

Recent case law

From mere Christmas decorations to concrete constitutional ethics

EFF v Speaker of the National Assembly; DA v Speaker of the National Assembly 2016 3 SA 580 (CC)

1 Prelude

“There’s a President who’s sure all that glitters is gold
and he’s building a homestead at Nkandla.
When he gets there, he knows, even if the tuck shop is closed
with a word he could get what he came for.
Ooh, ooh, and he’s building a homestead at Nkandla.”

The above is an adaptation of the first verse of the 1971 hit song “Stairway to heaven” by Led Zeppelin (see <http://bit.ly/2gCXfnb>, accessed on 2017-04-14). The original song was composed by the guitarist Jimmy Page and the vocalist Robert Plant. Plant explained the lyrics as referring cynically to a woman who got everything she wanted, all of the time, without giving back any thought or consideration. It is suggested that this particular attitude can also be attributed to the former South African President, Mr Jacob Zuma, since he allowed taxpayers’ money to be utilised for his private benefit.

2 Introduction

On 31 March 2016, the Constitutional Court per Moegeng Moegeng CJ, on behalf of a unanimous court of 11 judges, handed down judgment in the case of *EFF v Speaker, National Assembly* (2016 3 SA 580 (CC)). The case has become known and is hereafter referred to as the Nkandla decision. The decision has been hailed from various quarters as ground breaking and precedent-setting (see <http://bit.ly/2gCJhBP>, accessed on 2017-07-07). Although a variety of legal principles, such as the rule of law; the role of Parliament; the jurisdiction of the Constitutional Court and the powers and functions of the Public Protector, have been traversed in many prior judicial decisions (see, eg, *In re: Certification of the Constitution of the RSA*, 1996 4 SA 744 (CC); *Pharmaceutical Manufacturers Association of SA: Ex parte President of the RSA* 2000 2 SA 674 (CC); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC); *NNP v Government of the RSA* 1999 3 SA 191 (CC) and *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC)), the Nkandla decision has also created an important legal precedent in relation to the reading and interpretation of the South African Constitution. This reading, which encapsulates the recognition and enforcement of

constitutional ethics and the subsequent moral reading of the Constitution of the RSA, 1996 (hereafter “the Constitution”), is the specific subject of this case discussion.

In an almost routine manner, the highest court in the South African judicial system has again confirmed that the South African constitutional scheme is not only founded on a particular value-laden system, but also that it is imperative that one and all, the state and society, should be driven by a moral obligation to ensure the continuous survival of the Republic’s democratic order. In this regard, the court in its introduction stated as follows:

“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era. To achieve this goal we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason public-office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck” (585J 586A–B).

The court quoted with approval the following statement by Madala J in *Nyathi v MEC Council for Department of Health, Gauteng* 2008 5 SA 94 (CC) para 80:

“Certain values in the Constitution have been designated as (the) foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to insure the continuous survival of our democracy.”

It is against this background that the principles of moral obligations and debate about the application of constitutional ethics have been reignited and redirected to be much more than mere “Christmas decorations” on a dining room table in the month of December.

3 Background and facts

Between December 2011 and November 2012, various members of the public and also members of Parliament lodged complaints with the Public Protector concerning certain aspects of security upgrades that were effected at President Jacob Zuma’s Nkandla private residence. These complaints triggered, what the court described as “a fairly extensive investigation” by the Public Protector into the Nkandla project (587E–F para 5; see also the Public Protector’s report “Secure in comfort: Report by the Public Protector on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at

Nkandla in the KwaZulu-Natal province, Report no 25 of 2013/24, March 19 2014”, available at <http://bit.ly/2lcGKDn>, accessed on 2017-07-07 (hereafter the *Nkandla report*). Note also that under s 182 of the Constitution, as well as ss 6–7 of the Public Protector Act 23 of 1994 and ss 3–4 of the Executive Members Ethics Act 82 of 1998 (hereafter the Ethics Act), the Public Protector has the power to investigate an alleged breach of the code of conduct provided for by the Ethics Act.

The complaints in essence alleged that the conduct of the President in relation to the implementation of certain security upgrades at his private residence may have been unethical and in violation of the Ethics Act and the Ethics Code created under the Ethics Act. Section 2 of the Ethics Act provides that the President, after consultation, and via a proclamation, must publish a code of ethics that prescribe standards and rules aimed at promoting open, democratic and accountable government (the Executive Ethics Code was published on 28 July 2000 in Government Gazette no 21399, notice 41, regulation 6853). The Ethics Act further provides that the code of ethics must include, *inter alia*, provisions requiring the members of the executive to at all times act in good faith and in the best interests of good governance; meet all obligations imposed on them by law; not act in a way inconsistent with their specific offices; not expose themselves to a situation involving risk of a conflict between official responsibilities and private interests and not act in a way that may compromise the credibility or integrity of their office or of the government. (see s 2(a)–(c) of the Ethics Act). Although the complaints and investigation into the conduct of the President was primarily in the pursuit of ethical standards imposed on members of the executive in terms of section 96 of the Constitution, certain aspects of the Executive Ethics Code, including regulations: 2(1)(a) to perform duties and exercise powers diligently and honestly and 2(1)(b) to fulfil obligations imposed by the Constitution and the law, were also considered. The Public Protector then also took into account various other provisions of the Constitution, including sections 1(d) and 237 as well as the values of accountability, responsiveness and openness, the latter being founding values of the South African democratic order (see *Nkandla report* 11 16 and s 1 of the Constitution).

After completion of the investigation, the Public Protector concluded that several improvements on the Nkandla estate were of a non-security nature. It further followed that since the state in this instance was under an obligation only to provide security for the President at his private residence, any installation that had nothing to do with such security amounted to undue benefit or unlawful enrichment for the President and his family. Against this background, the Public Protector confirmed that the President has acted in breach of his constitutional obligations in terms of sections 96(1), (2)(b) and (c) of the Constitution. (*Nkandla case* 587H para 7). The Public Protector further concluded that the President also violated the provisions of the Ethics Act as well as the Ethics Code as provided for in the Ethics Act. Specific mention was made that the President acted in a manner inconsistent with his position; that he used

his position to enrich himself and that he has exposed himself to a situation involving the risk of conflict between his official responsibilities and his private interests (refer to regulations 2(3)(c); 2(3)(d) and 2(3)(f)).

The Public Protector's finding on the violation of section 96 was based on what the court termed "the self-evident reality" that the features identified were unrelated to the security of the President (588B–C para 8). Based on the aforementioned, the court held that a direct connection existed between the position of President and the reasonable foreseeability by which the specified non-security features, asked for by the President or not, were installed at his private residence, and that this situation extended to the principle of undue enrichment (para 9E–F). The court further mentioned that the mere fact of the President allowing non-security features, about whose construction he was reportedly aware, to be built at his private residence at government expense, exposed him to a situation involving the risk of a conflict between his official responsibilities and his private interests. The court explained the potential conflict as follows (588F–G para 9):

"On the one hand, the President has the duty to ensure that state resources are used only for the advancement of state interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise"

Having arrived at the conclusion that the President and his family were unduly enriched as a result of the non-security features, the Public Protector took remedial action against the President in terms of section 182(1)(c) of the Constitution. In a written report, the Public Protector directed the President to determine the reasonable cost of the measures implemented at his private residence that did not relate to security; to pay back a reasonable percentage of such costs of the measures implemented; to reprimand certain ministers for how the Nkandla project was handled and finally to report to the National Assembly on the President's comments and actions within a period of 14 days (589A–C para 10).

4 Decision

After a comprehensive evaluation of the background and facts, the court held that the executive, as lead by the President, as well as Parliament, bear very important responsibilities and that each institution plays a crucial role in the affairs of the South African state. As such, the executive and the President deserve, and are indeed provided, with space to discharge their constitutional obligations unimpeded by the judiciary, unless where the Constitution otherwise permits (see 615C–D para 90). Mindful of the importance of the principle of separation of powers, the court held that the President's failure to comply with the remedial action taken against him by the Public Protector was inconsistent with his obligations to uphold, defend and respect the Constitution as the

supreme law of the Republic (620). In particular, the failure by the President was inconsistent with section 83(b) read together with sections 181(3) and 182(1)(c) of the Constitution, and as such, was invalid (620E–F para 104; see also s 2 which provides that any law or conduct inconsistent with the Constitution is invalid). It is also important to amplify that the Constitution not only demands ethical compliance of the President, but also from other organs of state. With specific relevance to the merits of the *Nkandla* case, the Constitution obligates Parliament, which consists of both the National Assembly and the National Council of Provinces, to be bound by the provisions and limits of the Constitution, including its ethical requirements, when exercising legislative authority (read ss 42(1) and 44(4) of the Constitution respectively). Section 55 of the Constitution then further demands that the National Assembly, in exercising its legislative power, must provide for mechanisms to ensure that all executive organs of state in the national sphere of government, which obviously includes the President, are accountable to it and that the Assembly must also maintain oversight of the exercise of national executive authority by such organs. The powers and functions of the President, as head of the national executive authority, are undoubtedly covered under such responsibility (note ss 55(2)(a)–(b) and 85 of the Constitution). In essence, the Constitutional Court thus confirmed that the failure of both the President and the National Assembly to comply with their constitutional obligations, founded amongst others on specific pre-determined values, flaunted their ethical and moral responsibilities as demanded by the supreme law of the Republic (611D 612C–613D–F paras 76–78 81–83).

5 General principles regarding the concept of “ethics” revisited

The debate about the origin, foundation and extent of ethics and moral standards has, perhaps since the beginning of time, been at the forefront of tolerable human coexistence. Over the centuries, philosophers, religious scholars and even legal commentators have searched and debated such principles. Even in modern times there is still significant dispute about these concepts. Commentators have observed that in a modern world people have learned to become more sensitive about the physical environment, as we know we depend on it. Nonetheless, mankind still seems insensitive towards what is referred to as ‘the moral or ethical’ environment (see Blackburn *Ethics: A very short introduction* (2003) 1). Although the scope of this case note falls outside an extensive investigation into the various philosophies and theories relating to the concepts of ethics and moral standards, it is perhaps of value to revisit at least some basic principles in order to substantiate the main thesis of this discussion.

In essence the ethical environment refers to the surrounding climate of ideas about how people should seek to live. It seeks to provide certain standards of behaviour, which in turn, according to certain commentators, shape mankind’s very identity (Blackburn 1–4).

According to the French philosopher Badiou, the word “ethics” comes from the Greek word that denotes a philosophy that searches for a good way and a wise cause of action (Badiou *Ethics: An essay on the understanding of evil* (transl Hallward 2001) 1). The *Collins concise dictionary* (2004) further defines the words “ethics” and “ethical” as moral principles or a set of moral values that are held by an individual, a profession or a particular group of people. The word “ethics” also relates to the philosophical study of those moral values of human conduct and the rules and principles that ought to govern it. The behaviour can relate to an individual, or a group or a profession (see *idem* 495). In building on this basic definition, the German theologian, Helmut Thielicke, further pointed out that the term “ethics”, although referring to how the behaviour/conduct of people ought to be, cannot be left to human beings to automatically or freely comply with and hence a minimum coercion (mostly through fear of punishment) must be added to guarantee its functioning. This coercive element has further developed into the practice that codes of ethics and morals are often linked and incorporated into the legal system of a particular community (see Thielicke *Theological ethics Vol II: Politics* (ed Lazareth 1969 157-158). According to the legal commentator Lewis, codes of ethics, even for lawyers and those holding public office, have their origins in general in the legal system (see *Legal ethics: A guide to professional conduct for SA attorneys* (1982) 1–2). Other writers have also indicated that terms such as values, ethics and morality are often intertwined and used interchangeably (Church “The question of ethics revisited” 2006 (2) *Codicillus* 16). Church further submits that both values and ethics are seen to stem from and are determined by a broader social morality that involves an evaluation of societal conduct on the basis of a broader cultural context or religious standard (17).

Founded on the aforementioned, it seems acceptable to conclude that principles such as ethics, values and morals are linked with the concepts of law and legal systems. However, as certain commentators have underscored, law is made for and by people but there is no universal or uniform definition of the principle or concept of “the law” (Kleyn and Viljoen *Beginner’s guide for law students* (2015) 3; see also Van der Westhuizen “Madiba would have agreed: The law is for the protection of the people” 2013 *De Jure* 878 879 who mentions that the oldest question in legal philosophy is “what is law and why is it there?”). Kleyn and Viljoen 3 further submit that often the concept of “the law” refers to a set of norms that distinguish and determine good from bad. A legal norm is thus a rule that regulates human conduct. However, as the writers correctly point out, it is common cause that not all norms are legal rules. Many other normative systems exist that influence human existence and coexistence. Such systems include religion, individual morality as well as communal mores. Different normative systems are often interlinked and portray similar standards such as the value for human life and prescriptions against crimes such as murder or assault. However, different normative systems do not overlap completely. (Kleyn and

Viljoen 4 point out that a “sin” in Christianity is not necessarily a “crime” in a particular legal system. Thielicke 162 in this regard also points to the possible contradiction between law and ethics. He submits that what is regarded as immoral can be lawful and what is morally right, can be illegal.)

It would seem that most commentators agree that although the concepts of “law” and “morality”, which include the concept of ethics, are distinguishable from one another, there are clear links between the two and to separate them completely would be a mistake (Thielicke 158). Thielicke in this respect submits that the law is often grounded in basic moral convictions and is further sustained by ethical distinction between good and evil. Law is, however, “outward” whilst morality and ethics are termed “inward” (159–160). The writer uses the example that law is concerned to punish the theft (deed) and not per se the thief (person). Notwithstanding the aforementioned, there seems to be consensus that law in general does not enforce morality on its own. Only when a moral norm has been enacted into a legal rule, can the law be used to enforce such a norm (Kleyn and Viljoen 6). One should, however, note again, as was mentioned above, that not all wrongdoing for example is criminal. The moral compass of a society often shows the extent to which the law allows the liberty to do or feel certain things. Furthermore, it is not the function of the law to forbid and banish every departure from the so-called ideal world. The challenge is again to determine a common ground (Blackburn 53 56).

6 Ethics and the South African Constitution

Within the South African legal context, many legal commentators have, over many decades, discussed and debated the approach by lawyers on how to deal with ethics or morality and their relationship to the law. Mureinik has referred to this debate as the “important controversy in jurisprudence about the relationship between law and morality” (“Law and morality in SA” 1988 *SALJ* 457). The writer also pointed out that for some time, the controversy was reduced to a simple polemic between two fundamentally irreconcilable camps, namely, the approach by natural lawyers and the approach by positivists. In essence, natural lawyers hold the view that what is immoral, cannot be law. Positivists to the contrary argue that there is no necessary connection between law and morality and they insist on a clear separation between law and morality (See confirmation in this regard by Kroeze “When worlds collide: An essay on morality” 2007 *SAPL* 323–324 and Kleyn and Viljoen 11). Kleyn and Viljoen 10-11 further point out that contrary to the legal positivists view, that law is what it is, the school of natural law argues that law is what it ought to be. For natural lawyers, there exists in the human world a moral code/set of moral principles, irrespective of human interaction or the existence of positive law. Any law that conflicts with these “higher norms” is unjust and as such not law and therefore unlawful/invalid. The legality of legal rules for natural lawyers thus depends on the moral content of the law. Kroeze 328-329 further

expands on this theory by submitting that natural law supporters posit a pre-political or pre-social set of moral rules that determine both the content and validity of positive rules. Such pre-political or pre-social codes can have their origins in different sources, depending on one's particular approach. In this regard she makes a distinction between so-called pre-modern thinkers and the modern thinkers. Pre-modern thinkers are mostly tied up to metaphysical explanation of the world, which implies a natural order that prescribes both behaviour and morality. Such thinkers, like Plato and Aristotle did not concern themselves too much with morality and context, since such issues according to them were regarded as being part of the natural order (see <http://stanford.io/2xmFQpq>, accessed on 2017-10-14). In contrast, modern thinkers no longer regard moral rules as emanating from God or the metaphysical world. Moral rules and ethical codes are seen as products of human rationality and include characteristics such as individualism and relativism. This modernistic view on morality is essentially based on the work of Emanuel Kant, who in essence separated the principle of morals from metaphysics and linked it up with logic and human reason (see <http://stanford.io/2zOUM1d>, accessed on 2017-10-14; see also Kroeze 328 and Badiou 2–3) Notwithstanding these two opposing approaches, Mureinik 457 points out that the debate has since moved on and that the jurisprudence has matured to such an extent that there are not two camps any more, but a densely populated spectrum of opinion on the topic.

As part of the densely-populated spectrum of opinion mentioned above, the concepts of ethics and morals are often also perceived to relate only to the private sphere, which perception of course is misplaced. Many contemporary societies make a distinction between private, public and professional ethics. It is not only private individuals that are required to act and conduct themselves in an acceptable ethical manner. Public office bearers and members of certain professional institutions are also required to comply with a variety of ethical codes and requirements. In this respect, Lewis points out that, since public officials and certain key organs of state have become necessary instruments in modern societies, it has become essential that such officials conduct themselves and fulfill their duties ethically according to what the particular community requires of them (Lewis 2). The writer further opines that the general experience in South Africa and elsewhere indicates that the needs of society are such that it is not enough to leave prescriptions of duty and honour to people's own conscience, but that such aspects must be specified and enforced through the law. Kleyn and Viljoen 5-8 also distinguish between individual and community morality. Contrary to individual morality, which relates to a person's ideal self image of him or her founded on his or her conscience, community or also called collective morals, are those morals and values of a particular community as a whole, which are supported and required by such community.

Notwithstanding the aforementioned debate, it is not uncommon for contemporary constitutional schemes to incorporate sets of predetermined values and provisions that relate to the moral behaviour of not only private citizens but state institutions alike. The South African constitutional dispensation since 1994 is a good example of such a system. Various legal commentators have indicated that the Constitution provides a general benchmark and broader framework for a general guiding morality (Church 17; see also Bohler-Muller “When things fall apart: Ethical jurisprudence and global justice” 2005 *SAPL* 29 30). It has further been pointed out that when a Constitution entrenches certain values and ethical requirements, it becomes much more than just a law that determines and establishes the powers and functions of organs of state that comprise of particular state. The incorporation of ethical prescriptions further requires that all legal authority provided for under the law, including the Constitution, should be consistent with a particular moral code that was decided upon when the particular constitutional/legal system was created. In many instances, the constitutional drafters often carefully consider a variety of factors before deciding on which moral and ethical requirements to incorporate. However, once incorporated as part of the constitutional scheme, such principles and requirements then establish the term “constitutional ethics” and further require an ethical or moral reading/interpretation of constitutional issues and disputes (see Bekink *Principles of South African constitutional law* (2016) 7). However, it should be noted that the principle of the moral reading of a Constitution is not something new. In his seminal work, *Freedom’s law: The moral reading of the American Constitution*, Ronald Dworkin has commented that many contemporary Constitutions declare individual rights against their governments in broad and abstract language. The moral reading of such Constitutions then proposes to interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. Such a moral reading, according to Dworkin, then brings “political morality” into the heart of constitutional law (see *idem* (1996) 2). Dworkin further mentions that since political morality is inherently uncertain and controversial, any system of government that incorporates such principles as part of its law, must decide whose interpretation and understanding will be authoritative. However, he then confirms that there is nothing revolutionary about the moral reading of such a legal system (2–3). He also opines that the advantage of such moral reading is that constitutional interpretation is then directed and disciplined. Judicial officers may not read their own convictions into the Constitution, but must do so in line with the structural design of the Constitution as a whole, including examples of past constitutional interpretation (10).

Upon a closer evaluation of the Constitution, 1996, it becomes evident that the South African constitutional drafters intentionally incorporated a variety of ethical requirements and moral standards in the provisions of South Africa’s supreme law. These principles may be summarised as follows: Already in the preamble it is mentioned that the Constitution

aims to establish a society based on a variety of values, social justice and a democratic and open society; the founding provisions further confirm that the Republic of South Africa is a democratic state with various core values, the rule of law and an open and accountable government (s 1); in chapter 2, the Bill of Rights is defined as a cornerstone of democracy and it is said to affirm democratic values such as human dignity, equality and freedom. The state is further obliged to respect, protect, promote and fulfill these rights (see s 7(1)–(3)). Chapter three further requires that the three spheres of government must act in an effective, transparent and accountable manner and be loyal to the Constitution and its people. Principles such as good faith and mutual trust are also required amongst spheres of government. Furthermore, specific ethical conduct is required from members of the legislature and the executive. They are obliged to be faithful and obedient to the Constitution and must, before taking office, swear/affirm faithfulness to the Republic and obedience to the Constitution. Many executive members are further required to act in terms of a code of ethics prescribed by national legislation and may not act inconsistently with their offices and may not create a conflict between their official duties and their private interests (see ss 48 83 87 90 96 107 129 135 136 of the Constitution, Sch 2 of the Constitution and the Executive Members Ethics Act mentioned above). Even judicial officers must uphold the Constitution, ensure impartiality and are subject to the Constitution and the law. All judicial officers are also required to make an oath/affirm to uphold and protect the Constitution (ss 165 and 174 and Sch 2 of the Constitution). Finally the Constitution also provides for so-called “administrative ethics” and “financial ethics”. For example, the public administration is to be governed by democratic values and principles enshrined in the Constitution, including high standards of professional ethics and compliance with the law. Furthermore, the financial affairs of the state must be regulated by processes providing transparency, accountability and effectiveness whilst recognising uniform norms and standards (see ss 195 and 215–217). Notwithstanding the clear and pronounced provisions of the Constitution, some commentators surprisingly still seem to argue against the concept of constitutional ethics as being part of the South African normative legal system. It has been suggested in this regard, that in trying to pin the essence of constitutional ethics down more precisely, one is reduced to either a pre-modern metaphysical speculation or a modernist construction (see Kroeze 331–334). The writer seems to favour a more post modernist approach to constitutional ethics based on the view of plasticity and the constant change of reality and knowledge. She further supports the idea that all knowledge is interpretation and no interpretation is final (334). This approach, however philosophically attractive it may seem to some, is directly in conflict with the jurisprudence of the highest court in South Africa (for more detail on South Africa’s normative approach to constitutional law, see for example *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC); *K v Minister of Safety and Security* 2005 6 SA 419 (CC) and *Walele v City of Cape Town* 2008 6 SA 129 (CC)).

7 Final comments and conclusion

Notwithstanding the academic debate about the origin, content and acceptability of the philosophy of ethics in general and constitutional ethics in particular, the *Nkandla* precedent has put beyond doubt the importance and application of ethics in the supreme legal dispensation of the South African state. Such ethical principles are clearly not intended to be mere decorative add-ons, but indeed are concrete enforceable legal provisions that form an important part of the overall legal system. In practice it is not really of importance to determine whether one falls in the school of natural lawyers or perhaps positivists regarding the origin and foundation for legal/constitutional ethics, a possible trap that the Constitutional Court has also expertly avoided. What is important is that the South African legal system, and its supreme constitutional foundation, provides for ethical provisions that must be complied with. Perhaps this important legal milestone in recognising and emphasising the importance of constitutional ethics, is best encapsulated in the following closing quotation by Kriegler J in his supporting judgment in *S v Makwanyane* 1995 3 SA 391 (CC):

“The issue is not whether I favour the retention or the abolition of the death penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it. In answering that question the methods to be used are essentially legal, not moral or philosophical. *To be true the judicial process [including the law] cannot operate in an ethical vacuum.* After all, concepts like ‘good faith’, ‘unconscionable’ or ‘reasonable’ import value judgments into the daily grind of courts of law” (paras 206–207; emphasis added).

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