

Part 1

Introducing the Constitution and the environment

by Ian Cox

“It was a tiny grubby-looking little pub. If Hagrid had not pointed it out, Harry would not have noticed it was there. The people hurrying by did not glance at it. Their eyes slid from the big book shop on one side to the record shop on the other as if they couldn’t see the Leaky Cauldron at all. In fact Harry had the most peculiar feeling that only he and Hagrid could see it.”

I think most South Africans have the same relationship with the [Constitution](#) save that unlike the muggles living in Harry Potter’s world they can only see those bits of the Constitution they want to see. Like other muggles their eyes seem to slide past those bits that don’t fit their self-interest.

This is not unusual or even unexpected. You see the Constitution is meant to challenge our comfort zones. It requires us to reach out and find “unity in our diversity” to “Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

“Yeah yeah”, most South Africans say, “cue the choir, but life is real and all this high minded aspirational stuff does not put bread on the table”. And they are right until of course, until putting bread on the table requires your right to so to be protected. Then the Constitution becomes very important indeed.

The upshot is that very few cases make it to the Constitutional Court that is honestly motivated by pure ideals of constitutionalism. It is far more likely that those who have the means to tread the very expensive path to Braamfontein are doing so in pursuit of self-interest of one sort or another.

Judges of our superior courts swear an [oath](#) that, to be faithful to the Republic of South Africa, to uphold and protect the Constitution and the human rights entrenched in it, and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. This obliges judges to look beyond the narrow self-interested concerns of the parties to the dispute and deliver justice in accordance with the Constitution and the rule of law.

Our judges of in the Constitutional Court are particularly mindful of this great responsibility. The result is that their judgements tend to deal more with the principles underlying the dispute that is before them rather than the dispute itself. It follows that taking a matter to the [Constitutional Court](#) is not so much about doing simple justice between the parties, but doing so on terms that recognise the presence of that grubby looking little pub that is the Constitution. This means that the court will use cases before it to establish legal principles that promote constitutionalism and through it, unity in diversity while healing the divisions of the past and promoting the establishment of a society based on democratic values, social justice and fundamental human rights.

Litigants who take matters involving constitutional issues to court should recognise that the determination of the case may not be just about them. Their dispute may become a proxy for the determination of weightier issues. South Africans should be devoutly grateful that this is so.

I intend during the next few articles to look at how this is working out in the environmental space. This is something of a speculative venture because only one overtly environmental case has made it

to the Constitutional Court in the 23 or so years of our post-apartheid constitutional era. This is a telling indication of just how low environmental matters sit on South Africans list of priorities, despite all the hoopla to the contrary.

The lack of concern South Africans have for environmental matters has paradoxically created space in which the proverbial mice are playing, giving rise to what I suggest are some truly awful environmental laws. I think these happy days are running out very rapidly. I will also deal with this reality and the consequences that may flow from this tomfoolery in the articles that will follow.
