to believe that the records may assist the FIC to identify the proceeds of unlawful activities or to combat money laundering activities. The warrant may be made subject to certain conditions.

The accountable institution, when requested by an authorised representative, advise whether a specified person is or has been a client of the accountable institution; is acting or has acted on behalf of any client of the accountable institution; or is acting or has acted for a specified person.

An accountable institution and a reporting institution must, within a prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the amount prescribed
periodically in the regulations, is paid by the accountable institution or reporting institution to the client, or his proxy or is received by them from the client, or his proxy.

A person who operates, manages or is employed by a business and who knows or suspects that the business has or is about to receive the proceeds of unlawful activities; or is likely to facilitate the transfer of the proceeds of unlawful activities; or that the business has been used or is about to be used in any way for money laundering purposes, must, within the prescribed period, report to the FIC the grounds for the knowledge or suspicion and the prescribed particulars.

The conveyance of an amount of cash to or from the Republic, in excess of an amount to be prescribed from time to time by the Minister must, be reported to the FIC. Similarly the transfer of such monies through electronic transfer from outside the Republic must be reported to the FIC.

The FIC can, after consulting an accountable institution, a reporting institution or the person required to make a report, if it has reasonable grounds to suspect that a transaction may involve the proceeds of unlawful activities or money laundering, direct the party in writing not to proceed with the execution of that transaction for a period which may not be more than five court days. This allows the FIC to make the necessary inquiries. It will, if appropriate, inform and advise an investigating authority or the National Director of Public Prosecutions.

No restriction on the disclosure of information affects compliance with these provisions with the exception of the common law right to legal professional privilege as between an attorney and the attorney’s client in respect of communications made in confidence between the attorney and the attorney’s client for the purposes of legal advice.

No person is entitled to information held by the FIC, except

- an investigating authority inside the Republic, the South African Revenue Service and the intelligence services, which can be provided with such information unless the information is required to investigate suspected unlawful activity;
- at the initiative of the Centre, if the Centre reasonably believes such information is required to investigate suspected unlawful activity; or to an entity outside the Republic under certain conditions;
• in terms of an order of a court;
• in terms of other national legislation.

Such a request for information must be in writing and must specify the desired information and the purpose for which it is required. A person who obtains information from the FIC may use it only within the scope of that person’s powers and duties and for the purpose specified.

No person may disclose confidential information held by or obtained from the FIC except,
(a) within the scope of that person’s powers and duties in terms of any legislation;
(b) for the purpose of carrying out the provisions of this Act;
(c) with the permission of the FIC;
(d) for the purpose of legal proceedings, including any proceedings before a judge in chambers;
(e) in terms of an order of court.

The Act stipulates that the failure to identify persons, to keep records, to report cash transactions, to send reports to the FIC and several other omissions are criminal offences. The failure to send a report to the FIC, to formulate and implement internal rules and to provide training and appoint a compliance officer which are punishable with imprisonment for a period not exceeding five years or to a fine not exceeding R1 000 000. The remaining offences are subject to imprisonment for a period not exceeding 15 years or to a fine not exceeding R10 000 000.

4.3. PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000.

Section 32(2) of the final Constitution obliged parliament to enact access to information legislation in order to give effect to the constitutional right. The Act provides for access to records held by both public and private bodies. It sets out the grounds on which disclosure must or may be refused. The manner in which such grounds may be overridden in the public interest and mechanisms for the resolution of disputes over access, notably judicial review, is established.
The need for an open and accountable government is particularly important given South Africa’s past which was characterized by extreme levels of government secrecy. Klaaren and Penfold (2002:62-3) suggest that in the private sector the justification for the right to access may lie more with the promoting and supplementing of rights than with enhancing democracy.

Litigation in terms of this act is not directly controlled by the Bill of Rights but statutory rights and remedies. The Act fails to give effect to the constitutional right in all respects but Klaaren and Penfold (2002:62-6) suggest that the court should refer the matter to Parliament to rectify this defect. If this is not the case then procedures such as the internal appeal procedure allowed by the Act would not apply.

It is to be noted that this Act applies only to physically recorded information and not other forms of information or information still to be recorded in the future. Requests for information must be made to the information officer of the public body or the head of a private body who will then consider the application and, if applicable, notify third parties of the application to allow them to make representations as to the result of the application. Provision is made for an internal appeal procedure as well as an appeal to a court.

The Act sets out a list of mandatory and discretionary grounds for refusal of requests for access to records including grounds such as confidential information and commercial information of a third party (sections 33 to 46). Section 46 makes it compulsory to disclose information which reveals evidence of a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question. Section 50 places an obligation on private bodies to give access to any record if it is required for the exercise or protection of any rights and on compliance with the procedural requirements in the Act relating to a request for access to it. A request by a public body for access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.

In Van Niekerk v Pretoria City Council 1997(3) SA 839(T) Judge Cameron held that an applicant was entitled to access to a report for the purposes of establishing whether he had a delictual claim against the local council in relation to a power surge which had caused the applicant damage. He held that not only would access to the electrical report
assist the applicant in either proceeding with or abandoning his claim but would also promote an early settlement of the matter. Similarly the *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd (supra)* held that an unsuccessful tenderer was entitled to access to other tenders to assess whether its right to procedural fairness had been infringed. The court specifically refuted the argument that the applicant should first show an apparent irregularity in the tender process to be entitled to the documentation. The courts are likely to follow a less liberal approach in the case of private bodies as opposed to public bodies.

Privacy is an important consideration in this type of access. The protection of the privacy of third parties is an internationally recognized restriction on freedom to information. The Act refers to personal information such as race, gender, medical history, views and preferences and other issues. The third party may consent to the release of this information. Other exceptions include where the third party was informed at the time of disclosure that it would be publicly available, or where it relates to an official of a public body.

### 4.4. PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT NO 4 OF 2000.

This legislation was passed to give effect to the provisions of section 9 read with item 23(1) of Schedule 6 of the final Constitution. In terms of the preamble the Act "endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."

The objects are numerated in section 2. Important examples are:

(a) to enact legislation required by section 9 of the Constitution;
(b) to give effect to the letter and spirit of the Constitution, in particular-
   (i) the equal enjoyment of all rights and freedoms by every person;
   (ii) the promotion of equality;
(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

(v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(d) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(e) to set out measures to advance persons disadvantaged by unfair discrimination.

Chapter 2 provides for the prevention and general prohibition of unfair discrimination; the prohibition of unfair discrimination on ground of race; of unfair discrimination on ground of gender; of unfair discrimination on ground of disability; the prohibition of hate speech; of harassment; and of the dissemination and publication of unfair discriminatory information that unfairly discriminates. Provision is made for the creation of equality courts to enforce the legislation.

The Act imposes a general responsibility and social commitment to promote equality. A schedule to the Act lists some unfair practices which are widespread and have been identified. This should not be regarded as a limit to the possible list of unfair practices. Of interest to this research are the following:

- **Labour and employment.**

  (a) Creating artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures.
(b) Applying human resource utilisation, development, promotion and retention practices which unfairly discriminate against persons from groups identified by the prohibited grounds.

(c) Failing to respect the principle of equal pay for equal work.

(e) Perpetuating disproportionate income differentials deriving from past unfair discrimination.

- **Pensions.**
  
  (a) Unfairly excluding any person from membership to a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds.
  
  (b) Unfairly discriminating against members or beneficiaries of a retirement fund.

- **Partnerships.**
  
  (a) Determining in an unfair discriminatory manner who should be invited to become a partner in the partnership in question.
  
  (b) Imposing unfair and discriminatory terms or conditions under which a person is invited or admitted to become a partner.

- **Professions and bodies.**
  
  (a) Imposing conditions that unfairly limit or deny entry into the profession of persons from historically disadvantaged groups.
  
  (b) Unfairly limiting or denying members access to benefits or facilities on the basis of a prohibited ground.

- ** Provision of goods, services and facilities.**
  
  (a) Unfairly refusing or failing to provide the goods or services or to make the facilities available to any person or group of persons on one or more of the prohibited grounds.
  
  (b) Imposing terms, conditions or practices that perpetuate the
consequences of past unfair discrimination or exclusion regarding access to financial resources.

(c) Unfairly limiting access to contractual opportunities for supplying goods and services.

- **Clubs, sport and associations.**

(a) Unfairly refusing to consider a person’s application for membership of the association or club on any of the prohibited grounds.

(b) Unfairly denying a member access to or limiting a member’s access to any benefit provided by the association or club.

(c) Failure to promote diversity in selection of representative teams.

*Brink v Kitshoff NO (supra)* was the first equality case and found that section 44 of the Insurance Act 27 of 1943 constituted unfair sex discrimination. At issue were the benefits to be received by a woman after her husband ceded her a life policy. Other cases followed involving the Forest Act 122 of 1984 (*Prinsloo v Van der Linde supra*) and a Presidential remission of sentence for prisoners who had committed less serious crimes and who were mothers of children under the age of 12 (*President of the Republic of South Africa v Hugo supra*). Reference has been made previously to the case of *Harksen v Lane NO and others supra* in which the majority judgment found section 21 of the Insolvency Act to be discriminatory but not unfair. *The City Council of Pretoria v Walker 1998(2) SA 363 (CC)* held that the imposition of a flat rate for municipal services was not unfair discrimination but that the selective enforcement of debts was unfair. Unfair discrimination on the basis of sexual orientation and marital status has been found unconstitutional in the cases of *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others 1999(1) SA 6 (CC)* and *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others 2000(2) SA 1 (CC)*. In *Hoffmann v South African*
Airways 2000(1) SA 1 (CC) the plaintiff’s application for employment as a cabin attendant was refused solely because he was HIV-positive and his appointment would be contrary to a policy to appoint persons of this status as flight crew. In an appeal to the Constitutional Court SAA conceded that this policy had no medical basis and was unfair. SAA was ordered to give plaintiff a position in their company.

4.5. THE EMPLOYMENT EQUITY ACT NO 55 OF 1998.

This Act declares in the preamble that it aims “to promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation.”

In his article Human Rights Cases Around the World – Ireland (De Rebus: Jan 1999:56) Seth Nthai avers that the Act ensures that management in the private sector reflects the demographics of our society. After discussing the Irish approach to similar legislation he concludes that the unique history of our country has made the need to change the demographic composition of management in the private sector urgent, as well as the need to share the wealth of the country. This will affect the manner in which this type of legislation is interpreted by the Constitutional Court. The approach, in the light of our heritage, will be different to that of Ireland.

Section 2 declares it’s purpose as being
“… to achieve equity in the workplace by

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”

Section 9 specifically extends the definition of an “employee” to an applicant for employment.

Specific reference is made to medical testing of an employee which is prohibited unless,

- permitted by legislation;
  or if justifiable in the light of
- medical facts;
- employment conditions;
- social policy;
- the fair distribution of employee benefits;
- the inherent requirements of a job.

The testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of this Act.

Psychometric testing and other similar assessments of an employee are prohibited unless the test or assessment being used
(a) has been scientifically shown to be valid and reliable;
(b) can be applied fairly to employees;
(c) is not biased against any employee or group.

The question of affirmative action is addressed in sections 12 to 27.

A “designated employer” is defined as

(a) a person who employs 50 or more employees;
(b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 of this Act (the lowest being the agricultural sector in the amount of R2 million; catering, accommodation and other trade in the amount of R5 million);
(c) a municipality, as referred to in Chapter 7 of the Constitution;
(d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service;
(e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

The “designated groups” are defined as black people, women and people with disabilities.

Section 20 imposes a duty on a designated employer to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer’s workforce.
The equity plan must state,

(a) the objectives to be achieved for each year of the plan;
(b) the affirmative action measures to be implemented;
(c) where the under representation of people from designated groups has been identified, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable and the strategies to be used;
(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
(e) the duration of the plan, which may not be shorter than one year or longer than five years;
(f) the procedures to be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan.
(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan.

A person may be suitably qualified for a job as a result of any one of, or any combination of that person’s formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable time, the ability to do the job.
A designated employer employing fewer than 150 employees must submit its first report to the Director-General within 12 months after the commencement of this Act (1 December 1999) or, if later, within 12 months after the date on which that employer became a designated employer. The employer must submit a report to the Director-General once every two years, on the first working day of October. A designated employer that employs 150 or more employees must submit its first report to the Director-General within six months after the commencement of this Act. Every report prepared in terms of this section is a public document.

The Act provides for the establishment of a Commission for Employment Equity which will advise the Minister on codes of good practice, regulations made by the Minister, policy and any other matter concerning this Act. In addition the Commission can make awards recognising achievements of employers in furthering the purpose of this Act. It can research and report to the Minister on any matter relating to the application of this Act, including appropriate and well-researched norms and benchmarks for the setting of numerical goals in various sectors.

Chapter 5 of the Act provides for the monitoring, enforcement and other legal proceedings in connection with the provisions of this Act. Schedule 1 provides for maximum fines for the contravention of certain provisions of the Act ranging from R500 000 to R900 000.

4.6. THE PROTECTED DISCLOSURES ACT 26 OF 2000

There is recognition that criminal and other irregular conduct in organs of state and private bodies are detrimental to good governance can endanger the economic stability of the
country and have the potential to cause social damage. The legislator has, therefore, imposed on every employer and employee a responsibility to disclose criminal and any other irregular conduct in the workplace and a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals. The aim is to create a culture which will facilitate disclosure in a responsible manner by providing comprehensive statutory guidelines. This is to promote the eradication of criminal and other irregular conduct.

The Act commenced on 16 February 2001 and applies to disclosures made after this date, irrespective of the date on which the impropriety occurred.

Disclosures are defined as the following,

(a) information that a criminal offence has been committed, is being committed or is likely to be committed;
(b) information that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
(c) information that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) information that the health or safety of an individual has been, is being or is likely to be endangered;
(e) information that the environment has been, is being or is likely to be damaged;
(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000);
(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.
A protected disclosure is one made to

(a) a legal adviser;
(b) an employer;
(c) a member of Cabinet or of the Executive Council of a province;
(d) a person or body such as the Public Protector or the Auditor-General;
(e) any other person or body in accordance with the conditions of section 9,

but does not include a disclosure,

(i) in respect of which the employee concerned commits an offence by making that disclosure;
(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5.

An employee who makes such a disclosure is protected against occupational detriment in relation to the working environment and may not be,

(a) be subjected to any disciplinary action;
(b) be dismissed, suspended, demoted, harassed or intimidated;
(c) be transferred against his or her will;
(d) be refused transfer or promotion;
(e) be subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
(f) be refused a reference, or being provided with an adverse reference, from his or her employer;
(g) be denied appointment to any employment, profession or office;
(h) be threatened with any of the abovementioned actions;

(i) be otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

The Act provides for remedies in the event of any of the above occurring in that and employee may approach any court, including the Labour Court, or use any other legal process for relief.

4.7. INTERCEPTION AND MONITORING PROHIBITION ACT 127 OF 1992

The aim of this legislation as stated in its preamble is to prohibit the interception of certain communications and the monitoring of certain conversations or communications. It provides for the interception of postal articles and communications and for the monitoring of conversations or communications in the case of a serious offence or if the security of the Republic is threatened and to provide for matters connected therewith.

Section 2 of the Act prohibits the intentional interception of communications by telephone or over a telecommunications line without the knowledge or permission of the dispatcher by means of a monitoring device to gather confidential information concerning any person, body or organization. A judge of any provincial or local division of the Supreme Court may direct that either a particular postal article or telecommunications communication be intercepted or be monitored. Such orders may not exceed a period of three months. The application to court for the order shall, in terms of the Act, be heard and a direction issued without any notice to the person, body or organization to which the application applies and without hearing them.
A court order may be granted if the judge is convinced, on the grounds mentioned in a written application that the possible offence is of a serious enough nature and cannot be properly investigated in any other manner and of which the investigation in terms of this Act is necessary. Serious offences range from treason, sedition, public violence, murder, rape, robbery, kidnapping, child stealing, serious assault, arson, malicious injury to property, theft, fraud, forgery or uttering, to any offence, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.

Any person concerned in the performance of any function in terms of this Act, shall not disclose any information which he obtained except to any person who requires it for the performance of his functions. It can be disclosed if such information is required in terms of any law or as evidence in any court of law; or to any competent authority which requires it for the institution of any criminal prosecution.

Any person who unlawfully intercepts or monitors communications shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years. It is also an offence to break a secrecy clause and such offence is subject to a fine, or to imprisonment for a period not exceeding five years.

4.8. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT 25 OF 2002

This Act provides for the facilitation and regulation of electronic communications and transactions, the development of a national e-strategy for the Republic as well as promoting universal access to electronic communications and transactions and the use of electronic transactions by SMMEs. It also addresses the abuse of information systems.

Various chapters of the Act deal with topics such as,
- maximizing benefits,
• policy framework particularly with regard to a national e-strategy;
• the facilitation of electronic transactions;
• the registration of cryptography providers;
• the establishment of an accreditation authority;
• consumer protection;
• the protection of personal information and critical databases;
• a domain name authority and the administration thereof;
• the scope of liability of service providers;
• cyber crime;
• the power of inspectors to inspect, search and seize.

The act is such that a meaningful yet concise synopsis is not possible.

The sections on interpretation and the sphere of application are of importance.

Legal recognition is given to data messages. Prior to this Act there was uncertainty as to whether certain basic legal requirements could be met by using the computer. For example, the legal requirement of certain pieces of legislation that an agreement be in writing if stored electronically rather than on paper is dealt with by section 12 which reads:

“A requirement in law that a document or information must be in writing is met if the document or information is
(a) in the form of a data message; and
(b) accessible in a manner usable for subsequent reference.”

The formal requirement that a document be signed can be met by use of an advanced electronic signature as contemplated in section 13. These provisions do not apply to,

• a contract for the alienation of immovable property as provided for in the Alienation of Land Act 68 of 1981;
• an agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act, 1981;
• the execution, retention and presentation of a will or codicil as defined in the Wills Act 7 of 1953;
• the execution of a bill of exchange as defined in the Bills of Exchange Act 34 of 1964.

Matters such as offer and acceptance and the consequences which flow from these are specifically dealt with because of the unique communication method. Numerous other matters including the admissibility and evidential weight of data messages, the retention and production of a document or information, and the notarisation, acknowledgement and certification are dealt with. In particular the Act deals with a cooling-off period during which a consumer is entitled to cancel a contract and request a refund (section 44) and “spam” or unsolicited commercial communications to consumers. It is an offence to continue to send such unwelcome communications and on conviction the sender is liable to a fine or imprisonment for a period not exceeding 12 months. Other offences are also created which are specifically related to electronic dealings (sections 86 to 88).

Criminal or civil liability in terms of the common law is retained.

4.9. CONCLUSION

This chapter has summarised the contents of certain specific pieces of legislation passed since 1994 which have an effect on the management of business. The benefits of and duties imposed by this legislation have been highlighted to illustrate the onerous nature of some of the duties and obligations imposed by certain pieces of legislation.

The preamble to each piece of legislation discloses the aim sought to be achieved. This is a factor which determines the extent to which the duties imposed by a particular piece of legislation intrudes on the freedom to make management decisions. Those aimed at combating crime appear to be more arduous in nature.
Clearly some legislation is as a direct result of the provisions of the Constitution (Promotion of Access to Information Act), while others are aimed at facilitating the transition to a democratic society and promoting the principles of equality, fairness, equity, social progress, justice, human dignity and freedom (Employment Equity Act). Others are aimed at the prevention and limitation of unlawful activities and organized crime (Financial Intelligence Centre Act). The degree of invasiveness resulting from these pieces of legislation differ from instance to instance as indicated above and will be dealt with in greater detail in the following chapter. The impact will also differ depending on the form of the organization and its particular characteristics.

Legislature aimed at combating crime grant officials of the State extensive powers of access to confidential commercial information. This allows for abuse should such information come into the hands of corrupt officials.

Citizens are encouraged to disclose information which will assist in eradicating crime and irregular conduct, however, the protection given to persons who make such disclosures are the normal legal remedies which involve court applications. The existence of such remedies is of little assistance in the absence of financial resources to seek legal advice and representation. No provision is made for physical protection for persons making disclosures. This may be of particular importance in a family business where the financial implications for a family unit are involved. A glance at the daily newspapers reveals that "Mafia"-type families do not only exist in Hollywood.

Despite the fact that the pieces of legislation discussed in this chapter have been in effect for some 3, 5 or even 10 years, there has been little evidence of policing or enforcement. A lack of resources may be the main reason for this. A lack of policing and enforcement encourages a disregard for the law.

Legislation aimed at enforcing diversity in larger organizations may be inhibiting to organizations which cannot locate suitably qualified employees of colour. This aspect is of particular importance in a family business which employs 50 or more employees. Family members world-wide tend to belong to the same racial, cultural and religious groups simply because they have similar values and interests. Few South African families have even one member of another racial group let alone more than one such group. A family
business would be hesitant to allow any outsider to wield any real power within their business for fear of losing control. The enforcement of the provisions of the Employment Equity Act may lead to the fragmentation of family businesses who employ more than 50 employees or even a decision to relocate the entire business.

Family businesses are also required to comply with all the obligations in this recent legislature and will in a similar fashion to their counterparts suffer the same effects particularly with regard to cost implications. Legislature such as the Employment Equity Act and the Protected Disclosures Act will have a greater impact on the unique character of the business as they impact directly on the management and employee representation in the organization and on the bonds of loyalty between family members.

The following chapter will consider selected aspects of management and the manner in which they have been effected by recent legislation.

CHAPTER 5

IMPLICATIONS FOR FAMILY BUSINESS

5.1. INTRODUCTION

The previous chapter discussed the benefits granted and duties imposed by certain pieces of legislation passed since 1994. This chapter looks at specific aspects of management such as representivity, labour issues, insolvency and restraint of trade clauses and the manner in which these have been effected by this legislation.

Whether the family business is structured as a natural or juristic entity, will in many instances, not change the effect which the new legislation has on the business. A structural change can become important particularly as the business grows and should be reviewed annually under advisement from both legal and financial advisors.

The impact legislation will have on a business depends to a large extent on the goal the legislation wishes to achieve. Chapter 4 indicates that some legislation is directed solely at promoting the values entrenched in the Constitution and Bill of Rights. Some legislation is
directed at the management and control of new technologies, whilst other is directed at the curb of criminal activities. The latter imposes onerous obligations on businesses and gives rise to possible infringements of other professional and even constitutional rights. This chapter will consider the implications of the fundamental changes in our legal system with reference to recent case law on certain issues. Whilst the scope of the areas of business which might be affected are too vast to cover individually, a study of isolated case law will give an indication of the direction in which the courts of this country are moving. This should enable business to anticipate and solve specific issues as they arise in day-to-day business.

5.2. PARADIGM SHIFT

Since the formalization of the Union in 1910, South African society has developed in the milieu of the Westminster system, which encompasses as one of its fundamental concepts the sovereignty of parliament. The power of parliament is absolute.

Successive South African governments introduced and enforced policies of segregation and apartheid. The parliamentary system facilitated the disenfranchisement of people of colour and the policies of segregation and apartheid. It is for this reason that the dominance of parliamentary supremacy has been said to have shaped South Africa’s modern constitutional history (Klug:1996:2-1). During this period law generally was “expedient, transient and ultimately self serving” according to Leon AJA in *Ex parte Attorney-General and the Prosecutor-General, Namibia : in re The Constitutional Relationship between the Attorney-General and the Prosecutor-General 1995(8) BCLR 1070 (NmS)*. The mere passing of legislation in a parliament dominated by a minority population group could change the rights and privileges of the majority without any input from them.

The threat of social upheaval, mass action and the escalating level of violence led to the formation of the multi-party negotiating forum which was entrusted with the formulation of the Constitution. The norms and values adopted by the Constitution are a measure against which all law and conduct is now to be tested. The fundamental rights provisions affirm the democratic values of human dignity, equality and freedom. Provision is made for a democratic system of government committed to achieving these values, the
separation of powers between legislative, executive and judicial branches of government and also for a process of judicial review.

The Constitution is aimed at healing the divisions of the past and establishing a democratic and just society, creating a new political order, improving the quality of life for all citizens and a commitment to building a united and democratic South Africa. These values permeate society as a whole and for this purpose all law is subject to a values-based methodology of interpretation as set out in section 39(2):

“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.”

The supremacy clause in section 2, rendering the Constitution as the uppermost law of the land, establishes an entirely new constitutional dispensation which requires a paradigm shift in jurisprudential thinking and theory in South Africa (Matiso v Commanding Officer, Port Elizabeth Prison 1994(3) SA 899 (SE)). All law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. The Constitution is the highest law of the land and parliamentary sovereignty a thing of the past. The importance of this fundamental change cannot be over-emphasized.

It is obvious from the above that the criminal law, and in particular that implemented by the legislature, would be the most affected by the Constitution. The common law has been widely accepted as a resourceful body of doctrine which has previously recognized many of the rights now provided for in the Bill of Rights (Hopkins:2003:22). Particularly in private law the common law has always recognized, for example, the right to freedom of expression and privacy and has developed a method of balancing these competing rights by utilizing the concepts of fairness and reasonableness. These criteria are influenced by notions of ethics and positive morality which in turn inform the public policy doctrine – a doctrine in line with the legal convictions of the community. The Bill of Rights may now be the criteria which establishes public policy. Common law rules of private law and case law
authority which has evolved from them, should even be tested against constitutional values.

The effect which the Constitution has on legislation will be equally applicable to all types of business, big or small. A greater duty of social responsibility has been imposed which will effect family business more than others as they have a closer link to society and the community in which they function. This may increase their vulnerability particularly in areas of financial liquidity and employee representivity.

5.3. FUNDAMENTAL RIGHTS

All actions have consequences both for the actor and those whose lives are touched by the action. These legal, social and economic consequences are now governed by the fundamental rights entrenched in the Constitution. These values permeate all society on an individual, business and political level. The relationships between parties in business dealings are all effected, be they between,

- individuals;
- juristic persons;
- employers and their employees;
- businesses and their supplier;
- businesses and clients.

The Constitution imposes a duty on every roleplayer to be committed to nation building, reconciliation, reparation and reconstruction. These rights are considered so important that they cannot be waived in a contract (Transnet Limited v Goodman Brothers (Pty) Ltd 2001(2) BCLR 176 (SCA)).

The manner in which business, and particularly family business, will be affected is too vast to detail or contemplate. Singular aspects are discussed in light of the fundamental rights discussed in Chapter 3 of this paper with reference to case law which has already emanated from South African courts since 1996. The implications of the fundamental
rights will affect a business, whether they are the party enforcing the right or the party questioning it.

5.3.1. **Representivity**

It is this obligation which has made it necessary for businesses to become more race and gender representative. In an effort to uplift these previously disadvantaged groups income generating business is also directed in the main towards representative businesses. This leaves black family businesses, be they sole proprietorships or juristic entities, which operate in the formal or semi-formal business world, in an excellent position specifically when it comes to tendering for work or forging links with international or market listed companies. Family businesses with predominantly “white” ownership or control are at a disadvantage.

Representivity within the company itself, and specifically with regard to the employment ratio in a business, will generally only become applicable with reference to the number of employees or the annual turnover of the business. The obligation to comply with the Employment Equity Act falls on an employer who employs 50 or more employees, or with an annual turnover exceeding those set out in the Schedule to the Act. The micro - or small income business in the informal sector will be unaffected by this legislation.

For the so-called “white” family business equity amongst employees will not directly impact on the control of the business by the family. The impact will be felt if management is lacking in diversity when there is competition for work. The business may have the correct race and gender representivity but if management is not a reflection of this diversity, the business may not be awarded certain work because of this defect.

Transformation, growth and economic development has been recognized by President Mbeki as having to go hand in hand. It is government policy not to impose a so-called quota system to eradicate the imbalances in the business industry in the interests of
creating a thriving economy and with the aim of encouraging prospective foreign investment (The Herald, Monday 22 September 2003 page 1).

5.3.2 Labour Issues

Human resources are one of the most common problems in a business. The potential for conflict in a family business between the rights which an employee may expect due to his membership of the family and the rights which he may have as an employee of the business are vast. Balshaw (2003:32) illustrates this potential conflict by comparing the emotion-based factors of the family system (the characteristics of being inward-looking, protecting low achievers, inheriting lifetime membership, etc) to the task-based characteristics of a successful business (the characteristic of being outward-looking, rewarding performance, expecting employees to perform or leave, meritocracy, etc). The potential for conflict is obvious and can unfortunately result in family disputes being aired in court. It is important for a business to be aware of the changing views of the courts with respect to labour and other issues.

Family businesses which employ less than 50 employees are not effected by the provisions of the Employment Equity Act which requires that an organization be representative of the South African population. Representivity will probably not be an issue at the unskilled or semi-skilled workforce levels. At management level the issue becomes contentious as it impacts on the very character of the family business. The outsourcing of certain management functions, such as the human resources division of an organization, may present a possible solution to this issue. The utilization of a reputable empowerment organization with a proven track record will satisfy the needs of the family business and prove that they are supporters of transformation while still preserving the unique nature of the family business.
The family business which chooses to operate like any other successful business and makes appointments and grants rewards on the basis of merit, faces the same labour issues as any other business, irrespective of whether the employee/manager is a family member or not.

The Carephone– case (supra) made several observations which are important to employers involved in labour disputes. The Commission for Conciliation, Mediation and Arbitration (CCMA) has been recognized as an independent public institution although created as an organ of State. It is bound by the Bill of Rights. The arbitration process has to be,

- fair;
- equitable;
- the commissioner impartial and unbiased;
- the proceedings lawful and procedurally fair;
- reasons given for an award given publicly and in writing.

The award must be justifiable in terms of those reasons. The provisions of the Labour Relations Act 66 of 1995 dealing with arbitration proceedings were found by this court to be consistent with these requirements.

The award can only be reviewed by a Labour Court if there are facts which point to misconduct, gross irregularity, impropriety or if the commissioners findings are not justifiable in terms of the stated reasons.

These views were again considered in Shoprite Checkers (Pty) Ltd v Ramdaw NO and others 2001(3) SA 68 LC. This court rejected the notion that CCMA actions were administrative in nature. It was concluded that the only possible ground on which an award could be set aside was that the commissioner had committed a gross irregularity in the conduct of the proceedings.

Section 197 of the Labour Relations Act 66 of 1995 deals with the transfer of a business as a going concern. It deals with whether the employees are transferred automatically within the business without prior agreement to that effect between the transferor and transferee employer. This was considered in National Education Health and Allied Workers Union v UCT 2003(3) SA 1 CC. The right to fair labour practices entrenched in section 23
of the final Constitution was confirmed in respect of both employees and employers, irrespective of whether the latter were natural or juristic persons. The purpose of section 197 was regarded as facilitating commercial transactions (the sale of businesses) and protecting the employees against unfair job losses.

The court held that outsourcing is different from a transfer of the business. The former occurs when the employer pays the contractor a fee to render services as opposed to paying salaries to a group of employees. Outsourcing is not a transfer in terms of section 197. The sale of a “going concern” includes the employees. Sellers and purchasers can effectively exclude the operation of section 197 by agreement.

A family business, which outsources the workforce, but retains family members as the management component may seriously affect the re-sale value of the business. This may not be of importance as long as the business has a family member to succeed in the line of control of the business. When this is no longer an option and the need to realize the equity in the business arises, this may not be possible. It may become necessary to allow the entrance of outsiders who may later take over the business irrespective of the wishes of the remaining minority family members.

The outsourcing of management divisions, such as human resources, will result in these divisions falling in the hands of the new owners of the family business allowing them greater control. Those family members who remain with the business after its transfer and have contracts of employment will be subject to normal labour practices.

A major victory for employers, which has far-reaching consequences for unions who engage in unlawful strike action, was won in Rustenburg Platinum Mines Limited v The Mouthpiece Workers Union (LC) case number J5099/99 unreported. Employers can claim compensation for any loss suffered as a result of an unprotected strike against both the
participants in and organizers of such strikes depending on the circumstances and, in particular, whether there are adversarial relations between employers and militant unions.

5.3.3. **Contracts**

Contract law is different to other branches of common law which have as their basis the principles of fairness and reasonableness. The “sanctity of contract rule” provides that a court will not release a contracting party from the consequences of an agreement entered into merely because it is unfair or harsh. Hopkins (2003:23) maintains that whether the contract is fair or not the parties must live with what they have agreed. The courts respect the freedom of an individual to choose the terms of their agreement and gives effect to them as expressed in writing. The only qualification to this rule is that the contract should be legal and enforceable.

The judge in *Knox D'Arcy Limited and another v Shaw and another* 1995(12) BCLR 1702 (W) stated:

> “The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions.”

The entrenched fundamental rights are those values most important to the community. *Afrox Healthcare Bpk v Strydom* 2002(6) SA 21 (SCA) confirms that the Bill of Rights is the most reliable statement of public policy. Consideration must still be given to the scope of application of the constitutional provision, to determine public policy. The provisions of the contract could constitute an infringement of rights. If it does infringe on these rights it must
be decided whether there is good reason to retain the provision (*Afrox Healthcare Bpk* – case *supra*). If the Bill of Rights is accepted as being the public policy doctrine then, contends Hopkins, the freedom of access to courts, contractual freedom and equality of the contracting parties must be considered. As an example standard-form contracts between insurance companies and individuals is mentioned to illustrate the inequality of bargaining power between contracting parties.

Many contracts contain a clause inhibiting the access to courts of law by compelling submission to arbitration. This would be a common clause in the employment contract of a family member in a family business as it is a method of resolving disputes without revealing confidential information, both about the family and the business, to outsiders. Depending on the extent of the limitation such a clause may be found to be unconstitutional.

Any contract which places one party in a position of influence over the other may result in that contract being declared unenforceable if tested in a court of law.

The dominant family member in an organization may force junior members of the family to accept certain terms of employment and conditions of succession at risk of being excluded from the family business or even inheriting.

This new approach may be to the advantage of family business as well as in respect of other businesses in the small and medium enterprise sector. Competing with large enterprises, some which are international, the sole proprietorship or small enterprise is often at a disadvantage when contracting with an organization which is influential in the commercial sector. The small enterprise may often be induced to make concessions in
favour of the other party in order to win their favour – and the contract. This conduct is being viewed more and more as inappropriate and may in certain circumstances lead to a claim for damages.

5.3.4. Damages

The liability of banks in the wake of ABSA Bank Internet theft has become a topical point. In *Minister of Safety and Security v Van Duivenboden [2002] 3 All SA 741 (SCA)* the court held that a person can be liable for damage or loss caused from negligently omitting to act. The omission would be unlawful if it occurs in circumstances which the law regards as a legal duty to avoid such negligent harm. Even where there is a legal duty to act the failure to do so will only attract liability if a reasonable person would not only have foreseen the harm but also have acted to avert it. Petzer (2003:59) is of the opinion that being aware of the risks associated with internet banking and aware of the methods used by criminals to access pin numbers and passwords and also having the ability to effectively limit these risks, the bank which intentionally or negligently decides not to inform its customers of the risks or the steps needed to be taken to eliminate this risk, has failed in it’s duty to act. He states that a reasonable person in the position of the bank would have foreseen the harm and would have acted to prevent it occurring. The bank is liable for losses incurred by their client. This liability is not limited by the Electronic Communications and Transactions Act. This theory has still to be tested in a court of law.

5.3.5. Access to Information

An issue which has arisen on several occasions in recent years is the tender process in the business world. The family business without the required representivity in terms of race
and gender within management may find this right useful in ensuring that their tender application is dealt with in a fair and equitable manner.

The *Aquafund* – case (*supra*) confirmed the right to obtain information reasonably necessary to determine whether a right to lawful administrative action had been violated or not. This was confirmed in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001(1) SA 853 SCA. The fact that Transnet was a limited company and competition – and profit orientated was held to be irrelevant as the state still held all the shares and had ultimate control. The adjudication of tenders was an administrative function incidental to the company’s general powers. Goodman Bros had to be given the necessary information regarding the tender process so as to afford them the opportunity to consider further action.

Certain pages of tender documents and certain details of the successful tender were requested but refused in *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd* [2003] 1 All SA 335 (W). The argument that disclosure would likely cause harm to commercial or financial interests of other parties was rejected by the court. It found that the information would have to have some objective or market value to fall within these parameters. Prices tendered, where the tender date has already passed, can no longer benefit a competitor and would not stand to be protected.

Applicant in *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and another* 1999(4) SA 375 TPD sought to extend its prospecting rights but these were granted to another company. The applicant sought access to all the relevant documentation relating to the applications for mineral leases which were in the control of first respondent but was refused. The respondent argued that it was not an organ of State and if it were, the decision to enter into a contract with a private company was not reviewable in law. The applicant did not require the information sought within the meaning of section 23 of the interim Constitution and that, even if entitled to information, applicant was only entitled to a record of the proceedings.

The court found respondent to be an organ of State as it was created by statute and subject to the control of the state. The award of mineral rights was similar to the award of a tender, an action which had, prior to the Constitution already, been recognized as an administrative act. The information sought would be pertinent to contractual or delictual
rights and reasonably required for the protection and exercise of the applicant’s rights. Access to all documentation in respondents possession was granted.

Section 68(4) of the Mental Health Act 18 of 1973 requires that action be instituted with respect to this Act within three months of the cause of action arising. The applicant in *Potgieter v Lid van die Uitvoerende Raad : Gesondheid, Provinsiale Regering Gauteng en andere [2002] 1 All SA 589 (T)* was granted access to these records by the court for the purposes of possible action against the State for damages. The court also considered whether the time period allowed in the Act was constitutional. The court could not find any grounds for the protection granted in section 68(4) nor could it find any justification for the limitation of applicant’s rights. Section 68(4) was held to be unconstitutional. Similar limitations on time periods appear in many pieces of legislation relating to actions involving the State. Many of these are likely to be declared unconstitutional by the courts.

The Access to Information Act allows an Internet Service Provider (ISP) to disclose information about its users where the latter are violating copyright laws. This is an important tool for copyright proprietor’s to use. It has been suggested by Ebersöhn (July 2003:22) that provision should be made in the Electronic Communications Act to regulate these disclosure procedures and facilitate the expeditious identification of copyright infringement perpetrators.

The attorneys firm is often a family practice passed from generation to generation. It is important for the attorney to consider his position. His duties in terms of this legislation may impact on his relationship with his client and the confidentiality of information exchanged during a consultation. Similarly the client needs to know the parameters of his relationship with his attorney especially as regards the confidentiality of information he may disclose during a consultation. These clients include family businesses and the information disclosed during consultations which the attorney may later be forced to reveal, may affect not only the business but also the family unit.

Bester (June 2002:23) quotes the Centre for the Study of Economic Crime research results as having indicated that professional people, particularly attorneys and policemen, are responsible for helping criminals in South Africa launder their money. Despite this he is of the opinion that attorneys have been harshly treated by the legislature. They have to exercise extreme care in fulfilling their duties in terms of the Act to protect their personal
interests and those of their clients. The latter are entitled to the right to legal professional privilege and attorney-client confidentiality. The Act may result in an order being made by a judge compelling an attorney to make secret reports to the government on his own unsuspecting client!

Not all communication between a client and his attorney is privileged and confidential. There is a distinction between communications and legal advice. The former is only confidential, the latter is also privileged (Bester:July 2002:26). This legislation will, without doubt, lead to much future litigation.

5.3.6. Insolvency

The liquidation of individuals and companies has increased alarmingly in recent years. Financial discipline in family businesses has been identified as a specific problem. Lank (2000:195) identifies specifically,

- The failure to find capital for growth without diluting the family’s equity;
- The inability to balance optimally the family’s need for liquidity and the business’s need for cash;
- Poor estate planning and the inability of the next generation to pay inheritance taxes.

The disclosure of information at interrogations held in terms of the Insolvency Act can be detrimental to the unity of the family and associated family business connections to the insolvent estate.

*Vryenhoek v Powell NO and others 1996(1) SA 984 CC* considered section 417(2)(b) of the Companies Act which provided that a person is required to answer any questions put to him at an enquiry, notwithstanding that the answer may incriminate him, or that the answer may be used in evidence against him in further proceedings. The court held that in winding up companies liquidators faced difficulties in recapturing the knowledge of the
company prior to liquidation for the purpose of determining the cause of the company’s failure and in establishing the scope of its assets. It was in the interests of creditors and the public that the directors, officers and other persons who had dealings with the company be compelled to make a full and frank disclosure of their dealings with the company. The use of this incriminating evidence at later proceedings was not perceived as being fair to the accused and to this extent was inconsistent with the Constitution as it placed the State in a position of advantage. Reference was made to various international law sources to compare similar provisions in various European and American countries. The provision was declared invalid with reference only to the words “and any answer given to any such question may thereafter be used in evidence against him”.

During the course of an insolvency enquiry, in terms of the Companies Act, certain parties objected to being compelled in terms of section 417(2)(b) of this Act to answer questions which could incriminate them. On the basis of information furnished by the trustees of an insolvent estate the Master of the High Court had decided to hold an enquiry in terms of the Insolvency Act (Act 24 of 1936) and issued subpoenas to the applicants to appear (Strauss and others v The Master and others NNO 2001(1) SA 649 TPD). The applicants requested access to the information on which the Master had decided to hold the enquiry. This was refused by the presiding officer.

The Act required the Master to “be of the opinion” that the person summoned would have information concerning the insolvent estate. The subjective opinion of the Master limited any further enquiry as to whether it had been exercised in bad faith, with an ulterior motive or whether he had failed to apply his mind. There was no such evidence in this particular instance.

Consideration was given to the right of review of the presiding officers decision. The enquiry was purely investigative in nature. The presiding officer only recorded the evidence and regulated the proceedings and was not called upon to make a decision or
ruling. There was no question of rights having been infringed and, therefore it was held, no right to review existed.

5.3.7. Indigenous Law: Succession

A large number of the informal business sector consists of the “spaza”/”tavern” form of enterprise. The majority of these are run from residential premises, particularly in the more informal settlements, and the income derived from them supports both immediate and extended families. These can often be regarded as family businesses. Several members of the family are usually involved in the running of the business and have an interest in its income and future. Women are often the heads of households within the urban black household and many such households do not have a male heir to the business. Serious consideration has to given to the succession of the assets of these businesses. Contrary to view the Constitution does not resolve this issue.

*Mthembu v Letsela and another 2000(3) SA 867 SCA* considered the customary rule excluding illegitimate African female children from intestate succession. In terms of customary law when the head of a family dies, his heir takes his place as head of the family and becomes owner of the deceased’s property. He becomes liable for the deceased’s debts and assumes the position as guardian of the women and minors in the family. The heir must support and maintain the deceased’s dependants.

It was submitted to the court that the illegitimate daughter of the deceased was a victim of gender discrimination in terms of a law inconsistent with the Chapter 3 rights of the interim Constitution. The court rejected this contention. It was held that the regulation at issue did not introduce something foreign to black persons but recognized a principle or system which had been in existence and followed for a long time. The existing law enabled black persons to avoid the application of customary law of succession by drafting a will to alter the devolution of their estates. If this was not done it must be assumed that the wish of the deceased was to have customary law applicable.

Customary indigenous law provides for a system of *lobola* and marriage. Civil marriages for black persons were previously automatically not in community of property (unless an
anti-nuptial contract was drawn up) in terms of the Black Administration Act 38 of 1927, as opposed to white civil marriages which were automatically in community of property (similarly unless an anti-nuptial contract was drawn up).

Regulation 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks distinguishes between the estate of a deceased whose marriage is one not in community of property and other matrimonial property regimes. Regulation 2 was found in Zondi v President of the Republic of South Africa and others 2000(2) SA 49 NPD to offend the equality provisions of the final Constitution. Illegitimate children of persons whose estates should be distributed in terms of Regulation 2 cannot inherit intestate. The regulation distinguishes for the purpose of intestate succession between a deceased who was party to a marriage not in community of property (repealed section 22(6) of the Black Administration Act 38 of 1927) and other civil marriage regimes. The latter can inherit intestate.

The court found that the fact that the deceased entered into a marriage not in community of property indicates that he did not want customary law to apply. Illegitimate children of all races can inherit intestate and the fact that a child of parents who fall under this particular civil matrimonial system cannot, is discriminatory. All children should enjoy the same rights. The Regulation was declared invalid.

Section 23(7)(a) of the Black Administrations Act 38 of 1927 was reviewed in Moseneke and others v The Master and another 2001(2) SA 18. The effect of this provision is that the Master of the High Court has no power to deal with intestate black estates as he has with other ethnic groups. The court held that the differentiation based on race, ethnic origin and colour was unfair in terms of section 9(5) of the Bill of Rights and that it was not reasonable and justifiable in a democratic society. The section was declared invalid but the order was suspended for two years to enable the legislature to address the matter. In the interim the Master was also given the power to administer such estates.

5.3.8. Freedom of Expression

Day-to-day business decisions can affect the harmony within the family especially if they adversely affect the family business and its financial standing. For that reason simple
matters, seemingly unrelated to family harmony, need to be knowledgeably considered in order to avoid unnecessary conflict. Illegal forms of expression by the business can result in financial loss to the business which ultimately affects family harmony.

Advertising contrary to certain municipal by-laws can lead to a business suffering financial loss. It is a form of expression falling within the ambit of section 16 of the Constitution.

The municipal by-laws of the city of Cape Town provide that failure to obtain permission to erect a billboard sign is an offence. Such signs can contain only certain, very limited, information. Respondents in *City of Cape Town v AD Outpost (Pty) Ltd and others 2000(2) SA 733 CPD* claimed that these regulations were invalid as they, amongst other things, inhibited freedom of trade and expression.

Section 22 (which guarantees freedom of trade and occupation) was found to protect the rights of individual citizens and not juristic persons. It ensured that each person could have the right to choose how to employ his labour or skills without irrational government restriction. It was not a provision which should be extended to the regulation of economic intercourse as undertaken by economic enterprises owned by juristic persons.

It was recognized that advertising was a form of expression and stood to be protected under section 16 of the Constitution (which guarantees freedom of expression). The court did not express an opinion as to whether this form of expression had any less value than other forms. The case of *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and others 2002(2) SA 625 D & CLD* did. It confirmed that advertising was a constitutionally protected form of commercial speech but it is granted a lesser form of protection. The by-laws of the applicant merely required that permission be obtained to erect billboards. There were no restrictions placed on the content of the
advertisement. The interests of public safety and welfare particularly in respect of the location of the boards, was found to be a reasonable and justifiable restriction on applicant’s rights.

Junk e-mail or spam is a problem, not only to recipients who have not solicited the information contained in them, but to the Internet Service Providers (ISP) who,

- Receive complaints from their users due to the quantity of spam received and/or the slow down or even crash of the system;
- And from employers who loose hours of production and incur increased costs due to the excessive time employees spend on sifting through mail.

Section 86 of the Electronic Communications Act criminalizes certain cyber abuses and section 45 attempts to provide a form of consumer protection. The provisions do not penalize an initial unsolicited e-mail message, where these include an option to cancel subscription to the mailing system, repetitions of these messages when they are unanswered, or an instance where the quantity of messages cause the e-mail server to crash. The Act only allows personal information of an individual to be distributed with their written consent or if permitted to do so by law but it is not an offence to contravene this section! Unsolicited commercial e-mail constitutes an unfair business practice in terms of the Consumer Affairs Unfair Business Practices Act 71 of 1988 in that the sifting of unwanted mail results in prejudice as a result of the additional connection fees incurred by the user.

5.3.9. Access to Courts

Similarly the rights accruing to the business must be understood to effectively protect the assets of the family. Constitutional aspects addressed by the courts are discussed below.
In terms of section 114 of the Customs and Excise Act 91 of 1964 goods can be detained as security for customs duties due by importers. The section does not require any application to court to detain the goods, giving the State an advantage over other creditors. The court addressed the question of the right to access of the court in *First National Bank t/a Wesbank v Commissioner, SARS 2001(3) SA 310 CPD* under this legislature. The court found that the preference of similar claims by the State are features of tax regimes in several other democracies. There was nothing to prevent the owner of the goods from approaching the court for appropriate relief once a detention had been made. The important aspect was found to be not whether the statute provided for judicially supervised execution procedures but whether the court’s general supervisory functions over the administrative act of selling the property had been excluded. The court’s power to stop a sale pending further proceedings was not affected and the provision of the Act was not so removed from judicial control that it amounted to a constitutionally offensive limitation of the owner’s right of access to the courts and the detention of the goods was found to be lawful.

Certain provisions of the Land Bank Act 13 of 1944 allow for the attachment and sale of both movable and immovable property in execution on its own authority without judicial supervision. It was claimed in *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and others; Sheard v Land and Agricultural Bank of South Africa and others 2000(3) SA 626 CC* that this negated the right of access to courts. The Court held that access to courts is fundamental to a democratic society which cherishes the rule of law. Powerful considerations are required to limit this right. These assets are security for the Land Bank which enable it to offer low interest rates and give advances which other bank’s would, in the normal course of business, not grant. The court found that there was no good reason why normal court process should not be utilized. The relevant sections of the Land Act were found to be unconstitutional in the interests of public policy and particularly the national agricultural sector. The declaration of invalidity was suspended for two years to enable the legislature to address the issue on condition that attachments and sales in execution not completed at date of judgment would not be finalized without recourse to a court of law.
The downside to the protection of this fundamental right is that these additional procedures will result in more legal costs for the litigants and may affect other creditors in that any residual from the sale of the assets will be that much less due to these additional costs.

The applicant in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd 2001(1) SA 251 EC* applied for an order authorizing it to take possession of respondent’s movables to perfect its security under a general notarial bond. The court held that if the clause was invalid the court could not ignore this fact merely because the other party did not oppose the application. The respondent had not consented to judgment nor to the selling of its movables. The court could not sanction a private kind of execution. This judgment was quoted with approval in *Senwes Ltd v Muller 2002(4) SA 134 TPD.*

The Constitution cannot ensure that a litigant is protected against a wrong decision of the court. It is the fairness and correctness of the court proceedings which are protected according to *Lane and Fey NNO v Dabelstein and others 2001(2) SA 1187 CC.* *Van der Walt v Metcash Trading Ltd 2002(4) SA 317 CC* also adopted this view. A degree of uncertainty in the exercise of a discretion is inherent to the system.

5.3.10. **Restraint of Trade Clauses**

Families members tend to stick to the business that they know, be it farming, the shop-on-the-corner, or a particular industry or retail sector. It is in the best interest of a family business to protect itself should an employee, be s/he a family member or not, leave the business with a desire to either join a competitor or start their own business. The sanctity of the contract and the freedom to trade are two rights which have to be balanced.

This aspect has been dealt with in Chapter 2, however, the matter has been revisited in *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards 2001(2) SA 853 (SE).* It was held that any party to an agreement where a restraint of trade clause is material is free to agree to include such a clause in the agreement. In terms of common law such an agreement is only enforceable if it is not in conflict with public policy.
In terms of the Constitution the freedom to trade should not be unreasonable because that would be contrary to public policy. According to Letsika’s argument (August 2003:31) it is for the covenantee to show that the restraint is reasonable and for the covenantor to show that it will be contrary to public policy to enforce the agreement.

5.4. CONCLUSION

In terms of this study the chapter highlighted the following aspects:

- organisational representivity on managerial and workforce level;
- labour issues;
- contractual challenges in the commercial sector;
- claims for damages;
- access to information in the commercial sphere;
- aspects of the indigenous law of succession;
- insolvency issues;
- forms of commercial expression;
- the right of access to courts; and
- restraint of trade clauses.

These individual aspects of management have enjoyed the attention of the courts and have elicited opinions from various legal minds as a result of legislation passed since 1994. Their impact on management, and particularly family business, is highlighted and has revealed that the effect has in the main been in respect of businesses in general. The issues of representivity and succession are two which have been identified as impacting directly on family business as these affect the very nature, foundation and continued existence of the family business.

Other than representivity and succession, the remaining aspects have mostly financial implications for the family business as well as other businesses. Family businesses probably make up the larger portion of the small and medium enterprise sector and it is this sector which often does not have the resources to carry it through times of financial difficulty nor the ability to access such resources with ease.
The type and structure of the business will determine whether outsourcing may be a solution to the major problem of management representivity in family business. This is an important aspect to consider as it may affect the continued existence of the business in its present form and the fortunes of the family unit.

The exclusion of illegitimate African female children from intestate succession has been recognized by the Supreme Court of Appeal to be constitutional. The question of the exclusion of the female line from inheriting in the majority of estates still has to be considered by the Constitutional Court. This aspect remains of extreme importance particularly in the urban areas where traditional customs have become entwined with western culture, family units are dissolving as a result of urbanization and the impact of the AIDS virus is becoming a reality.

It is in the nature of litigation that matters take some time to reach the highest courts of the land. A determining factor is the cost involved in litigating in these courts. Consequently some ten years into democracy limited issues have been considered by the courts of our land. The aims of the Constitution, to eradicate the divisions of the past and establish a democracy and a just society, are the basis to all decisions. It is these principles which underlie the issues such as representivity, labour disputes and access to courts. The court decisions discussed in this chapter are an indication of the conservative yet bold approach taken to legislation both old and new.

The final chapter summarises the various aspects covered in chapters 1 to 5 of this document with specific reference to the changing environment resulting from the impact of the Constitution, the Bill of Rights and specific legislation passed in the wake of 1994.

CHAPTER 6
CONCLUSION

6.1. INTRODUCTION

The previous chapter discussed specific aspects of management as, for example, representivity, labour issues, insolvency and the effect of indigenous law, with specific reference to their impact on family business.
This chapter is a summation of this document in an effort to reveal the effect which recent trends in legislation in South Africa have on the management of business and in particular family business.

The environment influences the strategy of the family business as in all business. Family business, as one of the largest sectors to create new employment, is a concept which should be encouraged and not hindered in its growth. The effect which the legal aspect of the macro environment has on this sector is important. Legislative policies should encourage and not hamper the formation, growth and perpetuation of family business. This research has investigated the impact of legislation and consideration has been given to the factors identified as influencing legislation viz the Constitution and Bill of Rights as well as specific legislation. The latter indicates the trends and methods adopted thusfar in tackling issues such as technology and crime.

6.2. THE ENVIRONMENT

One of the many factors which influence environment is the legal aspect. The year 1994 was the dawn of a new order in South Africa based on social justice. The Constitution and Bill of Rights created a previously unknown system of judicial review, in which legislation and executive acts of government could be declared invalid if found to violate fundamental human rights. This has the potential to have a drastic effect on South African law as it existed prior to 1994 but the parameters differ in respect of the criminal and civil sectors of the law.

Criminal law was used as a political tool and has had to undergo radical changes. The advent of technology and the rampant crime wave are two major factors which have struck the country. They have required that the legislature regulate these areas in the interests of the community at large. The interpretation which the courts have placed on the legislature is influenced by the rights which the Constitution seeks to protect rather than by public opinion.

Civil law has not been influenced in the same manner as it has always been based on principles of a balance of convenience and equity. The values of society have changed and this has influenced the manner in which certain concepts are to be applied in future.
6.3. THE CONSTITUTION AND BILL OF RIGHTS

The Constitution creates an order based on equality, fundamental rights and freedom. There is a separation of government powers which allows for an independent judiciary with the power to review legislation which may be more politically motivated than in the general interests of a community. It creates a guideline for public policy.

The Constitution refers specifically to “persons” which allows for an interpretation including juristic persons. They are entitled to protection where, and to the extent that the nature of the rights permit. Some are clearly not designed to benefit corporations. They do not have a conscience nor religion, life nor human dignity. Certain juristic persons have suffered discrimination in the past due to apartheid and should be entitled to the protection afforded by fundamental rights where applicable. This would include the “black” family business.

The rights enshrined in the Constitution are not absolute but may be limited in an effort to reinforce the values encompassed within them. A test has been created to judge whether a limitation is reasonable and justifiable in an open and democratic society. This is the guideline for all business actions and the Constitution imposes a positive duty to further or advance fundamental rights. This can conflict with certain family business concepts such as their characteristic commitment to community and the ideal of family partnership and responsibility rather than just profit. Any conflict should not be seen only in a negative light but as a challenge which should be addressed positively with a view to a long term solution.

Emigration is a further factor unique to South African family businesses. It is often viewed by the younger generation as a solution to the limitations forced on them by the policy of affirmative action. This is not an option open to every heir to a family business. This makes it more important that new trends in the legal sphere be regarded as a challenge and confronted positively to ensure the survival of the family business.

The courts are conservative towards change to the disappointment of followers of socialist philosophies and while they champion the ideals of justice, equality and the access to courts, they continue to revere the sanctity of a contract. Within the limits of public policy contractual agreements can be utilized to protect the commercial interests of a family
business. Any tendency to reinforce an inequality in the bargaining power of either of the contracting parties is not acceptable.

Equality, although symbolically the most important right in the Constitution, is a highly problematic concept riddled with difficulties particularly in the light of affirmative action. Simply treating all persons similarly often results in reinforcing rather than redressing social disadvantages.

A substantive approach to equality accepts that past discrimination will have lasting effects on the present and inequality thus needs to be redressed and not just removed. This results in those who were deprived in the past receiving an “unequal” share of present resources. “White” family businesses, as many other SME’s, will be threatened by this. Negative attitudes need to be addressed otherwise affirmative action will become perceived as detrimental to all. Government needs to encourage the growth of this sector with a macroeconomic policy which pursues economic growth and job creation. Without sufficient jobs the increase in black school graduates will create expectations which the economy will be unable to deliver, leading to an increase in social tension. It would be in the interests of a family business to take the initiative and implement programmes to train and develop managers of colour to empower them with the skills required to take positions of real authority such as operational or financial manager as opposed to public relations or human resources manager. These members of management, without the family losing control of the business, should be allowed some authority in the business based on economic and business principles.

Personal and visible commitment from the most senior person in the organization, as well as line ownership for its implementation, have been identified as prerequisites for the success of affirmative action (Swanepoel, Erasmus, Van Wyk and Schenk:2000:189). These principles are applicable equally to the small family business as to their larger counterparts. It is important that they empower themselves by having properly trained specialists in their employ or as advisors to assist in implementing a plan and strategy in the interests of the business.

It is accepted world wide that the regulation of the practice of a profession is justifiable rather than limitation of entry into the profession itself. Such limitations must be reasonable. Minimum standards of qualification and ethical behaviour are important for
any profession. It is important that these qualities and values be instilled from a young age in potential successors to such a family business. If the family cannot itself produce such a successor there is generally a problem when the family business is a professional one and consideration must then be given to alternatives.

The Constitution has had relatively little influence on labour matters as existing labour legislation deals with most labour issues in a fair and equitable manner. The rights, in respect of both employers and employees, already present in the Labour Relations Act have been secured in the Constitution. The single defect of importance is that there is no protection for the employer against legislation being passed at a future date to curtail a lockout. This is a constraint for all business and not particularly in respect of family businesses.

Although there has been recognition of the important role which African jurisprudence has to play in the development of a new legal order in South Africa. There are obvious irreconcilable conflicts between in particular the recognition of the rights of women and the patriarchal and authoritarian foundations of indigenous law which discriminate against women.

The courts have been conservative in their development of customary law and have continued to recognize the choice which individuals make to either follow customary law or divert from the long established traditional rights, especially with regard to the rules of succession. “Black” family businesses in particular should be aware of this when considering succession. It would be advisable in most instances to make a proper testament even if the provisions are along the lines of custom and tradition. This results in certainty for all parties concerned. Few urban families strictly follow custom. There is usually a mixture of custom and First World values which influence black urban lifestyle. Appropriate provision can be made for special circumstances such as children born out of wedlock and recognized customary unions to ensure the continued existence and control of the family business.

6.4. SPECIFIC LEGISLATION

Important legislation has been passed since 1994 specifically aimed at addressing issues which have arisen from new technology and in particular crime. These are important in that
regulation is required in the interests of the business community with a balance between the rights and duties imposed.

Legislation such as the Financial Intelligence Centre Act aimed at combating money laundering activities impose heavy duties in respect of record keeping on various institutions. Large institutions dealing with finance such as banks are able to deal with such systems in a more cost effective manner. Smaller concerns, which are often family businesses, such as attorney’s, estate agents, long term insurance brokers and motor vehicle dealers unable to deal with these duties in as cost effective a manner. It may result in the appointment of additional staff, it requires storage space or, if outsourced, the cost of this additional service.

The identification and verification process required endangers business relationships and competition for these smaller businesses is strong. An unwise business relationship may expose the business to involvement with law enforcement agencies which may be time consuming and invite undesirable publicity. There is yet no indication of how the rights and duties imposed by the Act will be policed and it is doubtful that there are adequate resources available to do this effectively.

There can be no dispute that the unchecked crime rate has negatively affected business in the last decade. The lack of foreign investment has an effect on the creation of work opportunities which affects the economy as a whole. Drastic measures are required to bring the situation into check and it may well be that smaller businesses may suffer in the interests of the community at large. The Constitution imposes a duty to assist with nation building. South Africans have a habit of complaining about all the negative factors prevailing in the economy but do not take proactive steps to change these factors. Legislation such as this Act aim to assist with this but to be effective there needs to be proper policing.

This should be viewed positively as a challenge which will, in the long term, benefit business. Although a constraint which faces many businesses, and certainly all competitors in a particular field of business, the consequences may be more onerous on those smaller businesses which often are also family businesses. The legislation must be complied with and the best alternatives with the least cost to the business must be sought.
An obvious cheap solution may well be electronic storage which requires less space at minimal cost.

Businesses have to plan their compliance with legislation such as the Promotion of Access to Information Act. The Act places additional duties on the business but this system can also benefit the business in ensuring that their rights are handled in a fair and equitable manner, as in the tender process. This legislation is applicable to all business. It may be more onerous on small business than on larger institutions, it is a constraint applicable across the board. Every business will have to plan and strategise to discover the best option in order to comply with the Act at the cheapest cost.

Reference has been made to consequences, particularly for the legal profession, with regard to the disclosure of information regarding clients. This will have to be considered and approached with circumspection by legal practitioners and guidance will have to be forthcoming from their professional bodies.

The Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act are both aimed at redressing the effects of past discrimination. Although government has indicated that there will not be an imposition of a quota system, the implementation of an equity plan is particularly problematic in respect of family business. There will have to be a conscious decision by smaller organizations whether,

- to keep the number of employees below 50 and so remain outside the Employment Equity Act’s definition of a designated employer;
- to keep annual turnover below the minimum fixed in the Act, and thus not be subject to the provisions the Act,
- to continue to expand and comply with the Act.

The business may, in the latter instance, have to be “re-invented” in the form of a juristic person which allows the majority of control to remain in the hands of family members. This may still not satisfy the requirements needed on respect of certain work opportunities.

6.5. THE RESEARCH QUESTION
The aim of this document has been to identify the effects, if any, which recent trends in legislation in South Africa has had on the management of businesses and particularly family business.

Consideration was given to the effect of the Constitution of the Republic of South Africa Act 200 of 1993, including the Bill of Rights, on the legal system and legislation passed in parliament since 1994.

Selected pieces of legislation which have been passed by parliament since 1994 have been discussed in some detail in an attempt to establish the methods used to achieve the aims disclosed in the preamble to the particular piece of legislation.

The effect of these trends on family businesses is discussed and alternatives have been suggested to resolve specific problems already identified by the courts.

It is clear from the research that the Constitution is the product of the unique history and political situation of South Africa. The norms and values of the new society are encompassed in the Constitution and will affect all spheres of life regulated by law. As the uppermost law of the land the new Constitution has required a paradigm shift in jurisprudential thinking and theory in South Africa. Parliamentary sovereignty has been rendered obsolete and legislation inconsistent with the spirit of the Constitution may be declared invalid by the judiciary.

The Bill of Rights has entrenched certain fundamental rights in an attempt to protect vulnerable individuals and minorities whose cause may not win the favour of popular public opinion.

The Constitution imposes a duty on all roleplayers, individuals or juristic persons, to be committed to nation building, reconciliation, reparation and reconstruction. These rights cannot be waived, even by consent.

The impact which these rights will have particularly on existing legislation and legal principles is as yet inconceivable. The impact has been most dramatic in respect of the criminal law as this was used as a political tool by a ruling minority group for many years to
subdue the masses. The impact on commercial law has been less dramatic as private law has not been subjected to as much legislative regulation as has criminal law.

This piece of legislation has led to many pieces of legislation pre-dating 1994 being declared invalid. The fundamental rights entrenched in the Bill of Rights have formed the basis of all new legislation passed since 1994. The new constitutional dispensation is foreign even to those who draw up draft legislation and on occasion new laws have been found lacking by the courts. Many still need to be tested. Legislation particularly aimed the combat of crime have invasive provisions and place onerous obligations on individuals and organizations.

The immediate impact on family businesses indicated by the study are in the fields of representivity and succession. Legislation which has financial implications will affect all businesses. However, as the family business appears to make up a large portion of the small and medium enterprise sector family businesses must view this aspect as an important part of their strategy.

6.6. FUTURE RESEARCH

This document has been explorative in nature and intends only to form the basis of further more intensive research on the topic. The Supreme Court of Appeal and Constitutional Court considers new aspects of our law daily which impact on the management of business in general. Some of this will have particular significance for the family business and needs to be monitored on a continuous basis.

Legislation discussed in this paper has been in effect for periods of 5 to 10 years without being proactively enforced. There is reluctance on the part of national government to do so in many instances for fear of adversely affecting the economy. Recently there has been indications that representivity in terms of the Employment Equity Act will be monitored. Future research in the form of empirical studies in this sector, based on actual data, in order to compile reliable statistics needs to be undertaken.

The family business within the black community is as yet unresearched. Of particular interest is succession in terms of customary law and the effect of the Constitution on this system. Succession in terms of Hindu and Muslim law is also of importance as these
Communities are traditionally tradesmen and vendors involved in varying forms of family business.

6.7. CONCLUSION

The literature study has shown that the advent of the Constitution and Bill of Rights has had a momentous impact on the legal system in South Africa. It has imposed an ethical basis for our society encompassing values based on equality, human rights and freedom. It is the moral foundation of a new society with a guarantee of an objective watchdog to protect these values. There can be no valid objection by business to this piece of legislation as it guides public policy in the interests of the community as a whole and does not meddle with the individuals freedom to pursue honest interests to his benefit or disadvantage.

Individual aspects of legislation have proved to impose onerous duties on business and in certain aspects strong powers have been granted to government agencies in an effort to combat crime. These powers should they come into the hands of corrupt officials are open to abuse. It is for business to play a more proactive role in community affairs, the passing of legislation and the policing of their interests, instead of insulating themselves from the community and only considering their own interests. This is one area in which family business has played a more positive role in the business sphere than tier counterparts.

Family business is in general at no more of a disadvantage than their counterparts with regard to legislation since 1994, be the business large or small. The one area of particular concern, however, is in the area of equity compliance which is a threat to the family identity, their control of the business and the ability to meet certain job opportunities. Many businesses who do not meet equity requirements enter into joint ventures with competitors to obtain contract work. This is one example of the manner in which these disadvantages can be overcome. Thorough consideration of the particularly circumstances prevailing for a family business should result in an acceptable solution. This type of disadvantage should, however, be confronted positively and solved with the sincere goal of national building at heart.

REFERENCES
Ackerman, R. 2001 *Hearing grasshoppers jump: The story of Raymond Ackerman as told to Denise Prichard.* Davis Phillip, Cape Town.


