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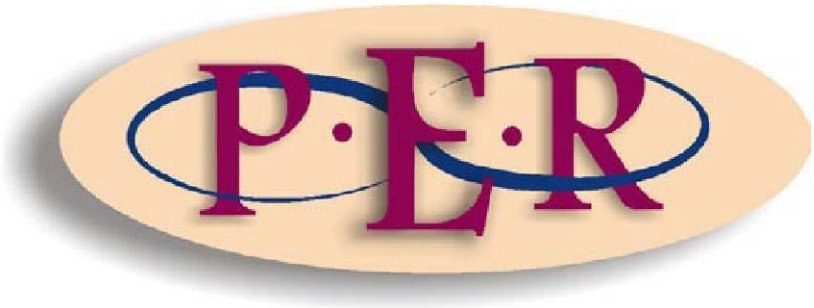

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CONSTITUTIONAL COURT 1995 – 2012: HOW DID THE CASES REACH THE COURT, WHY DID THE COURT REFUSE TO CONSIDER SOME OF THEM, AND HOW OFTEN DID THE COURT INVALIDATE LAWS AND ACTIONS?

IM Rautenbach*

Introduction

Unlike Parliament, other courts, legislative and executive institutions at all levels of government, the Constitutional Court was a completely new institution when it was instituted in 1994. The Court has been the guardian of all actions to give effect to the most comprehensive law reform programme that has ever been undertaken in South African history, namely the new constitutional dispensation. The major role it has played in the transformation of South African society and the legal system cannot be denied by anybody However, as could have been expected, everybody, and particularly everyone who forms part of some or other legal circle, has an opinion on how successful or otherwise the court has been in fulfilling this role. Opinions in this regard are often based on perceptions. The reason for this could be that the rather small number of high-profile judgments does not reflect the full picture of all the court's rulings and the effect it has had on society in general and on the legal system in particular.[1]

The purpose of this article is to reflect on the outcome of the counting and classifying of certain aspects of the Constitutional Court judgments delivered between 1995 and 2012. Although is it generally recognised that statistics cannot replace sound judgments, judgments based only on intuition and assumptions are usually not as sound as they could be. It is better to know than to guess, even if it is not uncommon afterwards to adapt what you know to suit your case.

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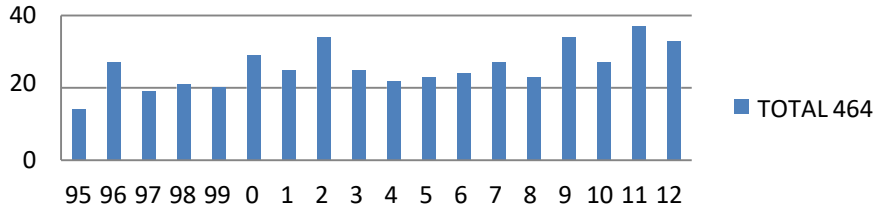
1 Meydani *Israeli Supreme Court* 7 in an introduction to a quantitative study of rulings of the Israeli High Court of Justice.

This study's cut-off date of 31 December 2012 has no other significance than that it was the last date before the beginning of the year in which this article was written. However, since the *Constitution Seventeenth Amendment Act* of 2012 expressly provides that the Constitutional Court now has jurisdiction to hear applications on non-constitutional matters, the figures contained in this article could be used at a later stage to determine what effect this amendment might have had on the functioning of the Court – that is, after the Court has been operating for some time as the so-called apex court.

Between 1995 and 2012, the Constitutional Court considered approximately 464 applications for review.[2]

FIGURE 1: TOTAL APPLICATIONS PER YEAR



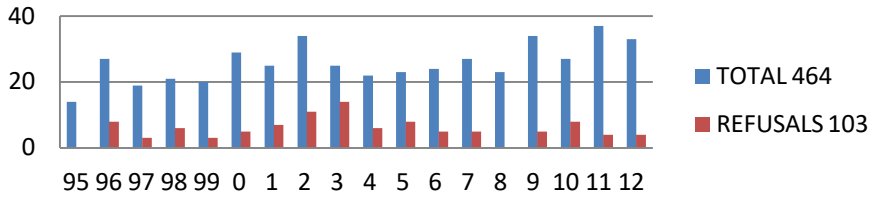
However, the Court did not consider the merits of all the cases that came to its attention.[3] There were approximately 103 instances in which the Court refused to consider the merits.[4] These comprise 22.19 % of the total number of 464.

[2] As counted on SAFLII 1995-2012 www.saflii.org.za. A few double references appear in this source. In this article a case with multiple references is counted as one case. Only a few of the cases noted were not reported in the *Butterworths Constitutional Law Reports* or the *South African Law Reports*. The cases considered per year were: 1995: 14; 1996: 27; 1997: 19; 1998: 21; 1999: 20; 2000: 29; 2001: 25; 2002: 34; 2003: 25; 2004: 22; 2005: 23; 2006: 24; 2007: 27; 2008: 23; 2009: 34; 2010: 27; 2011: 37; 2012: 33.

[3] See O'Regan 2012 *SAJHR* 122. For statistical analyses of the use of foreign precedents by the Constitutional Court, see Rautenbach *Teaching an 'Old Dog' New Tricks?*; Rautenbach and Du Plessis 2013 *German Law Journal.*

[4] The refusals per year were: 1995: 0; 1996: 8; 1997: 3; 1998: 6; 1999: 3; 2000: 5; 2001: 7; 2002: 11; 2003: 14; 2004: 6; 2005: 8; 2006: 5; 2007: 5; 2008: 0; 2009: 5; 2010: 8; 2011: 4; 2012: 5.

FIGURE 2: TOTAL APPLICATIONS / REFUSALS PER YEAR



Section 172(1)(a) of the *Constitution of the Republic of South Africa* of 1996 provides that when deciding a constitutional matter within its power, every court must declare that any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of it inconsistency. Between 1995 and the end of 2012 the Constitutional Court invalidated or confirmed the invalidation of laws or conduct in 192 instances. As indicated in the first chart in paragraph 7.3 below, these invalidations represent 41.38% of the applications it received during the period and 53.18% of the instances in which it considered the merits of applications.

There are various ways in which applications reach the Constitutional Court. In this article, these pathways were used as the categories in respect of which the counting was done. These categories are the following (the numbers refer to the sections in which they are discussed below):

1 Referrals by other courts in terms of the interim *Constitution*.[5]

2 Referrals of matters within the exclusive jurisdiction of the Constitutional Court.

3 Confirmations of invalidations by other courts of parliamentary and provincial laws, and actions of the President.

4 Applications for direct access.

5 Appeals.

5.1 Applications for appeal against judgments of the Supreme Court of Appeal.

5.2 Applications for direct appeal against judgments of courts other than the Supreme Court of Appeal.

[5] *Constitution of the Republic of South Africa Act* 200 of 1993 (the interim *Constitution*).

6 Applications relating to previous orders of the Constitutional Court and other matters.

In respect of each category, the measured variables which are discussed in the sections below are: firstly, the number of applications dealt with by the Court; secondly, the number of refusals by the Court to consider certain applications and the reasons for doing so; and thirdly the outcome of the consideration of the merits of applications in terms of the validity or invalidity of the laws and actions reviewed by the Court.[6].

1 Automatic referrals by other courts in terms of the interim *Constitution*

1.1 General

The provisions of the interim *Constitution* which dealt with the exclusive jurisdiction of the Constitutional Court were extremely complex.[7] Matters within the exclusive jurisdiction of the Constitutional Court included the constitutionality of all Acts and Bills of Parliament, disputes of a constitutional nature between state organs and other matters entrusted to the Court by other legislation.[8]

The Supreme Court of Appeal had no jurisdiction to adjudicate on any matter within the jurisdiction of the Constitutional Court.[9] However, a constitutional matter could on appeal from a provincial Division of the High Court come before the court in matters that involved both constitutional and other disputes. If the Division could not dispose of the appeal without a finding on the constitutional dispute, the Division has to refer the constitutional dispute to the Constitutional Court.[10]

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[6] The reasons for the findings on constitutionality are not recorded in this article. Such reasons deal with the substance of court judgments and ultimately with the effect of the judgments on the legal system. A subsequent article will provide an overview of the legal fields affected by the judgments and the impact of the judgments on these fields

[7] See Rautenbach *General Provisions* 122-129; Cachalia *et al Fundamental Right* 127-131.

[8] Sections 98(2) to (g) read with s 101(3)(c), (d) and (e) and 101(6) of the interim *Constitution*.

[9] Section 101(5) of the interim *Constitution*.

[10] Section 102(6) of the interim *Constitution*.

Provincial Divisions of the High Court had jurisdiction on a wide range of constitutional matters within their areas of jurisdiction and parties before a Court could for the purposes of a particular case agree that the provincial Court would exercise jurisdiction in matters within the exclusive jurisdiction of the Constitutional Court.[11] The rules for referring constitutional matters within the exclusive jurisdiction of the Constitutional Court to the Court were complicated[12] and it serves no purpose to repeat them here. This project was not a success.

One of the advantages of "experimenting" within the framework of an interim constitution is that less successful enterprises need not be repeated. The Supreme Court of Appeal now has jurisdiction on all constitutional matters that do not fall within the exclusive jurisdiction of the Constitutional Court.[13] Divisions of the High Court similarly have no jurisdiction on matters within the exclusive jurisdiction of the Constitutional Court,[14] but may decide any other constitutional matter except a matter which the Constitutional Court has agreed to hear directly in terms of section 167(6)(a) of the *Constitution*.[15]

Between 1995 and 1998 a total number of 35 cases were referred to the Constitutional Court by other Courts in terms of the interim *Constitution*. They constituted 44.30% of the 79 cases considered by the Court in the years 1995, 1996, 1997 and 1998. It was the single greatest source of cases during these years. The cases represent 7.54% of all cases considered by the Court during 1995 to 2012.

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11 Section 101(6) of the interim *Constitution*.

12 See Rautenbach *General Provisions* 131-142.

13 Section 167(4) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) describes the matters on which only the Constitutional Court has jurisdiction and s 168(3)(*a*) provides that the Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa, except in respect of labour or competition matters as may be determined by an Act of Parliament.

14 Section 167(4) of the *Constitution*.

15 Section 169(1) of the *Constitution*. S 167(1)(a) provides that national legislation and the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with the leave of the Constitutional Court to bring a matter directly to the Constitutional Court.

The breakdown per year is as follows: 1995 – 12; 1996 – 15; 1997 – 5; 1998 – 3. Of the 35 cases, the Supreme Court of Appeal referred 3 cases.[16] The referrals from the other courts were:[17] Eastern Cape Division (Grahamstown) – 1; Gauteng Division (Johannesburg) – 8; Gauteng Division (Pretoria) – 11; KwaZulu-Natal Division (Durban) – 1; KwaZulu-Natal Division (Pietermaritzburg) – 2; Western Cape Division (Cape Town) – 8; and 1 combined referral from the Western Cape Division (Cape Town) and the Eastern Cape Division (Port Elizabeth).

The new *Constitution* abolished this system. After 1998 no referrals occurred in terms of these provisions.

1.2 Refusals to consider the merits of applications

In the case of 7 of the 35 referrals that took place between 1995 and the end of 1998, the Constitutional Court refused to consider the merits of the cases – 6 in 1996 and 1 in 1997. The reasons for these refusals included that

- the issue was moot;[18]
- the relevant incidents took place before the commencement of the interim *Constitution* and that the interim *Constitution* thus did not apply to them;[19]
- the application of the interim *Constitution* would not be decisive for the resolution of the dispute;[20] and

[16] *S v Makwanyane* 1995 6 BCLR 665 (CC), 1995 3 SA 391 (CC); *Rudolph v Commissioner for Inland Revenue* 1996 7 BCLR 889 (CC), 1996 4 SA 552 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC), 1999 1 SA 374 (CC).

[17] The names of the Divisions are the names as they are referred to in cl 50 of the *Superior Courts Bill* B 7B-2011 (as amended by the Portfolio Committee on Justice and Constitutional Development (National Assembly)) which at the time of the writing of this article had already been approved by the National Assembly and the National Council of Provinces.

[18] *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 6 BCLR 788 (CC), 1996 4 SA 187 (CC).

[19] *Rudolph v Commissioner for Inland Revenue* 1996 7 BCLR 889 (CC), 1996 4 SA 552 (CC); *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1996 11 BCLR 1439 (CC), 1997 1 SA 585 (CC).

[20] *Luitingh v Minister of Defence* 1996 4 BCLR 581 (CC), 1996 2 SA 909 (CC); *Motsepe v Commissioner for Inland Revenue* 1997 6 BCLR 692 (CC), 1997 2 SA 898 (CC).

- the issue was not ripe for referral because the Court *a quo* did not investigate whether the interim *Constitution* would be decisive for the case.[21]

1.3 Invalidations

The Constitutional Court considered the merits of applications in this category in 28 of the applications. The Court invalidated provisions of Acts of Parliament in 19 instances. In 8 cases the Court sustained the validity of Acts of Parliament and in 1 case the validity of a local government legislative action.

2 Matters within the exclusive jurisdiction of the Constitutional Court

2.1 General

Section 167(4) of the *Constitution* provides that only the Constitutional Court has jurisdiction on (a) disputes between organs of state in the national and provincial spheres concerning the constitutional status, powers or functions of any of those organs, (b) the constitutionality of national and provincial Bills when the President or a provincial Premier has reservations about the constitutionality of the Bill, (c) the constitutionality of Acts of Parliament or a provincial legislature at the request of one third of the members of the relevant legislature within 30 days after the Act was signed by the President or the Premier, (d) the constitutionality of constitutional amendments, (e) alleged failure by the President or Parliament to fulfill constitutional duties, and (f) the certification of provincial *Constitutions*.[22] Except in respect of (e), the Constitutional Court has not encountered problems in interpreting and applying section 167(4). Section 167(4)(e) read with section 172(2)(a) provides a very rare example of poor draftsmanship in the *Constitution*. Section 167(4)(e) provides that findings on non-compliance with constitutional obligations by Parliament fall within the exclusive jurisdiction of the Constitutional Court, whereas section 172(2)(a) provides that the Supreme Court of Appeal, the High Court of

21 *S v Bequinot* 1996 12 BCLR 1588 (CC), 1997 2 SA 887 (CC).
22 Sections 167(4)(a) to (f) of the *Constitution*.

South Africa or a Court of similar status may make an order concerning the constitutionality validity of a parliamentary or provincial act or the conduct of the President, but that an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. The Constitutional Court has not yet reconciled the provisions of sections 167(4)(e) and 172(2)(a) satisfactorily. The Court's efforts in this regard include arguments that the exclusive jurisdiction of the Court does not include obligations to comply with the Bill of Rights;[23] that it covers only non-compliance with duties of Parliament which involve the exercise of a discretion, which are not readily ascertainable, and the exercise of which are likely to cause disputes;[24] and that actions which involve only the President or only Parliament are included, but not actions in which the President or Parliament has to cooperate with others in performing the action.[25] Although the confirmation by the Constitutional Court of certain invalidations by the other Courts is, strictly speaking, also a matter within the exclusive jurisdiction of the Constitutional Court,[26] such confirmations are discussed separately in paragraph 3 below.

In the years 1995 to 2012 the Constitutional Court considered matters within its exclusive jurisdiction in 21 cases - that is, in 4.52% of the 464 cases considered in this period.[27] The subject matter covered in these cases was as follows:

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23 *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1412F-H.

24 *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) 1414-1415.

25 *Women's Legal Centre Trust v President of the RSA* 2009 6 SA 94 (CC) para 11. In *Von Abo v President of SA* 2009 10 BCLR 1052 (CC), 2009 5 SA 345 (CC) para 37 reference was made to "certain duties that are pointedly reserved for the President".

26 And the best make-shift solution is probably that s 167(4)(e) should be understood to refer to the obligatory confirmation of findings of other courts in respect of the constitutional invalidity of laws and actions of Parliament and actions of the President - see Rautenbach *Constitutional Law* 177-178.

27 The cases considered per year were: 1995: 2; 1996: 6; 1997: 2; 1998: 0; 1999: 2; 2000: 0; 2001: 1; 2002: 0; 2003: 0; 2004: 0; 2005 0; 2006: 3; 2007: 0; 2008: 1; 2009: 0; 2010: 1; 2011: 3; 2012: 0.

(a) Disputes between organs of state were considered in 3 cases; all these cases involved applications by provincial governments.[28]
(b) 1 case concerned a reference by a provincial Premier in terms of section 121(2) of the *Constitution* and involved the constitutionality of a provincial Bill.[29]
(c) The constitutionality of Parliamentary or provincial Acts (or Bills in the case of the interim *Constitution*) referred to the court by Speakers of legislatures at the request of at least one third of the members of the legislature concerned was at stake in 4 cases.[30]
(d) 6 cases concerned applications for direct access in respect of constitutional amendments.[31]
(e) 1 case concerned obligations of Parliament to fulfill its duties.[32]
(f) 1 case concerned the non-observance of obligations by the President.[33]
(g) 3 cases concerned the certification of provincial *Constitutions*,[34] and 2 the certification in terms of section 71 of the interim *Constitution* of the new national *Constitution*.[35]

[28] *Executive Council of the Western Cape Legislature v President of the RSA* 1995 10 BCLR 1289 (CC), 1995 4 SA 877 (CC). *Premier of the Province of the Western Cape v Electoral Commission* 1999 11 BCLR 1209 (CC); *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v President of the RSA* 1999 12 BCLR 1360 (CC), 2000 1 SA 661 (CC).

[29] *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* 2001 11 BCLR 1126 (CC), 2002 1 SA 447 (CC).

[30] *In re: The National Education Policy Bill No 83 of 1995* 1996 4 BCLR 518 (CC), 1996 3 SA 289 (CC); *In re:The School Education Bill of 1995 (Gauteng*) 1996 4 BCLR 537 (CC), 1996 3 SA 165 (CC); *In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995* 1996 7 BCLR 903 (CC), 1996 4 SA 653 (CC); *Premier: Limpopo Province v Speaker: Limpopo Province* 2011 11 BCLR 1181 (CC), 2011 6 SA 396 (CC).

[31] *Premier KwaZulu-Natal v President of the RSA* 1995 12 BCLR 1561 (CC), 1996 1 SA 769 (CC); *Matatiele Municipality v President of the RSA (1)* 2006 5 BCLR 622 (CC); 2006 5 SA 47 (CC); *Matatiele Municipality v President of the RSA (2)* 2007 1 BCLR 47 (CC); *Merafong Demarcation Forum v President of the RSA* 2008 10 BCLR 968 (CC), 2008 5 SA 171 (CC*); Poverty Alliance Network v President of the RSA* 2010 6 BCLR 520 (CC); *Moutse Demarcation Forum v President of the RSA* 2011 11 BCLR 1158 (CC).

[32] *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC), 2006 6 SA 416 (CC).

[33] *Justice Alliance of South Africa v President of RSA, Centre for Applied Legal Studies v President of RSA* 2011 5 SA 388 (CC), 2011 10 BCLR 1017 (CC).

[34] *Certification of the Constitution of Province of KwaZulu-Natal, 1996* 1996 11 BCLR 1419 (CC), 1996 4 SA 1098 (CC); *Certification of the Constitution of the Western Cape, 1997* 1997 9 BCLR 1167 (CC), 1997 4 SA 1076 (CC); *Certification of the Amended Text of Western Cape 1997* 1997 12 BCLR 1653 (CC), 1998 1 SA 655 (CC).

[35] *Certification of the Constitution of the RSA, 1996* 1996 10 BCLR 1253 (CC), 1996 4 SA 744 (CC); *Certification of the Amended Text of the Constitution of the RSA, 1996* 1997 1 BCLR 1 (CC), 1997 2 SA 97 (CC).

2.2 Refusals to consider the merits of referrals/ applications

There were no refusals to consider the merits of applications in any of the applications referred to in this paragraph.

2.3 Invalidations

In exercising its jurisdiction on matters within its exclusive jurisdiction between 1995 and the end of 2012, the Constitutional Court considered

- 2 drafts of the new national *Constitution* - it refused to certify the first draft and certified the second;
- 3 draft provincial *Constitutions* – it refused to certify 2 drafts and certified 1;
- 6 constitutional amendments – it invalidated 1 amendment and confirmed the validity of 5 amendments;
- 5 Acts of Parliament – it invalidated the 5 Acts;
- 2 parliamentary Bills – it confirmed the validity of both Bills;
- 1 Act of a provincial legislature – it confirmed the validity of the Act;
- 2 provincial Bills – it invalidated 1 Bill and confirmed the validity of 1 Bill.

FIGURE 3: NUMBER OF INVALIDATIONS / CONFIMATIONS OF VALIDITY - MATTERS WITHIN THE EXCLUSIVE JURISDICTION OF THE CONSTITUTIONAL COURT

	Number	*Invalidated*	*Confirmed validity*
Drafts of national Constitution	2	1 not certified	1 certified
Drafts of provincial Constitutions	3	2 not certified	1 certified
Constitutional amendments	6	1	5
Acts of Parliament	5	5	0
Bills of Parliament	2	0	2
Acts of provinces	1	0	1
Bills of provincial legislatures	2	1	1
Total	21 100%	10 47.61%	11 52.39%

3 Confirmations of invalidations by other courts of actions of the President and Acts of Parliament and Provinces

3.1 General

Section 167(5) of the *Constitution* provides that the Constitutional Court must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court, or a Court of similar status, before that order can have any force.[36] Section 167(2)(a) repeats this provision. Section 167(2)(c) provides that national legislation must provide for the referral of an order of invalidity to the Constitutional Court.

The Constitutional Court has explained that the purpose of the confirmation procedure is "to preserve the comity between the judicial branch of government on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest court in constitutional matters intrudes into the domain of the principal legislative and executive organs of state",[37] and to ensure "that certainty is obtained as to the constitutionality of Acts of Parliament where that has been challenged".[38]

Section 167(2)(d) of the *Constitution* provides that any person or organ of state with sufficient interest may appeal, or apply directly to the Constitutional Court to confirm or vary an order of constitutional invalidity. The Constitutional Court has explained that although referrals of orders of constitutional invalidity are peremptory, provision has nevertheless been made for appeals and direct access because an appeal may permit more issues to be examined than would be the case in a mere referral.[39]

In the years 1995 to 2012 there were 74 instances in which the Constitutional Court considered confirmation of invalidations - that is, 15.94% of the 464 cases

36 See also s 172(2)(a) of the *Constitution*.
37 *President of the RSA v SARFU* 1999 2 BCLR 175 (CC), 1999 2 SA 14 (CC) para 29.
38 *Mkangeli v Joubert* 2001 4 BCLR 316 (CC), 2001 2 SA 1191 (CC) para 11.
39 *President of the RSA v SARFU* 1999 2 BCLR 175 (CC), 1999 2 SA 14 (CC) para 36.

considered from 1995 to 2012.[40] In 4 instances the Court considered invalidations of the same legislation by two different courts[41] and the Constitutional Court thus considered 78 invalidations by individual courts. The numbers of invalidations from respectively the Supreme Court of Appeal and each one of the Divisions of the High Court considered is indicated in table paragraph 3.3 below.

3.2 Refusals to consider applications for confirmation

The Constitutional Court refused to consider 7 applications for confirmation of invalidity emanating from High Court Divisions[42] – 1 application concerned an invalidation by the Gauteng Division (Johannesburg), 1 concerned an invalidation by the Gauteng Division (Pretoria), 1 concerned an invalidation by the KwaZulu-Natal Division (Pietermaritzburg), 1 concerned an invalidation by the Northern Cape Division (Kimberley); and 3 concerned invalidations by the Western Cape Division (Northern Cape).

In 2 of these 7 instances, the Court refused to consider the merits of the other Courts' invalidations because the issues were moot, either because the invalidity of the statutory provision had already earlier been confirmed by the Constitutional Court, [43] or because by the time the confirmation of invalidity was to be considered, Parliament had already passed legislation that rectified the defects in the invalidated legislation.[44] The Court held that when an invalidated Act was repealed before the Constitutional Court had been able to consider the confirmation, the Court would,

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[40] The cases considered per year were: 1995: 0; 1996: 0; 1997: 2; 1998: 3; 1999: 5; 2000: 11; 2001: 5; 2002: 8; 2003: 2; 2004: 6; 2005: 3; 2006: 3; 2007: 3; 2008: 5; 2009: 10; 2010: 4; 2011: 2; 2012: 4.

[41] *Sheard v Land and Agricultural Bank of SA, FNB of SA v Land and Agricultural Bank of SA* 2000 8 BCLR 876 (CC), 2000 3 SA 626 (CC); *Bhe v Khayelitsha Magistrate, Shibi v Sithole* 2005 1 BCLR 1 (CC), 2005 1 SA 580 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality, Bisset v Buffalo Municipality, Transfer Rights Action Campaign v MEC for Local Government and Housing Gauteng* 2005 2 BCLR 150 (CC), 2005 1 SA 530 (CC); *S v Shinga, S v O'Connell* 2007 5 BCLR 474 (CC).

[42] See the following 7 footnotes.

[43] *S v Van Nell* 1998 8 BCLR 943 (CC). The invalidation by the Gauteng Division (Pretoria) of the presumption of possession arising from proof that drugs found in the immediate vicinity of an accused was confirmed in *S v Mello* 1998 7 BCLR 908 (CC), 1998 3 SA 712 (CC).

[44] *Wiese v Government Employees Pension Fund* 2012 6 BCLR 599 (CC); *President of the Ordinary Court Martial v Freedom of Expression Institute* 1999 11 BCLR 1219 (CC), 1999 4 SA 682 (CC).

however, still deal with the application if the invalidation order might indeed have a practical effect.[45] In 3 instances the Constitutional Court refused to decide the confirmation issue because the confirmation procedure did not apply to the invalidations concerned, either because the invalidation of ministerial regulations issued in terms of a statute was involved,[46] or because it concerned an invalidation of actions of the President that need not be confirmed,[47] or because the organs of state involved did not try to resolve the issues at a political level as required by section 41(1)(h)(vi) of the *Constitution*.[48] In 1 instance the Court referred the matter back to the invalidating Court, because that Court invalidated only one provision of the Act concerned instead of considering all the provisions.[49]

3.3 Confirmation of invalidations

After considering the invalidations, the Constitutional Court did not confirm the invalidations in 18 cases. 3 instances concerned action by the President, 4 concerned provincial legislation and the rest concerned Acts of Parliament. The position in respect of confirmation or non-confirmation of the referrals from the Supreme Court of Appeal and Divisions of the High Court is as follows:

45 *Uthukela District Municipality v President of the RSA* 2002 11 BCLR 1220 (CC), 2003 1 SA 678 (CC) para 12.
46 *Minister of Home Affairs v Liebenberg* 2001 11 BCLR 1168 (CC), 2002 1 SA 21 (CC).
47 *Von Abo v President of the RSA* 2009 10 BCLR 1052 (CC), 2009 5 SA 345 (CC).
48 *Uthukela District Municipality v President of the RSA* 2002 11 BCLR 1220 (CC), 2003 1 SA 678 (CC).
49 *National Director of Public Prosecutions v Mohamed* 2002 9 BCLR 970 (CC), 2002 4 SA 843 (CC).

FIGURE 4: REFERRALS BY OTHER COURTS - REFUSALS TO CONSIDER MERITS / CONFIRMATIONS OF INVALIDITY / REFUSALS TO CONFIRM INVALIDITY

Court	*Nr*	*Refused*	*Confirmed*	*Not confirmed*
Supreme Court of Appeal	4		4	0
Eastern Cape Division (Grahamstown)	5		3	2
Eastern Cape Division (Mthatha)	1		1	0
Eastern Cape Division (Port Elizabeth)	2		0	2
Free State Division (Bloemfontein)	1		1	0
Gauteng Division (Johannesburg)	11	1	5	5
Gauteng Division (Pretoria)	26	1	18	7
KwaZulu-Natal Division (Durban)	2		2	0
KwaZulu-Natal Division (Pietermaritzburg)	6	1	4	1
Limpopo Division (Thohoyandou)	1		1	0
North West Division (Mahikeng)	2		2	0
Northern Cape Division (Kimberley)	1	1	0	0
Western Cape Division (Cape Town)	16	3	12	1
Total	78 100%	7 8.97%	53 67.95%	18 23.08%

In the period 1995 to the end of 2012, the Constitutional Court

- confirmed in 4 instances the invalidation of proclamations and actions of the President;[50]

[50] *Pharmaceutical Manufacturers Association of SA. In re: Ex parte Application of the President of the RSA* 2003 3 BCLR 241 (CC), 2000 2 SA 674 (CC) – invalidation of presidential proclamation to bring the *South African Medicines and Medical Devices Regulatory Authority Act* 132 of 1998 into effect; *Mashava v President of the RSA* 2004 12 BCLR 1243 (CC), 2005 2 SA 476 (CC) - invalidation of presidential proclamation which assigned the execution of aspects of the *Social Assistance Act* 59 of 1992 to the provinces; *Kruger v President of the RSA* 2009 3 BCLR 268 (CC), 2009 1 SA 417 (CC) – invalidation of proclamations to put sections of the *Road Accident Amendment Act* 19 of 2005 into effect; and *Democratic Alliance v President of the RSA* 2012 12 BCLR 1261 (CC) - invalidation of appointment by the President of a Director of National Prosecutions.

- confirmed the invalidation of provisions of provincial legislatures in 4 instances[51] and refused to confirm the invalidation of provisions of provincial legislatures in 3 instances;[52]
- confirmed the invalidation of existing common law and its development to bring it in line with previous understanding of the rules concerned;[53]
- confirmed the invalidation of common law and provisions in an Act of Parliament in a combined confirmation;[54]
- confirmed the invalidation of customary law and provisions in an Act of Parliament in a combined confirmation;[55]
- confirmed the invalidation of provisions of Acts of Parliament in 42 instances and refused to confirm the invalidation of provisions of Acts of Parliament in 15 instances.

The Constitutional Court therefore confirmed invalidations in 53 instances and refused to confirm invalidations in 18 instances.

4 Direct access

4.1 General

Section 167(6)(a) of the *Constitution* provides that national legislation or the rules of the court must allow a person, when it is in the interests of justice do so, to bring a matter directly to the Constitutional Court. Such direct access requires the leave of the Constitutional Court. Direct access to the Constitutional Court involves instances where a constitutional issue that can also be heard by other courts is raised without

[51] *Lesapo v North West Agricultural Bank* 1999 12 BCLR 1429 (CC), 2000 1 SA 409 (CC); *Ex parte Western Cape Provincial Government: In re DVB Behuising v North West Provincial Government* 2000 4 BCLR 147 (CC), 2000 1 SA 500 (CC); *Zondi v MEC for Traditional and Local Government Affairs* 2005 4 BCLR 347 (CC), 2005 3 SA 598 (CC); *South African Liquor Traders Associaion v Chairperson Gauteng Liquor Board* 2006 8 BCLR 901 (CC), 2009 1 SA 565 (CC).

[52] *In re Constitutionality of the Mpumalanga Petitions Bill* 2001 11 BCLR 126 (CC), 2002 1 SA 447 (CC); *Weare v Ndeble* 2009 4 BCLR 370 (CC), 2009 1 SA 600 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2010 1 BCLR 61 (CC), 2009 6 SA 391 (CC).

[53] *F v Minister of Safety and Security* 2012 3 BCLR 244 (CC), 2012 1 SA 536 (CC).

[54] *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC), 2006 1 SA 524 (CC).

[55] *Bhe v Khayelitsha Magistrate; Sibi v Sithole* 2005 1 BCLR 1 (CC), 2005 1 SA 580 (CC).

having been considered by those courts.[56] In these instances the Constitutional Court is approached outside the context of an appeal. (There may, however, be circumstances in which direct access may be granted in respect of an issue on which an appeal is pending in a provincial Court, if deciding the matter will fill a gap concerning a matter already on appeal from the Supreme Court of Appeal before the Constitutional Court, a decision on both matters will inevitably be the same and the Supreme Court of Appeal has devoted considerable attention to both matters when it dealt with the second matter.)[57] When considering applications for direct access, the Constitutional Court has always emphasized that direct access is an extraordinary procedure to be followed in exceptional circumstances only[58] and this category of applications for access to the Constitutional Court therefore inevitably contains a very high percentage of instances in which applications have been refused.[59]

During the years 1995 to 2012, 45 applications for direct appeal were considered by the Constitutional Court.[60]

4.2 Refusal of applications for direct access

34 applications were refused of the 45 applications reported, that is 75.66%. The most prevalent reasons provided by the Constitutional Court for refusing applications were that

- there was no prospect of success for the applications;[61]
- there was no urgency to hear the case;[62]

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56 *Shongwe v S* 2003 8 BCLR 858 (CC), 2003 5 SA 276 (CC) para 4. *Glenister v President of the RSA* 2011 7 BCLR 651 (CC), 2011 3 SA 347 (CC) para 24.

57 *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC), 2006 1 SA 524 (CC) paras 40, 44.

58 See eg *Christian Education of SA v Minister of Education* 1998 12 BCLR 1449 (CC), 1999 2 SA 83 (CC) para 4; *Besserglik v Minister of Trade, Industry and Tourism* 1996 6 BCLR 745 (CC), 1996 4 SA 331 (CC) para 1; *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC), 2005 3 SA 280 (CC) para 52.

59 See Dugard 2006 *SAJHR* 271.

60 The numbers per year are as follows: 1995: 0; 1996: 3; 1997: 1; 1998: 3; 1999: 2; 2000: 3; 2001: 2; 2002: 3; 2003: 7; 2004: 2; 2005: 4; 2006: 1; 2007: 1; 2008: 1; 2009: 2; 2010: 5; 2011: 4; 2012: 1.

61 In at least 10 cases; see eg *Transvaal Agricultural Union v Minister of Land Affairs* 1996 12 BCLR 1573 (CC), 1997 2 SA 621 (CC); *Liberal Party v Electoral Commission* 2004 8 BCLR 810 (CC).

- there were too many factual matters to be resolved by lower courts;[63] and
- the applicants provided no special reasons for direct access apart from the fact that the legislation or action might be unconstitutional; this is not a ground for direct access.[64]

Other reasons provided by the Constitutional Court were that the Court lacked jurisdiction to hear the case,[65] that the application was premature because an appeal was pending,[66] that the applicants confused direct access with an appeal procedure because they sought the nullification of the judgment of another Court,[67] that the applicant tried to raise new issues in a separate procedure,[68] and that the issue was moot.[69]

4.3 Invalidations

After considering the merits of direct applications in 11 instances, the Constitutional Court

- invalidated Acts of Parliament in 4 instances,[70] and refused to invalidate Acts of Parliament in 3 instances;[71]

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62 In at least 6 cases; see eg *Ex parte Omar* 2003 10 BCLR 1087 (CC), 2004 2 SA 284 (CC); *Bruce v Fleecytex Johannesburg CC* 1998 4 BCLR 415 (CC), 1998 2 SA 1143 (CC).

63 In at least 4 cases; see eg *Phenithi v Minister of Education* 2003 11 BCLR 1217 (CC); *Gcali v MEC for Housing and Local Government, Eastern Cape* 2003 11 BCLR 1203 (CC).

64 In at least 7 cases; see eg *Christian Education of SA v Minister of Education* 1998 12 BCLR 1449 (CC), 1999 2 SA 83 (CC); *Mnguni v Minister of Correctional Services* 2005 12 BCLR 1187 (CC).

65 *Van Straaten v President of the RSA* 2009 5 BCLR 480 (CC), 2009 3 SA 457 (CC).

66 *Ex parte Mercer* 2003 1 SA 203 (CC).

67 *Wallach v High Court of SA (WLD)* 2003 5 SA 273 (CC); *S v Shongwe* 2003 8 BCLR 858 (CC), 2003 5 SA 276 (CC).

68 *Wallach v Registrar of Deeds (Pretoria), Wallach v Splig* 2004 3 BCLR 229 (CC).

69 *Chonco v President of the RSA* 2010 6 BCLR 511 (CC).

70 *Executive Council of the Province of the Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v President of the RSA* 1999 12 BCLR 1360 (CC), 2000 1 SA 661 (CC); *S v State* 2001 1 BCLR 52 (CC), 2001 1 SA 1146 (CC); *Justice Alliance of SA v President of the RSA* 2011 5 SA 388 (CC); 2011 10 BCLR 1017 (CC); *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC), 2005 3 SA 280 (CC).

71 *Besserglik v Minister of Trade and Industry and Tourism* 1996 6 BCLR 745 (CC), 1996 4 SA 331 (CC); *AZAPO v President of the RSA* 1996 8 BCLR 1015 (CC), 1996 4 SA 671 (CC); *Van Vuren v Minister of Correctional Services* 2010 12 BCLR 1233 (CC).

- invalidated common-law rules and provisions of an Act of Parliament in reaction to a single application;[72]
- invalidated the determination of the number of seats allocated to a provincial legislature by the Electoral Commission;[73]
- invalidated in two instances the actions of the registrar of the Constitutional Court[74] and the registrar of a Division of the High Court.[75]

The Constitutional Court therefore invalidated in 8 instances and refused to invalidate in 3 instances.

5 Appeals

5.1 General

The Constitutional Court is first and foremost a court of appeal. From 1995 until the end of 2012, the Court considered 251 applications for leave to appeal. Since the commencement of the present *Constitution*, the Supreme Court of Appeal and the Divisions of the High Court have had jurisdiction to decide all constitutional matters which do not fall within the exclusive jurisdiction of the Constitutional Court. Whilst it could have been expected that the normal flow of appeals from the provincial levels would therefore be through the Supreme Court of Appeal, this has not happened. As is indicated below in paragraph 5.3.1, section 167(6)(b) of the *Constitution* provides that a person may appeal directly to the Constitutional Court from any other court when it is in the interests of justice and with leave of the Constitutional Court. The applications concerning the decisions of other Courts outnumbered the applications against decisions of the Supreme Court of Appeal. From 1995 to the end of 2012, the Constitutional Court considered approximately 101 applications for leave to appeal against judgments of the Supreme Court of Appeal and 150 applications for

72 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC).
73 *Premier of the Province of the Western Cape v Electoral Commission* 1999 11 BCLR 1209 (CC).
74 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 8 BCLR 771 (CC), 2008 5 SA 31 (CC).
75 *Gundwana v Steko Development CC* 2011 8 BCLR 792 (CC), 2011 3 SA 608 (CC).

leave to appeal against the judgments of other courts. In the following paragraphs the figures concerning these two sources of appeal are provided separately in paragraphs 5.2 and 5.3. In paragraph 5.4 an account of the combined figures is provided.

It must be noted that as far as invalidations are concerned, there were instances in which judgments contained findings of both validity and invalidity; in this survey they are recorded as invalidations. It must further be noted that findings of invalidity of administrative, executive, judicial and private actions were based not only on inconsistencies with the *Constitution*, but also on being inconsistent with other legal rules. This is due to the fact that the Constitutional Court has increasingly assumed jurisdiction on constitutional matters without applying constitutional provisions in reaching conclusions on the merits of applications.[76]

5.2 Appeals against judgments of the Supreme Court of Appeal

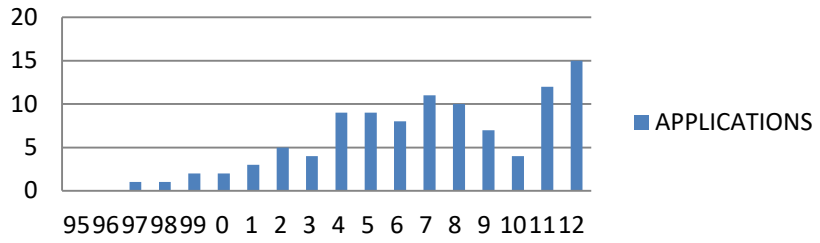
5.2.1 General

Between 1995 and the end of 2012 the Constitutional Court considered 101 applications for leave to appeal against judgments of the Supreme Court of Appeal. These applications represent 21.76% of the 464 cases which the Court considered during this period. Since 1995 there has been a steady increase in the number of applications per year.[77]

[76] See Lewis 2009 *LQR* 456-457; Rautenbach and Heleba 2013 *TSAR* 406-409.

[77] The numbers per year were as follows: 1995: 0; 1996: 0; 1997: 1; 1998: 1; 1999: 2; 2000: 2; 2001: 3; 2002: 5; 2003: 4; 2004: 7; 2005: 9; 2006: 8; 2007: 11; 2008: 10; 2009: 7; 2010: 4; 2011: 12; 2012: 15.

FIGURE 5: APPEALS FROM SCA PER YEAR



5.2.2 Refusals

In 21 cases the applications for leave to appeal were refused. This number comprises 20.79% of the 101 applications considered. The grounds for refusing applications included that

- there was no prospect of success;[78]
- the issue was moot;[79]
- the application related to an issue not raised in the Court *a quo*;[80]
- the determination of a matter concerning children's rights should not be postponed by further appeals;[81]
- no constitutional issues were involved;[82]
- common-law issues were involved which must first be considered by the Supreme Court of Appeal;[83]
- late filings of applications were not condoned;[84] and
- applications for conditional appeals and pending appeals to other forums were not acceptable.[85]

78 See eg *Pennington v Summerley* 1997 10 BCLR 1413 (CC), 1997 4 SA 1076 (CC); *Strategic Liquor Services v Mvumbi* 2009 10 BCLR 1046 (CC), 2010 2 SA 92 (CC).

79 See eg *Radio Pretoria v Chairperson ICASA* 2005 3 BCLR 231 (CC), 2005 4 SA 319 (CC).

80 See eg *Phillips v National Director of Public Prosecutions* 2006 2 BLCR 274 (CC), 2006 1 SA 505 (CC).

81 *Fraser v Naude* 1998 11 BCLR 1357 (CC), 1999 1 SA 1 (CC).

82 See eg *Boesak v S* 2001 1 BCLR 36 (CC), 2001 1 SA 912 (CC).

83 *S v Bierman* 2002 10 BCLR 1078 (CC), 2002 5 SA 243 (CC).

84 See eg *Head Department of Education Limpopo Province v Settlers Agricultural High School* 2003 11 BCLR 1212 (CC).

85 *S v Western Areas Ltd* 2004 8 BCLR 819 (CC).

5.2.3 Invalidations

26 of the 80 applications in which the Court considered the merits of the appeals involved Acts of Parliament; 4 involved common law and customary law; 23 involved executive and administrative action; 18 involved discretionary actions of courts *a quo*; and 9 involved the actions of private persons and the state within the framework of delictual actions.

In the course of considering the merits of appeals against decisions of the Supreme Court of Appeal, the Constitutional Court invalidated

- Acts of Parliament in 4 instances;[86]
- rules of the common law and rules of customary law in 2 instances;[87]
- administrative and executive action in 16 instances,[88] 1 of which was in respect of action of the President;[89]
- discretionary action such as maintenance orders, sentencing, the admissions of evidence and recusals in 8 instances;[90] and

[86] *Prince v President of the Law Society of Good Hope* 2001 2 BCLR 133 (CC); *Niemand v State* 2002 3 BCLR 219 (CC), 2002 1 SA 21 (CC); *Mabaso v Law Society of the Northern Province* 2005 2 BCLR 129 (CC), 2005 2 SA 117 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 5 BCLR 475 (CC), 2008 3 SA 208 (CC).

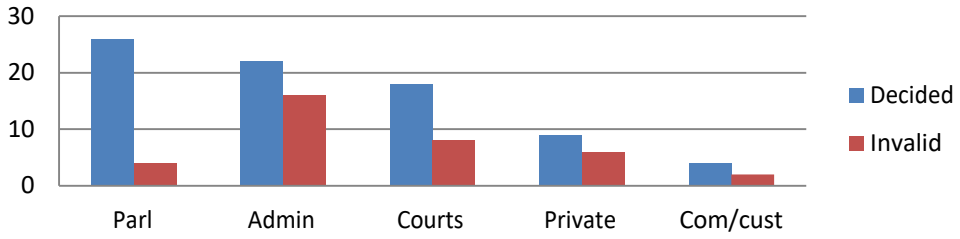
[87] *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 10 BCLR 995 (CC), 2001 4 SA 938 (CC); *Shilubane v Mwamitwa* 2008 9 BCLR 914 (CC), 2009 2 SA 66 (CC).

[88] *Alexcor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC), 2004 5 SA 460 (CC); *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC), 2005 1 SA 217 (CC); *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC), 2005 5 SA 3 (CC); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 8 BCLR 872 (CC), 2006 2 SA 311 (CC); *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC), 2007 6 SA 199 (CC); *Fuel Retailers Association of SA v Director General: Environmental Management* 2007 10 BCLR 1059 (CC), 2007 6 SA 4 (CC); *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 BCLR 158 (CC), 2008 2 SA 24 (CC); *Chirwa v Transnet Ltd* 2008 3 BCLR 251 (CC), 2008 4 SA 367 (CC); *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 3 BCLR 177 (CC), 2010 2 SA 415 (CC); *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd* 2011 2 BCLR 207 (CC), 2011 1 SA 327 (CC); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC), 2011 4 SA 113 (CC); *Minister of Safety and Security v Van der Merwe* 2011 9 BCLR 961 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 2 BCLR 150 (CC), 2012 2 SA 104 (CC); *Competition Commission of SA v Senwes Ltd* 2012 7 BCLR 667 (CC); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 BCLR 68 (CC), 2013 1 SA 323 (CC); *Democratic Alliance v President of the RSA* 2012 12 BCLR 1261 (CC).

[89] *Democratic Alliance v President of the RSA* 2012 12 BCLR 1261 (CC).

- action based on delict and breach of contract in 3 instances[91] and delictual actions against the state in 3 instances.[92]

FIGURE 6: APPEALS FROM SCA - MERITS CONSIDERED / INVALIDATIONS



5.3 Direct appeals from Courts other than the Supreme Court of Appeal

5.3.1 General

Section 167(6)(b) of the *Constitution* provides that national legislation or the rules of the court must allow a person, when it is in the interests of justice to do so, to apply for leave to appeal directly to the Constitutional Court from any other Court. Such an application requires the leave of the Constitutional Court. A "direct" appeal to the Constitutional Court involves that the Constitutional Court hears an appeal when another Court has concurrent jurisdiction to hear that same appeal and has not yet done so. This provision therefore deals with situations in which the Supreme Court of Appeal is bypassed, and enables the Constitutional Court to hear an appeal

[90] *Bannatyne v Bannatyne* 2003 2 BCLR 111 (CC), 2003 2 SA 363 (CC); *S v Basson* 2005 12 BCLR 1192 (CC), 2007 3 SA 582 (CC); *Minister of Health v New Clicks SA (Pty) Ltd In re: Application for Declaratory Relief* 2006 8 BCLR 872 (CC), 2006 2 SA 311 (CC); *Mohunram v National Director of Public Prosecutions* 2007 6 BCLR 575 (CC); 2007 4 SA 222 (CC); *Mphela v Haakdoornbult Boerdery CC* 2008 7 BCLR 675 (CC), 2008 4 SA 488 (CC); *S v Molimi* 2008 5 BCLR 451 (CC), 2008 3 SA 608 (CC); *National Treasury v Opposition to Urban Tolling Alliance* 2012 11 BCLR 1148 (CC), 2012 6 SA 223 (CC); *Bogaards v S* 2012 12 BCLR 1261 (CC).

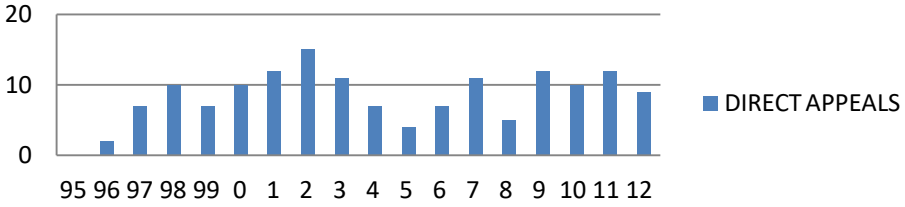
[91] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 6 BCLR 527 (CC), 2009 4 SA 529 (CC); *Le Roux v Dey* 2011 6 BCLR 577 (CC), 2011 3 SA 274 (CC); *Maphango v Aengus Properties (Pty) Ltd* 2012 5 BLCR 449 (CC), 2013 3 SA 531 (CC).

[92] *Zealand v Minister for Justice and Constitutional Development* 2008 6 BCLR 601 (CC), 2008 4 SA 458 (CC); *Chagi v Special Investigating Unit* 2009 3 BCLR 227 (CC), 2009 1 SACR 339 (CC); *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC), 2005 6 SA 419 (CC).

regardless of whether or not there is a right of appeal to any other Court in terms of either the *Constitution* or another statute.[93]

Between 1995 and the end of 2012 the Constitutional Court considered 150 applications for leave to appeal directly to the Constitutional Court. (In one instance the Constitutional Court considered appeals on the same subject matter from two different High Court Divisions[94] and two applications were noted for the purposes of this article.) The applications for direct access represent 32.32% of the 464 cases which the Court considered during this period. This constitutes the largest category of applications considered by the Court.

FIGURE 7: DIRECT APPEALS FROM PROVINCIAL AND OTHER COURTS PER YEAR



The applications for leave to appeal against judgments of particular Courts are as follows (the number of refusals to hear applications are also included in the table):

[93] *Director of Public Prosecutions: Cape of Good Hope v Robinson* 2005 2 BCLR 103 (CC), 2002 6 SA 642 (CC) paras 22-25. See also in respect of direct appeals, Currie and De Waal *Bill of Rights Handbook* 123-132.

[94] *Dlamini, Dladla, Joubert, Schietekat v State* 1999 7 BCLR 771 (CC), 1999 4 SA 632 (CC).

FIGURE 8: DIRECT APPEALS FROM PARTICULAR COURTS – APPLICATIONS / REFUSALS

Court	*Number*	*Leave refused*
Eastern Cape Division (Grahamstown)	3	2
Eastern Cape Division (Mthatha)	1	0
Eastern Cape Division (Port Elizabeth)	7	3
Free State Division (Bloemfontein)	5	2
Gauteng Division (Johannesburg)	18	2
Gauteng Division (Pretoria)	39	7
KwaZulu-Natal Division (Durban)	8	1
KwaZulu-Natal Division (Pietermaritzburg)	9	3
Limpopo Division (Thohoyandou)	0	0
North West Division (Mahikeng)	2	1
Northern Cape Division (Kimberley)	2	0
Western Cape Division (Cape Town)	36	6
Labour Appeal Court	12	4
Electoral Court	3	0
Competition Appeal Court	2	1
Magistrates Courts/Regional Court	3	2
Total	150 100%	34 22.66%

5.3.2 Refusals

The Constitutional Court refused the merits of appeals in 34 instances. The reasons for the refusals included that:

- new issues involving the common law must first be considered by the Supreme Court of Appeal;[95]
- there was no urgency;[96]

[95] See eg *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2007 5 BCLR 453 (CC), 2008 4 SA 16 (CC); *Fourie v Minister of Home Affairs* 2003 10 BCLR 1092 (CC), 2003 3 SA 501 (CC).

- the issue involved action that pre-dated the commencement of the *Constitution*;[97]
- there was no prospect of success;[98]
- appeals against *obiter* conclusions are usually not allowed;[99]
- the issue was moot;[100]
- no constitutional or legal issue was involved;[101]
- all the parties concerned were not joined;[102]
- the applicants failed to apply for leave to appeal from the Supreme Court of Appeal;[103]
- the applicants challenged the wrong legislative provision;[104]
- the matter must first be considered by the Labour Appeal Court and there was no indication that the latter court could deal with the matter speedily;[105]
- the issues raised were not considered by the courts *a quo*;[106]
- an application to the Supreme Court of Appeal for leave to appeal on the same issue was still pending.[107]

5.3.3 Invalidations

Of the 116 applications in which the court considered the merits of the appeals,

- 53 involved statutory and common law and of these:
- 43 involved Acts of Parliament of which 11 were invalidated;[108]

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96 *Competition Commission v Yara SA (Pty) Ltd* 2012 9 BCLR 932 (CC).

97 *Brümmer v Gorfil Bros Investment (Pty*) Ltd 2000 5 BCLR 465 (CC), 2000 2 SA 837 (CC).

98 See eg *Xinwa v Volkswagen of SA (Pty) Ltd* 2003 6 BCLR 575 (CC), 2003 4 SA 390 (CC); *Mthembu v S* 2010 7 BCLR 636 (CC).

99 *Mkangeli v Joubert* 2001 4 BCLR 316 (CC), 2001 2 SA 1191 (CC).

100 See eg *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2010 11 BCLR 1134 (CC), 2011 1 SA 267 (CC).

101 See eg *S v Marais* 2010 12 BCLR 1223 (CC), 2011 1 SA 502 (CC).

102 *Swartbooi v Brink* 2003 1 BCLR 21 (CC), 2003 2 SA 34 (CC).

103 *Municipality of Plettenberg Bay v Van Dyk & Co Inc* 2004 2 BCLR 113 (CC).

104 *Shaik v Minister of Justice and Constitutional Development* 2004 4 BCLR 133 (CC), 2004 3 SA 599 (CC).

105 *Dudley v City of Cape Town* 2004 8 BCLR 805 (CC), 2005 5 SA 429 (CC).

106 See eg *Billiton Aliminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 5 BCLR 422 (CC).

107 *University of Witwatersrand Law Clinic v Minister of Home Affairs* 2007 7 BCLR 821 (CC).

108 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2001 1 BCLR 39 (CC), 2000 2 SA 1 (CC); *Janse van Rensburg v Minister of Trade and Industry* 2000 11 BCLR 1235

- 3 involved provincial laws of which 2 were invalidated;[109]
- 4 involved local legislative measures of which 2 were invalidated; [110] and
- 3 involved rules of the common law of which 2 were invalidated.[111]

Of the 116 applications in which the court considered the merits of appeals, 41 involved administrative and executive acts. Of these, 3 involved actions of the President of which 1 was invalidated;[112] and 38 involved other administrative and executive acts of which 21 were invalidated.[113]

(CC), 2001 1 SA 29 (CC); *SA Asssociation of Personal Injury Lawyers v Heath* 2001 1 BCLR 77 (CC), 2001 1 SA 883 (CC); *Islamic Unity Convention v ICASA* 2002 5 BCLR 433 (CC), 2002 4 SA 294 (CC); *First National Bank t/a v Commissioner SA Revenue Service* 2002 7 BCLR 702 (CC), 2002 4 SA 768 (CC); *S v Van Rooyen* 2002 8 BCLR 810 (CC), 2002 5 SA 246 (CC); *UDM v President of the RSA (1)* 2002 11 BCLR 1179 (CC), 2003 1 SA 495 (CC); *Japhta v Schoeman* 2005 1 BCLR 78 (CC), 2005 2 SA 140 (CC); *Engelbrecht v Road Accident Fund* 2007 5 BCLR 457 (CC), 2007 6 SA 96 (CC); *Glenister v President of the RSA* 2011 7 BCLR 651 (CC), 2011 3 SA 347 (CC); *Print Media SA v Minister of Home Affairs* 2012 12 BCLR 1364 (CC), 2012 6 SA 443 (CC).

[109] *Magajane v Chairperson, North West Gambling Board* 2006 10 BCLR 1133 (CC), 2006 5 SA 250 (CC); *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC).

[110] *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC), 1998 2 SA 363 (CC); *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC), 2010 4 SA 55 (CC).

[111] *Larbi-Odam v MEC for Education (North West Province)* 1997 12 BCLR 1655 (CC), 1998 1 SA 745 (CC); *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools* 1999 2 BCLR 151 (CC), 1999 2 SA 91 (CC); *August v Independent Electoral Commission* 1999 4 BCLR 382 (CC), 1999 3 SA 1 (CC); *Grootboom v Government of the RSA* 2000 11 BCLR 775 (CC), 2000 4 SA 1078 (CC); *Hoffmann v SAA* 2000 11 BCLR 1211, 2001 SA 1 (CC); *Mohamed v President of the RSA* 2001 7 BCLR 685 (CC), 2001 3 SA 893 (CC); *Minister of Education v Harris* 2001 11 BCLR 1157 (CC), 2001 4 SA 1297 (CC); *Minister of Health v TAC (1)* 2002 10 BCLR 1033 (CC), 2002 5 SA 703 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC); *MEC for Education KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC), 2008 1 SA 474 (CC); *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 6 BCLR 571 (CC), 2008 4 SA 237 (CC); *Walele v City of Cape Tow*n 2008 11 BCLR 1067 (CC), 2008 6 SA 129 (CC); *African National Congress v Chief Electoral Officer IEC* 2009 10 BCLR 971 (CC), 2010 5 SA 487 (CC); *Masethla v President of the RSA* 2008 1 BCLR 1 (CC); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC), 2011 4 SA 113 (CC); *S v Thunzi* 2011 3 BCLR 281 (CC); *Electoral Commission of the RSA v Inkatha Freedom Party* 2011 9 BCLR 943 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC), 2012 2 SA 598 (CC); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* 2012 4 BCLR 372 (CC), 2012 2 SA 337 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 4 BCLR 382 (CC); *Macsand (Pty) Ltd v City of Cape Town* 2012 7 BCLR 690 (CC), 2012 4 SA 181 (CC).

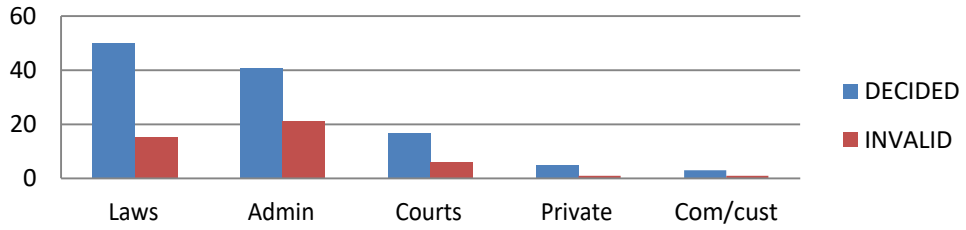
[112] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 5 BCLR 391 (CC), 2010 3 SA 293 (CC).

[113] *Masiya v Director of Public Prosecutions Pretoria* 2007 8 BCLR 827 (CC), 2007 5 SA 30 (CC); *S v Mamabolo* 2001 3 SA 409 (CC), 2001 5 BCLR 449 (CC).

Of the 116 applications, 17 involved discretionary actions of courts *a quo* of which 6 were invalidated.[114]

5 of the 166 applications involved actions of private persons and institutions and in only in 1 instance was the action held to be unlawful.[115]

FIGURE 9: DIRECT APPEALS - INVALIDATIONS



5.4 Combined figures concerning appeals

The Constitutional Court received 251 applications for leave to appeal from all other courts. This constitutes 54.09% of the 464 applications and referrals it considered from 1995 until the end of 2012.

The Court refused to consider the merits of applications in 55 instances, that is, in respect of 21.91% of the applications for leave to appeal received. It therefore made decisions on the merits of applications for leave to appeal in 196 instances.

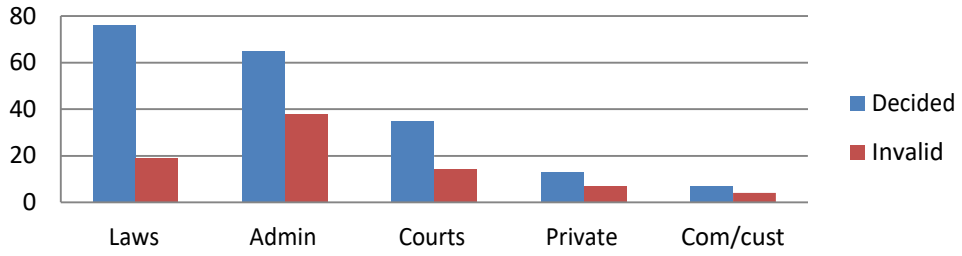
[114] *Director of Public Prosecutions: Cape of Good Hope v Robinson* 2005 3 BCLR 231 (CC), 2005 4 SA 1 (CC); *Veldman v Director of Public Prosecutions (WLD)* 2007 9 BCLR 929 (CC), 2007 3 SA 210 (CC); *S v M* 2007 12 BCLR 1312 (CC), 2008 3 SA 232 (CC); *Machele v Mailula* 2009 8 BCLR 767 (CC), 2010 2 SA 257 (CC); *International Trade Administration Commission v SCAW SA (Pty) Ltd* 2010 5 BCLR 457 (CC); *National Treasury v Opposition to Urban Tolling Alliance* 2012 11 BCLR 1148 (CC), 2012 6 SA 223 (CC).

[115] *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC).

After considering the merits of the 196 applications, the Court invalidated

- 15 Acts of Parliament after reviewing 69 Acts;
- 2 provincial laws after reviewing 3 laws;
- 2 local government legislative provisions after reviewing 4 provisions;
- 38 executive and administrative actions including 2 of the President, after reviewing 65 actions;
- 4 common law and customary law rules after reviewing 7 cases;
- 14 lower court exercises of discretion after reviewing 35 instances;
- 7 private law cases after reviewing 13 cases.

FIGURE 10: ALL APPEALS - INVALIDATIONS



6 Applications relating to previous court orders and other matters

The last category of application concerns applications relating to previous orders of the Constitutional Court and a few other matters. The category consists of 34 applications, that is 7.32% of the 464 applications considered by the Constitutional Court. 16 of the applications dealt with the amendment of previous orders,[116] 8 with the determination of costs concerning previous judgments and the rest with the recusal of judges,[117] the reopening of an appeal,[118] postponements of appeal hearings,[119] the admission of *amici curiae*,[120] and the effect of previous orders on

116 See eg *Minister of Justice v Ntuli* 1997 6 BCLR 677 (CC), 1997 3 SA 772 (CC).

117 See eg *Viking Pony Africa Pumps (Pty) Ltd v Hydro Tech Systems (Pty) Ltd* 2011 6 BCLR 646 (CC); *Moloi v Minister for Justice and Constitutional Development* 2010 5 BCLR 497 (CC).

118 *Levy v Glynos* (not reported) CCT 29/00 of 21 November 2000.

119 *National Police Service Union v Minister of Safety and Security* 2001 1 BLCR 775 (CC), 2000 4 SA 1110 (CC).

120 *Institute for Security Studies: In re S v Basson* 2006 6 SA 195 (CC).

other provinces[121] and previous legislation.[122] There was also one judgment in which the court made a *mero motu* announcement about its own quorum requirements.[123] In this category, no refusals to hear applications or "invalidations" are noted – it would be inappropriate to consider the determination of costs and reversal of previous cost orders or amendment to previous orders of the court itself as "invalidations".

7 Summary and notes

Between 1995 and the end of 2012 the Constitutional Court considered 464 applications for review.

7.1 How did the cases reach the court?

The ways in which these 464 applications reached the Court were as follows:

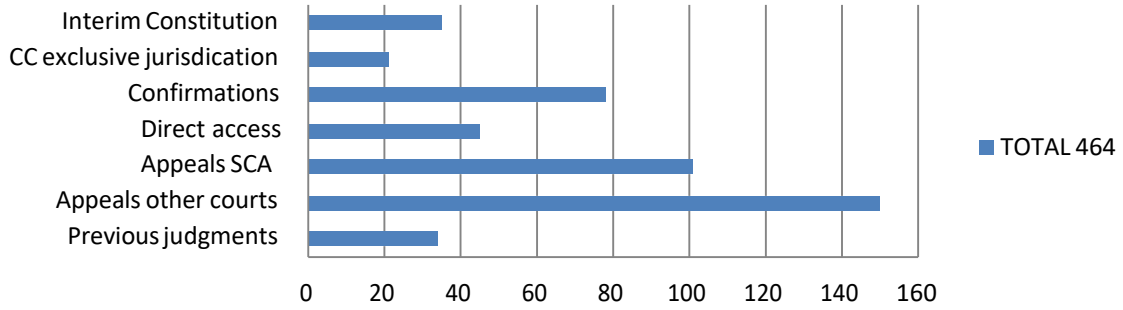
- 35 referrals in terms of the interim *Constitution*;
- 21 applications and referrals on matters within the exclusive jurisdiction of the Court;
- 78 applications for confirmations of parliamentary or provincial laws and actions of the President;
- 45 applications for direct access to the Constitutional Court;
- 101 applications for leave to appeal against judgments of the Supreme Court of Appeal;
- 150 applications for leave to appeal against judgments of other Courts;
- 34 applications concerning previous judgments of the Court and other matters.

121 *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature* 2012 6 BCLR 583 (CC), 2012 4 SA 58 (CC).

122 *Satchwell v President of the RSA* 2004 1 BCLR 1 (CC), 2003 4 SA 266 (CC).

123 *Hlope v Premier of the Western Cape Province; Hlope v Freedom Under the Law* 2012 1 BCLR 1 (CC).

FIGURE 11: ORIGINS OF APPLICATIONS



Since the Constitutional Court is primarily a court of appeal, it is not surprising that by far the greatest number of applications (251 out of 464, that is, 54.09%) consists of applications for leave to appeal against judgments of other courts. What is noticeable, however, is that the majority of these applications were for so-called direct appeal in terms of section 167(6)(b) of the *Constitution*, in which efforts were made to bypass the Supreme Court of Appeal.[124] About 50% more applications were received against judgments of the other Courts. Although the reasons which the Constitutional Court provided for refusing to accede to requests to appeal directly from other Courts to the Constitutional Court include a few references to the fact that the appeal must first be heard by the Supreme Court of Appeal,[125] the majority of reasons, as can be expected, are similar to those that applied to applications which emanated from Supreme Court of Appeal judgments.[126] Add to this that the percentages of applications which the Constitutional Court refused to consider are in both instances almost the same, namely 21% in the case of applications against the Supreme Court of Appeal and 22.66% in the case of applications against other courts.[127] Whatever its motivations and intentions might have been, the outcome of the Constitutional Courts willingness to hear direct appeals from other Courts was that the Constitutional Court provided the Supreme Court of Appeal with some relief from its extremely heavy case load, particularly as far as constitutional matters were concerned. This trend is likely to continue in future and it is even likely to gain momentum as far as non-constitutional matters are concerned. Section 167(3) of the

124 See para 5.3.1 above.
125 See the references in footnotes 92, 100 and 104 above.
126 Paragraph 5.2.2 with para 5.3.2.
127 See para 5.2.2 and 5.2.3 above and 7.2 below.

Constitution was amended by the *Constitution Seventeenth Amendment Act* and now provides that the Constitutional Court may decide on constitutional matters and "any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court".[128]

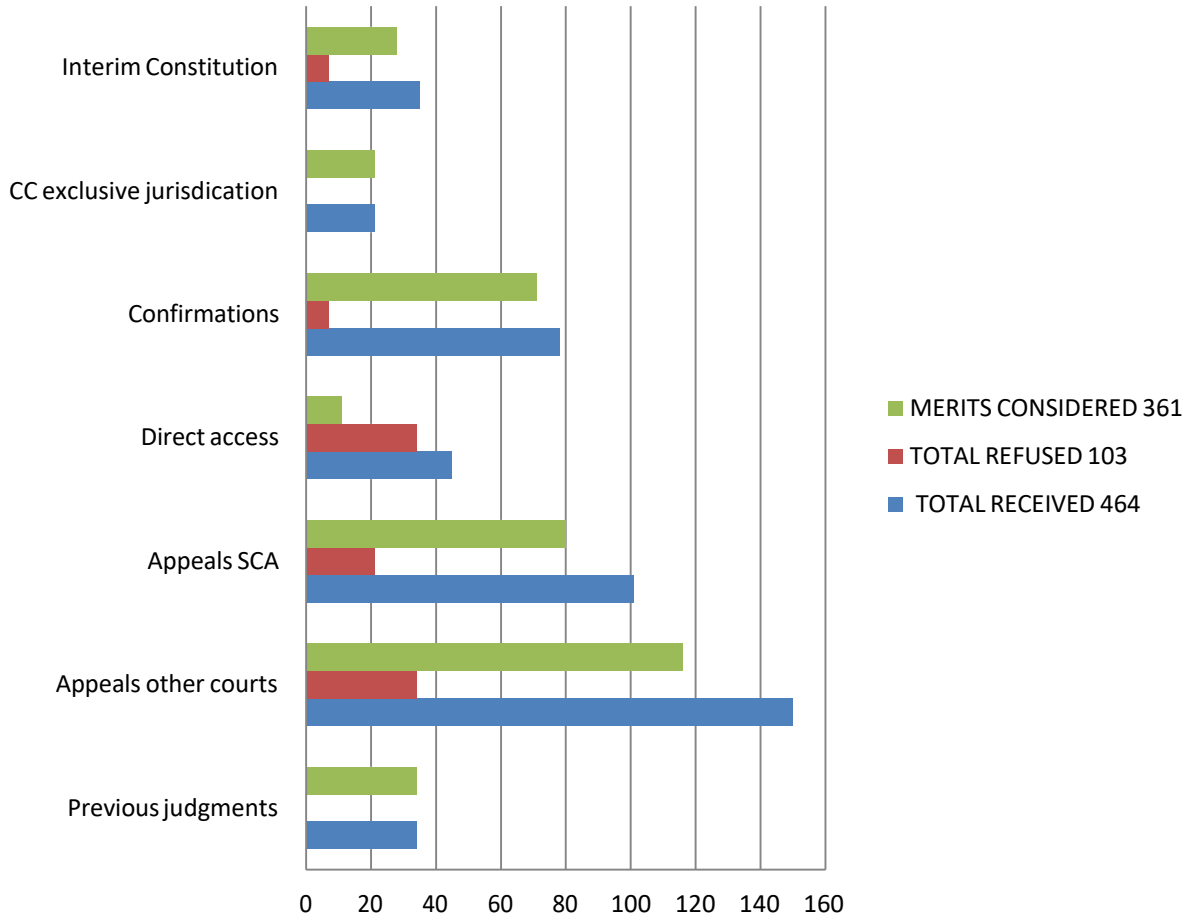
7.2 In how many instances did the court refuse to consider the applications?

The Constitutional Court refused to consider applications in 103 instances and considered the merits of applications in 361 instances. The number of refusals per category is as follows:

- 7 refusals in respect of 35 referrals in terms of the interim *Constitution*;
- no refusals in respect of 21 applications and referrals on matters within the exclusive jurisdiction of the Court;
- 7 refusals in respect of 78 applications for confirmations of parliamentary or provincial laws and actions of the President;
- 34 refusals in respect of 45 applications for direct access to the Constitutional Court;
- 21 refusals in respect of 101 applications for leave to appeal against judgments of the Supreme Court of Appeal;
- 34 refusals in respect of 150 applications for leave to appeal against judgments of other Courts.

[128] For a discussion of this amendment, and its likely impact on the extent of the Constitutional Court's involvement with non-constituitonal matters, see Rautenbach and Heleba 2013 *TSAR* 408-418.

FIGURE 12: REFUSALS TO CONSIDER MERITS / MERITS CONSIDERED



A noteworthy feature of these figures is that the percentages of applications in respect of which the Constitutional Court refused to consider the merits of applications in terms of the interim *Constitution* (20%), matters within the exclusive jurisdiction of the Constitutional Court (0%), applications concerning the confirmation of invalidations by other courts (8.97%) and appeals against the judgments of other courts (21.91%) are relatively small compared to the high percentage of refusals in the case of direct applications, namely 75.55%. Although many of the reasons provided by the court for its refusals in this regard are no different from the reasons for refusals in other instances, the court's reluctance to act can clearly be attributed to a reluctance to act as a court of "first and final instance". "Direct access" to the Constitutional Court is available in exceptionally urgent and otherwise unavoidable circumstances only. Although this path chosen by the Constitutional Court could be criticized as leading to a virtual negation of the

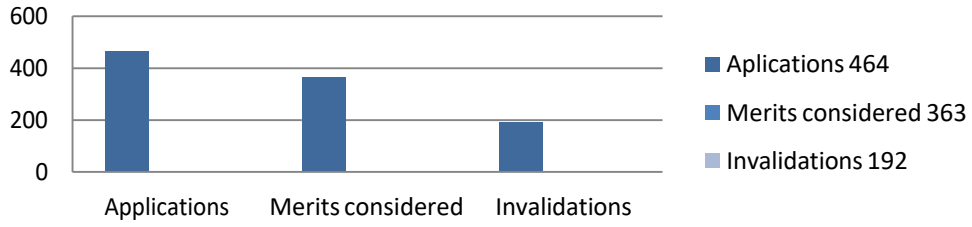
possibility of direct access, particularly in the case of poor people,[129] it is founded upon the basic principle of all appeal systems, namely that justice requires that court decisions should in principle never be the outcome of the deliberations of a single court. This is a sound principle. The Constitutional Court explained it as follows in *Bruce v Fleecytex Johannesburg CC*:[130]

It is not ordinarily in the interests of justice for a court to sit as a court of first and final instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than on court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.

7.3 In how many instances did the Court invalidate laws and action?

The Constitutional Court invalidated in 192 instances legal rules and actions of organs of state and individuals. These invalidations were done in respect of 464 applications received for review in all the categories and they were done in respect of 361 instances in which the Court reviewed the merits of applications. 41.39% of the 464 applications received were invalidated. 53.18% of the applications where the merits were considered were invalidated.

FIGURE 13: APPLICATIONS - MERITS CONSIDERED / INVALIDATIONS



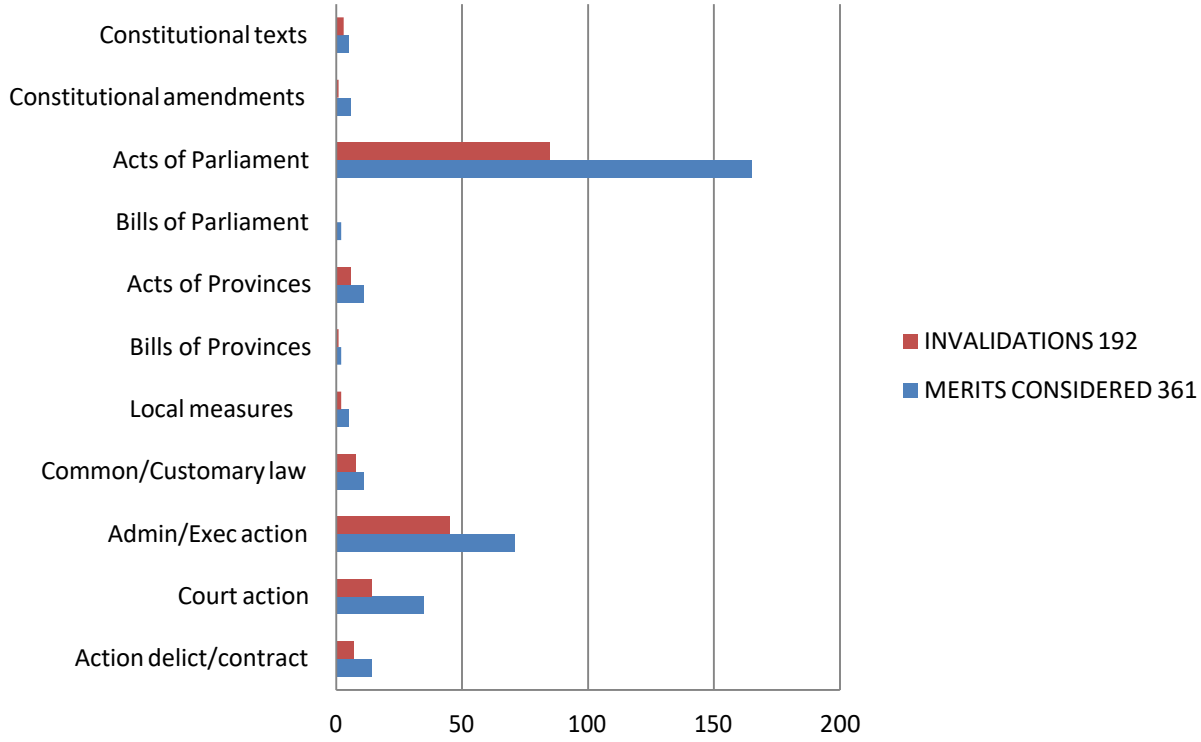
129 See Dugard 2006 *SAJHR* 261-282.

130 *Bruce v Fleecytex Johannesburg CC* 1998 4 BCLR 415 (CC), 1998 2 SA 1143 (CC) para 8.

The *invalidations* in the different categories in respect of various kinds of law and action were as follows. In respects of:

- Draft constitutional texts – 3 refusals to certify out of 5 texts considered (60%);
- Constitutional amendments – 1 invalidation out of 6 considered (16.66%)-;
- Acts of Parliament – 85 invalidations out of 165 considered (51.51%);
- Bills of Parliament – 0 invalidations out of 2 considered (0%);
- Acts of Provinces – 6 invalidations out of 11 considered (54.54%);
- Bills of Provinces – 1 invalidation out of 2 considered (50%);
- Local government legislative measures – 2 invalidations out of 5 considered (40%);
- Common law and customary law – 8 invalidations out of 11 considered (72.72%);
- Administrative and executive action – 45 invalidations out of 71 considered (63,38%);
- Court discretionary action – 14 out of 35 considered (40%);
- Action in respect of delict and contract – 7 invalidations out of 14 considered (50%).

FIGURE 14: KINDS OF LAW AND ACTION - MERITS CONSIDERED / INVALIDATIONS



Acts of Parliament constitute the largest category of applications considered, to which the Constitutional Court reacted by invalidating some of the provisions considered. The real impact of the invalidation of legal rules can be assessed only by an analysis of the contents of invalidation orders and such an exercise was not the focus of this investigation. It is also very important to note that even refusals to formally invalidate legal rules could change the *status quo* in respect of the meaning of those rules. The Constitutional Court follows a rule that when legislation can be interpreted in more than one way and at least one of the interpretations amounts to a reasonable interpretation that does not conflict with the Bill of Rights, that particular interpretation must be followed.[131] This means that without invalidating a legal rule, it may be assigned a meaning which it previously did not have.

Administrative, executive and private actions which were performed in terms of legal rules which the Court invalidated were, of course, also invalidated, but because such invalidity ensued from the invalidity of the authorising law, they were not counted in

131 For a discussion of the rule see Rautenbach *Constitutional Law* 255-264.

the last three categories - that is, those concerning administrative, executive, discretionary court and private action. The latter categories therefore concerned the invalidation of actions performed in terms of valid legal rules.

The category Administrative and Executive action includes 8 applications in which the constitutionality of actions of the President were considered. There were 5 invalidations of actions of the President[132] and 3 instances in which the Court refused to invalidate the action.[133]

Processes of counting and classifying can be frustrating because they abound with pitfalls (more accurately "potholes" in the South African context) relating to incorrect counts and the subjectivity of classifications – ask anyone who grew up on a sheep farm about the frustrations of the numerous outcomes of counting the same flock over and over. However, it has to be done, even if it produces no more than a small contribution for improving the quality of the bigger debates that will follow sooner or later, after we have reached home after dusk.

[132] *Pharmaceutical Manufacturers Association of SA. In re: Ex parte Application of the President of the RSA* 2003 3 BCLR 241 (CC), 2000 2 SA 674 (CC); *Mashava v President of the RSA* 2004 12 BCLR 1243 (CC), 2005 2 SA 476 (CC); *Kruger v President of the RSA* 2009 3 BCLR 268 (CC), 2009 1 SA 417 (CC); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 5 BCLR 291 (CC), 2010 3 SA 293 (CC); *Democratic Alliance v President of the RSA* 2012 12 BCLR 1261 (CC).

[133] *President of the RSA v Hugo* 1997 6 BCLR 708 (CC), 1997 4 SA 1 (CC), *President of the RSA v SARF*U 1999 10 BCLR 1059 (CC), 2000 1 SA 1 (CC); *Masetlha v President* 2208 1 BCLR 1 (CC), 2008 1 SA 566 (CC).

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List of abbreviations

LQR	Law Quarterly Review
SAFLII	South African Legal Information Institute
SAJHR	South African Journal of Human Rights
TSAR	Tydskrif vir die Suid-Afrikaanse Reg