SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORDS OF NOMINEES FOR APPOINTMENT TO THE CONSTITUTIONAL COURT, SUPREME COURT OF APPEAL, HIGH COURT, ELECTORAL COURT AND LABOUR COURT

APRIL 2017

INTRODUCTION

1. The Democratic Governance and Rights Unit (DGRU) is an applied research unit based in the Department of Public Law at the University of Cape Town. DGRU's vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by conducting applied and comparative research; supporting the development of an independent, accountable and progressive judiciary; promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and enabling scholarship, advocacy and online access to legal information. The DGRU has established itself as one of South Africa's leading research centres in the area of judicial governance.

2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, observing and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for the JSC interviews in September 2009, and for all further JSC interviews from October 2010 onwards.

3. The intention of these reports is to assist the JSC by providing an impartial insight into the judicial records of the short-listed candidates. The reports are also intended to provide civil society and other interested stakeholders with an objective basis on which to assess candidates' suitability for appointment to the bench.

METHODOLOGY OF THIS REPORT

4. As regular readers of our reports will recall, we attempted to implement a new style of report for the October 2016 sitting of the JSC. This was intended to present a more comprehensive overview of a candidate's track record than presenting simple summaries of judgments and academic articles candidates have written. We attempted to present a comprehensive overview of all a candidate's judgments, including a table of the total number of cases heard and judgments written.

5. Our efforts to do this were met with several challenges, which ultimately necessitated the report focusing on Constitutional Court candidates only.

6. During the course of 2016, we also surveyed members of the JSC to solicit feedback on how useful the reports are, and to invite thoughts on how they might be improved. We are grateful for the responses we received, and have incorporated them into our thinking on how to develop the reports further.

[1] The reports are available at http://www.dgru.uct.ac.za/research/researchreports/

7. Based on these and other inputs, the current report has become something of a hybrid between the two approaches. We have not attempted to set out all of candidate's judgments, and have returned to thematically-organised summaries of what seem to us to be candidates' most significant judgments. We have retained the table of cases heard and judgments written for the Constitutional Court candidates, in respect only of their time as acting justices of the Constitutional Court. Responding to feedback, we have attempted to shorten the case summaries.

8. We have received suggestions that we should offer commentary on the strength or weakness of the summarised judgments. We remain reluctant to do so, for reasons of capacity and expertise. However, we have attempted to help meet this need by including any academic criticism of the featured judgments that we are able to find. We continue to include any academic writing by the candidates themselves, as well as any notable media coverage.

9. Capacity constraints have precluded us from summarising Afrikaans judgments. We have also not included any Magistrates' Court judgments – as these judgments are not reported, we would be unable to source any beyond those that a candidate might attach to their application forms.

10. As with our previous reports, we do not advocate for or against the appointment of individual candidates. We do not provide our own analysis or criticism of the judgments summarised, although as discussed above, we have tried to integrate academic comment on judgments into the report. Our intention in producing these reports continues to be to attempt to move beyond the partisan and personalised debates that have at times surrounded the suitability of candidates for judicial appointment. Instead, we hope to further a deeper analysis of the criteria in terms of which judicial appointments are made, and to enable stakeholders to assess how a candidate's judicial track record matches up to those criteria. The report thus does not seek to advocate, explicitly or implicitly, for the appointment of any candidate.

11. The template for this report is certainly not perfect, although we are pleased to have been able to complete it in respect of all the candidates. We will continue to work on developing a format that is both capable of being implemented effectively, and is useful to interested parties. We continue to welcome any feedback or suggestions on the structure of the report.

SUBMISSIONS REGARDING THE INTERVIEWS

12. In our previous submission, we wish to outline briefly some of the criteria we think should inform an assessment of the suitability of candidates for the Constitutional Court, echoing those made in our previous submissions.[2] As the Constitutional Court interviews were curtailed, we repeated these criteria for ease of reference here.

[2] These are based on research by Advocate Susannah Cowen into the qualities of an ideal South African judge, available at http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf

12.1. A commitment to constitutional values and to apply the underlying values of the Constitution (human dignity, freedom and equality), with empathy and compassion, and with due regard to the separation of powers and the vision of social transformation articulated by the Constitution;

12.2. Independence of mind: judges must have the courage and disposition to act independently and free from partisan political influence and private interests;

12.3. A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice;

12.4. High standards of ethics and honesty;

12.5. Judicial temperament, encompassing qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness;

12.6. As well as being qualified in respect of the general body of law, Constitutional court judges must also have expertise in constitutional law, and be equipped to give meaning to constitutional values.

ACKNOWLEDGEMENTS

13. This research was conducted by Chris Oxtoby, DGRU senior researcher, and Sarai Chisala, Liat Davis, Prince Mathibela and Kate Loughran, DGRU research assistants.

14. We are grateful for the financial support of the Open Society Foundation and the Raith Foundation for making this project possible.

DGRU

22 March 2017

JUSTICE RAYMOND ZONDO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 4 May 1960.

BJuris, University of Zululand (1983)

LLB, University of Natal (Durban) (1986)

LLM, UNISA (2005)

CAREER PATH

Justice of the Constitutional Court (2012 -)

Acting Justice of the Constitutional Court (2011 – 2012)

Judge President, Labour Appeal Court (2000 – 2010)

Judge, North Gauteng High Court (1999 – 2012)

Judge, Labour Court (1997)

Director, SS Mathe & Zondo & Co attorneys (1989 – 1997)

Clerk, SS Mathe & Co (1988 – 1989)

Articled clerk, Chennells Albertyn attorneys (1986 – 1988)

Articled clerk, Michael Mthembu & Co attorneys (1985 – 1986)

Articled clerk, V.N. Mxenge & Co attorneys (1985)

Fellow, Legal Resources Centre (1984 – 1985)

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

DEMOCRATIC ALLIANCE V AFRICAN NATIONAL CONGRESS AND ANOTHER (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (19 JANUARY 2015)

Case heard: 11 September 2014; Judgment delivered 19 January 2015

Prior to the May 2014 national and provincial elections, the applicant political party published a statement by bulk sms to potential voters. The statement, which followed the release of the Public Protector's "Nkandla" report, stated that President Zuma had stolen money "to build his R 264m home." The first respondent took the view that the statement was false, and was published with the intention of influencing the election, and thus breached the Electoral Act and/or the electoral Code of Conduct. The Electoral Court agreed, overruling the initial decision of the High Court.

Cameron , Froneman and Khampepe JJ (Moseneke DCJ and Nkabinde J concurring) upheld the appeal. Van der Westhuizen J (Madlanga J concurring) agreed, but for different reasons. Zondo J (Jafta J and Leeuw AJ concurring) would have dismissed the appeal:

"We must ensure that the interpretation we give to section 89(2)(c) is not only consistent with the right to freedom of expression but also with all citizens' right to free and fair elections and with every adult citizen's right to vote in free and fair elections. The right to freedom of expression is certainly not the only constitutional right with which the meaning we give to section 89(2)(c) must be consistent. Equally important is the need for us to also give section 89(2)(c) a meaning that is consistent with the right to free and fair elections. As this Court said in *New National Party*, the right to vote entrenched in our Constitution is a right to vote in free and fair elections. This means that any conduct that threatens to render an election unfree and unfair is conduct that threatens citizens' rights to vote and to free and fair elections. To state the obvious, an election that any political party or candidate wins as a result of false statements would be an unfair election. As such it would be an infringement of the citizens' right to *free and fair* elections. It is, therefore, important that no one resorts to making false statements about a political party, its leaders or candidates in order to win votes or to divert votes from a political rival." [Paragraph 42]

"In so far as the applicant contends that the SMS was a comment or opinion, the law requires that the facts upon which a comment is based must be stated in the publication unless they are sufficiently notorious that the persons who read or hear the comment would have known those facts. In this case the applicant relies on the conclusions or findings of the Public Protector in the Nkandla Report. ... It did not set out any of those findings or facts in its SMS. There would still have been enough room in the SMS for it to have included at least three or four of the most serious findings of the Public Protector upon which its alleged comment or opinion was based. It did not do so." [Paragraph 79]

MINISTER OF HOME AFFAIRS AND OTHERS v TSEBE AND OTHERS 2012 (5) SA 467 (CC)

Case heard: 23 February 2012; Judgment delivered 27 July 2012.

This was an appeal against a decision of the High Court, which had granted an application to restrain government from extraditing or deporting the respondents to Botswana, absent a written assurance that, if they were convicted of murder, the death penalty would not be imposed or executed.

Zondo AJ (Mogoeng CJ, Jafta J, Khampepe J, Maya AJ and Nkabinde J concurring) dismissed the appeal:

"If we as a society or the state hand somebody over to another state where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone. This court's decision in *Mohamed* said that what the South African authorities did in that case was not consistent with the kind of society that we have committed ourselves to creating. It said in effect that we will not be party to the killing of any human being as a punishment — no matter who they are and no matter what they are alleged to have done." [Paragraph 68]

"Accordingly, in terms of s 7(2) of the Constitution the government is under an obligation not to deport or extradite Mr Phale or in any way to transfer him from South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the government deport or extradite Mr Phale without the requisite assurance, it would be acting in breach of its obligations in terms of s 7(2), the values of the Constitution and Mr Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading. In my view no grounds exist upon which the judgment of the high court can be faulted." [Paragraph 74]

Cameron J (Froneman, Skweyiya and Van der Westhuizen JJ concurring), concurred in the judgment, to the exclusion of certain paragraphs he felt to be superfluous. Yacoob ADCJ wrote a separate opinion, finding that leave to appeal should not have been granted.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MAPHANGO AND OTHERS V AENGUS LIFESTYLE PROPERTIES (PTY) LTD CCT 57/11 [2012] ZACC 2

Case heard 3 November 2011, Judgment delivered 13 March 2012

Applicants were tenants of flats in the inner city of Johannesburg. The respondent landlord, having bought and upgraded the building, wanted to increase the rent. At issue was whether the landlord was entitled to exercise the power of termination of the existing leases purely to secure higher rents. For the majority, Cameron J (Moseneke DCJ, Froneman, Nkabinde, Skweyiya, Yacoob and Van Der Westhuizen JJ concurring) held that the High Court, which had heard the matter at first instance, should have postponed the eviction application in order for a Tribunal to determine whether the termination was an "unfair practice", in terms of the Rental Housing Act (RHA).

Zondo AJ (Mogoeng CJ and Jafta J concurring) dissented:

"... A reading of the affidavits put up by the applicants in the High Court does not reveal that it was their case that the termination of their leases was invalid because it constituted an unfair practice. The bases upon which the applicants contended that the termination ... was invalid was that the respondent sought to effect a rent increase that was in excess of the maximum rent increase permitted by the leases and that the termination of the leases was an infringement of their constitutional right of access to adequate housing. ... " [Paragraphs 102 - 103]

"In labour law, which gave rise to the concept of an unfair labour practice from which the drafters of the RHA may have derived the concept of an unfair practice, it was decided a long time ago by the Appellate Division that the determination of whether conduct is an unfair labour practice or is unfair is not a question of law but involves the passing of a value judgment. ... There is no basis to depart from the decision of the Appellate Division ... even this Court has ... approved the approach that the determination of what is fair involves a value judgment. ... Since this point is not a question of law, the rule that a party may raise a point of law at any time does not apply." [Paragraph 106]

"The concurring judgment sets much store on the fact that MWASA [the Media Workers Association case] was decided before the Constitution came into force. ... [T]he principle it lays down was followed by the Supreme Court of Appeal in a long list of cases after the Constitution had come into operation. The reason is that the Constitution has not changed the principle. The principle has nothing to do with interpreting a statute in accordance with section 39(2) of the Constitution. What the principle does is to define the process of determining whether what has occurred constitutes an unfair labour practice or is unfair. This indisputably involves a consideration of facts and passing a value judgment on the facts, based not on the questions of legality but on one's sense of justice and fairness. The values invoked to pass judgment are now entrenched in the Constitution. The passing of a value judgment is quite different from raising a point of law." [Paragraph 108]

"I am unable to uphold the proposition that the termination of the leases constitutes a limitation of the applicants' right of access to adequate housing, let alone its infringement. In my view the cancellation terminated the applicants' legal entitlement to occupy the flats and no more. It did not, of itself, result in the loss of access to housing. What would have implicated the applicants' housing right is the eviction. ..." [Paragraph 120]

LABOUR LAW

LANGEVELDT V VRYBURG TRANSITIONAL LOCAL COUNCIL & OTHERS (2001) 22 ILJ 1116 (LAC)

The appellant, a former town clerk of Vryburg, brought a review application in the Labour Court to set aside the first respondent's decision to dismiss him. The Labour Court dismissed his application with costs.

Zondo JP held:

"As the Labour Court is a court of a status similar to that of a High Court, it has power in terms of s 172(2) of the Constitution 'to make an order concerning the constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President'. As is the case with orders of constitutional invalidity made by a High Court, an order of constitutional invalidity made by the Labour Court does not become operative unless it is confirmed by the Constitutional Court. Section 172(2) (b) provides that a court

which makes an order of constitutional invalidity may grant 'a temporary interdict or other temporary relief to a party or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct'. Section 169 (b) of the Constitution provide that a High Court may decide 'any constitutional matter' except a matter that 'is assigned by an Act Parliament to another court of a status similar to a High Court'. This provision ensures that High Courts have no jurisdiction in constitutional matters which have been assigned to the Labour Court by an Act of parliament." [Paragraph 11]

"The Constitutional Court also has its share of jurisdiction as a court of first instance in dismissal and other employment and labour disputes. It would have jurisdiction as a court of first instance where the dismissal is challenged on the basis that it is inconsistent with the Constitution. This is so because s 167(6) of the Constitution contemplates that either national legislation or the Rules of the Constitutional Court must allow direct access to the Constitutional Court when it is in the interests of justice to do so and if the Constitutional Court grants leave ..." [Paragraph 49]

"A dismissal the unfairness of which is based on grounds that it is inconsistent with s 9(1), (3) and (4) of the Constitution can be said to constitute an automatically unfair dismissal as defined in s 187(1) (f) of the Act ... In fact an employee may institute proceedings in a High Court and then go to the Constitutional Court with or without first going to the Supreme Court of Appeal. Although the dispute would be an employment or labour dispute, it could proceed through the ordinary courts and reach the Constitutional Court without receiving the attention of the Labour Court and this court. Although such an employee may, in terms of s 167 (b) of the Constitution or in terms of the Rules of the Constitutional Court, approach the Constitutional Court for leave to have direct access to it, this should not present any difficulty in practice because in all probability the Constitutional Court will very rarely grant leave for a matter to be brought directly to it (without such matter having been dealt with by another court first)." [Paragraph 50]

MEDIA COVERAGE

In 2007, the official opposition queried transport and living allowance paid to then – Judge President Zondo:

"The Judge President of the Labour Court, Raymond Zondo, has been paid R1 275 493 in transport and living allowances over the past five years. This was disclosed by the Minister for Justice and Constitutional Development in answer to questions from the Democratic Alliance. ...

Zondo was appointed to the Labour Court in November 1997. He was not a high court judge at the time, although he was entitled to many of the same conditions of employment and remuneration while serving out his 10 year contract. In June 1998 the then Minister of Justice, Dullah Omar, gave permission for Zondo to retain Durban, where he had his home and where the Labour Court had a satellite branch, as his headquarters. This entitled him to a per diem allowance for every 24 hours spent away from home while on official duties, including time spent at the seat of the court in Johannesburg.

The DA's spokesperson for justice, Sheila Camerer, said on Sunday that it was "hard to see how this special dispensation is justifiable" considering that other high court judges do not receive the same entitlements, and the department itself constantly complains of having inadequate resources."

- James Myburgh, "Judge President under Fire", *Moneyweb,* 23 April 2007. Available at: https://www.moneyweb.co.za/archive/judge-president-under-fire/

DEPUTY PRESIDENT MANDISA MAYA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 20 March 1964.

BProc, University of Transkei (1986)

LLB, University of Natal, Durban (1988)

LLM, Duke University, U.S.A. (1990) (Fulbright scholarship)

CAREER PATH

Deputy President, Supreme Court of Appeal (2015 -)

Acting Justice, Constitutional Court (2012)

Justice of Appeal, Supreme Court of Appeal (2005 -)

Judge of the High Court (2000 – 2004)

Acting Judge, Cape Provincial Division, Transkei Divsion (1999 – 2000)

Advocate, Transkei Society of Advocates (1994 – 1999)

Investigator, Independent Electoral Commission (1994)

Lecturer, University of Transkei (1992, 1993, 1995)

Assistant Law Advisor, Department of Justice (1991 – 1993)

Policy counsel / lobbyist, Womens' Legal Defence Fund, Washington D.C. (1990 – 1991)

Legal Assistant, Department of Justice (1988 – 1989)

Chairperson, South African Law Reform Commission (2013 -)

Advisory board member, Walter Sisulu University Law Journal (2005 -)

Founding member, International Association of Women Judges, South African chapter (2004 -)

Member, Black Lawyers' Association (1994 – 2000)

Member, NADEL (1995)

SELECTED JUDGMENTS

PRIVATE LAW

MINISTER OF SAFTEY AND SECURITY V F 2011 (3) SA 487 (SCA)

Case heard 11 November 2010, Judgment delivered 22 February 2011

At issue was the vicarious liability of the State for the rape of the respondent by a Mr Van Wyk, a policeman who was off duty but on "standby duty" when he committed the rape. For the majority, Nugent JA (Snyders JA and R Pillay AJA concurring) held that there was no vicarious liability, and upheld the appeal (see summary at pages 29 - 30). Maya JA (Bosielo JA concurring) dissented:

"[T]here is no question that Van Wyk's conduct in raping F had nothing whatsoever to do with the performance of his duties as a police officer. But the enquiry goes further. It must still be considered whether, despite the fact that Van Wyk's unlawful conduct was totally self-serving, there nevertheless was a sufficiently close link between his acts for his own personal gratification and the State's business." [Paragraph 67]

"I find it quite pertinent that F was aware that Van Wyk was a police officer when she accepted Van Wyk's second bogus offer to take her home … and I agree with the court below that this knowledge influenced her decision and quelled her earlier misgivings. …" [Paragraphs 70 – 71]

"… [B]y offering to rescue and take home in a police vehicle a lone, vulnerable child stranded on a dark, deserted riverside in the dead of night in those circumstances, Van Wyk subjectively placed himself on duty and acted in his capacity as a police officer. … In my opinion he placed himself on duty as he was empowered to do by law. And once he did, he assumed the status and obligations of an on-duty police officer. For that reason, I would find the Minister vicariously liable." [Paragraph 73]

On appeal, the majority decision was reversed by the Constitutional Court (per Mogoeng J, Moseneke DCJ, Cameron, Khampepe, Nkabinde, Skweyiya and Van Der Westhuizen JJ concurring; Froneman J in a separate concurrence finding direct liability; Yacoob J, with Jafta J concurring, dissenting. F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC).

LABOUR LAW

DEPARTMENT OF CORRECTIONAL SERVICES AND ANOTHER v POPCRU AND OTHERS 2013 (4) SA 176 (SCA)

Case heard 19 February 2013, Judgment delivered 28 March 2013

This was an appeal against a judgment of the Labour Appeal Court, which had upheld the Labour Court's finding that the Department's dismissal of certain correctional services officers, for their refusal to cut their dreadlocks, to be unfair. The Labour Court found the dismissals to be automatically unfair on the ground of gender discrimination. The Labour Appeal Court found that, in addition, the grounds of religion and culture were impacted. The officers were all male, and all wore dreadlocks, for various reasons.

Maya JA (Nugent and Pillay JJA and Plasket and Mbha AJJA concurring) held that the appeal should be dismissed:

"[B]ut for their religious and cultural beliefs, the respondents would not have worn dreadlocks. And but for that fact and their male gender, they would not have been dismissed. The disparate treatment constituted discrimination and the appellants' motives and objectives of the dress code are entirely irrelevant for this finding. …" [Paragraphs 18 – 19]

"Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection. The impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment." [Paragraph 22]

"[N]o evidence was adduced to prove that the respondents' hair, worn over many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation and corruption. Therefore, it was not established that short hair, not worn in dreadlocks, was an inherent requirement of their jobs. A policy is not justified if it restricts a practice of religious belief — and, by necessary extension, a cultural belief — that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense …" [Paragraph 25]

CIVIL PROCEDURE

HELEN SUZMAN FOUNDATION V JUDICIAL SERVICE COMMISSION AND OTHERS (145/2015) [2016] ZASCA 161; [2017] 1 ALL SA 58 (SCA); 2017 (1) SA 367 (SCA) (2 NOVEMBER 2016)

Case heard: 5 May 2016; Judgment delivered 2 November 2016.

At issue was whether the closed deliberations of the JSC formed part of the record of its proceedings in terms of Uniform Rule 53(1)(b). The High Court had held that they did not. Maya DP (Majiedt, Mbha, Dmabuza JJA and Fourie AJA concurring) dismissed the appeal:

"I have difficulty with HSF's contentions that non-disclosure of the recording is inimical to the notions of open justice and public accountability and that protecting the confidentiality of the deliberations would undermine the public's trust in the JSC and its processes. The nature of the JSC's constitutional mandate requires it to engage in a rigorous, intense judicial selection process. To that end, it must be accepted that during the course of the deliberations adverse remarks will be made, which although not necessarily actionable in law, may yet be hurtful to a candidate and cause reputational damage harmful to his or her professional career. This would apply with greater force to a sitting judge who applies for a higher position on the Bench with the potential of eroding public esteem in the judiciary upon which the ultimate power of the courts rests. The JSC and its members may also be exposed to possible actionable claims for delictual damages arising from utterances made during the deliberations which a candidate may consider defamatory. It should not be overlooked too that the legal practitioners in the JSC will, in future, appear before the appointed judge who may harbour ill feelings against them if they expressed adverse views against her or his appointment in the deliberations. This may potentially inhibit the practitioners and even the judges sitting on the JSC from freely and frankly expressing themselves on the suitability of the candidates." [Paragraph 28]

"Protecting the confidentiality of the deliberations clearly serves legitimate public interests in the circumstances. Whilst the JSC itself cannot lay claim to a general right to privacy as it discharges a public duty, the privacy and dignity of judicial candidates, who are assured by the JSC Act and its regulations that the deliberations concerning their suitability will be confidential, must be protected in the judicial interviewing and selection process. Non-disclosure of the deliberations therefore fosters this obligation. It likely encourages applicants who might otherwise not make themselves available for judicial appointment for fear of embarrassment were the JSC members' frank opinions on their competence or otherwise be made open to the public. This would compromise the efficacy of the judicial selection process. The cloak of confidentiality also enhances the judicial appointments process by allowing the members to robustly and candidly state facts and exchange views in discussing the suitability or otherwise of the candidates based on their skills, characters, weaknesses and strengths." [Paragraph 29]

LEGAL AID SOUTH AFRICA v MAGIDIWANA AND OTHERS 2015 (2) SA 568 (SCA)

Case heard 8 September 2014, Judgment delivered 26 September 2014

The parties had entered into a settlement agreement in which differences regarding legal aid funding were resolved. The court had to decide whether the judgment sought would have any practical effect or result. The majority (Ponnan JA, Swain JA and Fourie AJA concurring) dismissed the application, holding that where parties had by agreement settled all disputes between them, there was no discretion for the court to exercise under s 16(2)(a)(i) of the Superior Courts Act. Maya JA (Zondi JA concurring) agreed that the application had to be dismissed, but took a different view on the issue of the discretion available to the court:

"[A] court of appeal will concern itself with issues that subsist between and will have practical effect for the parties to the litigation. However, it appears that the courts may have a tightly circumscribed discretion to enquire into the merits of an appeal, even in the absence of a lis between the parties in an appropriate case." [Paragraph 27]

"The Constitutional Court [in Sebola and Another v Standard Bank of South Africa Ltd and Another] highlighted the provisions of s 21A(3) of the old Act, which are replicated in s 16(2)(a)(ii). Their effect is that it is only in exceptional circumstances (which did not exist in the matter) that the question, whether the decision sought will have practical effect or result, is to be determined with reference to the question of costs. The fact that the matter involved the interpretation of statutory provisions whose meaning had long been shrouded in uncertainty, weighed heavily with the court in deciding to hear the appeal." [Paragraph 30]

CRIMINAL JUSTICE

THE STATE V MUDAU (631/2013) [2014] ZASCA 190 (27 November 2014)

Case heard 27 November 2014, Judgment delivered 27 November 2014

The issue in this case was whether the regional court had jurisdiction to impose sentences of life imprisonment in light of s 53A of the Criminal Law Amendment Act. Respondents had been convicted of rape, indecent assault and robbery with aggravating circumstances by the regional court, which sentenced them to life imprisonment, 12 months' imprisonment and 15 years imprisonment respectively. On appeal, the high court held that the sentences were incompetent as, at the time the regional court imposed them, it lacked jurisdiction and should have referred the case to the high court for sentencing.

Maya JA (Wallis JA and Dambuza AJA concurring) held:

"… [W]ith effect from the date of commencement (31 December 2007) [of the Criminal Law (Sentencing) Amendment Act] of these provisions jurisdiction was conferred on a regional court to impose life imprisonment for offences referred to in Part 1 of Schedule 2 of the Act which include rape of the nature for which the appellants were convicted. It was therefore within the regional magistrate's powers to sentence the respondents as he did as the appellants correctly conceded. The court below erred in finding that the magistrate's invocation of s 53A of the Act was improper and it should not have set the sentences aside. …" [Paragraph 4]

"But the order of the court below went too far. It should not have granted the appellants leave to appeal to this court in respect of the convictions and sentences. This court's appellate jurisdiction to hear criminal appeals is not an inherent jurisdiction. It has no jurisdiction to hear appeals against convictions and sentences of lower courts. And the high court is not authorised to grant leave to appeal directly to this court against convictions and sentences imposed by the regional court. Such convictions and sentences can only be appealed against in this court when an appeal against them has failed in the high court. ." [Paragraph 5]

"The court below must therefore deal with the appeal originally placed before it by the respondents" [Paragraph 5]

The appeal was upheld, and the case was referred back to the court below to consider the appeal [Paragraph 6].

JUDGE JODY KOLLAPEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born 19 May 1957, Pretoria.

B. Proc – University of the Witwatersrand (1978)

LL.B – University of the Witwatersrand (1981)

CAREER PATH

Chairperson, South African Law Reform Commission (2016 to date)

Judge of the High Court (North Gauteng) (2011 to date)

Acting Judge, North Gauteng High Court (2010 – 2011)

Chairperson, South African Human Rights Commission (2002 – 2009)

Deputy Chairperson, South African Human Rights Commission (2001 – 2002)

Commissioner, South African Human Rights Commission (1996 – 2001)

Lawyers for Human Rights (1992 – 1996)

N Kollapen (Attorney) (1982 – 1983; 1988 – 1992)

Moosa Omar and Kollapen (Partner) (1984 – 1987)

Trustee, Legal Resources Centre (2000 to date)

Pretoria Child and Welfare Society (2001 to date)

Laudium Care Services for the Aged (2000 to date)

SELECTED JUDGMENTS

PRIVATE LAW

SA National Defence Union v Minister of Defence & others (2012) 33 ILJ 1061 (GNP); 2012 (4) SA 382 (GNP)

Case heard: 29 August and 2 September 2011; Judgment delivered 9 February 2012.

Upheld a claim for defamation by plaintiff trade union regarding an article published in the official magazine of the Department of Defence.

"Our law has developed to such a stage where considerations of legal and public policy must mean that a trade union should have the right to sue for defamation and in my view this would be consistent with the spirit of the judgment of the Constitutional Court in *SA National Defence Union v Minister of Defence & another*, where the court found that the total ban on trade unions in the defence force went beyond what was reasonable and justifiable.

If such an action would be available to a trade union in the widest sense … there can be no reason why a trade union that operates within the context of the defence force should on account of any policy or legal considerations be excluded from being the recipient of such a right and on this aspect one must conclude that, having regard to the incremental development in our law of defamation as well as regard to the constitutional values which underpin our constitutional order, there can be no reason why a trade union and in particular a trade union such as the plaintiff which operates within the defence force should not have the right to sue for defamation under appropriate circumstances." [Paragraph 19]

CIVIL AND POLITICAL RIGHTS

AFRIFORUM AND ANOTHER V CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF PRETORIA AND OTHERS [2017] 1 ALL SA 832 (GP).

Case heard 1 December 2016; Judgment delivered 15 December 2016.

This was an application to review and set aside decisions of the university senate and council to change university language policy, to provide for English as the main language of learning and teaching. Kollapen J (Baqwa and Mabuse JJ concurring) held that Section 29(2) of the Constitution provided that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. However, the exercise of the right to receive education in the language of one's choice cannot negate considerations of race and equity.

"[I]t could hardly be said that UP failed to be responsive to the constitutional rights of Afrikaans students seeking instruction in the language of Afrikaans. Being responsive can hardly equate to having to positively respond to the request made. What it requires is … to consider the request and determine whether the request is one that is reasonably practicable as contemplated in Section 29(2). I have demonstrated that this exercise, as required, was undertaken with a high level of

engagement, thoroughness and transparency and the ultimate conclusion that it would not be reasonably practicable was reached after a proper consideration of all the necessary and relevant factors in a context-sensitive understanding within which the claim was located." [Paragraph 47]

HENNIE AND OTHERS V MINISTER OF CORRECTIONAL SERVICES AND OTHERS (729/2015) [2015] ZAGPPHC 311 (7 MAY 2015)

Case heard 2 March 2015; Judgment delivered 7 May 2015.

Granted urgent application for prisoners to use laptop computers in their cells for study purposes.

"Having regard to the Respondents concern that granting an order in favour of the Applicants in this matter, will open flood gates for numerous applications similar to the current one, it needs to be taken into account that prior to this application, only two similar applications were brought in this division, one of which was settled between the parties, allowing the Applicant in the matter access to her personal computer in her cell and the other an order of court, which granted the applicant access to his personal computer in his cell. Those orders have hardly resulted in the 'opening of the floodgates' as it were." [Paragraph 27]

"In order for the Department to ensure that it gives effect to the rights of the offender students to have access to formal education as stated in the Constitution and to ensure that the Department gives effect to its vision and mission in respect of its formal education programme and considering the precautionary measures that can be put in place to ensure that security within the prison is not compromised by the use of personal laptops in single cells by the Applicants, as well as the inconsistent application of its policy on formal education, the disallowing of the use of personal laptops by the Applicants in this instance is without merit. … The Respondents have … not advanced a justification for the prohibition which they seek to apply. While security considerations will always remain an important feature of how a correctional facility is managed, on what is before me, there is no evidence that personal laptops without modems compromise security. On the other hand to refusal to allow the Applicants access to their laptop computers in their cells has the real risk of compromising their ability to study and infringes on their right to further education." [Paragraphs 42 – 43]

SOCIO-ECONOMIC RIGHTS

SECTION 27 AND OTHERS v MINISTER OF EDUCATION AND ANOTHER 2013 (2) SA 40 (GNP)

Case heard 17 May 2012; Judgment delivered 18 June 2012.

Held that that the failure of the respondents to provide textbooks to schools in Limpopo constituted a violation of the right to basic education; and ordered respondents to provide textbooks to certain grades as a matter of urgency; and ordered respondents to develop a "catch-up plan" for affected learners.

"… [T]he provision of learner support material in the form of such textbooks as may be prescribed is an essential component of the right to basic education, inextricably linked to the fulfilment of that right. In fact it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks. On that basis it accordingly has to follow — given the respondents' own goals and indicators in their Annual Performance Plan, and their target of 100% in respect of delivery of workbooks and textbooks for the entire school year — that the failure to provide textbooks by about midway through the academic year would prima facie constitute a violation of the right to basic education." [Paragraph 25]

The judgment was followed by the SCA in **MINISTER OF BASIC EDUCATION AND OTHERS v BASIC EDUCATION FOR ALL AND OTHERS 2016 (4) SA 63 (SCA)**, where the court said (at paragraph 46): "I agree with Kollapen J … that the failure to provide textbooks to learners in schools in Limpopo in the circumstances … is a violation of the rights to a basic education, equality, dignity, SASA and s 195 of the Constitution."

The judgment was also approved by the Eastern Cape High Court in **TRIPARTITE STEERING COMMITTEE AND ANOTHER v MINISTER OF BASIC EDUCATION AND OTHERS 2015 (5) SA 107 (ECG)**, where the court said (at paragraph 18): "In my view Kollapen J is correct. The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and transport to and from school at state expense in appropriate cases."

CIVIL PROCEDURE

GF v SH AND OTHERS 2011 (3) SA 25 (GNP)

Case heard and judgment delivered 9 December 2010.

Set aside a writ of execution, on the basis that the maintenance obligations had been varied by agreement, and that to insist on compliance with the court order in the face of a mediated agreement would offend against fairness and equity. The warrant was set aside as it did not take the adjusted maintenance amounts into account. Applicant was found in contempt of court for failing to pay maintenance during certain periods, and was sentenced to imprisonment, suspend on condition that arrear maintenance was paid.

"It must thus be clear and apparent that the risk … that public policy should not depend on the determination of subjective judicial minds, is unlikely to materialise in the constitutional dispensation of our society since the Constitution and its values provide, in the most compelling fashion, a framework to determine the scope and parameters of such public policy." [Paragraph 16]

"These in real and substantive terms represent the efforts and the conclusions reached by the parties with regard to how they would engage each other in respect of their reciprocal obligations towards the minor children, and therefore such agreements would fall to be considered as constituting a valid basis for the departure from the *Shifren* principle. In particular, to the extent that the letter … of 13 August 2008 evidences a new (albeit) temporary financial arrangement, which by

all accounts the parties gave effect to and complied with in broad substantial terms, it would constitute a gross inequality if it were open to the first respondent, having been party to both concluding such an agreement and giving effect thereto, to purport to ignore its existence simply on account of the fact that it was not reduced to writing and signed by the parties." [Paragraph 28]

The judgment was overturned in part by the SCA in **SH v GF AND OTHERS 2013 (6) SA 621 (SCA)**. The SCA held that there had been no variation of the maintenance order, but dismissed the appeal against the sanction for contempt of court.

The SCA said (paragraphs 15 – 16): "In context the parties in my judgment did not intend the arrangement … to constitute a variation of the maintenance order. What was envisaged was clearly that if the trial period should prove to be successful, a formal variation would be brought about and, until that takes place, there is no variation of the maintenance order. … I find therefore that the court a quo erred in concluding that the maintenance order was in fact varied. … In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution. … Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in *Shifren*."

CRIMINAL JUSTICE

S V MALUKA 2015 (2) SACR 273 (GP)

Case heard 28 May 2014, Judgment delivered 31 October 2014.

Whether an order made by a magistrate under s 78(6)(a)(ii)(aa) of the Criminal Procedure Act, read with s 37 of the Mental Care Act (committing a person as an involuntary mental health care user) should be reviewed by the High Court (Thobane and Dosio AJJ concurring).

"… [T]he potential for serious prejudice, which has been demonstrated in both theory and practice in the cases cited, does indeed make it desirable for some form of automatic review mechanism to be considered. This is a matter for the legislature to consider, and the court should carefully guard against the usurping of the legislative function. It is a matter best left to the executive and the legislature in terms of their policy-making and legislative functions. I intend to refer the matter to the ministers of justice and correctional services, as well as to the speaker of the legislature, for further attention." [Paragraph 40]

SELECTED PUBLICATIONS

"Not only the business of the state, but also a business of all: State reporting in South Africa and popular participation", *Journal of Law, Democracy and Development*, Volume 15 (2011).

This article discusses issues arising from South Africa's state reporting regarding international human rights law.

"While reporting is primarily a state obligation, what is contained in the report is not exclusively the business of state. It is the business of everybody else in the country inasmuch as they have an interest and stake in it. Similar reasoning applies in the case of entities like the United Nations (UN) and African Union (AU). Although they are inter-governmental organisations, their work is the concern of all humanity, and therefore everybody has an interest in what happens within these structures and in the reports that are submitted to them. In other words, given the existence of a gap between international standard - setting and compliance therewith, it is vital that citizens participate in the processes around state reporting, both at country and intergovernmental levels." [Page 516]

"We have a constitution that is committed to public participation at virtually every level of governance: the level of policy making, the level of law making and the level of service delivery. The notion of public participation is the golden thread running through the Constitution; by implication, that notion applies as well to the processes by which government discharges its international human rights obligations." [Page 518]

"Prisoners' Rights Under the Constitution Act No. 200 of 1993", *Centre for the Study of Violence and Reconciliation* Seminar No. 5, 1994 (http://www.csvr.org.za/wits/papers/papkolpn.htm)

"In recent times we have seen high levels of unrest in our prisons and while not condoning some of the actions taken, some of the underlying causes of such unrest appear to be legitimate. It might very well be argued that prisoners who all have a common interest should have the freedom to associate and any law which makes inroads on such freedoms would be unconstitutional. If one was able to successfully argue the freedom of association, the notion of prisoner organisations operating within prisons could become a reality, and if this is so, on what basis could one possibly argue against the right of such prisoners who belong to such associations, to assemble, demonstrate and present petitions. These questions pose interesting challenges not only to the administration of prisons but to the notion that we in society have regarding prisons and prisoners' rights. If prisoners were allowed to associate, to assemble and to present petitions, could it still be argued that such conduct was objectionable, or would someone seeking to outlaw such conduct have difficulty in presenting an argument to the effect that a limitation of such rights complied with the criteria set out in Section 33 of the Constitution. It would certainly appear that the Constitution, far from providing definite answers, brings up interesting questions."

MEDIA COVERAGE AND ADDITIONAL INFORMATION

Media report of keynote address at 2014 Public Interest Law Gathering (http://www.publicinterestlawgathering.com/media-report-on-keynote-by-judge-jody-kollapen/)

"… [H]e said, if the question was have we done enough to transform our society, the answer would have to be decisively no.

Kollapen cautioned against the judicialisation of politics, saying there was a critical role for public interest lawyers, but also a need for the awareness of the limits of that role. He said that despite their best intentions, public interest lawyers should be strategic about the kinds of cases they took up."

Quoted discussing higher education's role in human rights and transformation, at UNISA (http://www.unisa.ac.za/news/index.php/2014/09/higher-educations-role-in-transformation/)

"A university in advancing, defending and embracing academic freedom and institutional autonomy cannot do so without accepting the responsibility of changing society. Universities need to decolonise and deracialise higher education and some of the more practical ways (they) can do that is to be aware of their service providers, their human rights and transformation track record, how they work …"

Complainant in the Equality Court case of **Kollapen v Du Preez (EC 001/03) [2005] ZAEQC 1 (29 March 2005)**, which was settled with the respondent acknowledging that hairdressing salons under his control had unfairly discriminated on the basis of race by turning people away.

JUSTICE STEVAN MAJIEDT

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 18 December 1960.

LLB, University of the Western Cape (1983)

B.A, University of the Western Cape (1981)

CAREER PATH

Acting Justice of the Constitutional Court (2014).

Justice of Appeal, Supreme Court of Appeal (2010 – to date)

Judge of the Northern Cape High Court, Kimberley (2000 – 2010).

Acting Judge of the Northern Cape High Court, Kimberley (2000).

Advocate, Northern Cape Society of Advocates (January – March 2000).

Chief Provincial State Law Advisor, Office of the Premier, Kimberley (1996 – 1999).

Head, adjudication, Independent Electoral Commission, Northern Cape (1994).

Advocate, Cape Bar (1984 – 1995).

Chair, Commission of Inquiry into the sale of vehicles by the Department of Health, Northern Cape (2007).

Chair, International Commission of Inquiry into allegations of racism within Zimbabwean Cricket (2005).

Between 1996 – 1999, Justice Majiedt chaired the following Commissions of Inquiry:

Chair, Commission of Inquiry into the alienation and transfer of Municipal land at Douglas, Northern Cape.

Chair, Commission of Inquiry into housing in the Northern Cape.

Chair, Commission of Inquiry into the Kimberley Hospital Complex.

Chancellor, Sol Plaatjie University (August 2015 – to date).

Member, South African Judicial Education Institute (SAJEI), (2014 – to date).

Chairperson, Rules Board for the Courts of Law (2013 – to date).

Chairperson, William Pescod High School Alumni Trust (2009 – 2015)

Chairperson, St Joseph Congregational Church Council (2009 – 2015).

Chairperson, African Library Trust (2007 – 2015).

SELECTED JUDGMENTS

Table of judgments delivered as acting justice of the Constitutional Court. The judgments are tabulated as follows:

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d – number of cases where at least one judgment dissented from the leading judgment (J)

S – number of separate but concurring judgments written by the judge

D – number of dissenting judgments written by the judge.

YEAR	C	J	s	d	S	D
2014	11	1		2	1	
TOTAL	11	1		2	1	

PRIVATE LAW

MALAN V CITY OF CAPE TOWN 2014 (6) SA 315 (CC).

Case heard 20 February 2014; Decided on 18 September 2014.

The validity of the City of Cape Town's decision to cancel a lease agreement as well as an appeal against the High Court's eviction order. Majiedt AJ concluded that the City had lawfully and validly cancelled the lease because of Ms Malan's arrear rental and alleged illegal activities conducted on the property.

"Tenants in public housing thus may not be evicted merely on notice. There must be something more: either further breaches of the lease agreement, or the necessity to secure vacant premises for other pressing public reasons…. It is sufficient to say that, absent good cause, the Constitution forbids a government agency from using a contractual power of termination against a tenant in need of public housing." [Paragraph 64].

"As Ms Malan will be adequately accommodated as proposed, there is no good reason why the property should not be made available to a deserving, needy family. We were informed by Counsel for the City that there are many thousands of people waiting to be accommodated. The City must also bear in mind the rights and needs of these people." [Paragraph 85].

Majority judgment written by Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron, Jafta, Khampepe and Van der Westhuizen JJ concurred). Two dissenting judgments – Dambuza AJ (Froneman J and Madlanga J concurring), and Zondo J.

SOCIO – ECONOMIC RIGHTS

LESTER V NDLAMBE MUNICIPALITY AND ANOTHER [2014] 1 ALL SA 402 (SCA).

Case heard 15 May 2013; judgment delivered 22 August 2013.

Demolition of a luxurious building erected without approved building plans.

"[S]ection 26(3) of the Constitution must not only be read in its historical context, ie as a bulwark against the forced removals, summary evictions and arbitrary demolitions of the shameful past dispensation, but also together with section 26(1) and (2) … The protection afforded in section 26(3) must therefore always, without exception, be read against the backdrop of the right to have access to adequate housing, enshrined in section 26(1). Thus where a person, facing a demolition order, does not adduce any evidence that he or she would not, in the event of his or her dwelling being demolished by order of a court, be able to afford alternative housing, section 26(1) is of no avail to him or her. … This Court pointed out in Standard Bank of South Africa Ltd v Saunderson … that what constitutes "adequate housing" is always a factual enquiry and that executing a writ of execution in respect of a luxury home … has no bearing on the right of access to adequate housing. … The cardinal question is whether demolition of Lester's property would infringe upon his right to access to adequate housing. The answer, on the papers before us, must be an emphatic "no". … " [Paragraph 17]

The appeal was dismissed with costs. The majority judgment in *BSB International Link CC v Readam South Africa (Pty) Limited and another* [2016] 2 All SA 633 (SCA) raised doubts as to whether the interpretation accorded to section 21 of the National Building Regulations and Building Standards Act in *Lester* was cogent.

ADMINISTRATIVE JUSTICE

KIMBERLEY GIRLS' HIGH SCHOOL AND ANOTHER V THE HEAD OF DEPARTMENT OF EDUCATION, NORTHERN CAPE PROVINCE AND OTHERS [2005] 1 ALL SA 360 (NC).

Case heard 2 May 2003; Judgment delivered 30 May 2003.

Review of a decision by the first respondent to reject the governing body's recommendation for the appointment of an English higher grade, first language teacher. The first respondent had declined

the recommendation on the basis that the governing body had failed to give preference to candidates disadvantaged by injustices of the past, as required by the Employment of Educators Act, and that the recommendations had failed to have regard to the democratic values and principles referred to in the Act (Kgomo JP concurring).

"The notion that a head of department may not … independently and objectively ascertain whether a recommendation does indeed on the facts and prevailing circumstances accord with the democratic values and principles, is untenable in my view. In the present case the Head of Department was fully justified in my view to decline the recommendation and to remit the matter to the governing body. …" [Paragraph 21].

"… [W]hen the opportunity arises to correct the imbalances of the past by filling a post left vacant by a resignation, a concerted effort should be made (and, importantly, should clearly be seen to be made) to comply with the obligations imposed on a school governing body by section 6(3)(b)(v) of the Employment Act. This has clearly not happened in this matter." [Paragraph 26.3].

CONSTITUTIONAL AND STATUTORY INTERPRETATION

COOL IDEAS 1186 CC V HUBBARD AND ANOTHER 2014 (4) SA 474 (CC).

Case heard 5 February 2014; Decided on 5 June 2014.

The case was about a building contract for the construction of a residential dwelling unit. The issue was around a property developer not being a registered home builder in terms of the Housing Protection Act. An arbitration award was made in the builder's favour. The Court had to consider the proper meaning of section 10(1)(b) of the Housing Protection Act. It observed that the fundamental tenet of statutory interpretation was that the words in a statute had to be given their ordinary grammatical meaning, unless to do so would result in an absurdity. It was held that this was subject to three important interrelated riders to this general principle: Statutory provisions should always be interpreted purposively; they should be properly contextualised; and all statutes had to be construed consistently with the Constitution.

The Court refused to make the arbitration award an order of court but nonetheless stated:

"That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that constitutional values require courts to "be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently". Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute. … So it will often be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. But it will not always be so. The force of the prohibition must be weighed against the important goals of private arbitration that this court has recognised."[para 56].

Moseneke ACJ, Skweyiya ADCJ, Khampepe and Madlanga JJ concurred in the judgment of Majiedt AJ. Jafta J (Zondo J concurring) wrote separate concurring judgment. Froneman J (Cameron, Van der Westhuizen JJ and Dambuza AJ) dissented.

The judgment was criticised by Justice Malcolm Wallis in '**The Common Law's Cool Ideas for Dealing with Ms Hubbard',** ***South African Law Journal,*** **Vol. 132, Issue 4 (2015), pp. 940-970.** Justice Wallis argued that Majiedt AJ should have resolved the case by the straightforward application of common law principles. Instead, the article argued, Majiedt AJ created uncertainty and "cast doubt upon two long established rules that are part of the bedrock of the rule of law. The first was that a court would not order someone to do something that is forbidden by law. The second, an extension of the first, was that an arbitrator is in the same position as a court and likewise may not, by an award, order that something unlawful be done. In part the reason was that the court held itself bound by the incorrect approach to the case by the litigants, contrary to its own decision that this infringes the principle of legality." Justice Wallis argued that Majiedt AJ created uncertainty in well-established common law principle by leaving open the possibility that an award, performance of which involved the breach of a statutory provision and constituted a criminal offence, might nonetheless be enforceable. Furthermore, it was argued that while Majiedt AJ held that the contract remained valid and binding, this was incorrect since "[a] contract to perform work, when the law prohibits the party under that obligation from performing the work, cannot be a valid contract, much less an enforceable one."

Justice Wallis argued that there was a claim for unjustified enrichment however the majority held that such a remedy was precluded due to the continuing validity of the contract. "The premise was incorrect, the authority relied upon inapplicable, and the result mistaken. This was then compounded by the court holding that the absence of an enrichment action was a deprivation of property. However, if the necessary elements of an enrichment action were not present, their absence could not be a deprivation of property. There can only be a deprivation of property if, in the first place, there is some property, in the broad sense in which that expression is used in s 25 of the Constitution. But if Cool Ideas did not have an enrichment claim, because the contract remained valid and binding, it could not be deprived of that non-existent claim and the whole discussion of an arbitrary deprivation of property became irrelevant. …"

Regarding Majiedt AJ's approach to statutory interpretation, Justice Wallis commented that:

"it is to be hoped that this does not signal a reversion to a process of interpretation that most thought had been safely confined to history and one that is inconsistent with the previous approach of the Constitutional Court. … [T]he SCA now approaches the interpretation of statutes and all documents in a manner that respects the language used whilst also being purposive, contextualised and consistent with the Constitution and constitutional values. Those developments themselves accord with constitutional values that encourage transparency in judicial reasoning. It will be a considerable backward step for the Constitutional Court to endorse any return to literalism in statutory interpretation." [Page 953].

CIVIL PROCEDURE

MINISTER OF AGRICULTURE AND LAND AFFAIRS V CJ RANCE (PTY) LTD [2010] 3 ALL SA 537 (SCA).

Case heard 3 February 2010; Judgment delivered 25 March 2010.

Condonation in terms of section 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

'In considering whether condonation was rightly granted it is instructive to bear in mind why notices of the kind contemplated in section 3 of the Act have been insisted on by the Legislature. Statutory requirements of notice have long been familiar features of South Africa's legal landscape. The conventional explanation for demanding prior notification of intention to sue organs of State, is that: "with its extensive activities and large staff which tends to shift it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them."

From time to time there have been judicial pronouncements about how such provisions restrict the rights of its potential litigants. However, their legitimacy and constitutionality is not in issue."

JC Sonnekus, in 'Shielding of Parastatals Against Claims for Performance: An Unwarranted Digression From Legal Principles' in *The South African Law Journal,* Vol 128, Issue 2 (2011), criticized Majiedt AJA for proffering no explanation as to why the reasons he relied upon from the *Mohlomi* judgment of the Constitutional do not find any application in all litigation matters, and not just those where the state is the defendant. Moreover, the judgment does not explain why the same reasons do not apply when the state is involved as a claimant.

CRIMINAL JUSTICE

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE V SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE AND ANOTHER (DUGARD AND OTHERS AS AMICI CURIAE) 2015 (1) SA 315 (CC).

Case heard 19 May 2014; Judgment delivered 30 October 2014.

The extent to which the SAPS is obligated under domestic and international law to investigate crimes against humanity of torture allegedly committed in Zimbabwe. The court held that torture formed part of the category of crimes in which all states have an interest in terms of customary international law. Accordingly, the appellant's contention that it could not investigate without a suspect's presence in the country was rejected.

"We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity." [Paragraph 80].

The judgment was commended by Max du Plessis in *Institute for Security Studies Policy Brief 81* November 2015, where he stated that "the decision establishes a progressive framework for prosecuting international crimes, provides a powerful tool against impunity, and confirms that states can and must play a complementary role in pursuing the aims of international criminal justice in respect of non-state parties."

ELS V STALS AND OTHERS [2009] JOL 23294 (NCK).

Case heard 20 February 2009; Judgment delivered 13 March 2009.

The applicant was an accused in a private prosecution for rape. He sought a declaratory order and injunctive relief in the form of a permanent stay of prosecution against the first respondent, who was the private prosecutor and the complainant. Majiedt J (Tlaletsi J concurring) issued the stay, holding that the unreasonable delay, for which it regarded the first respondent as fully culpable, would result in irreparable trial prejudice to the applicant and deny him his constitutional right to a fair trial.

The decision was unanimously overturned by the Constitutional Court: **Bothma v Els and Others (CCT 21/09) [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) SACR 184 (CC); 2010 (1) BCLR 1 (CC) (8 October 2009)**

MEDIA COVERAGE

In 2006, Judge Majiedt, Judge Lacock, and Judge President Kgomo were involved in a dispute over alleged racism, nepotism and discrimination. The incident originated from a dispute over who would act as judge president while Kgomo JP was acting at the SCA. Kgomo JP lodged a complaint with the JSC in 2006 demanding that Judges Majiedt and Lacock be fired for misconduct after they allegedly insulted him. Judges Majiedt and Lacock laid a counter-complaint. In a statement the JSC said that the conduct of Judges Majiedt and Lacock "using insulting and inappropriate language constituted unacceptable and unworthy conduct." The incident is discussed in the following articles: http://www.bdlive.co.za/articles/2008/10/15/history-casts-shadow-over-appeal-court-hopefuls and http://constitutionallyspeaking.co.za/another-racial-spat-in-the-judiciary/.

JUSTICE BOISSIE MBHA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 31 July 1952

BJuris, University of Fort Hare (1981)

LLB, Witwatersrand University (1985)

Advanced Diploma in Labour Law, University of Johannesberg (1996)

Advanced Diploma in Tax Practice, University of Johannesberg (1999)

LLM, University of Johannesberg (2010)

CAREER PATH

Acting Judge, Constitutional Court (2016)

Justice of Appeal, Supreme Court of Appeal (2014 -)

Acting Justice of Appeal, Supreme Court of Appeal (2012 – 2013)

Judge, alternate chairperson, Court of Military Appeals (2007 – 2014)

Judge, Gauteng High Court (2004)

Acting Judge, Gauteng High Court (2003 – 2004)

Senior Military Judge, South African National Defence Force (2003)

BH Mbha Attorneys (1990 – 2003)

Professional Assistant, Bowman Gilfilian Attorneys (1986 – 1990)

Articled Clerk, R.N. Bhoolia Attorneys (1983 – 1986)

Member, SA Council for Medical Schemes (2002 – 2003)

Member, Transvaal Law Society Council (1998 – 1999)

Member, Black Lawyers' Association (1987 -)

SELECTED JUDGMENTS

Table of judgments delivered as acting justice of the Constitutional Court. The judgments are tabulated as follows:

C- number of cases heard by the judge

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d – number of cases where at least one judgment dissented from the leading judgment (J)

S – number of separate but concurring judgments written by the judge

D – number of dissenting judgments written by the judge.

YEAR	C	J	s	d	S	D
2017	5	1				
2016	12		1			
TOTAL	17	1	1			

PRIVATE LAW

LAUBSCHER NO V DUPLAN AND ANOTHER [2016] ZACC 44.

Case heard 18 August 2016; Judgment delivered 30 November 2016.

This matter concerned the intestate succession rights of unmarried same-sex partners in a permanent same-sex partnership, in which the partners had undertaken reciprocal duties of support. The deceased and the respondent had lived together in a permanent same-sex partnership, with reciprocal duties of support. The partnership was never formally solemnised or registered, and the deceased died intestate. At issue was whether the respondent could nevertheless inherit. The High court found that the respondent was the only intestate heir. Mbha AJ (Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring) dismissed the appeal. Froneman J wrote a separate concurring judgment.

"Although this Court had specifically ordered that the benefit be extended to permanent same-sex partners, the Legislature, within its rightful discretion, widened the ambit of protection to include both same-sex and opposite-sex unmarried partners. The result is an apt example of the Legislature "equalising up" while giving effect to the rights prescribed by this Court's order. In my view, the Court in *Gory* had clearly foreseen the enactment of CUA and had envisioned that same-sex permanent partners would continue to be protected despite not concluding a "marriage" (or union as it turned out to be), under the new dispensation. Any indication to the contrary is best left to Parliament to decipher." [Paragraph 32]

"Civil unions concluded under CUA constitute a new category of beneficiary for purposes of ISA and are distinguishable from same-sex permanent life partnerships. As a result, same-sex permanent partners will continue to enjoy intestate succession rights under section 1(1) of ISA, as per the *Gory* order, until such time that the Legislature specifically amends the section." [Paragraph 55]

In an article entitled ***Moralistic view of marriage leaves unmarried couples unprotected*** [http://constitutionallyspeaking.co.za/moralistic-view-of-marriage-leaves-unmarried-couples-unprotected/], Professor Pierre de Vos criticises the majority judgment for not revisiting the sexist reasoning in the *Volks v Robinson* judgment. In an aside, he also argued that the judgment wrongly and in a demeaning way referred to same sex marriages concluded in terms of the Civil Union Act in inverted commas as "marriages" or as civil unions – "as if such unions are not fully fledged marriages that are identical to different sex marriages." This, he argued, suggests the Court's reluctance "to accept the equal status of marriages concluded under the Civil Union Act, even though the Act explicitly recognizes that such marriages may be called marriages and that they attract the same legal rights and duties as other marriages."

SOCIO-ECONOMIC RIGHTS

GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL AND ANOTHER V MEC FOR EDUCATION: GAUTENG PROVINCE AND OTHERS [2012] 1 ALL SA 576 (GSJ)

Case heard 3 - 4 October 2011, Judgment delivered 07 December 2011

Applicant sought to set aside a decision taken by the Head of Department: Gauteng Department of Education, instructing the Principal of the Rivonia Primary School to enroll a learner in Grade 1 at the school, contrary to the school's admission policy as determined by the governing body. Mbha J held that the Schools Act did not grant a school governing body an unqualified power to determine a public school's admissions policy; that the power to determine the maximum capacity of a public school in Gauteng vested in the Gauteng Department of Education and not in the school governing body; that the Gauteng Department of Education had the power to intervene in the school governing body's power to determine the admission policy of a public school; and that the MEC for Education, Gauteng Province, was the ultimate arbiter whether or not a learner should be admitted to a public school.

"Our Constitution places a duty on all the courts to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values. The primary right involved in this matter is the right to a basic education. This right is guaranteed by section 29(1)(a) of the Constitution. It

is enshrined in the Bill of Rights. In terms of section 7(2) of the Constitution the State must respect, protect, promote and fulfil these rights. Accordingly, the statutory powers, rights and obligations of the applicants and the first to third respondents must be understood in the context of the constitutional commitment to substantive equality in section 9, and, importantly the constitutional guarantee of access to a basic education in section 29(1)(a). The importance of the right to basic education is underscored by the fact that, unlike other socio-economic rights it is not subject to the limits of "availability of resources" or "reasonable legislative measures. Secondly, central to the quest and government's commitment to transforming the current, unjust and unequal basic education system is not only about redressing past injustices, but importantly it is also about breaking the cycle of poverty that perpetuates the patterns of class and racial inequality generation after generation. Undoubtedly, the right to education is an empowerment right that enables people to realise their potential and improve their conditions of living. …" [Paragraphs 24-26]

"Leaving schools to determine their admission policy, including the power to determine their capacity, and subject only to appeals in individual cases, one unwittingly creates space privileged schools can use and manipulate that power to fortify rather than dismantle existing inequalities. Schools such as the applicants could thus craft admissions policies that allow them to continue to offer a premium education to their learners, while ignoring the increased demand their action places on other schools in the area that are already operating with fewer resources and higher learner-to-class ratios. … [I]nterpreting the Act to deny government the ability to intervene to ensure an equitable distribution of learners across all schools in the areas prevents it from fulfilling its obligation under section 7(2) of the Constitution to "respect, protect, promote and fulfil" the right to equality and to a basic education. … " [Paragraphs 73-74]

The decision was overturned by the SCA in **Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others 2013 (1) SA 632 (SCA)**, finding that the instruction to admit the learner contrary to the school's admission policy, had been unlawful. However, the Constitutional Court in turn reversed the SCA in **MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others 2013 (6) SA 582 (CC)**, finding that the HoD of Education had been empowered to issue the instruction to the principal to admit the learner in excess of the limit in its admission policy, but that in exercising that power, the HoD had to act in a procedurally fair manner, and had not done so.

ADMINISTATIVE JUSTICE

LOUISVALE PIRATES V SOUTH AFRICAN FOOTBALL ASSOCIATION (40614/2011) [2012] ZAGPJHC 78 (4 MAY 2012)

Case heard 14 February 2012, Judgment delivered 4 May 2012

The applicant football team had been thrown out of a competition following a ruling by the disciplinary committee of the respondent, and sought an order declaring this ruling null and void. The court had to decide whether the applicant had prematurely approached the court, having not exhausted all available internal remedies, and whether the decision was reviewable under the Promotion of Administrative Justice Act (PAJA).

Mbha J dismissed the application:

"PAJA does not confine the definition of administrative action to decisions only by organs of State or public bodies. It also includes any decision taken, or any failure to take a decision by a natural or juristic person when exercising a public power or when performing a public function, which adversely affects the right of any person and which has a direct, external legal effect. An empowering provision is defined as "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken" (my emphasis). I am accordingly of the view that the constitution of SAFA in terms of which soccer is governed in this country, constitutes an empowering provision in terms of which the respondent carries out its functions including disciplining its members. The respondent is the dominant and only soccer body governing the game of soccer in the country. It exercises this power nationally and whatever decision it makes, on any matter involving soccer, effects the public. I am also informed that it partly receives its funding from the government. It is accordingly a body which performs a public function which is to, inter alia, entertain the nation, provide employment and develop, control and manage sporting activities for all young and old nationally. It is also a well-known fact that soccer is a sport which is enjoying wide-ranging support in South Africa resulting in the fate of soccer teams and players being a matter of public interest. It is thus of vital importance that the respondent exercises its decisions within the strict rules of natural justice as all soccer teams, players, soccer matches and associated activities fall within the public interest domain. Although the respondent is a private body or voluntary association, the public at large has an interest in what happens in soccer generally. It stands to reason that the disciplining and the possible subsequent suspension of soccer teams by the respondent, is of necessity a matter of public interest or concern." [Paragraphs 24-25]

CRIMINAL JUSTICE

S V MAFOHO 2013 (2) SACR 179 (SCA)

Case heard 12 March 2013, Judgment delivered 28 March 2013

Appellant had, in 2001, been sentenced to 275 years imprisonment having pleaded guilty to 60 counts of robbery with aggravating circumstances, attempted murder, rape, attempted rape and pointing a firearm. At issue was the appropriateness of the sentence in light of legislative provisions regarding eligibility for parole.

Mbha AJA (Mthiyane DP, Shongwe JA, Schoeman and Swain AJJA concurring) dismissed the appeal:

"Section 136(1) of the new Act provides that any person serving a sentence of incarceration (that is, offenders serving determinate and indeterminate sentences immediately before the commencement of the new Act) is subject to the provisions of the old Act. Clearly, this section preserves the policy and guidelines that applied at any time before the new Act came into operation in 2004. … It is therefore clear that … the parole provisions applicable to the appellant were those set out in s 65(4)(a) of the old Act, namely that a prisoner serving a determinate sentence imposed prior to July 2004 is not considered for parole before having served half of the sentence, unless the date for considering parole is brought forward as a result of credits earned. …" [Paragraphs 12 - 13]

"On 1 October 2004 the Parole and Correctional Supervision Amendment Act … (the 1997 Act) came into operation. The 1997 Act amended s 65(4)(a) of the old Act by providing that a prisoner serving a determinate sentence shall not be considered for placement on parole, unless he has served half of his

term of imprisonment, provided that no such prisoner shall serve more than 25 years before being considered for parole. Of particular relevance to this case is that the 1997 Act also amended … the old Act by providing that, in respect of imprisonment contemplated in s 52(2) of the Minimum Sentences Act … the prisoner shall not be placed on parole unless he has served at least four-fifths of the term of imprisonment imposed, or 25 years, whichever is the shorter." [Paragraph 14]

"In my view, s 9 of the 1997 Act is intended to ensure legal continuity and to prevent a hiatus developing. Clearly, the repeal of s 65 of the old Act and its substitution in terms of the 1997 Act ensured that there was no gap in continuity between the provisions of s 65 as contained in the old Act, and as substituted in terms of the 1997 Act. … The issue, accordingly, is the effect, of the amendment of the parole period in s 65(4) of the old Act, upon the appellant's right to parole. … [T]he intention of the legislature was to create equality amongst those prisoners eligible for parole, irrespective of whether they were sentenced before or after the passing of the new Act. …" [Paragraphs 16 - 17]

JUSTICE LEONA THERON

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 7 November 1966

BA, University of Natal (1987)

LLB, University of Natal (1989)

LLM, Georgetown University, Washington DC, USA (1990)

CAREER PATH

Acting Justice, Constitutional Court (2015)

Justice of Appeal, Supreme Court of Appeal (2010 -)

Acting Justice of Appeal, Supreme Court of Appeal (2009 – 2010)

Judge, KwaZulu-Natal High Court (1999 – 2010)

Acting Judge, High Court, KwaZulu-Natal and Transkei divisions (1999)

Advocate of the High Court (1991 – 1999)

Provincial Adjudication Secretary, Independent Electoral Commission (1994)

Special Assistant to the Director, International Labour Organisation, Washington D.C. (1989 – 1990)

Candidate Attorney, Dawson & Partners (1989)

Commonwealth Magistrates' and Judges Association

- Member of Council (2009 – 2012)
- Member (2007 -)

South African Chapter, International Association of Women Judges

- Vice President (programs) (2004 – 2007)
- Member (2004 - ; founding member 2003)

Member of board of trustees, Commonwealth Judicial Education Institute (2007 – 2016)

Council member, South African Judicial Education Institute (2008 – 2013)

Member, Chairperson of High Court sub committee, Rules Board for Courts of Law (2008 – 2012)

Provincial Board member, NICRO (1999 – 2010)

Member, NADEL (1990 – 1999)

Members, Advocates for Transformation (until 1999)

SELECTED JUDGMENTS

Table of judgments delivered as acting justice of the Constitutional Court. The judgments are tabulated as follows:

C- number of cases heard by the judge

J – number of unanimous leading judgments written by the judge

s – number of cases where at least one separate judgment concurred with the leading judgment (J)

d – number of cases where at least one judgment dissented from the leading judgment (J)

S – number of separate but concurring judgments written by the judge

D – number of dissenting judgments written by the judge.

YEAR	C	J	s	d	S	D
2015	21	2		2		
TOTAL	21	2		2		

ADMINISTRATIVE JUSTICE

HEAD, DEPARTMENT OF EDUCATION, FREE STATE PROVINCE V WELKOM HIGH SCHOOL AND ANOTHER 2012 (6) SA 525 (SCA)

Case heard 18 September 2012, Judgment delivered 28 September 2012

The respondents were public schools and their governing bodies. The governing bodies had adopted pregnancy policies, in terms of which two learners were excluded from the schools for a stipulated period, having fallen pregnant. The appellant (HOD) instructed the school principals to allow the learners to return to school immediately. The high court held that the HOD lacked the authority to compel the principals to act contrary to a policy adopted by the governing bodies, and that the decisions to exclude the learners were valid in law.

Theron JA (Mpati P, Cloete and Mhlantla JJA and Plasket AJA concurring) dismissed the appeal:

"The HOD alleges that he is, in these proceedings, protecting the constitutional right of learners not to be excluded from school. A collateral challenge of this nature … is not a defence in the hands of the HOD. The HOD says the pregnancy policies are unlawful, and in a nutshell, the basis of his defence is that the HOD has the power to instruct principals, as their employer, not to obey an unlawful policy or act in an unlawful manner, especially if to do so would be unconstitutional. That is a direct challenge and he has to approach a court to set aside the decisions that are, in his opinion, invalid. … " [Paragraph 16]

"[T]he adoption of a code of conduct is a governance issue that falls within the domain of the governing body. It does not fall within the professional management of a public school that must be undertaken by the principal under the authority of the HOD. The HOD … does not have any authority, under the Act, to issue an instruction to a principal to disregard a policy adopted by the governing body in relation to governance matters at the school. The HOD's opinion that such policy might be unlawful is no justification for his interference in matters over which the governing body exercises responsibility. " [Paragraphs 21 - 22]

"A decision by a school governing body to adopt a pregnancy policy is an administrative decision. Even if the pregnancy policies adopted are unconstitutional, and even if school governing bodies are not empowered by the Act to adopt such policies … it does not follow that the HOD is entitled to instruct the principals to disregard such policies. … The HOD says that by issuing the instructions … he was acting in the best interests of the learners who were being denied access to school in terms of unlawful and unconstitutional polices. The purest of motives of the HOD cannot justify what amounts to self-help. …" [Paragraphs 23 - 24]

"T]he HOD issued a directive … that D and M should be allowed to return to school and that the decision of the governing bodies be rescinded. The HOD … was in effect substituting his own pregnancy policy for that of the respective schools. The HOD does not have the power … to determine pregnancy policies for the schools. Whether the governing bodies have such power is irrelevant, and so is the constitutionality of the policies … It suffices, for the purposes of this appeal, to hold that the HOD failed to adhere to the principle of legality and that his conduct is accordingly unlawful …" [Paragraph 27]

The decision of the SCA was upheld by a plurality of the Constitutional Court: Head of Department, Department of Education, Free State Province v Welkom High School and Others 2014 (2) SA 228 (CC).

CHILDRENS' RIGHTS

DE GREE AND ANOTHER V WEBB AND OTHERS (CENTRE FOR CHILD LAW AS AMICUS CURAE) 2007 (5) SA 184 (SCA)

Case heard 9 May 2007, Judgment delivered 1 June 2007

The appellants were American citizens who wished to adopt an abandoned child (R), and leave South Africa with her. The child had been placed in the foster care of the first two respondents. An application by the appellants for, inter alia, an order that sole custody and guardianship of the minor child be awarded to them and authorisation to leave South Africa was dismissed by the High Court.

Theron AJA (Snyders JA concurring) held:

"The problem with granting a custody and guardianship order with a view to concluding an adoption in a foreign country is that such an approach circumvents local adoption law and falls short of the standards and safeguards provided by the law. … South Africans wishing to adopt a child would be required to make application to the Children's Court. There is no good reason why an alternate route, via the High Court, should be available to foreigners …" [Paragraph 15]

"…The appellants' first port of call should have been the Children's Court and, if necessary, they could, thereafter, have taken the matter on review or appeal to the High Court." [Paragraph 20]

"In my view, it is not in R's best interests that she be removed from the country in terms of a custody and guardianship order, without the protection and safeguards of an adoption first effect in the Children's Court." [Paragraph 27]

Heher JA (Hancke AJA concurring) dissented, holding that the best interests of the child "were overwhelmingly favoured by the grant of the application" [paragraph 29], and disagreeing "strongly with Theron AJA that the grant of the application would 'sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified'." [Paragraph 54]. Heher JA held that the value to the child of a stable future in the United States, and deprivation and prejudice she would suffer if no adoptive parent should were found outweighed "the sum of formal compliance with the Child Care Act." [Paragraphs 77 – 78]. Ponnan JA concurred in the judgment of Theron AJA.

The Constitutional Court partly upheld and partly reversed the decision of Theron AJA. The Court held that the High Court did have jurisdiction to make a sole custody and guardianship order, even if the ultimate objective was adoption by foreigners in a foreign jurisdiction. But bypassing the Children's Court would only be justified in very exceptional circumstances, and in this case it would be in the child's best interests to refer the matter to the Children's Court. The Court held that the SCA should have proactively referred the matter to the Children's Court, rather than dismissing the appeal outright: **AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC)**.

CRIMINAL JUSTICE

MOLAUDZI V S 2015 (8) BCLR 904 (CC).

Judgment delivered 25 June 2015.

The matter concerned the doctrine of res judicata, the principle that once a matter has been judged on the merits it may not generally be pursued by the same parties, and the Court's power to reconsider a previous final order. The applicant had been sentenced to life imprisonment, and applied for leave to appeal to the Constitutional Court. The application was dismissed because it was based on an attack on the factual findings of the High Court, thus not raising a constitutional issue and engaging the Court's jurisdiction. Two of the applicant's co-accused applied for leave to appeal, but raised constitutional arguments regarding the evidence admitted against them. The Constitutional Court considered this to be a meritorious constitutional issue which engaged its jurisdiction and granted them leave to appeal. The Court overturned their convictions and ordered their immediate release.

The applicant then brought another application for leave to appeal to the Constitutional Court, to have his convictions and sentences set aside, in which he raised the same arguments advanced in his co-accused's appeal. He maintained that the case was not res judicata because the second application raised new constitutional arguments which were not previously before the Court.

In a unanimous judgment, Theron AJ found that while, in the first application, the Court was not called upon to adjudicate the substantive constitutional challenges now raised, the second application was still res judicata as the Court had already made a final judgment on the merits of the case. However, where significant or manifest injustice would result if a final order stands, the doctrine ought to be relaxed in a manner which permits the Court to revisit its past decisions in accordance with its inherent powers and constitutional mandate to develop the common law. This requires rare and exceptional circumstances, where there is no alternative effective remedy.

"Since *res judicata* is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures." [Paragraph 32].

"Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to *res judicata*. The present case demonstrates exceptional circumstances that cry out for flexibility on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi."[Paragraph 45].

NKOMO V S [2007] 3 ALL SA 596 (SCA)

Case heard: 21 November 2006, Judgment delivered 1 December 2006.

The appellant had been convicted of rape and kidnapping, and sentenced him to life imprisonment. Lewis JA (Cameron JA concurring) held that the court below had erred in not considering the mitigating factors adduced by the appellant to constitute substantial and compelling circumstances, and replaced the sentence with one of 16 years' imprisonment.

Theron AJA dissented:

"The fact that the complainant jumped from the second floor, despite the possible threat of physical injury or worse to herself, is indicative of the desperation that she felt and the lengths to which she was prepared to go to escape from the clutches of the appellant. ..." [Paragraph 27]

"In my view, the rape of the complainant is one of the worst imaginable. If life imprisonment is not appropriate in a rape as brutal as this, then when would it be appropriate? I am of the view that this is precisely the kind of matter the legislature had in mind for the imposition of the minimum sentence of life imprisonment. Courts must not shrink from their *duty* to impose, in appropriate cases, the prescribed minimum sentences ordained by the legislature." [Paragraph 28]

"Against the backdrop of the unprecedented spate of rapes in this country, courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women. Society's legitimate expectation is 'that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because [substantial and compelling] circumstances are, unwarrantedly, held to be present.' In our constitutional order women are entitled to expect and insist upon the full protection of the law." [Paragraph 29]

"There is hardly a person of whom it can be said that there is no prospect of rehabilitation. The appellant was 29 years old at the time and would ordinarily not be regarded as a youthful or immature offender. Employment in itself would not necessarily qualify as a substantial and compelling circumstance. ... I can see no room to conclude that the totality of facts in this case are such that they constitute substantial and compelling circumstances. The basis therefore suggested by Lewis JA ... for interfering with the sentence is unwarranted." [Paragraph 30]

SHINGA AND ANOTHER V S [2007] 1 All SA 113 (N)

Case heard 16 September , 16 December 2005, Judgment delivered 3 August 2006.

The issue to be decided in this case was whether the appeal procedure created by sections 309(3A), 309B and 309(C) of the Criminal Procedure Act 51 of 1977 were constitutional. These provisions regulated *inter alia* the disposal of appeals by the High Court in chambers based on written argument. Theron J (Hugo J and Koen AJ concurring) held that the provisions were inconsistent with the Constitution and invalid.

"...The requirement of written argument prejudices an appellant who, if he or she does not have access to legal representation, will find it nearly impossible, as a lay litigant, to adequately prepare written argument. The requirement of written argument will also prejudice an appellant who has access to legal representation. Even experienced counsel cannot be expected in all cases to produce fully

comprehensive written argument which addresses all possible issues which may be, or become, relevant when the appeal comes under consideration." [Paragraph 14]

"Oral argument is an invaluable tool. Were this not so our legal history and traditions would have been to argue appeals by way of written submissions only. … I am of the view that section 309(3A) of the CPA, by depriving an appellant of the right to be present and have an audience at the hearing of such appellant's criminal appeal, offends constitutional norms and unjustifiably limits individual rights in particular, the right to a fair trial as contemplated by section 35(3) of the Constitution." [Paragraph 15]

"Essential to a determination of whether the limitation is reasonable and justified is, *inter alia,* the purpose thereof. The only conceivable purpose why an appellant should be deprived of both the right to be present and have audience and his or her appeal, would be for the convenience of the State or the Courts, or to streamline and speed up the processing of appeals, in order to save time. Neither the saving of time, nor the convenience of the Court, can reasonably justify the deprivation of fundamental and established rights brought about by s 309(3A) of the CPA. If one were to try and balance these interests … then the right of an appellant to a fair hearing must prevail. …" [Paragraph 25]

The Constitutional Court declined to hold sections 309B and 309C unconstitutional in their entirety, and referred the case back to the High Court: **Shinga v The State & another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell & others v The State 2007 (4) SA 611 (CC).**

CUSTOMARY LAW

GUMEDE (BORN SHANGE) V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (4225/2006)

[2008] ZAKZHC 41 (13 JUNE 2008)

Case heard 6 December 2007, Judgment delivered 13 June 2007.

The applicant sought an order declaring certain provisions of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proclamation R151 of 1987 (which governed customary marriages concluded prior to 15 November 2000) unconstitutional. The applicant also sought an order declaring that the distinction that the Recognition of Customary Marriages Act drew between the two categories of marriages was unconstitutional.

Theron J held that the impugned provisions were inconsistent with the Constitution and invalid:

"Section 7 of the Recognition Act differentiates between people who entered into customary marriages before the commencement of the Act and those who entered into such marriages thereafter. The position prior to the Recognition Act was that the proprietary consequences of *all* customary marriages were governed by customary law. Now, the default position in respect of monogamous customary marriages entered into after the commencement of the Recognition Act is that they are in community of property." [Paragraph 11]

"In my view, the proprietary regime established by the codification of customary law, is, prima facie, discriminatory. It is discriminatory as only African women are subjected by the law to such consequences.

The discrimination is on two of the prohibited grounds listed in section 9(3) of the Constitution, namely race and gender. …" [Paragraph 12]

"… [T]he provisions of the Divorce Act do not affect the proprietary regime which exists during the subsistence of the customary marriage. Secondly, the current statutory provisions creates a default situation in which, upon divorce, the fifth respondent will remain the owner of all the property acquired during the course of the marriage, unless the applicant is able to persuade the Divorce Court to make an order transferring some of the fifth respondent's property to her … The position of the applicant in this regard is sharply different to that of women who are not black or who entered into customary marriages after the commencement of the Recognition Act." [Paragraph 14]

The decision was upheld by the Constitutional Court in **Gumede (born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) (8 December 2008).**

JUSTICE MALCOM WALLIS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 8 July 1950

PhD, University of Kwa-Zulu Natal (2001)

LLB (Cum Laude), University of Natal (1972)

B Com, University of Natal (1970)

CAREER PATH

Acting Justice of the Constitutional Court (2015 – 2015)

Justice of Appeal, Supreme Court of Appeal (2011 to date)

Judge, Labour Appeal Court (2010 – 2011)

Acting Judge, Competition Appeal Court (2010 – 2011)

Acting Judge, Supreme Court of Appeal (2009)

Judge of the KwaZulu-Natal High Court (2009 – 2011)

Acting Judge, Labour Court (2000)

Acting Judge, High Court: 1 – 31 March 1987; 31 August – 4 September 1987; 1 – 28 February 1988; 4 – 29 June 1990; 18 – 19 July 2002; 20 – 21 July 2003; 22 – 23 July 2004; 12 July 2005; 20 July 2006; 3 – 30 March 2008; and 21 – 23 July 2008

Chair, Natal Bar (1991 – 1993)

Obtained senior counsel status 1985

Advocate, Natal Bar (1973 – 2008)

Honorary Bencher, King's Inn, Dublin (2013)

Fellow of the International Academy for Trial Advocates (1999 – 2007)

Honorary Member, Australian Bar Association (2003)

Honorary Vice-President, General Council of the Bar

Honorary Professor, Faculty of Law, UKZN (2011 to date)

Various offices in IBA structures (1994 – 2009)

Vice-Chair, Bar Issues Commission of the IBA (2004 – 2006)

Co-Chair, Barristers and Advocates Forum of the International Bar Association (1998-2002)

Chair, General Council of the Bar (1994 – 1997)

Vice-Chair, General Council of the Bar (1993 – 1994)

JUDGMENTS

Table of judgments delivered as acting justice of the Constitutional Court. The judgments are tabulated as follows:

C- number of cases heard by the judge

J – number of unanimous leading judgments written by the judge

s – number of cases where at least one separate judgment concurred with the leading judgment (J)

d – number of cases where at least one judgment dissented from the leading judgment (J)

S – number of separate but concurring judgments written by the judge

D – number of dissenting judgments written by the judge.

YEAR	C	J	s	d	S	D
2016	10	1			2	
2015	2					
TOTAL	12	1			2	

COMMERCIAL LAW

PAULSEN AND ANOTHER V SLIP KNOT INVESTMENTS 777 (PTY) LTD [2014] 2 ALL SA 527 (SCA)

Found that the *in duplum* rule continues to operate after litigation commences, capping the amount of accrued interest at the capital sum (overturned *Standard Bank of South Africa Ltd. v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA)). Willis JA concurred in part and dissented in part.

Appealed to the Constitutional Court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC). Moseneke DCJ (Mogoeng CJ, Leeuw AJ, Khampepe J and van der Westhuizen J concurring) broadly confirmed the substance of Wallis JA's judgment, but pointed out

at [113-114] that the SCA had in fact developed the common law in its approach to the *in duplum* rule (despite claims to the contrary). Further, at [115]: 'The main judgment makes another mistake in reasoning that the separation of powers precludes it from adapting the common law in this case.... Developing the *in duplum* rule, a common law norm that has always been under the oversight of the courts, will not encroach on any exclusive terrain of Parliament.'

SOCIO – ECONOMIC RIGHTS

EDUCATED RISK INVESTMENTS 165 (PTY) LTD AND OTHERS V EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS [2016] 3 ALL SA 18 (SCA)

This case dealt with town planning, and informal housing compliance with a Town Planning Scheme.

"One of the characteristics of apartheid was chronic under-provision of housing for the vast majority of South Africans in our major urban areas at a time when there was rapidly increasing urbanisation. Its consequences were to be seen in the mushrooming of informal settlements in and around urban areas that are still part of our urban landscape. Conventional town planning schemes, of which the one before us in this case is an example, generally have no provisions specifically directed at this situation or the interplay between addressing these social issues and formal development of the urban environment." [Paragraph 15]

ADMINISTRATIVE JUSTICE

MINISTER OF HOME AFFAIRS AND OTHERS V SCALABRINI CENTRE, CAPE TOWN AND OTHERS [2013] 4 ALL SA 571 (SCA)

Administrative law review of the closure of Cape Town Refugee Reception Office. The majority, per Nugent JA, had set aside the effective closure of the office. Wallis JA wrote a separate concurring opinion expressly disagreed with the minority judgment of Willis JA, which held that the Director-General Home Affairs was under no legal obligation to consult with the Scalabrini Centre before shutting down the Reception Office.

"The fundamental ground for my disagreement with my colleague lies with his approach that we can determine whether the Director-General's decision in this case under the Refugees Act was administrative action, by referring to another case, dealing with a different decision taken in terms of a different statute about a different subject-matter. That is not how the Constitutional Court has enjoined courts to undertake the enquiry whether particular conduct is administrative action. The enquiry we must undertake is into the nature of the very power under consideration in the particular case. The power being exercised in *Bato Star* was fundamentally different from the power being exercised here by the Director-General ..." [Paragraph 93]

CIVIL PROCEDURE

HOTZ AND OTHERS V UNIVERSITY OF CAPE TOWN [2016] 4 ALL SA 723 (SCA).

Case heard 29 September 2016; Judgment delivered 20 October 2016.

This case dealt with the requirements for the grant of an interdict, in the context of the protests on university campuses at the time.

"This understanding of the nature and purpose of an interdict is rooted in constitutional principles. Section 34 of the Constitution guarantees access to courts, or, where appropriate, some other independent or impartial tribunal, for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Court has described the right as being of cardinal importance and 'foundational to the stability of an orderly society' as it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help'. It is 'a bulwark against vigilantism, and chaos and anarchy'. Not only is the Constitution the source of the university's right to approach the court for assistance, in doing so it is exercising a right that the Constitution guarantees. In granting an interdict the court is enforcing the principle of legality that obliges courts to give effect to legally recognised rights. In the same way the principle of legality precludes a court from granting legal recognition and enforcement to unlawful conduct. To do so is 'the very antithesis of the rule of law'." [Paragraph 39].

"[I]t is not open to us to attach to the legal remedy of an interdict conditions of the type suggested on behalf of the appellants. It is not for a court to instruct the university whether to pursue or abandon disciplinary proceedings in terms of its student code of conduct. Nor can a court instruct the university to establish a commission of enquiry, much less dictate the remit and mode of functioning of such a commission. The court's function is essentially adjudicative. While there are times when it must engage in a measure of judicial creativity in formulating a remedy in a particular case it does not have carte blanche to do whatever it wishes or deems appropriate. There are two principal reasons for this. The first is that the nature of judicial proceedings, presented as they are as a dispute between the litigants, is ill-suited to understanding the full implications and underlying nuances that would affect the terms of such broad and general orders. The second is that the court's role under our Constitution is not to provide the solution to every social problem, but to make orders arising from an adjudication on the merits of the particular dispute with which it is confronted on the basis of the evidence led and the submissions of the parties. The courts are also bound by the principle of legality." [Paragraph 82].

CRIMINAL JUSTICE

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS V SOUTHERN AFRICAN LITIGATION CENTRE (HELEN SUZMAN FOUNDATION AND OTHERS AS AMICI CURIAE) [2016] 2 ALL SA 365 (SCA)

Confirmed court a quo's finding that government failure to arrest and detain President Al Bashir was unlawful.

'Immediately after this order was made, Counsel for the Government told the Court that President Al Bashir had left the country earlier that day. According to an affidavit later filed by the Director-General: Home Affairs, the eighth applicant, he appears to have left on a flight from Waterkloof Air Base at about 11:30am that morning. The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible. Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances, the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled Counsel in giving instructions, or the representatives and Counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.' [Paragraph 7]

Majiedt and Shongwe JJA concurred in the judgment of Wallis JA. Lewis and Ponnan JJA concurred for separate reasons in the judgment of Wallis JA.

ADMINISTRATION OF JUSTICE

CELE V SOUTH AFRICAN SOCIAL SECURITY AGENCY AND 22 RELATED CASES 2009 (5) SA 105 (D)

Case heard: 7 March 2008; Judgment delivered: 19 March 2008.

Social assistance grants. Order set out a practice directive for dealing with such matters in the KwaZulu-Natal Provincial Division.

"The orders sought in the matters … were all sought by consent and granted accordingly. However, I did take the opportunity of expressing my disquiet over the quality of the papers and whether in any of the applications a proper case had been made for the grant of relief. Thereafter I made enquiries among the other judges stationed in Durban during this month and they confirmed, what I suspected, that the motion roll of this Court and indeed the motion roll of the Natal Provincial Division of the High Court, are cluttered with cases of this type. … It seems to me that this situation is entirely untenable. The only obvious beneficiaries of what is happening are those legal practitioners who specialise in dealing with this type of case. Apart from the limited number of attorneys who undertake these matters there seems from my enquiries to be a small coterie of

junior counsel for whom this is a profitable way in which to spend a morning. ... I merely observe that this makes the motion court very profitable particularly as the papers are standardised and the matters are invariably adjourned and not argued. That may explain why a number of Durban counsel are prepared to travel to Pietermaritzburg to attend to adjournments. Whether and to what extent they examine the papers in any detail is debatable. Judging by the inability of counsel who appeared last Monday to proffer any helpful submissions in response to my questions those counsel had barely read the application papers and had certainly not applied their minds to them. I cannot say that this is true of all cases or all advocates but that it happened at all is deeply perturbing." [Paragraphs 12 – 13]

SELECTED ARTICLES

"Commercial certainty and constitutionalism: Are they compatible?" ***2016 South African Law Journal 545***

This article discusses concerns that the jurisprudence of the Constitutional Court introduced a level of uncertainty into aspects of the law of contract and commercial law. It argues that the application of constitutional norms in the context of commercial law does not need to generate such uncertainty.

"The problem seems to me to lie, with perhaps a couple of exceptions, not so much in actual decisions, but in obiter remarks made in decisions, such as those in *Barkhuizen* and *Everfresh*, that appear to suggest that the enforcement of contractual obligations depends upon the judicial sense of reasonableness, fairness and good faith, rather than the terms of the contract. One problematic decision, at least in the principles that appear to have informed the result, is *Botha v Rich*, where the court defined the issue as being whether the cancellation of a contract was fair 'and thus constitutionally compliant'. This has undoubtedly added to the concern." [Page 550]

"What is of greater importance is that the court simply put on one side, and by its decision negated, the contractual rights of the seller. It did so apparently because of its view that it would be 'disproportionate' for Ms Botha's default to result in her losing the opportunity to acquire the property. Why that was so was not explained. But there is now a decision by the Constitutional Court that a person who breaches their contract and is faced with the legitimate contractual termination thereof may resist cancellation by saying that, notwithstanding the terms of the contract, in their particular circumstances, that is a disproportionate response to their breach. But, if that is so, we can never know when a cancellation will be legitimate and when not. How is a party to a contract to know, when faced with a default by the other party, whether they are entitled to invoke and pursue their contractual remedies? How does a lawyer advise a client wanting to know its remedies for contractual breach?" [Page 557]

"The remedy for these concerns lies in the hands of the Constitutional Court. They could be dispersed by an unequivocal statement in an appropriate case that the Constitution does not demand the wholesale restructuring of our law of contract and other areas of commercial law. A simple statement that contracts will be enforced on their terms, subject only to well-recognised

exceptions such as fraud, misrepresentation, duress or conflict with public policy, and subject to the provisions of statutes, especially those such as the Consumer Protection Act and the National Credit Act that serve to correct imbalances in bargaining power and prevent exploitation of consumers, would go a long way towards resolving the problem." [Pages 564 – 565]

"The common law's cool ideas for dealing with Ms Hubbard" ***2015 South African Law Journal 940.***

This article discusses reconciling the Constitution with the common law in the light of the decisions in Hubbard v Cool Ideas 1186 CC 2013 (5) SA 112 (SCA) and Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC).

"The Constitution is both the cornerstone and the centrepiece of our law. It is the cornerstone because all law must be founded in the Constitution and finds the source of its authority and character as law in the prescripts of the Constitution. As the founding document on which our constitutional democracy is based, it is the centrepiece, because it is to the Constitution that we look for the guarantee that our democracy will function in terms of the rule of law and for the guarantee of the rights set out in the Bill of Rights. However, a cornerstone does not constitute a building, and a centrepiece without surrounds is a jewel without a setting. … [T]here is a grave difficulty if we pretend that every legal problem can find its solution in the provisions of the Constitution. It risks devaluing our most prized legal instrument as every disappointed litigant treats its terms as a grab bag into which they can dip in the hope of receiving relief from our highest court. …" [Page 940]

"But none of that means that in every case the solution to a legal problem is to be found in the language and provisions of the Bill of Rights. Its broad expression of fundamental rights is ill suited to the determination of many private-law disputes. The distinction that the Constitution itself draws between constitutional matters and other matters raising points of law of general public importance makes it clear, unless we are to ignore the language of the Constitution itself, that there are legal matters and issues that do not have a constitutional answer. This does not mean that the Constitution does not provide the underpinning for the law that is there applied. It is merely that the legal issue is not one that can be resolved by reference to the language or the underlying spirit, purport or objects of the Bill of Rights. And there is a powerful separation-of-powers reason for accepting that this is so. In a democracy it is the role of the legislature to fashion a vision for society structured by law and to enact legislation, including legislation that repeals, amends or adapts the common law, which reflects that vision." [Page 943]

"Ordinary justice for ordinary people: The eighth Victoria and Griffiths Mxenge Memorial Lecture" 2010 ***South African Law Journal 369***

"I am afraid that I do not believe that ordinary people in South Africa are receiving the ordinary justice that is their due. They find their encounters with the justice system slow, costly and frustrating … The principal manifestation of this failure of justice is to be seen in the delays that are endemic to both our civil and criminal courts. …" [Pages 372 – 373]

"... [I]t is far too easy and far too comfortable for lawyers, be they judges, magistrates, advocates or attorneys to blame the system and other people's failings without examining their own responsibility for these problems. We need to be honest with ourselves and accept that in many ways we are comfortable with what goes on in our courts and reluctant to change because it would remove us from our own comfort zone. We fail to take responsibility ourselves for the failure of our legal system to provide ordinary justice to ordinary people." [Page 374]

"For as long as I can remember a last minute amendment of pleadings, the late production of documents, or even blatant failure to prepare a case accompanied by a promise to do better next time will almost always prompt a judge to grant an adjournment. Usually that is covered by the mantra that the court is reluctant to shut a litigant out and any prejudice can be cured by an appropriate order for costs, but the latter is simply untrue, as any businessman would tell you. Because of our system of taxation of costs an award of costs does not compensate the other party for the actual costs wasted by the adjournment. More importantly it does not compensate for the delay in resolving the case; the contingency of having to spend more time and energy on litigation; the potential harm caused by the loss of evidence; and the risk of insolvency or a change in economic circumstances that renders a judgment less valuable. Where the adjournment is sought as a device to put tactical pressure on an opponent or to cover up the litigant's own lack of preparedness or the lack of merit in their case, it is even less true.

This type of situation infuriates litigants and lulls the judiciary into a false sense of security in thinking that they are disposing of matters, although they are merely adding to the existing backlog. In my view the time has come for us to debate whether courts should not be far less forgiving in this regard. ..." [Page 375]

"Turning then to the administration of our courts: this must strike most litigants as puzzling. First there are the court hours. Harking back to a more leisured era the court day is shorter in the High Court than in the magistrates' courts, although I have not noticed that the judges are markedly less robust than the magistrates. In the Durban court the lunch adjournment is designed to enable the judges to walk to the Durban Club and back for lunch — something none of them have done for many years. ... We have a sub-tropical climate yet we choose to have the longest portion of the court day in the afternoon. Is any of this sensible? Then there is the fact that effectively the High Courts are closed for three months of the year for all but unopposed and urgent matters. Should this be re-examined so as to make the courts more available to litigants without rendering the terms of judicial service more onerous? I raise these issues not to say that these are a panacea or a final solution but to suggest that they are matters that could usefully be explored if courts are to provide ordinary justice for ordinary people. Having a court available at all times would facilitate this." [376]

JUDGE MANDELA MAKAULA

BIOGRAPHICAL INFORMATION AND QUALFICATIONS

Date of birth : 6 May 1964

BJuris, University of Transkei (1986)

LLB, University of Transkei

LLM. Georgetown University, U.S.A. (1993)

CAREER PATH

Judge of the High Court, Eastern Cape Division (2010 -)

Attorney, Makaula Zilwa & Co (1993 – 2010)

Articled clerk, DZ Dukada & Co attorneys (1990 – 1992)

Magistrate (1988 – 1990)

Prosecutor (1986 – 1988)

Clerk, interpreter (1984 – 1985)

Member, NADEL (1990 – 2010)

Transkei Attorneys Association

- Chairperson (2008 – 2009)
- Member (1993 – 2010)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

KIRLAND INVESTMENTS (PTY) LTD V MEC FOR HEALTH, PROVINCE OF THE EASTERN CAPE NO 2012 JDR 0002 (ECG)

Case heard February 3, 2011; Judgment delivered December 15, 2011

Applicant sought to establish two private hospitals. Both applications were rejected, but the applicant was not informed. While the Superintendent General (SG) was on leave recovering from an accident, the Acting Superintendent General (ASG) wrote to the applicant approving the applications. The SG subsequently withdrew the approval.

Makaula J held:

"It is not doubted that when the ASG made the decision to approve the applications, she did so by virtue of being the Head of the Department of Health. The decision she made was communicated in writing to the applicant with all its legal effects. That to me was a valid decision which falls squarely within the definition of an administrative action and which was in full compliance with the provisions of Regulation 7 ... The actions of the SG by withdrawing the approval amounted to its revocation. The respondents have not been able to refer me to any provision in the regulations or any applicable legislation which granted them such power to revoke the approval. The respondents further did not establish that by so acting, the ASG acted *ultra vires* her powers. The respondents failed to prove that the approval was either obtained fraudulently or that it was prejudiced thereby. It falls to reason therefore, that once the ASG made the decision to approve, as the Head of the Department, the SG became *functus officio* and could not revisit that decision" [Paragraph 23]

"Having found that the act of withdrawal of the approval constituted an administrative action, the inevitable conclusion I have to arrive at, is that the procedure followed in withdrawing the approval has not been fair. It is my finding that the withdrawal of the approval stands to be set aside as being procedurally unfair in terms of Section 6 (2) (c) of *PAJA*." [Paragraph 26]

The decisions by both the ASG, to approve the application, and the SG to withdraw the approval, were both reviewed and set aside. This outcome was described as "interesting" by Professor Cora Hoexter ("The Enforcement of an Official Promise: Form, Substance and the Constitutional Court" (2015) 132 *South African Law Journal* 2017, p. 216). On appeal, the Supreme Court of Appeal rejected an appeal by the MEC, but upheld Kirland's cross appeal against the setting aside of the approval [**MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute 2014 (3) SA 219 (SCA)**]. A majority of the Constitutional Court rejected an appeal against the SCA decision [**MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC)**.

LABOUR LAW

NGIDI V MINISTER OF HOME AFFAIRS AND OTHERS (1481/07) [2011] ZAECMHC 16

Case heard 25 May 2008, Judgment delivered 23 September 2011

The applicant was dismissed for accepting a gift of a cool drink from a customer. Her internal appeal was unsuccessful, and she sought an order directing the first respondent to reinstate her.

Makaula J held:

"It is most important that I should mention upfront that the delay and the inconvenience caused to the parties by delivering this judgment so late is regretted." [Paragraph 1]

"It is apparent that when the first respondent exercised the power of terminating the employment contract basing its decision on the outcome of the misconduct enquiry, it was not exercising a power in terms of the Constitution or a Provincial Constitution or public power or the performance of a public function in terms of any legislation as required by PAJA." [Paragraph 24]

"[T]he subject matter of the power involved in this matter is the termination of the employment contract due to misconduct by the applicant based on the employment contract ... The act complained of does not involve the implementation of legislation which constitutes an administrative action." [Paragraph 30]

The application was dismissed with costs on the basis that applicant ought to have referred the matter for conciliation by the General Public Service Sectoral Bargaining Council.

CIVIL PROCEDURE

BAHLE V MINISTER OF SAFETY AND SECURITY AND ANOTHER (362/09) [2012] ZAECMHC 7

Case heard 25 January 2012, Judgment delivered 12 April 2012

Defendant raised a special plea to the effect that the plaintiff had failed to comply with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act (the special plea cited the incorrect sections of the Act). At issue was whether the plaintiff complied with the provisions of the Act by serving the notice on the defendant instead of the National or Provincial Commissioners.

Makaula J held:

"The facts bear out that the defendant received the notice albeit it contrary to the provisions of the Act. Having received it, the defendant referred it to the proper functionary hence the

Provincial Office's response ... The contents of the statement are not in issue, what is in issue is the service of the notice. The plaintiff partially complied with the provision of the Act but for failure to serve on the National or Provincial Commissioners ... The defendants strongly argue that such failure to strictly comply with the provisions of the Act must not be condoned. I, with respect, disagree. ... I am therefore of the view that there has been substantial compliance with the provisions of Section 4 (1) (a) of the Act". [Paragraph 13]

Makaula J disagreed with the defendant's argument that the failure by the plaintiff to bring a substantive application for condonation was fatal, and dismissed the special plea with costs.

CRIMINAL JUSTICE

S v DAYILE 2011 (1) SACR 245 (ECG)

Case heard 31 March 2010, Judgment delivered 19 August 2010

This was an appeal against conviction and sentence. The accused, 17 years old at the time of the offence, had been convicted of the rape of a 7 year old girl by the regional court, and sentenced to 25 years imprisonment, 10 years of which was conditionally suspended. The appeal was on the basis that the magistrate erred in finding that the contradictions that existed between the state witnesses (N and N) were immaterial. The sentence was challenged on the basis that the 15 years imposed by the court was "shockingly inappropriate and harsh", that the rape the appellant was convicted of was not of a serious nature, and that the court failed to take into account the youthfulness of the appellant at the time of the commission of the offence.

Makaula J (Ebrahim J concurring) held:

"The decision arrived at by the magistrate in accepting the evidence of the complainant and N is vindicated by the record. The record clearly shows that despite the contradictions, there was sufficient evidence and corroboration to sustain a conviction. Contradictions are expected in the circumstances of this matter. That is so because the key witnesses were children at the time the offence was committed. They testified four to five years later. It would be expected to occur even if the witnesses were adults. The two child witnesses were good and intelligent witnesses when I have regard to their ages at the time of the occurrence of this offence. They gave a good account of the events and corroborated each other on all material aspects. There is much credence in their evidence which overshadows the contradictions. " [Paragraph 12]

"[T]he trial court correctly found that there were substantial and compelling circumstances justifying the departure from the minimum sentence. What has to be determined is whether a sentence of 25 years imprisonment, of which the appellant must effectively serve 15 years, is appropriate in the circumstances. I may say from the onset that the sentence which was imposed by the magistrate is strikingly inappropriate and stands to be interfered with. The

substantial and compelling circumstances which the trial Court rightly found to exist justified a lesser sentence that which it imposed. While the fact that the appellant was only 17 years old when he committed the offence was recognised it does not appear that the trial Court attached sufficient weight to this. Similarly, greater weight should have been given to the absence of evidence regarding the nature and extent of the psychological harm the complainant may have suffered. There is no indication either that proper weight was given to the fact that the rape, while obviously serious, was nevertheless not the worst of its kind. The evidence … did not indicate that grave physical harm had been inflicted on the complainant. The only aggravating factor was that the complainant was 7 years old at the time. In view of these factors, this Court, sitting as a Court of first instance, would have imposed a sentence of imprisonment for fifteen (15) years and suspended five (5) years conditionally. …" [Paragraph 21]

The appeal against conviction was dismissed, and the accused was sentenced to a term of imprisonment for fifteen years of which five years were suspended for a period of five years, on condition that the accused was not convicted of rape or attempted rape during the period of suspension.

JUDGE ZAMANI NHLANGULELA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 13 December 1960

BA, University of Fort Hare (1985)

LLB, University of Natal, Durban (1988)

Certificate in Constitutional Litigation, UNISA (1995)

CAREER PATH

Deputy Judge President, Eastern Cape High Court (Mthatha) (2016 -)

Acting Deputy Judge President Eastern Cape High Court (Mthatha) (2014 – 2015)

Judge of the Eastern Cape High Court (2009 -)

Attorney, Z.M. Nhlangulela Inc (1994 – 2008)

Attorney, Mjoli, Nhlangulela Msizi Inc (1993 – 1994)

Professional Assistant, Canca & Company (1991 – 1992)

Articled clerk, Dazana Mafungo Inc (1989 – 1990)

Member, NADEL (1988 – 2008)

Member, Mthatha Chamber of Business (1994 – 2008)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S V MAPUKATA 2009 (2) SACR 225 (TK)

Case heard 6 February 2009, Judgment delivered 6 February 2009

The accused pleaded guilty in the magistrates' court to a charge of dealing in dagga, and was sentenced to a fine of R 3000, and in default thereof, 8 months' imprisonment. She was sentenced to a further two years' imprisonment, suspended for five years.

Nhlangulela J (Miller J concurring) held:

"When the matter was brought to this court on automatic review, Petse ADJP queried the sentence on the basis that the alternative sentence of eight months was not proportionate to the gravity of the crime and the sentence of payment of a R3000 fine. … [A]n excessive alternative sentence invariably indicates that the sentencing court has abdicated its duty to punish the accused for the crime which he/she has committed. … When that does happen, the sentencing court would have strayed from applying the guiding principle that a court should always take into account the personal circumstances of the accused, the nature of the crime and interest of society, without overemphasising each of such factors above the other. …" [Paragraph 2]

"… [T]he sentence does not seem to be completely out of proportion to the nature of the crime. I find further that the accused's personal circumstances, and especially that she was a first offender and a woman of advanced age, constitute a compelling case for the imposition of non-custodial punishment, for now at least. Consequently, the imposed sentence falls to be set aside and substituted with a fresh sentence. …" [Paragraph 6]

The alternative sentence was substituted to one of three months' imprisonment.

ADMINISTRATION OF JUSTICE

CHRISTIAN CATHOLIC APOSTOLIC CHURCH IN ZION V HLAMANDLANA AND OTHERS (1499/14) [2015] ZAECMHC 51 (23 APRIL 2015)

Case heard 27 March 2015, Judgment delivered 23 April 2015

Applicant argued that respondents were in contempt of a previous court order which had ordered them, inter alia, to return a church building and property removed from it to the applicant, and interdicting them from holding themselves out to be church leaders, and interfering with the activities of the church leadership.

Nhlangulela ADJP held:

"… [C]ounsel for the respondents, raised a point of lis pendens, contending that the enforceability of the court orders … were suspended on 24 April 2014 when the respondents filed an application for leave to appeal … as well as against the order of Majiki J … setting aside the answering affidavit of the

respondents on the basis that it was an irregular step. The problem with this contention is that in our law of civil procedure, Rule 49 (1)(b), an application for leave to appeal a judgment or order has to be brought within 15 days after the date of issue thereof ... The respondents filed the application for leave after approximately two months. But when that happened the application for condonation … was not brought. For these reasons I am bound to accept the submission … that the application for leave does not comply with Rule 49 (1)(b). It can safely be regarded as pro-non scripto. Therefore, both the orders dated 15 November 2013 and 20 February 2014 as well as that of Majiki J were not suspended by the filing of the application for leave ... " [Paragraph 7]

"I find that the order of court made on 15 November 2013 was served upon the first, third and fourth respondents on 22 November 2013; and served upon the second respondent on 06 December 2013. And they have been shown beyond a reasonable doubt to have wilfully and with mala fides elected not to comply with the orders. … The respondent's defence that the resolution of the Church conference … ex-communicating Mr Mboyi and substituting him and his group with the respondents faction requires to be given priority over the court orders must be given a short shrift. Such a resolution cannot prevail over the court order that was lawfully issued. The applicable rule is that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. …" [Paragraphs 16 - 17]

Respondents were held to be in contempt of court, and were each sentenced to three months' imprisonment, suspended for five years on condition they were not convicted of contempt during the period of suspension. Respondents were also ordered to pay the costs of the application on the attorney and client scale, jointly and severally.

QAKATHAYO V SOUTH AFRICAN SOCIAL SECURITY AGENCY (2058/11) [2013] ZAECMHC 19 (17 JANUARY 2013)

Case heard 22 November 2012, Judgment delivered 17 January 2013

At issue was whether the applicant's attorneys of record were liable to pay costs *de bonis propriis* incurred due to a postponement of an interlocutory application. Applicant had sought to stay the main application pending the finalisation of an internal appeal. Respondents opposed this on the basis that the relevant internal administrative review remedy had yet to be created.

Nhlangulela J held:

"… [I]nstead of pursuing the main application by setting it down for hearing on the point of law as raised … the applicant brought the interlocutory application. Pursuant thereto, the applicant secured a date for arguments, set down the matter for hearing … and appeared before me with the opponent to present arguments." [Paragraph 6]

"In my judgment there was no good reason for the setting down of the interlocutory applications as the adjudication of it alone would be impossible. In both applications the cause of action is the reviewing of the decision of the respondent, the parties are the same and the relief sought is virtually the same. The defence … does not only have merit, but it has also been conceded by the applicant. There was no reason for setting down the interlocutory application in the circumstances. ... I am acutely aware of a growing number of similar applications in this division that are being brought against the department merely to provoke a protracted litigation which is punctuated with numerous postponements deliberately, to cause

a delay in the finalization of disputes and to squeeze the public purse of as much "legal fees" as long as it is possible. This case is quintessentially the same. I am not persuaded … that the attorney has a right to implement client's instructions even where doing so is to repeat one and the same application. …" [Paragraph 12]

NKUME v FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK 2012 (4) SA 121 (ECM)

Case heard 6 March 2012, Judgment delivered 15 March 2012

Applicant sought an order of specific performance under the National Credit Act, seeking reasons for the refusal of a credit facility. After proceedings had been instituted, respondent supplied the requested information, notwithstanding its opposition to the application.

Nhlangulela J held:

"It would then appear that the real issue for determination is one of costs. To that end I must have regard to all the affidavits filed on the merits of the application.... In the circumstances the universal rule, that a party who succeeds should be awarded costs, cannot apply. In the exercise of the court's discretion I have to consider the manner in which the parties conducted themselves in this application, both before and after the application was brought. ... I must also consider which of the parties took unnecessary steps or adopted a wrong procedure, any misconduct by a party, and any other relevant factors." [Paragraph 9]

"… [T]he respondent did not explain its delay in responding to a demand for information, until the application was brought and litigation costs incurred thereby. In my view it did not avail the respondent to remain supine in the face of a legal demand, and only to respond when the application had been brought. The conduct of Ms Msomi, acting for the respondent, was unbecoming and it ought to be viewed as a complete disregard of the rights of the applicant in terms of s 62 of the Act. The reason, that 'far more pressing issues', without more, made it impossible for a response to be given before 4 November 2011, is inadequate." [Paragraph 12]

"In this case … for the mere fact that no explanation was given by the respondent as to why it refused to give reasons and release the particulars of the credit bureau in good time for the costs to be avoided, the furnishing of the information on 7 November 2011 constituted unreasonable delay." [Paragraph 15]

Respondent was ordered to pay the costs of the application.

JUDGE JOHN SMITH

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 5 November 1958.

BA (Law), University of the Western Cape (1980)

LLB, Rhodes University (1982)

Diploma in Labour Law, University of Cape Town (1991)

CAREER PATH

Judge of the High Court, Eastern Cape Provincial Division (2010 onwards)

Acting Judge, Eastern Cape High Court (between 1998 – 2010)

CEO, Smith Tabata Inc attorneys (2007 – 2010)

Chairperson, Eastern Cape Housing Board (1997 – 1999)

Director, Smith Tabata Inc attorneys (1996 – 2010)

Member of Provincial Legislature, African National Congress (1994 – 1995)

Partner, Smith Tabata Van Heerden attorneys (1984 – 1996)

Candidate Attorney, TM Mdlalana.

African National Congress Provincial Disciplinary Committee (2007 – 2010)

Chairperson, Ministerial Commission of Inquiry into Transformation in South African Cricket (2001)

National Trustee, Legal Resources Centre (1992 – 1996)

National Secretary, NADEL (1990 – 1992)

Vice President, NADEL (1989 - 1990)

Secretary, Eastern Cape Democratic Lawyers' Association (1983 – 1985)

Trustee, ITEC (2009 – 2016).

SELECTED JUDGMENTS

CONSTITUTIONAL AND STATUTORY INTERPRETATION

EASTERN CAPE PARKS AND TOURISM AGENCY v MEDBURY (PTY) LTD 2016 (4) SA 457 (ECG)

Case heard 13 October 2015; Judgment delivered 18 February 2016

Plaintiff sought the return of buffalo which had escaped from a nature reserve onto the defendant's property. Section 2(1)(a) of the Game Thefts Act provided that ownership of game would not be lost if it was kept on land that was "sufficiently enclosed". At issue was whether a certificate of sufficient enclosure in terms of the Act was the sole prerequisite for this preservation of ownership; and whether the common law should be developed in order to provide that wild animals, sufficiently contained in a protected area managed by an organ of state charged with managing the area under nature conservation legislation, are *res publicae* owned by the organ of state.

Smith J found against the plaintiff on both issues, holding that the certificate was a pre-requisite for the protection of ownership under the Act, and declining to develop the common law:

"I am not convinced that on the facts of this case it is either necessary or appropriate to develop the existing common-law rule. In my view the plaintiff has been unable to show that the rule is in conflict with any constitutional provision, or that it falls short of the spirit, purport or objects of s 24 of the Constitution. First, the common law, as amended by the provisions of the Act, provides effective protection to an owner of land on which game had been sufficiently enclosed. All that is required of the owner is to obtain a certificate of sufficient enclosure mentioned in s 2(2)*(a)*. The applicant has all along contended that the reserve had in fact been sufficiently enclosed to contain the buffalo. All that was therefore required of it was to apply for the certificate. It has failed to avail itself of this statutory protection and now instead impermissibly seeks development of the common law to obtain *ex post facto* protection." [Paragraph 33]

MDODANA V PREMIER OF THE EASTERN CAPE AND OTHERS (1648/10) [2013] ZAECGHC 66 (13 JUNE 2013)

Case heard 22 March 2013; Judgment delivered 13 June 2013.

Applicant challenged the constitutional validity of a Pounds Ordinance of 1938, arguing that it impermissibly sanctioned the impoundment and sale of livestock without judicial supervision, and unfairly discriminate against the landless.

"The Ordinance was enacted during a time when there was scant regard for basic human rights. It is therefore not surprising that its language is embarrassingly redolent of an era when the majority of South African citizens were subjected to discriminatory laws which resulted in their social and economic disempowerment. Nevertheless, there can be little doubt that there remains a compelling

social need for legislation that empowers local authorities to deal with the serious problems caused by unattended animals straying onto public roads and commercial farms." [Paragraph 8]

Smith J found all bar one of the impugned provisions to be unconstitutional. In **Mdodana v Premier of the Eastern Cape and Others (CCT 85/13) [2014] ZACC 7; 2014 (5) BCLR 533 (CC); 2014 (4) SA 99 (CC) (25 March 2014)**, the Constitutional Court found that it did not have jurisdiction to confirm the order of invalidity.

CIVIL PROCEDURE

KRIEL v BOWELS 2012 (2) SA 45 (ECP)

Case heard: 4 November 2010; Judgment delivered 11 November 2010.

This was an application for an order compelling the defendant to provide meaningful responsss to enquiries contained in plaintiff's Rule 37(4) agenda. Smith J dismissed the application:

"A party can … not be compelled to agree to anything during the course of rule 37 proceedings. This much is evident from the fact that rule 37(8)*(c)* provides that, even in a case where a conference had been convened before a judge in chambers, the judge may give directions which might promote the effective conclusion of the matter, but only with the consent of the parties. It appears that the remedy for any party who is frustrated by the lack of co-operation from the other party during rule 37 proceedings, is to request for a conference to be convened before a judge in chambers in terms of rule 37(8). The plaintiff gave an indication of his intention to pursue this course of action in the letter to the defendant's attorneys on 26 March 2010 but for some reason did not do so. … [T]hese enquiries should have been contained in a request for particulars for trial in terms of rule 21. It is abundantly clear from rule 37(4) that a formal request in the form served and filed by the plaintiff in this matter is not contemplated. What is contemplated is a list to be provided to the other party not later than 10 days before the pre-trial conference, inter alia, of enquiries which he will direct and which are not included in the request for particulars for trial and other matters regarding preparation for trial which he will raise for discussion. The list of enquiries is therefore intended to relate to matters which will be discussed at the pre-trial conference. …" [Paragraph 16]

CRIMINAL JUSTICE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v MAKOSHOLO AND OTHERS 2011 (2) SACR 598 (ECP)

Case heard 4 November 2010; Judgment delivered 9 November 2010.

This was a forfeiture application under section 50 of the Prevention of Organised Crime Act. First respondent applied for the application to be consolidated with another application. The application was rejected, Smith J finding that different factual bases were required for either application to succeed.

"[T]here can be no conceivable advantages to consolidating the two matters. The two applications are fundamentally different and do not concern the determination of substantially the same question of law or fact. It would, in my view, therefore not be convenient to consolidate the two matters. …" [Paragraph 13]

CHILDRENS' RIGHTS

LH AND ANOTHER v LA 2012 (6) SA 41 (ECG)

Case heard 7 August 2012; Judgment delivered 24 August 2012

Applicants sought an order to give them access to their 6 year old grandchild. Applicants son, the child's father, had passed away in a motor vehicle accident. The child's mother had not granted the applicants access to the child for a period of three years.

Smith J held:

"The Act … recognises that a child is a social being, and that members of the extended family, more often than not, play an important part in a child's social and psychological development. Grandparents, more than other relatives, usually take a keen interest in the upbringing of their grandchildren and this relationship, provided that it is kept within reasonable bounds and does not interfere with parental duties and responsibilities, often assists and complements parental care. There can therefore be little doubt that it is usually in a child's best interests to maintain a close relationship with his or her grandparents." [Paragraph 13]

Smith J held, however, that the access sought by the applicants was too broad, and ordered that the applicants had the right to visit their grandchild at least once a week, for three hours at a time, at the respondent's residence or another place as the respondent may determine.

ADMINISTRATION OF JUSTICE

RANDELL v CAPE LAW SOCIETY 2012 (3) SA 207 (ECG)

Case heard 9 September 2011; Judgment delivered 27 October 2011.

Applicant sought a stay of an application to strike him from the roll of attorneys, pending the finalisation of a criminal case against him, based on the same allegations. At issue was whether the court had the discretion to grant a stay of the civil proceedings pending finalisation of the criminal case.

Smith J held that courts have a discretion to suspend civil proceedings where there are criminal proceedings pending in respect of the same issues, and that each case must be decided on the particular circumstances and competing interests in question [paragraph 25].

Smith J held that:

"It was contended on behalf of the respondent that the potential prejudice in delaying the main application will be to the public. The respondent averred that the applicant is not a fit and proper person to practise as an attorney and it is therefore in the interest of the public that that issue be determined speedily. I am, however, of the view that, taking into account the nature of the allegations against the applicant in the main application and the fact that the criminal trial is imminent … the potential prejudice to the public will be minimal. It has not been suggested that there is any evidence of wrongdoing in the affairs of the applicant's practice and his trust account. I have no doubt that if this were the case (and considering the potentially serious implications for his clients and the general public), the respondent would have sought some type of interim relief in this regard. ...

The applicant has been advised by his attorney and counsel, who represent him in the criminal trial, that making a sworn statement in opposition to the main application might serve to prejudice him in the conduct of his defence in the criminal matter. This is so, despite the fact that he will deny any wrongdoing. It has generally been recognised by our courts … that such prejudice could potentially also flow from statements intended to be exculpatory. While it is so that the applicant has disclosed the essentials of his defence in his plea filed in the related civil matter, he will obviously be required to provide far greater detail of his defence in his answering affidavit in the striking-off application. There is therefore in my view a real danger that this may serve to prejudice him in the conduct of his defence in the criminal case. In the circumstances, I am satisfied that it is proper that the civil proceedings be stayed, pending the finalisation of the criminal trial against the applicant." [Paragraphs 26 – 27]

The decision was overturned by the Supreme Court of Appeal in **LAW SOCIETY OF THE CAPE OF GOOD HOPE v RANDELL 2013 (3) SA 437 (SCA)**. The SCA held that the High Court had erred in two respects: first, in its "broad formulation of the general principle applied in determining whether a stay should be granted", as "[o]n the approach adopted by the court below, the power to grant a stay under these circumstances would be unlimited." [Paragraph 13]. Second, the High Court was held to have erred in its application of the law to the facts [paragraph 14].

JUDGE DAVID VAN ZYL

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 10 January 1959

BA, University of Stellenbosch (1980)

LLB, University of Stellenbosch (1981)

Post graduate Diploma in Tax Law, UNISA (1984)

LLM, University of Stellenbosch (1986)

CAREER PATH

Deputy Judge President, Eastern Cape High Court, Bhisho Local Division (2016)

Acting Deputy Judge President, Eastern Cape High Court, Bhisho Local Division (2014 – 2016)

Acting Justice of Appeal, Supreme court of Appeal (2013 – 2014)

Acting Deputy Judge President, Eastern Cape High Court, Bhisho Local Division (2013)

Acting Judge of Appeal, Labour Appeal Court (2010)

Acting Judge, Labour Court (2005)

Acting Judge President, Eastern Cape High Court (2000)

Judge of the Eastern Cape High Court (1997)

Acting Judge, Transkei High Court, Mthatha (1996 – 1997)

Advocate (1988 – 1997)

Senior LEcturer, University of the Transkei (1988 – 1989)

State Prosecutor, Advocate, Department of Justice (1981 – 1987)

SELECTED JUDGMENTS

PRIVATE LAW

STEENKAMP NO V PROVINCIAL TENDER BOARD, EC [2006] JOL 16488 (CK)
Judgment delivered 29 July 2004

The Provincial Tender Board had awarded tenders for the payment of social grants, including to Balraz.. An aggrieved tenderer, Cash Paymaster Service, successfully applied to have the award of the contracts reviewed and set aside on the basis of alleged irregularities in the decision-making process. Two companies were subsequently awarded the tenders, but Balraz did not tender as it was in liquidation. The plaintiff, Balraz's liquidator, lodged a claim for damages.

Van Zyl J held:

"The mere fact of the setting aside of the Tender Board's decision on review did not provide the plaintiff with a cause of action. That decision did not automatically carry in its wake a claim for delictual damages. … [T]he wrongfulness of the Tender Board's conduct is to be determined by asking the question whether the latter had a legal duty to prevent the plaintiff's loss. … [I]t must be borne in mind that there is no general duty on anyone to prevent pure economic loss. …" [Paragraphs 17 - 18]

"The members of the Tender Board did not read the tender documents presented by the tenderers. … [W]hile the tender documents contained technical information which the members of the Tender Board might not have been able to understand, it also contained other information relevant to the adjudication of the tender which the members of the Tender Board could and should have read. The lack of technical qualifications of the Tender Board members was meant to be addressed by a report furnished by the Technical Committee on the tenders and the appearance of the Technical Committee before the Tender Board when the said report was considered. The Tender Board chose not to follow the recommendations made by the second Technical Committee …" [Paragraph 54]

"… [I]t is … clear, having regard to the nature of the functions and duties of the Tender Board … that it failed to comply therewith and with the administrative justice provisions of the Constitution. …" [Paragraph 57]

"The final question is whether in all the circumstances of the case it is just and reasonable that the Tender Board was under a legal duty to prevent harm or loss to Balraz. The failure of Balraz to submit a valid tender resulted in the absence of a relationship between it and the Tender Board as contemplated by the Act and the administrative justice provisions of the Constitution. In these circumstances it could not have been within the reasonable contemplation of the Tender Board that Balraz might suffer harm or loss when it directed its mind to the acts or omissions which have been called into question." [Paragraph 85]

Van Zyl J concluded that the plaintiff has not established the delictual requirement of wrongfulness. The claim was dismissed with costs. The decision was upheld by the SCA in Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA). A further appeal to the Constitutional Court was dismissed in Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC).

ADMINISTRATIVE JUSTICE

ESORFRANKI PIPELINES (PTY) LTD AND ANOTHER V MOPANI DISTRICT MUNICIPALITY AND OTHERS (40/13) [2014] ZASCA 21

Case heard 4 March 2014, Judgment delivered 28 March 2014

This case was about judicial review of administrative action in the form of a tender process.
A District Municipality had invited tenders for the construction of reservoirs and a bulk pipeline. The tender was awarded to a joint venture, and two unsuccessful bidders, the first appellant (Esorfranki) and the second appellant, Cycad Pipelines (Pty) Ltd (Cycad), brought review proceedings in the High Court. This culminated in an agreement in terms of which the award was set aside and the municipality was ordered to re-adjudicate the tenders. The tender was again awarded to the two original winners, and the two unsuccessful bidders again took the award on review. The ensuing litigation culminated in this appeal.

Van Zyl AJA (Mthiyane DP, Lewis and Bosielo JJA and Legodi AJA concurring) held:

"In this case, however, the high court, although correctly finding that the flaws in the tender process and award tainted it and the contract, nonetheless in effect ordered that the joint venture continue to execute the invalid contract under the municipality's supervision. No doubt it was the consideration of pragmatism and practicality that weighed heavily with the high court in ordering the continued execution of an invalid contract. …" [Paragraph 21]

"The decision of the high court to give effect to a contract concluded pursuant to an unlawful tender award is flawed for several reasons. First, the parties to that contract had acted dishonestly and unscrupulously and the joint venture was not qualified to execute the contract. The first order that the high court made – that the award was unlawful – was undermined by the order that the joint venture continue the work. The second reason is that it was premised on the possible existence of a number of unknown consequences which might follow upon an order declaring the award of the tender unlawful. A decision made in the exercise of the discretion in s 8 of PAJA must be based on fact and not on mere speculation. The delay in the finalisation of the review proceedings brought about a change in the factual position and it was the function of the court to ensure that it be placed in a position to arrive at an informed decision with regard to what an appropriate remedy would be. This could and should have been addressed by an appropriately worded order." [Paragraph 22]

"… [T]he decision whether to declare conduct in conflict with the Constitution unlawful but to order equitable relief … involves the weighing up of a number of competing interests. Certainty is but one. Other factors include the interests of affected parties and that of the public. … [T]hen the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality." [Paragraph 23]

"I therefore conclude that the high court erred in the exercise of its discretion and that its decision in effect to allow the continuation of the contract should be set aside. … [B]ecause of the bias displayed by the municipality in the adjudication of the tender and its conduct in the review and interlocutory proceedings, it should play no part in any further tender process in relation to this project." [Paragraph 27]

"…The joint venture was in turn found to have made itself guilty of dishonest conduct by misrepresenting the facts in their tender bid in an effort no doubt to achieve an advantage and to secure the award of the tender. The costs order made by the court does not reflect the seriousness of this conduct and the disapproval which it deserves" [Paragraph 31]

"The manner in which the municipality conducted itself in the litigation also calls for censure. Instead of complying with its duty to act in the public interest and to allow the serious allegations of fraud and dishonesty in the tender process to be ventilated and decided in legal proceedings, it chose to identify itself with the interests of the tenderers who stood accused of improper conduct. …" [Paragraph 32]

The appeal was upheld, with costs on the attorney and client scale.

CIVIL PROCEDURE

MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM v KRUISENGA AND ANOTHER 2008 (6) SA 264 (Ck)

Case heard 30 April 2008, Judgment delivered 30 April 2008

In an action for damages arising from a forest fire, the defendant's (applicant's) legal representatives, both at the pre-trial conference and later at the trial, conceded liability on the merits and gave an undertaking to pay the amounts claimed under certain heads of damage. An order that the applicant was to pay the admitted damages was made by consent, and the hearing postponed. The applicant, with a view to reopening his case on the merits, then launched an application for rescission of judgment ordering him to pay the admitted damages, and an order withdrawing his admissions of liability on the merits as reflected in the pre-trial minute.

In deciding the case, Van Zyl J considered the agent-principal relationship between an attorney and their client:

"... [J]ust as any other principal who may be liable for the acts of his agent despite limitations placed on the agent's authority, a litigant may be bound to a compromise entered into, or a judgment or order consented to, by his legal representative despite instructions to the contrary. The reason therefore lies in the fact that an agent's implied authority and his apparent or ostensible authority normally coincide, and the act of representation does not merely operate between the client and his representative, but also between the client and his opponent who deals with the representative. Unless the limitation of authority is communicated to the litigant's opponent or his legal representative, or it is implicit from what the litigant does or the surrounding circumstances, he may be estopped from relying on the absence of or excess of authority. A litigant can therefore not secretly or by way of private instructions to his legal representative curtail the latter's authority as far as third persons are concerned." [Paragraph 60]

"Because of the limitation placed on the authority of the State attorney by the so-called practice in the applicant's department, it must be accepted that the attorney concerned did not have actual authority to compromise on behalf of the applicant. The same does, however, not apply to counsel. There is no indication that counsel's authority or control over the way in which the applicant's defence was conducted was limited in any way. ... I do not believe that it must simply be accepted that because a limitation was placed on the authority of the State attorney, a similar limitation automatically extended to counsel. In my view, and in the absence of counsel having said so in his affidavit, it must be accepted that he acted in the exercise of his implied authority when he concluded the settlement agreement." [Paragraph 65]

"Through his conduct the attorney tacitly gave the assurance that he acted with the necessary authority while in truth, and to his knowledge, this was not the position. On his own account of events, it is clear that he acted improperly, not only in relation to his own client's affairs but also to the court, counsel retained by the department and the legal representatives of the respondents..." [Paragraph 78]

Van Zyl J found that the application had been brought about entirely as a result of the improper conduct of the applicant's attorney, and dismissed the application with costs. The decision was upheld by the Supreme Court of Appeal in **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA)**, the SCA finding that the High Court had been correct to hold that the appellant was estopped from denying the authority of the State Attorney to enter into the agreements.

CRIMINAL JUSTICE

S v YANTA 2000 (1) SACR 237 (Tk)

Case heard 9 December 1999, Judgment delivered 9 December 1999

The appellant was denied bail by a magistrate for planned and premeditated murder, a Schedule 6 offence in terms of the Criminal Procedure Act. On appeal, the High Court had to consider whether there were exceptional circumstances warranting the granting of bail.

Van Zyl J dismissed the appeal:

"The appellant has undoubtedly been charged with a very serious offence and if convicted could face a long term of imprisonment. If the commission of the crime is proved by the State, factors such as the fact that it was planned and premeditated and that it was aimed at eliminating a witness would undoubtedly constitute aggravating factors which would have a bearing on the sentence that may be imposed. These considerations are quite clearly relevant in assessing whether there is a likelihood that the appellant, if she is released, will attempt to evade her trial. ..." [Page 247D-E]

"By the nature of the appellant's involvement in crime itself it is possible to make an assessment of her character which is equally important in assessing the likelihood of her undermining or jeopardising the objectives of the proper functioning of the criminal justice system. ... To this extent the magistrate also in my view did not err in assessing the credibility of the appellant for purposes of establishing grounds against the granting of bail ... and for purposes of deciding whether or not the appellant adduced acceptable evidence supporting her contention that she should be released on bail. In this regard the magistrate took into account the appellant's failure to disclose all her previous convictions as well as postal and residential addresses of which she had made use in the past." [Page 247J – Page 248A & B]

"I cannot ... fault the magistrate's finding that the contention 'namely that the accused person needs to go and run her businesses has been overtaken by events so to speak'. Further ... the personal interests of the accused are secondary and the interests of society in the proper and effective administration of criminal justice are supreme." [Page 249B-D]

"It is not competent for an appellant in appeal proceedings to place new evidence before the Appeal Court by way of statements from the Bar. An appeal in terms of s 65 is analogous to an ordinary appeal. Like any other appeal an appeal against the refusal of bail must be determined on the material on record. ..." [Page 249E-G]

Van Zyl J dismissed the appellant's contentions that if denied bail she would not be able to take care of her children, on the basis that even during the trial she has been assisted by her family members, who were able to take care of her children.

MS SARDIA JACOBS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 16 January 1965

Diploma Juris, University of the Western Cape (1987)

BProc, University of the Western Cape (1997)

LLB, University of the Western Cape (1999)

LLM, UNISA (2007)

MBA, MANCOSA (2015)

CAREER PATH

Acting Judge, Eastern Cape High Court and Free State High Court (2013 – 2014 ; 2016)

Regional Magistrate (2007 -)

Magistrate (2003 – 2007)

Acting Magistrate (2001 – 2003)

Consultant (1998 – 2001)

Legal Advisor, House of Representatives (1987 – 1997)

ARMSA

- Member (2007 -)
- Provincial Secretary (2010 – 2011)
- Provincial Chairperson (2011 – 2013)

JOASA

- Member (2003 – 2006)
- Provincial Secretary (2006 – 2007)
- Member (2007 -)

IAWJ (South African Chapter)

- Provincial Representative (2005 – 2007)
- Member (2008 – 2012)
- Provincial Representative (2012 -)

SELECTED JUDGMENTS

COMMERCIAL LAW

VAN DER VYVER NO V OOS VRYSTAAT KAAP BEDRYF BEPERK 2016 JDR 1176 (ECG)

Case heard June 21, 2016; Judgment delivered June 21, 2016

Applicants agreed a payment schedule with the first respondent for debts incurred, which was made an order of court. Applicants then defaulted on the payments and first respondent issued a warrant of execution. The applicants had meanwhile entered into negations with Nedbank, which provided a letter of guarantee for the applicants' debts. The issue was whether this guarantee stayed the sale in execution.

Jacobs AJ dismissed the application:

"In the present case there is no such application for the rescission of the judgment. The Settlement Agreement is clear and unambiguous. There is therefore no possibility that the underlying cause may be removed. On the contrary, the Court order is not in dispute and is of full force and effect. In the circumstances the Applicants have failed to satisfy the Court that the applicants will ultimately succeed in establishing a clear right to the relief sought by them" [Paragraph 16]

CRIMINAL JUSTICE

MENZE V S (CA&R66/2014) [2014] ZAECGHC 75

Judgment delivered 10 September 2014

This was an appeal against a sentence of fifteen (15) years imprisonment imposed upon the appellant following his conviction on a charge of robbery with aggravating circumstances. On appeal, the age of the appellant at the time of commission of the offence was raised.

Jacobs AJ (Mey AJ concurring) held:

"[T]he appellant was 16 years old at the time of the commission of the offence. In Centre for Child Law … the majority per Cameron J declared that section 51(1) and (2) of the Criminal Law Amendment Act … are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years at the time of the commission of the offence. The relevant age to be considered of the accused is the age at the commission of the offence, and not the age of the accused at the time of the hearing. Minimum sentence legislation is therefore not applicable in this case." [Paragraph 3]

"The trial court, in applying minimum sentence legislation … misdirected itself. …" [Paragraph 5]

"The failure on the part of the Regional Magistrate to sentence the appellant without having regard to a pre- sentence report is an irregularity that requires the sentence imposed on the appellant to be set aside" [Paragraph 7]

The appeal was upheld, and the case remitted to the trial court to reconsider the sentence.

PIENAAR V S (CA&R439/2013) [2014] ZAECGHC 74

Judgment delivered: 10 September 2014.

This was an appeal against the sentence of eight (8) years imprisonment imposed on the appellant pursuant to a conviction on housebreaking with intent to steal and theft.

Jacobs AJ (Mey AJ concurring) held:

"The sentence imposed must always fit the crime. A long list of previous convictions of a similar nature is indeed very important. It could however never serve to extend the period of sentence to the extent that it is disproportionate to the seriousness of the crime for which such a person must be punished. A sentence of eight (8) years' imprisonment in circumstances where there was no actual loss suffered strikes me as unduly harsh. In the light of what I have stated above I am of the view that this court is entitled to intervene and to substitute the sentence imposed by the court a quo. In my view the proposed sentence of five (5) years' imprisonment is appropriate and fair". [Paragraph 6]

WINDVOEL V S (CA&R51/2014) [2014] ZAECGHC 73

Judgment delivered: 10 September 2014

This was an appeal against the sentence of 10 years imprisonment. The appellant was convicted of housebreaking with intent to rape, and rape.

Jacobs AJ (Mey AJ concurring) held:

"The appellant is a first offender of the nature and extent of this type of offence, and therefore the minimum sentence applicable is 10 years imprisonment. The magistrate wrongly held that the minimum sentence was 15 years imprisonment, but found substantial and compelling circumstances and imposed 10 years imprisonment. The sentence imposed was clearly a misdirection by the magistrate, which leaves this court to interfere with such sentence, and impose a sentence afresh". [Paragraph 1]

"The complainant did not suffer any physical injuries. Apart from the normal trauma associated with Rape she however suffered the indignation of being raped in her boyfriend's house. The trial court therefore correctly concluded that this is indeed a serious offence and that the interest of society can only be served if the appellant is removed from society for a considerable period of time". [Paragraph 5]

"The mitigating factors being that the appellant was employed and has minor dependent children viewed in the light of the seriousness of the offence and the interest of society does not constitute substantial and compelling circumstances which warrant a departure from the minimum sentence of 10 years." [Paragraph 7].

"There is in my judgment, no proper basis not to impose the minimum sentence of ten (10) years imprisonment". [Paragraph 8]

MR SITHEMBELE MGXAJI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 15 September 1960.

LLB, University of Natal - Pietermaritzburg (1992).

BA Law, University of Transkei (1989).

CAREER PATH

Acting Judge of Eastern Cape High Court (18 April 2011; October – December 2012; 2nd term 2015; third term 2015; second term 2016).

Small Claims Court – Mathatha Magistrates Court (2009 – 2016).

Sole Practitioner, Mgxaji Inc (1999 – to date).

Partner at Canca & Co. – Mthatha (1995 – 1999).

Professional Assistant at Clayton Mkhululi Manxiwa & Co. Mathatha (1994 – 1995).

Admitted as Conveyancer (31 January 2007)

Admitted as Attorney of High Court of South Africa (9 September 1994).

Councilor, Cape Law Society (1999 – 2010)

President of Cape Law Society (2006)

Chairperson of Attorneys Fidelity Fund (2008).

Black Lawyers' Association

- Member (1992 -)
- Branch chairperson (2001 – 2006)
- Deputy President (2006 – 2009)

Member, Pan Africanist Congress (1990 -)

SELECTED JUDGMENTS

PRIVATE LAW

SIBULALI V MINISTER OF POLICE 2016 JDR 1165 (ECM)

Case heard 26 May 2016; Judgment delivered 21 June 2016.

Claim for damages arising from an alleged unlawful and wrongful assault on the plaintiff by members of the South African Police Services. The plaintiff alleged that the assault too the form of torture, plastic suffocation, sticks and coercion.

Mgxaji AJ dismissd the claim:

"The plaintiff appeared to me to be a self confident vivacious young woman who cannot be said has had personal constraints consequent from her lack of a formal education. In my view she seemed to lack the necessary information of a personally experienced event narrator. It is on account of this glaring absence of a coordinated way of recounting the assault she alleged was perpetrated by the Police that her version I find to be unbelievable. It comes as not surprising, it seems to me, that the plaintiff has not been advised to seek corroboration by the young boy, she testified, once stayed with her as her nephew who accompanied the police officers to where she had been in the night vigil or the neighbourhood man who, according to her evidence, was at her home during the alleged assault nor anyone at her sister's home attending the night vigil, where according to her testimony, she was clapped with an open hand right in the doorway of the house by the female police officer." [Paragraph 28]

"It is my fortified view that the plaintiff's version is factually incredible and her recollection of the assault, if the alleged assault ever occurred at all, unreliable and in my assessment and evaluation of it against the evidence of the defence witness it is highly improbable too." [Paragraph 29]

CIVIL PROCEDURE

MINISTER OF POLICE, LIBODE AND ANOTHER V REFORMED PRESBYTERIAN CHURCH IN SOUTH AFRICA; IN RE: REFORMED PRESBYTARIAN CHURCH IN SOUTH AFRICA V MINISTER OF POLICE AND ANOTHER (3642/2015) [2016] ZAECMHC 22

Case heard 12 May 2016; Judgment delivered 24 May 2016.

This was a rescission application, which was granted by Mgxaji AJ:

"It seems to me that the Station Commissioner, Libode can never be an Administrator as conceived in law and even worse not as contemplated in rule 4(9) of Uniform Rules of Court and any notice of legal proceeding instituted against him or her has to be served upon him or her and not at the office of the State Attorney as was done in the main application by the respondent herein. On these facts the respondent in approaching court and obtaining the order granted on the 12January 2016

erroneously sought such order in the absence of the 2nd applicant as it was obtained on a flawed return of service when it should not have been granted." [Paragraph 13]

"I find that the order of the 12 January 2016 directing the applicants to conduct a thorough investigations in a contempt of court order complaint, where on the applicable legal principles it indisputably remained onerous on the respondent's members to give evidence at the Magistrate's Court establishing beyond reasonable doubt the alleged non compliance by the interdicted members with the court order, to have been granted erroneously." [Paragraph 22]

MEDIA COVERAGE

In 2009, as Deputy President of The Black Lawyers' Association, he was quoted as criticising then Constitutional Court Judge Kate O'Regan for criticising the government's decision to refuse to grant the Dalai Lama a visa to enter the country:

"In an interview, BLA deputy president Sithembele Mgxaji said it was "mischievous" for Justice O'Regan to comment on "an issue of a political nature. She cannot, as a judge, comment on acts of the government, especially an issue that resides with the executive".

- Sivuyile Mangxamba, "BLA attacks judge for Dalai Lama decision", IOL 30 March 2009, available at http://www.iol.co.za/news/politics/bla-attacks-judge-for-dalai-lama-decision-438612

MS FEZEKA MONAKALI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 28 May 1973

LLM (Masters in Labour Law), UNISA

LLB, University of Transkei (2000)

B. Juris, University of Transkei (1994).

CAREER PATH

District Magistrates Court (May 2004 – to date)

Acting in the Regional Court, Port Elizabeth (1 April 2016 – June 2016)

Acting in the Regional Court, East London (October 2014 – December 2014)

Acting in the Regional Court, Mathatha (October 2013 – December 2013)

Acting in the Regional Court, Bizana (December 2011)

Relief Prosecutor: Based in Pietermaritzberg (KZN): Prosecuting in the Regional and District Court (2003 – April 2004)

Control Prosecutor (2001 – April 2002)

Public Prosecutor (1999 – 2000)

National Prosecuting Authority (1996 – 1998)

Member, Black Lawyers' Association (2016)

Member, International Association of Women Judges, SA Chapter (2014 -)

Member, JOASA (1997 -)

ADVOCATE VIJAYLUTCHMEE REDDY

Biographical Information and Qualifications

Born: 22 January 1967.

LLM, University of South Africa (2007)

LLB, University of Durban-Westville (1991)

BA Law, University of Durban-Westville (1989)

Career Path

Regional Magistrate: Port Elizabeth (2007 – to date).

Acting Judge in Port Elizabeth and Grahamstown High Court: 27 June 2016 – 8 July 2016; 28 July 2015 – 31 July 2015; 13 April 2015 – 29 May 2015.

Acting in Sebokeng Regional Court, Gauteng (2006).

District Magistrate, Germiston (1998 – 2007).

Regional Court Prosecutor: Verulam Magistrates Office (1992 – 1998).

Candidate Attorney: Rajen Naidoo and Associates (1991 – 1992).

Association of Regional Magistrates of Southern Africa: member since 2007.

MR TREVOR BAILEY

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 8 August 1959

BA, University of KwaZulu-Natal, Durban (1980)

LLB, University of KwaZulu-Natal, Durban (1983)

Master of Laws (cun laude), University of Notre Dame, USA (1996)

Programme in Legislative Drafting (distinction), University of Pretoria (2014)

CAREER PATH

Acting Judge, Labour Court (2016)

Part-time Commissioner, CCMA (2016 -)

Chairperson, Council for Medical Schemes Appeals Committee (2016 -)

Member, Council for Medical Schemes Mediation Panel (2015 -)

Chairperson, Council for the Built Environment Appeals committee (2015 -)

Member, National Home Builders Registration Council Disciplinary Committee Chairpersons Panel (2012 – 2015)

Member, occasional chairperson, Council for Medical Schemes Appeals Committee (2008 – 2014)

Chairperson, Gauteng Rental Housing Tribunal (2007 – 2013); member (2001 – 2006)

Legal Adviser, National Consumer Tribunal (2008 – 2011)

Part time acting commissioner, CCMA (1998)

Additional member, Industrial Court and Agricultural Labour Court (1997 – 1998)

Trevor Bailey Attorney (1998 -)

Attorney, Legal Resources Centre (1987 – 1998)

Attorney, Miles & Moorhead (1986 – 1987)

Admitted as attorney of the High Court of South Africa (1986)

Accredited mediator.

Member, South African Society of Labour Lawyers (2011 -)

Member, NADEL (2010 -)

Member, Law Society of the Northern Provinces (1987 -)

Member, Law Society of KwaZulu – Natal (1986 – 1987)

SELECTED JUDGMENTS

LABOUR LAW

SNYDERS V FOSBEL AFRICA (PTY) LTD (J617/2015) [2016] ZALCJHB 382 (7 OCTOBER 2016)

Case heard: 13 July 2016; Judgment delivered 7 September 2016.

This was an application to make a mutual termination agreement an order of court in terms of section 158 (1)(c) of the Labour Relations Act. Bailey AJ found that the court lacked jurisdiction to make the agreement an order of court:

"I am not persuaded that the undisputed common cause facts and the terms of the agreement itself can be so widely interpreted to mean that that the agreement had as its genesis a dispute that the applicant had a right to refer to arbitration or to the Labour Court for adjudication. Consequently, the agreement cannot be considered a settlement agreement for the purposes of s 158 (1) (c)." [Paragraph 6]

SACCAWU OBO MABITLE V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS (JR2704/2012) [2016] ZALCJHB 407 (18 OCTOBER 2016)

Case heard 13 July 2016; Judgment delivered 18 October 2016

This was an application to review and set aside an arbitration award, which had found the dismissal of the employee to be substantively fair. Bailey AJ rejected an application for condonation of the late filing of the record of the review application, finding that "the delay was excessive and the reasons the Applicant has proffered for the delay are totally inadequate, unsatisfactory and simply do not pass muster." [Paragraph 17].

Bailey AJ further found that the prospects of success on the merits of the review were "somewhat poor" [paragraph 20]:

"Ultimately I am satisfied that the Second Respondent considered the evidence before him and drew a conclusion that another arbitrator could have drawn. The award is therefore not reviewable.' [Paragraph 20]

POPCRU GROUP OF COMPANIES V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS (JR1201/2014) [2016] ZALCJHB 406 (18 OCTOBER 2016)

Case heard: 15 July 2016; Judgment delivered 18 October 2016.

This was an application to have an arbitration award reviewed and set aside, on the basis that the arbitrator had refused to grant the applicant a requested postponement; had incorrectly found the dismissal to be procedurally and substantively unfair; and put the amount of compensation in issue.

Bailey AJ rejected all three grounds of review:

"Although the Applicant requested Dumas to make written representations and the Applicant's representative at the arbitration submitted that her representations were thoroughly considered, the commissioner was in my view correct to find that the Applicant had failed to follow a fair procedure when it dismissed Dumas. The Applicant was at the very least bound to hold an enquiry and give Dumas an opportunity to see and cross-examine her accusers before dismissing her. Moreover, the Applicant's representative at the arbitration did not suggest that there were good reasons for deviating from the general rule that a fair process at the very least requires holding an enquiry. ..." [Paragraph 17]

"In my view, the Applicant's conduct renders it the author of its own demise. The cavalier procedure it followed when dismissing Dumas was compounded by its failure to place itself in a position at the arbitration to discharge the onus borne by it that the dismissal was substantively fair." [Paragraph 18]

MS SAMUKELISIWE NDLOVU

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 2 May 1971

Secondary Teacher's Diploma, Esikhawini College (1993)

LLB, University of Zululand (2003)

Practical Legal Training (LEAD), University of Pretoria (2005)

Practice Management, University of KwaZulu-Natal (2011)

CAREER PATH

Magistrate, Empangeni Magistrates' Court (district court) (2015 -)

Acting Magistrate, Durban Magistrates' Court (2012 – 2015)

Director, Attorney, Conveyancer, Samke Ndlovu & Associates (2011 – 2015)

Senior Legal Advisor, Ethekwini Municipality (2007 – 2011)

Legal Advisor, Legal Wise (2006 – 2007)

Candidate Attorney, Rossouw & Rossouw (2005 – 2006)

Candidate Attorney, Zehir Omar Attorneys (2004 – 2005)

Teacher, Khambindlela High School (1994 – 2003).

Member, Black Lawyers' Association (2007 -)

Member, South African Women Lawyers' Association (2007 -)

ADVOCATE PORTIA NKUTHA – NKONTWANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 24 July 1971

BJuris, University of Zululand (1992)

LLB, University of Zululand (1994)

Certificate, Program in Industrial Relations, Wits University Business School (1997)

CAREER PATH

Acting Judge, Labour Court (2012, 2013, 2015)

Part time senior commissioner, CCMA (2007 – 2016)

Advocate of the High Court (2003 -)

Independent consultant (2000 – 2003)

Commissioner, CCMA (1996 – 2000)

Member, Back Lawyers' Association (2006 – 2010)

Member, Advocates for Transformation (2006 – 2010)

Member, Christian Lawyers' Association (2004 – 2010)

Member, South African Society for Labour Law (2012)

Member, African National Congress (2000 – 2011)

Patron, Kwa-Thema Stimulation Centre for Children with Disabilities.

SELECTED JUDGMENTS

LABOUR LAW

SACCAWU AND OTHERS V WOOLWORTHS (PTY) LTD (J3159/12, JS1177/12) [2016] ZALCJHB 126 (5 MARCH 2016)

Case heard 1 June 2015; Judgment delivered 5 March 2016

At issue in this case was whether dismissals for operational reasons was automatically unfair. Nkutha – Nkontwane AJ held that the dismissals were substantively and procedurally unfair:

"In section 189(3) notice, Woolworths gave only one reason for the retrenchments that 'the company needs to be in a position to employ employees who are able to be used on a flexible basis'. Therefore, Woolworth's attempt to add further reasons (equity and costs efficiency) in order to justify the retrenchments must be rejected since it was clearly an afterthought and a cynical attempt by Woolworths to extricate itself from its self-created predicament." [Paragraph 33]

"Interestingly, Woolworths' section 189(3) of the LRA notice states only one reason for the retrenchments being that 'the company needs to be in a position to employ employees who are able to be used on a flexible basis'. In this regard, it was contented on behalf of the Applicants that Woolworths, as an afterthought, cynically sought to add further reasons of equity and costs efficiency in order to justify the retrenchments. I am inclined to accept this submission given the fact that the affected employees readily accepted Woolworths' business rational and were willing to move to flexitime contracts, of course without loss of benefits." [Paragraph 47]

E-MERGE IT RECRUITMENT CC V BRITS & ANOTHER (2016) 37 ILJ 1145 (LC)

Case heard: 10 December 2015; Judgment delivered 14 December 2015

This was an urgent application to bring a restraint order into force pending an appeal, relying on section 18 of the Superior Courts Act.

Nkutha – Nkontwane AJ considered whether exceptional circumstances existed to justify granting the order:

"The duration of the restraint is 12 months commencing from 31 August 2015 and 2½ months of the restraint period have already expired. Given the fact that the respondents have not launched the appeal process on an urgent basis, the restraint period would have lapsed or, at the very least, a substantial portion thereof would have expired by the time the appeal is finalised. That would, consequently, render the relief granted in the restraint order futile. The applicant would derive no benefit from its successful litigation." [Paragraph 9]

Nkutha-Nkontwane AJ found further that the applicant had shown that it faced irreparable harm if the restraint order was not granted, whilst any harm to the first respondent's was not irreparable. An order was granted whereby the restraint came into force pending the outcome of any appeal.

MALOKA V DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS (JR 1740/12) [2015] ZALCJHB 98 (18 MARCH 2015)

Case heard: 8 October 2014; Judgment delivered: 18 March 2015.

This was an application to review the decision of the second respondent not to reinstate the applicant, following the termination of applicant's services under the Public Service Act. Nkutha-Nkoontwane AJ held:

"Unlike the Second Respondent, the arbitrator was alive to the issues beyond his scope of jurisdiction, in particular evidence sought to justify the Applicant's absence from work. He, also, correctly advised the Applicant to place that evidence before the Second Respondent in terms of section 17(3)(b) of the PSA. Therefore, the arbitrator's findings could not be used as a basis to refuse the Applicant reinstatement." [Paragraph 21]

"[I]t cannot be said that the Applicant was wilfully absent from work. Also, there is no evidence proffered by the Second Respondent to support its assertion that it had taken into consideration the Applicant's submissions chronicling her circumstances and satisfied itself that continued employment relationship had been rendered intolerable by her conduct." [Paragraph 27]

"The Second Respondent's decision not to reinstate the Applicant was capricious and absurd. The decision must be reviewed and set aside." [Paragraph 30]

SAMWU OBO MEMBERS V NGAKA AND OTHERS (J2485/14) [2014] ZALCJHB 430 (27 OCTOBER 2014)

Case heard: 16 October 2014; Judgment delivered 27 October 2014

This was an urgent application to declare that the exclusion of applicant's members, employees of the first respondent, by first respondent from its premises was an unlawful and unprotected lockout. Respondents sought to have portions of the founding affidavit struck out on the grounds of hearsay. Nkutha-Nkontwane AJ held:

"It is trite that in proceedings instituted by way of notice of motion and in particular in matters of urgency, that hearsay rule is sometimes relaxed and statements of information or belief may be made provided the deponent's source of information or ground for belief is disclosed … In the present application, for the period commencing from 6 October 2014 and beyond, Miya failed to disclose the source of his information and the grounds for belief in his truth. But most pertinently, he failed to show that this application is aimed at restraining irremediable injury. The only issue remaining is whether the Second Respondent's instruction that all employees must register for access card in order to gain entry into the First Respondent's premises amounts to a breach of the

Applicant's members' contracts. The Applicant ought to have been advised that once they allege a breach of contract in an application, a dispute of facts would be inevitable and hence action proceedings are appropriate in such matters. In any event, since the Applicant is complaining about a breach of contract, it has adequate remedy in due course, both in contract and labour law." [Paragraphs17 - 18]

The striking out was granted, and the main application dismissed.

MEDIA COVERAGE

Quoted in Lee Dube, *The Burden of Femininity*, 25 May 2015 (available at https://thefwordfemmefatale.wordpress.com/2015/05/25/the-burden-of-femininity/)

"Nkutha-Nkontwana blamed the 'societal stereotypes for hindering women from reaching their full potential'. Nkutha-Nkontwana posed that the greatest challenge to the goal of gender equality is the ideology of a traditional women has been passed on from generation to generation, weaving it's way into the very areas of progression like the workplace."

ADVOCATE RUSSEL BEATON SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 7 June 1956

B.Iuris, University of Pretoria

LLB, University of Pretoria

Postgraduate Diploma in Advanced Labour Law, University of Cape Town

Development Programme in Labour Relations, University of South Africa

CAREER PATH

Prosecutor and State Advocate, Department of Justice: 1975 – 1981

Practicing Advocate, Pretoria Bar: 1982 – 1987

Assistant Legal Advisor at Chamber of Mines: 1987 – 1988

Industrial Relations Advisor at Rand Mines: 1989 – 1993

Practicing Advocate, Pretoria Bar: 1993 – Present

Secretary of the Bar Council: 1996

Took Silk 11 December 2010

Acting Judge in the Labour Court, Johannesburg: 26 – 29 June 2012 and 4 – 8 January 2015. March 2004 - 2011

Chairperson of the Disciplinary Hearings during 1997 and 2003

Leader of Trial Advocacy Workshop: 2013 – 2017.

Member, Democratic Party (1988 – 1999)

Member and electoral agent, Progressive Federal Party (1987 – 1988)

SELECTED JUDGMENTS

LABOUR LAW

CALVINIA LANDE BK V DEPARTMENT OF LABOUR & ANOTHER (2013) 34 ILJ 359 (LC)

Case heard 28 June 2012; Judgment delivered 4 July 2012

In this case the court had to determine whether an appeal in terms of s 72 of Basic Conditions of Employment Act of 1997 was a wide appeal, in which there was a complete rehearing with or without additional information or evidence, or a narrow appeal limited to the information that was before the body that made the decision. In the court's view giving the word 'appeal' as used in s 72 the meaning of a narrow appeal would give the court so narrow a role in supervising the statutory scheme of enforcement in the BCEA that the provisions of s 72 would be rendered virtually meaningless. This could not have been the intention of the legislature. The court was therefore satisfied that the appeal contemplated in s 72 was a wide appeal.

ABRAHAMS V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA") AND OTHERS, FREEDOM PARK V ABRAHAMS AND OTHERS [2015] ZALCJHB 457

Case heard 7 January 2015; Judgment delivered 19 February 2015

The case involved a section 188A dismissal for failure to disclose an interest in a tender. Beaton AJ found that the evidence did not establish a disclosable interest.

"In my view that friendship could not constitute the type of interest which is the target of the regulatory measures ... Section 10.3 of the Supply Chain Management Policy describes the natural persons and their relationship to the official or employee concerned, which triggers the duty of disclosure. Those persons do not include a "friend". Mr van der Westhuizen submitted further that the employee had a "private interest" in the contract being procured because of his friendship ... In my view such a construction strains the natural meaning of the words concerned. It is the interest of the described persons in the contract, not the entity concluding the contract, hat requires disclosure." [Paragraph 7]

SELECTED PUBLICATIONS

"The Enforceability of Labour Agreements" (1989) 10 *ILJ* 388

MEDIA COVERAGE / CONDUCT

The candidate's application form discloses the following:

- Case for alleged negligent conduct – alleged that arbitration was lost as made concessions that should not have been made. Date to be set.

- Found guilty of "double briefing" in 1998.

- Disciplinary Inquiry: Pretoria Society of Advocates v Russel George Beaton SC.
  Found guilty of trying to influence a Judge (Lebala AJ) without the other side being present and had removed and subsequently replaced the Heads of Argument from the court documents. "The present offence was committed, not out of dishonesty or greed, but can at most be regarded as a temporary lapse of judgment resulting from over zealousness to have his case heard."[3] Sentenced to six month suspension suspended for 3 years.

[3] Disciplinary Committee Report paragraph 17.

MRS WINNIE EVERETT

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 3 December 1966

BA English Major, University of Cape Town 1989

LLB, University of Cape Town 1991

Diploma in Journalism, INTEC 1994

IRDP, University of Stellenbosch 1997

LLM specialization in Labour Law, University of Cape Town 2013 – present.

CAREER PATH

Journalist and Editor South African Labour News: 1994 – 1995

IMSSA mediator: 1994 – 1996

CCMA Commissioner: 1996 – current

CCMA Senior Commissioner: 2012 – current

Part-time Labour Law Lecturer, UWC 2002 – 2006 and 2016 – current

Bargaining Council Panelist and TOKISO panelist: 2002 – 2006

Convening Senior Commissioner CCMA Tswane: 2006 – 2011

Acting Judge Labour Court: 2015

IR Change Associate and Panelist: 2016 – current.

SELECTED JUDGMENTS

LABOUR LAW

MOKHELE & OTHERS V SCHMIDT NO & ANOTHER (2016) 37 ILJ 2662 (LC)

Case heard 12-14 October 2015; Judgment delivered 19 May 2016

In this case the court found that the business had been transferred as a going concern. It also expressed the view that the dismissals were unlawful and invalid because they were intended to avoid the automatic consequences of s 197A(2)(a) and did not comply with the consultation provisions of s 197B. The court found further that, even in the event that they were not invalid, the

dismissals were nevertheless automatically unfair. The provision in s 197A(2)(a) that the new employer in a transfer in circumstances of insolvency is automatically substituted in the place of the old employer in all employment contracts in existence immediately before the old employer's winding-up does not mean that the contracts of employment must be in existence right up to the very day of the employer's winding-up. The purpose of the section, which is to protect employment, would be undermined if it were to be interpreted literally.

BOEYENS V MURRAY AND ROBERTS (PTY) LTD (PROJECTS) [2016] ZALCJHB 163

Case heard 10 November 2015; Judgment delivered 4 February 2016

Everett AJ ruled that making a protected disclosure is not a listed ground, nor can it be regarded as an arbitrary ground of discrimination. A protected disclosure is an act committed by a person which then results in certain consequences whereas a ground of discrimination refers to a characteristic or attribute which is associated with belonging to a particular group. Second, the LRA makes specific provision for disputes about occupational detriments and dismissals following a protected disclosure and that is the appropriate route to follow. The dispute was not framed as such, nor referred to conciliation, nor conciliated and the court cannot adjudicate it. Boeyens's remedy lay in claiming an ordinary unfair dismissal which is where he started this process and he was in the correct forum which had jurisdiction to arbitrate – that is, the bargaining council.

M V JOHANNESBURG METROPOLITAN BUS SERVICES (PTY) LTD [2015] ZALCJHB 400

Case heard 6 October 2015; Judgment delivered 13 November 2015

Found that the applicant was not unfairly discriminated against on the basis of his HIV status, and he also failed to establish the existence of a dismissal.

"I accept the employer's evidence that the HR officer who informed him of the option of applying for disability was not aware of his HIV status at the time and it could therefore not have been a basis for differentiation. In any event, applying for disability was clearly presented as an option as he did not even take the forms with him that day." [Paragraph 14]

MINISTER OF POLICE AND ANOTHER V KGOPA AND ANOTHER ZALCJHB 194

Case heard 10 November 2015; Judgment delivered 19 May 2016

Application by the State to review and set aside a decision granting absolution from the instance in a disciplinary hearing. Although the decision was manifestly wrong in law, it was held that there was no basis for the State to review its own functionary in terms of section 158(1)(g) or (h).

SELECTED PUBLICATIONS

- Co-author of Du Toit et al *Labour Law Through the Cases* (LexisNexis 2002)
- Co-author of Bosch D, Molahlehi E and Everett W, *The Conciliation and Arbitration Handbook* (2003)
- Co-author of Daphne J and Everett W, "Tackling Business Distress and Job Loss: Training Layoff Scheme" South African Labour Bulletin vol 35 No 2 June/July 2011

MS DEPHNY MAHOSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 5 October 1972

BProc, University of Limpopo (1997)

LLB, University of Limpopo (1998)

Certificate in International Commercial Law, Vrije University, Netherlands (1999)

Diploma, Insolvency, University of Pretoria (1999)

CAREER PATH

Acting Judge, Labour Court (2016 – 2017)

Director and attorney, D Mahosi Incorporated attorneys (2003 -)

Part time commissioner, CCMA (2007 – 2010; 2011 -)

Lecturer, University of Limpopo (2003 – 2010)

Attorney, Mankoe & Magabane Attorneys (2002)

Candidate Attorney, Mankoe & Magabane Attorneys (2001)

Researcher, Consilium Legis (1999 – 2000)

Member, Black Lawyers' Association

Member, South African Society for Labour Law (2016 -)

Member, South African Women Lawyers' Association (2014 -)

Member, Limpopo Law Council (2000 – 2010)

Member, African National Congress (2009 – 2014)

Member, Business Women's' Association of South Africa (2011 -)

Member, Institute of Directors (2009 -)

SELECTED JUDGMENTS

LABOUR LAW

NDZUTA V SOUTH AFRICAN POLICE SERVICES AND ANOTHER (JS557/12) [2017] ZALCJHB 68 (23 FEBRUARY 2017)

Case heard: 23 February – 4 March 2016; Judgment delivered: 23 February 2017 [Note paragraph 2 of judgment describes delays in receiving heads of argument from parties]

Applicant sought an order that his dismissal be declared automatically unfair on account of discrimination and occupational detriments for having made protected disclosures in terms of the Protected Disclosures Act.

Mahosi AJ found that the disclosure in question was protected under the Act [paragraphs 41 – 42], but that the applicant had not shown a causal link between his disclosure and the alleged detriments, and therefore that he had not suffered "occupational detriment" in terms of the Protected Disclosures Act. Therefore the dismissal was not automatically unfair [paragraph 45].

The claim for automatically unfair dismissal was thus dismissed.

MOCQHAKA LOCAL MUNICIPLAITY V LEKOTA AND OTHERS (JR2681/09) [2016] ZALCJHB 307 (16 AUGUST 2016)

Case heard: 11 February 2016; Judgment delivered 16 August 2016

The employee had been dismissed for misconduct. Following arbitration, the dismissal was found to have been procedurally and substantively unfair. Applicant filed a review application but failed to take further steps to pursue it. This was an application to dismiss the application to review.

Mahosi AJ held:

"It is common cause that the review application was filed on the 5th of October 2009 and that up to the date of the filing of the rule 11 application, being 5 July 2013, no record was made available by the applicant. The delay of almost four years is extremely excessive. It cannot be said that the applicant had the intention to bring the matter to finality. I said this for the following reasons. The applicant said that despite many enquiries, the Registrar of the Labour Court had not informed it of the receipt of the record. I failed to understand why it took more than two years to enquire whether the Registrar of the Labour Court had received the record. I am doubting if that was even the case. …" [Paragraph 10]

Mahosi AJ found further that the applicant lacked reasonable prospects of success, and dismissed the application for review.

SAMWU OBO MOLEKWA AND OTHERS V CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY (J244/16) [2016] ZALCJHB 85 (8 MARCH 2016)

Case heard: 16 February 2016; Judgment delivered 8 March 2016.

This was an urgent application for an interdict ordering the respondent to uplift the suspension of applicant's members for failing to comply with a collective agreement. Mahosi AJ denied the application:

"[I]t is clear that the Applicant's reason for bringing this application on an urgent basis was based on the fact that the decision to suspend the Applicant's members was unlawful because it contravenes the Collective Agreement and that it is in breach of the signed agreement of 28 December 2015. … Rule 8 of this Court requires the Applicant to set out an explanation why the relief is sought on an urgent basis and why the timeframes set out in the Rules should be abridged. The unlawfulness of the suspension does not render the matter urgent. The Applicant is required to show why the rules of this Honorable Court relating to forms and service should be dispensed with. The Applicant has, in my view, failed to make out a case for urgency and it is for that reason alone that its application stands to fail." [Paragraph 15]

MR GRAHAM MOSHOANA

BIOGRAPHIAL INFORMATION AND QUALIFICATIONS

Date of birth: 22 October 1969

BProc, University of the North (1991)

LLB, Witwatersrand University (1993)

Higher Diploma in Labour Law, University of Johannesburg (1995)

LLM, University of Johannesburg (2003)

Higher Diploma in Corporate Law, University of Johannesburg (2005)

CAREER PATH

Acting Judge, Labour Court

Director, Mohlaba & Moshoana Inc attorneys (1995 -)

Candidate Attorney, Moseneke & Partners attorneys (1993 – 1995)

Member, African National Congress (2002 -)

SELECTED JUDGMENTS

LABOUR LAW

SA MUNICIPAL WORKERS UNION & ANOTHER V NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY & OTHERS (2016) 37 ILJ 2430 (LC)

Case heard 9 June 2016; Judgment delivered 7 July 2016.

This was an application to review and set aside an arbitration award finding the dismissal of the second applicant to be procedurally and substantively fair. Second applicant had been found guilty of insolence by the arbitrator, despite not having been so charged. Moshoana AJ set aside the award:

"The reasoning is inconsistent with what the LAC in *Absa* and *Fidelity* said. Nowhere in the judgment appears a clear expression that those judgments were wrong. To my mind, an arbitrator determines a dismissal that had occurred. Much as I agree that the arbitration is a hearing de novo, such does not detract from the fact that a dismissal has happened because an employer believes that an employee has committed a particular act of misconduct. Not all misconduct will lead to a dismissal. For that reason, a commissioner must determine amongst others whether the misconduct for which an employee has been dismissed attracts dismissal as a sanction. So if a commissioner is at large to formulate a charge for another party to the dispute, he or she would not be in a position to determine whether dismissal was appropriate. I say so because if an employee is charged and dismissed for charge X, a commissioner may and in fact is entitled to find that charge X cannot lead to a dismissal. To allow a commissioner at the altar of s 138(1) to formulate a charge that will attract dismissal as a sanction would be unfair in my mind. The other party, in particular the employee, will prepare his or her case around the misconduct that led to his or her dismissal. This much is apparent from the reasoning of the majority. Not affording parties to arbitration a fair hearing is an irregularity." [Paragraph 13]

ARENDS & OTHERS V SA LOCAL GOVERNMENT BARGAINING COUNCIL & OTHERS (2013) 34 ILJ 2560 (LC)

Case heard: 19 February 2013; Judgment delivered 1 March 2013

This was an application to review and set aside an award by the second respondent. The parties agreed that the award was in effect a jurisdictional ruling. At issue was whether a pay parity agreement permitted the employer to reduce employees' earnings below a given employee's total level of earnings.

Moshoana AJ dismissed the application for review:

"Regarding the right in the pay parity agreement, the second respondent was spot on when he found that the pay parity agreement does not give a right to no lowering of salary. In argument, I asked Mr *Niehaus* to direct my attention to a clause protecting the right in question. He could not. He, however, retorted that the entire agreement did not envisage a worse off situation. This does not help the applicants. … I am not averse to an argument that non-compliance with a collective agreement gives rise to a dispute about application. Since the applicants cannot point to a clause not complied with in the collective agreement, it must follow that their claim is not germane from the agreement. I agree that the award is not the best model of clarity. But a proper reading reflects a proper reasoning." [Paragraph 32]

"I am of the firm view that the true dispute between the applicants and the third respondent is one of reduction of salary contrived as Mr *Grogan*, for the third respondent, correctly argued as one residing in s 24. The exercise of determining the true dispute satisfies the requirement of jurisdictional facts." [Paragraph 36]

TRANSPORT & ALLIED WORKERS UNION OF SA ON BEHALF OF MEMBERS V ALGOA BUS CO (PTY) LTD & ANOTHER (2013) 34 ILJ 2949 (LC)

Case heard: 25 April 2013; Judgment delivered 3 May 2013.

This case involved two applications to interdict a lock-out.

Moshoana AJ held:

"These matters raise a very unique and interesting question, which has not in the past received judicial attention or scrutiny. Crisply put, the question is whether an employer faced with a strike called by one or two unions can lawfully lock out all its employees inclusive of those not on strike, having not been called to strike by the union they belong to. …" [Paragraph 8]

"I … conclude that a lock-out must be directed to employees with a demand. Much as one can accept that a lock-out is recourse and not a right like a strike, a lock-out falls within the terrain of power play. A power play cannot be imported into a situation where there is no flexing of muscles. Like in a definition of a strike, strikers must have a demand.

It does appear to me that a further important consideration is that a lock-out must have a purpose. Firstly, an employer must have a demand directed to those employees. When employing a lock-out, the purpose should be to compel those employees to accept a demand. Logic dictates that it is foolhardy for an employer to compel employees who do not resist. Put differently exclusion of employees without any purpose is not a lock-out as defined and is bound to be unlawful in terms of the LRA." [Paragraphs 13 – 14]

The interdict was granted.

ARTICLES

"THE NEW EMPLOYMENT EQUITY ACT 55 OF 1998", *DE REBUS* DECEMBER 1998, PAGES 33 – 36.

This article examined potential practical problems the Act might pose. In considering section 35, which gives a designated employer the right to object to a compliance order issued by a labour inspector by making written representations to the Director-General, the author writes:

"The other question that arises is whether the fact that the designated employer has a right to appeal closes the door on his taking the decision on review. In my opinion this does not close that door … In other words, the designated employer may chose not to appeal but to oppose the application to make the order an order of court, and in the midst of such an opposition bring an application to review the decision of the Director-General. Again the question arises whether he order of the Director-General carries any weight …"

"I suggest that the legislature is perpetuating the syndrome of what I would call double justice. One wonders whether the legislature is of the opinion that proper justice will be carried out only at the

labour court as opposed to the other forums to which, despite that belief, the legislature has given the power to decide certain matters. …" [Page 36].

JUDGE FRANCIS LEGODI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 7 September 1954

BProc, University of the North (1981)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (2013 – 2014)

Member, Arms Deal Commission (2011 – 2013)

Chairperson, Magistrates' Commission (2007 -)

Chairperson, Military Appeals Court (2007 -)

Designated Judge, under Interception & Monitoring Prohibition Act (2007)

Judge, Gauteng High Court (2004 -)

Acting Judge, Pretoria and Venda High Court (2000 – 2004)

Mpumalanga Parks Board

- Member (1995 – 1998)
- Chairperson (1999 – 2000)

Member, Mpumalanga Tender Board (1994 – 1998)

Attorney (1986 – 2004)

Legal Assistant, Phosa & Mojapelo Attorneys (1984 – 1986)

Candidate Attorney, Ngoepe & Machaka (1982 – 1984)

Prosecutor (1981 – 1982)

Interpreter, clerk of the court (1981)

SELECTED JUDGMENTS

CIVIL PROCEDURE

MONDI LIMITED AND DAVID HATHORN V THE COMPETITION COMMISSION AND SAPPI SOUTHERN AFRICA LIMITED (47050/13) [2016] ZAGPPHC 249 (20 April 2016)

Case heard 18 March 2016, Judgment delivered 20 April 2016

An application for leave to appeal after the Commission had approached the Constitutional Court for leave to appeal directly and the application was dismissed on the ground that the appeal bears no prospect of success.

Legodi J dismissed the application:

"The decision to refuse leave to appeal in the present matter was taken by eleven judges of the constitutional court and of importance stated: ''The constitutional court has considered this application for leave to appeal. It has concluded that the application should be dismissed as it bears no prospects of success. Order: The application is dismissed with costs"." [Paragraph 11]

"Once one cannot conclude "with confidence" and "is not possible to reach the conclusion that the application was dismissed on its merits", that should be sufficient to disqualify this court to hear the application. In any event, the Commission, if it really wanted not to second-guess the order of the Constitutional Court, it had the opportunity to approach the Constitutional Court for if a court is approached within a reasonable time, it would have the power to correct, alter or supplement its own judgment or order in accessory or consequential matters …" [Paragraph 14]

"Furthermore, if the constitutional court dismissed the leave to appeal on a "no jurisdiction" possibility as suggested by counsel on behalf of the Commission, the order of the Constitutional Court would have been framed clearly to convey that message. Put simply, the constitutional court would unlikely have pronounced or expressed itself that the appeal "bears no prospects of success" in one sentence without motivation, if its order was indeed based on the fact that it has no jurisdiction and or that direct access was not justified. I am therefore not satisfied that this court is competent to hear the Commission's leave to appeal. On this point alone, its attempt to revert its application for leave to appeal in this court, must fail." [Paragraph 21]

CRIMINAL JUSTICE

PHETLA AND ANOTHER V S (A632/2015) [2016] ZAGPPHC 555 (24 JUNE 2016)

Case heard 29 April 2016, Judgment delivered 24 June 2016

The matter turned on the issue of the questions which should be asked to establish the reliability of the evidence of identifying witnesses.

Legodi J held, in upholding the appeal:

“The distinctiveness of the person's appearances is a factor to be taken into account. The court will be able to survey whether the accused has peculiar features, but some people look distinctive to one witness and not another. Thus to a person of one race, everyone belonging to another race, tends to look alike... Assuming that this statement holds true, the present case should then be found to be falling squarely under such a factor for consideration. The complainant, a white woman was accosted by three unknown black persons as it would appear from the particulars of their names. If that was so, her evidence should have been approached with caution something which the trial court in my view, failed to do. I am therefore not satisfied that the evidence of the identity of the complainant's assailants at her home was sufficient to be relied upon.” [Paragraph 29]

“In the present case the only people who could have testified on the complainant's capability to identify accused 3 at the identification parade would have been the police official who were involved in conducting the identification parade. The fact that a photo album of the line up at the parade and the pointing out of accused 3 was handed in by agreement, without more evidence, does not, for two reasons, have probative value: First, the photo album showing the complainant putting her hand on accused 3's shoulder, does not equate to the admission that the identification parade was properly conducted and that all safe guards have been adhered to. It must be understood to mean that accused 3 did not dispute the fact that the complainant pointed him out at the identification parade, nothing more and nothing less. Therefore, the prosecution was still obligated to lead evidence on the safe guards. Lastly, the trial court neglected or omitted to deal with factors, if any, relevant to the proper conduct of the identification parade. For the pointing out at the identification parade to be of material value, it was necessary to lead evidence satisfying the safe guard requirements. Therefore any attempt to suggest that accused 3 did not challenge the correctness of the identification parade, cannot be correct.” [Paragraph 31]

The appeal succeeded.

ADMINISTRATION OF JUSTICE

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA V JIBA AND OTHERS (23576/2015) [2016] ZAGPPHC 833; [2016] 4 ALL SA 443 (GP); 2017 (1) SACR 47 (GP); 2017 (2) SA 122 (GP) (15 SEPTEMBER 2016)

Case heard 30 May – 1 June 2016, Judgment delivered 15 September 2016

This case dealt with whether the respondents, senior office holders in the National Prosecuting Authority, were "fit and proper'' persons to remain on a roll of admitted advocates in terms of the Admission of Advocates Act.

Legodi J held:

“You do not want members of the prosecution authority to unduly watch their backs for fear of being dismissed or removed from the roll of advocates every time when they make mistakes in prosecuting and presenting cases in court, or every time when an application for authorisation is made in terms of section 2(4) of POCA. An overriding factor for them for consideration should be to adhere to the rule of law and the Constitution. It suffices for now to conclude on Booysen matter by stating that no case has been made for removal or suspension from the roll of advocates.” [Paragraph 68]

"Taking into account the kind of personality Mrwebi and Jiba had to deal with, they should have stood firm and vigorous on the ground by persisting to prosecute Mdluli on fraud and corruption charges. By their conduct, they did not only bring the prosecuting authority and the legal profession into disrepute, but have also brought the good office of the President of the Republic of South Africa into disrepute by failing to prosecute Mdluli who inappropriately suggested that he was capable of assisting the President of the country to win the party presidential election in Mangaung during 2011 should the charges be dropped against him." [Paragraph 168]

"It is this kind of behaviour that diminishes the image of our country and its institutions which are meant to be impartial, independent and transparent in the exercise of their legislative public powers." [Paragraph 169]

"Mzinyathi in my view, was consistent throughout. His confirmatory statement … has to be considered in the light of … the contextualisation of the statement in … his confirmatory affidavit. It is for this reason, amongst others, that this court did not deem it necessary for Mzinyathi to address the court in the present proceedings, neither did GCB insist to proceed against Mzinyathi after counsel for GCB was requested to indicate whether GCB still persists with its application against Mzinyathi." [Paragraph 175]

The case against Mzinyathi (the third respondent) was dismissed with costs. The names of Ms Nomgcobo Jiba (first respondent) and Mr Lawrence Sithembiso Mrwebi (second respondent) were struck from the roll of advocates

MEDIA COVERAGE

Liezel Lüneberg, "Justice for all: Meet Judge Francis Legodi"
(http://lowveld.getitonline.co.za/2016/10/05/justice-for-all-meet-judge-francis-legodi/#.WNLr6FWGOUI)

"I am a judge and many people look up to me, but I'm still just an ordinary man, no better than anyone else. Every single person fulfils a duty in order to keep the body functioning and one member is no more important than the rest."

A newspaper report at the time of Judge Legodi's departure from the Arms Deal Commission suggested he was dissatisfied with being marginalised and not consulted:

"Several sources familiar with the events linked to his decision, say Legodi was pushed to resign as he was sidelined by the commission chairperson, Judge Willie Seriti, who allegedly ran a clandestine operation and did not consult him.

A series of events, including an incident in which Seriti issued of a "confidential" policy directive to staff, apparently led Legodi to hand in his notice.

The policy directive was aimed at Legodi and undermined his position, the sources claim.

Legodi was asked to stay on at the commission to preserve its credibility after he consulted Justice Minister Jeff Radebe last week but he apparently felt he needed to preserve his integrity. …

Legal sources say Legodi could lose out on promotions by quitting but he was upset by the secretive goings-on at the commission.

What apparently irked him and others was Seriti's policy directive, marked "confidential", which had been sent to all staff. It was issued in June after Legodi tried to assist a young clerk, Thembi Zulu, who he apparently thought was being treated unfairly."

- Glynnis Underhill, "Arms body judge Legodi bows out", *Mail & Guardian* 2 August 2013 (https://mg.co.za/article/2013-08-02-00-arms-body-judge-legodi-bows-out)

DEPUTY JUDGE PRESIDENT PULE TLALETSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 5 November 1960

BProc, University of Bophuthatswana (1985)

LLB, University of Bophuthatswana (1987)

Cert. Dep, UNISA (1999)

CAREER PATH

Acting Judge President, Labour and Labour Appeal Court (2016)

Deputy Judge President, Labour and Labour Appeal Court (2013 -)

Acting Deputy Judge President, Labour and Labour Appeal Court (2013 – 2014)

Judge of Appeal, Labour Appeal Court (2010 -)

Acting Judge of Appeal, Labour Appeal Court (2007 – 2010)

Acting Judge President, Northern Cape High Court (2006 ; 2014)

Acting Judge, Labour Court (2004, 2005, 2007)

Judge, Northern Cape High Court (2003 -)

Acting Judge, Northern Cape High Court (2003)

Attorney, Director Gura Tlaletsi Inc (1989 – 2003)

Candidate attorney, State Attorney (1987 – 1989)

Dispute Resolution Committee Member, Law Society of South Africa (2003)

Council member, North West Circle : Law Society of Northern Provinces (2002 – 2003)

Law Society of Bophuthatswana

- President (2002 – 2003)
- Council member (1997 – 2000)

Branch secretary, member, NADEL (1990 – 2003)

Councillor & chairperson, Mafikeng City Council (1995 – 2000)

Council member, University of the North West (1995 – 1999)

Exco member, treasurer, Lawyers for Human Rights (1989 – 1996)

SELECTED JUDGMENTS

LABOUR LAW

KIEVITS KROON COUNTRY ESTATE (PTY) LTD V MMOLEDI AND OTHERS (JA 78/10) [2012] ZALAC 22; [2012] 11 BLLR 1099 (LAC); (2012) 33 ILJ 2812 (LAC) (24 JULY 2012)

Case heard: 20 March 2012, Judgment delivered 24 July 2012

The respondent was dismissed for absconding after attending a traditional healer's course. The commissioner found that the dismissal to be substantively unfair and ordered that she was to be reinstated. The award was upheld by the Labour Court and the Labour Appeal Court.

Tlaletsi JA ((Ndlovu JA and Murphy AJA concurring) held:

*"I*t is not my understanding of the facts of this case that the employee's case was that she was sick or ill in the conventional sense. Her case was that, based on her cultural and or traditional belief she was in a 'condition' and upon consultation with those that she believed to be in a position to assist her, being a traditional healer, informed her that she must undergo some sessions that would qualify her to be a sangoma as she had a calling from her ancestors. …" [Paragraphs 22-23]

"[T]here will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices … Those who do not subscribe to the others' cultural beliefs should not trivialise them … What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society. … The fact that the appellant's attorney does not believe in the authenticity of the culture and that no credible and expert evidence was presented to prove that the respondent was ill is, in my view, subjective and irrelevant. A paradigm shift is necessary and one must appreciate the kind of society we live in. Accommodating one another is nothing else but "botho" or "Ubuntu" which is part of our heritage as a society." [Paragraph 26]

"... The issue raised in this matter is novel and the appellant did not act unreasonably in approaching this court on appeal. It would therefore be in accordance with the requirements of the law and fairness that there be no order as to costs." [Paragraph 29]

CRIMINAL JUSTICE

S V VAN WYK 2006 (2) SACR 22 (NC)

Case heard 10 March 2006, Judgment delivered 10 March 2006

This case was an automatic review of a decision of the Magistrate's Court in which the unrepresented accused was convicted of negligent driving. The accused had pleaded not guilty and in his verbal plea-explanation raised a defence that he experienced a sudden emergency caused by mechanical defect.

Tlaletsi J (Kgomo JP concurring) held:

"What I found incongruous is what the magistrate did after she was addressed by the prosecutor and the accused at the close of the defence case. She summarily convicted the accused, who could hardly put up an argument on the merits as he confessed not to understand the procedures in court, without giving any reasons for her decision..." [Paragraph 5]

"In my view it is improper for a court to merely find an accused, in particular an unrepresented accused guilty, without furnishing reasons. An accused person has a right to know during the trial facts upon which the conviction is based. This will enable him/her to be in a position to reconsider his/her position regarding legal representation and further to decide which facts or factors should be placed before court in mitigation of sentence. For a trial to proceed further without the accused being aware of the basis for a conviction may ... result in violation of the accused's right to a fair trial. The magistrate did not even advise the accused that he has a right to request reasons for conviction, before she proceeded to the sentencing stage of the trial. ..." [Paragraph 6]

"The practice of not giving reasons for the decision, be it to convict or to acquit, after evidence has been presented should in my view, be discontinued. A verdict is not an interlocutory decision, and should at all times be preceded by an indication of considerations, findings and conclusions, of both law and fact deliberated by the court to substantiate its final judgment. ..." [Paragraph 7]

The conviction and sentence were reviewed and set aside.

ADMINISTRATION OF JUSTICE

SAMUELS V OLD MUTUAL BANK (DA30/15) [2017] ZALAC 10 (25 JANUARY 2017)

Case heard 25 August 2016, Judgment delivered 25 January 2017

This was an application to retrieve a file archived in terms of the Labour Court Practice Manual.

Tlaletsi DJP held:

"The respondent has not challenged the appellant's bona fides in bringing this application. Neither did the court a quo find that the application is not made bona fide by the appellant. I have no doubt that given the financial expense and effort put by the appellant to pursue her review application that the application for retrieval of the file from achieve is bona fide." [Paragraph 18]

"The main challenge to the application is the delay of seven moths in filing copies of the exhibits and the general delay in filing the complete record for the review application. The appellant has devoted the bulk of her 33 paged founding affidavit to explain the difficulties she encountered in having the record prepared to the standard required by the Rules and directives of the Labour Court. It is evident from the chronology set out above that she did not sit back and do nothing to have a complete and proper record prepared and filed. The appellant played an active role to have the record prepared. There were exchanges of correspondence and attendances between the appellant, her attorneys of record, the CCMA and the transcribers all aimed at having a complete record produced. The fact that the appellant and her attorneys kept the respondent and the Registrar's office abreast of the difficulties she experienced and the progress made is not disputed. These exchanges evince reasonable and diligent steps taken by the appellant to prosecute her review application." [Paragraph 19]

"It is for the court on review that would be in a position to adjudicate on the review application once all the necessary papers have been filed. It must be emphasised that the Practice Directive, in particular the provisions relating to archiving and retrieval are there to facilitate expeditious but fair adjudication of the disputes in the Labour Court. The manual should not be used to enable a party to gain an unfair advantage over the other. In this matter, the refusal of the application to retrieve the file from archives would mean that an employee who has served her employer for a period of 26 years, who is not guilty of any misconduct, and elected to exercise her constitutional rights to fair labour practise is dismissed at will through trumped up charges by her senior manager. That would indeed be a wrong message to send." [Paragraph 23]

The appeal was upheld with costs.

MEDIA COVERAGE

Reported to have lodged a complaint to the JSC against Judges Majiedt and Lackock in 2008, accusing them of misconduct. The dispute was reported to have bene triggered when Judge President Kgomo recommended that Judge Tlaletsi be appointed as acting Judge President while he (JP Kgomo) was on leave.

- See Pierre de Vos, "Another racial spat in the judiciary", *Constitutionally Speaking* 29 April 2008 (http://constitutionallyspeaking.co.za/another-racial-spat-in-the-judiciary/)

JUDGE CECILE WILLIAMS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 7 August 1965

BA (Law), University of the Western Cape (1986)

LLB, University of the Western Cape (1988)

Diploma in Advanced International Human Rights and Humanitarian Law, Raoul Wallenberg Institute, University of Lund, Sweden (1998).

CAREER PATH

Judge of the Northern Cape High Court, Kimberley (2003 -)

Acting Judge, Western Cape High Court (2002)

Advocate, Cape Bar (1991 – 2003)

Part time criminal law lecturer, University of the Western Cape (1997)

Advocate, Port Elizabeth Bar (1991)

Fellow, Legal Resources Centre (1989)

Member, International Association of Women Judges (2004 – 2008)

Member, Advocates for Transformation (1998 – 2003)

Member, NADEL (1989 – 2003)

Member, Cape Bar Council (2001 – 2002)

SELECTED JUDGMENTS

PRIVATE LAW

ELS V MEC: DEPARTMENT OF HEALTH, NORTHERN CAPE (1744/2010) [2017] ZANCHC 7 (10 FEBRUARY 2017)

Case heard: 9 September 2016; Judgment delivered 10 February 2017

Plaintiff brought an action for damages, alleging negligence by health department employees due to an object having been left behind in her body after an operation.

Williams J held:

"During cross-examination however Dr Blanco [a witness for the defendant], most astoundingly and of his own accord, stated that he had never treated or seen the plaintiff before performing the dissection of the preserved breast tissue. The basis on which his evidence was introduced was thus at the very least misleading. His evidence was of an expert nature without having qualified himself as such. The question is then - what value can be attached to his evidence? The simple answer is - none. The notices in terms of Rule 36 (9) (a) and (b) make no mention of Dr Bianco's qualifications (even if it did, it has no evidential value) and he has not testified to his qualifications at all. This failure is fatal and his evidence relating to the matter at hand therefore remains mere opinion evidence which is irrelevant." [Paragraph 17]

"I have in the circumstances no hesitation in accepting the evidence of Dr Pienaar above that of Dr Boeddinghaus. Dr Pienaar is a vastly experience medical specialist and lecturer with more than 20 years experience in private surgical practice. ... His evidence was clear, well-balanced, took into account all the relevant considerations and is founded on logical reasoning. Dr Boeddinghaus on the other hand admitted to seeing relatively few cases of periductal mastitis over the course of her career. She could not explain how smoking contributed to the condition except for her statement that there is a strong correlation between smoking and periductal mastitis. Her diagnosis stands unsupported by any of the practitioners involved in the treatment of the plaintiff, or the hospital records of the plaintiff. Dr Boeddinghaus' refusal to acknowledge any possible detrimental effect that a foreign body left behind in the breast of the plaintiff could have had, is to my mind a clear indication of the fact that she is not an independent witness. The view I hold of the lack of independence of Dr Boeddinghaus, is confirmed by her reluctance to concede, on the basis of her diagnosis, that the employees of the Kimberley Hospital had misdiagnosed the condition as duct ectasia and had as a result prescribed the wrong antibiotics." [Paragraph 44]

Judgment was granted in favour of the plaintiff on the merits of the case.

MEREMENTSI V VISSER (CA&R 3/2011) [2013] ZANCHC 9 (26 MARCH 2013)

Case heard: 21 November 2011 and 11 February 2013; Judgment delivered 26 March 2013.

Appellant sued the respondent for damages for failing to sign transfer documents to transfer immovable property to the appellant. Respondent admitted not signing the documents, but claimed not to be at fault. The magistrate at first instance found for the respondent.

On appeal, Pakati J held that the magistrate had committed numerous misdirections, and upheld the appeal.

Williams J dissented:

"The plaintiff's claim is not based on enrichment and all references in the main judgment to the plaintiff's impoverishment on the one hand and the defendant's enrichment on the other are unfounded and not informed at all by either the pleadings or the evidence for that matter. …" [Paragraph 39]

"In my view the plaintiff has failed to prove his damages on all levels. As far as causation is concerned the question to be asked is whether it was the failure or refusal of the defendant to sign the transfer documents which resulted in the plaintiff having to pay the higher purchase price at the auction or whether it was in fact the improvement of the property by the plaintiff which caused the increased auction price on which he bases his claim for damages. Although the plaintiff has not given any evidence as to the costs incurred by him in effecting the improvements it can be gleaned from his evidence that the improvements were not insubstantial." [Paragraph 45]

Kgomo JP wrote a separate judgment concurring in the judgment of Pakati J:

"Williams J does not state that the parties hereto had entered into a valid agreement of the sale of the immovable property described by Pakati J in the opening paragraph of her judgment (para 10). It is therefore incomprehensible on what basis or legal principle it is suggested by Williams J that the respondent could alter arbitrarily and orally the terms of a binding written agreement of the sale of immovable property." [Paragraph 5]

DANIEL VISAGIE T/A PRIESKA ENTERTAINMENT CENTRE V MINISTER OF SAFETY AND SECURITY AND OTHERS NO AND OTHERS; CLYDE SHADLEY STEYTLER T/A KURUMAN ENTERTAINMENT CENTRE V MINISTER OF SAFETY AND SECURITY AND OTHERS NO AND OTHERS (1084/2013; 1085/2013) [2013] ZANCHC 30 (6 SEPTEMBER 2013)

Case heard: 2 August 2013; Judgment delivered: 6 September 2013

Applicants were suspected of conducting illegal gambling activities, and search and seizure warrants were executed against them. Applicants sought to have the warrants set aside, and possession of the removed items restored to them. The invalidity of the warrants was conceded. At issue was whether the gambling machines seized could be restored to the applicants, as the lacked the required licenses or authorisations to possess the machines. Possessing the machines without such authority constituted an offence under the National Gambling Act.

Williams J held:

"In *Ivanov v North West Gambling Board and Others* 2012(6) SA 67 (SCA), the Supreme Court of Appeal found, in circumstances on all fours with the present, that the appellant was entitled to a spoliation order, that the lawfulness of the appellant's possession of the gambling machines were irrelevant in such circumstances and ordered the unqualified restoration of the machines to the appellant. … In a judgment delivered on 31 May, 2013 a differently constituted bench of the SCA, in *Ngqukumba v Minister of Safety and Security and Others*, (660/12) ZASCA 89, held that the *Ivanov* matter was wrongly decided." [Paragraphs 7 – 8]

"The decision in *Ngqukumba,* being the latest in the SCA on this subject, would be binding on this Court in terms of the *stare decisis doctrine* – thus disentitling the applicants *in casu* to spoliatory relief where the items seized cannot be lawfully possessed. The appellant in *Ngqukumba* has however lodged an application for leave to appeal against the judgment of the SCA. The application for leave to appeal has been set down in the Constitutional Court …" [Paragraph 9]

"The words "*judgment or order"* when referred to in section 20 of the Supreme Court Act, which deals with appeals, is said to be used in the restrictive sense of the "*pronouncement of the disposition"* upon relief claimed. … This being the case, the "*suspension"* of the "*judgment or order"* pending appeal can only relate to the judgment or order in its restrictive sense and does not affect the *ratio decidendi* or reasons for the decision. High Courts are obliged to follow legal interpretations of the SCA and remain so obliged unless and until the SCA itself decides otherwise or the Constitutional Court does so in respect of a Constitutional issue. …" [Paragraphs 17 – 18]

The applicants were thus not entitled to the restoration of the gambling machines. The warrants were set aside, and the return of all goods the applicants were lawfully entitled to posses was ordered.

JUDGE VIOLET PHATSHOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 20 November 1972

BProc, University of the North (1995)

LLB, University of the Free State (1996)

LLM, University of the Free State (1999)

CAREER PATH

Acting Judge of Appeal, Labour Appeal Court (2016 – 2017)

Acting Judge, Labour Court (2016)

Judge of the High Court, Northern Cape Division (2011 -)

Acting Judge, Northern Cape High Court (2010 – 2011)

Enrolled as notary and conveyancer of the High Court (2009)

Part time lecturer, University of the Free State (2006 – 2009)

Part time arbitrator, conciliator, CCMA (1999 – 2004)

Admitted as Attorney of the High Court (1999)

Chairperson, Phatshoane Honey Inc attorneys (2002 - 2011)

Director, Naude's Attorneys (2000 – 2002)

Professional Assistant, Naude's Attorneys (1999 – 2000)

Candidate Attorney, Naude's Attorneys (1997 - 1999)

Researcher, Supreme Court of Appeal (1996)

Member, International Association of Women Judges (2011 onwards; Vice chairperson, programmes 2012 – 2014)

Member of Council, Sol Plaatje University (2014 -)

SELECTED JUDGMENTS

PRIVATE LAW

FREEPAK BK V DURAAN AND ANOTHER (729/2013) [2013] ZANCHC 42 (18 OCTOBER 2013)

Case heard: 16 August 2013; Judgment delivered 18 October 2013.

Applicant sought to enforce a restraint of trade agreement that would interdict the respondents from being involved in a business in the Northern Cape that was involved in selling similar products (packing material) to the applicant.

Phatshoane J held:

"The Duraans make it plain that they intend to open a business which sells similar products as that of the applicant. They do not dispute that they had personal contact with the applicant's clients or that these clients had their contact details. In their own words Van Der Walt rarely visited the branch and was seldom involved in the business. This goes to show how well they were acquainted with the applicant's clients. They also do not say why is it necessary for them to open the same business as the applicant except that they have been involved in the packaging business for 15 years; there is nothing secretive or special about this industry; and that they have been out of employment since February 2013." [Paragraph 23]

"In its current form the restraint clause impedes the Duraans' involvement in any business which sells similar products as the applicant in the whole of South Africa. It does not define the territory within which the restriction is to apply. Nevertheless, the applicant seeks an order in terms of which the restraint is to operate only in the Northern Cape. Similarly the period of five years over which the prohibition is to endure is out of kilter with what would be reasonable in the circumstances of this case." [Paragraph 27]

The order was granted, with the period of operation of the restraint of trade limited to two years.

LABOUR LAW

NOOSI V EXXARO MATLA COAL (JA62/2015) [2017] ZALAC 3 (10 JANUARY 2017)

Case heard 25 August 2016; Judgment delivered 10 January 2017

This was an appeal against the Labour Court's refusal to condone a late filing of a review record, and dismissal of the review.

On the condonation issue, Phatshoane AJA (Landman JA and Savage AJA concurring) held:

"The delay of eight weeks and four days outside the six-week period provided for in s 145 of the LRA, as correctly found by the Court *a quo,* was inordinate. One of the primary purposes of the LRA is the effective and expeditious resolution of labour disputes. …" [Paragraph 29]

"In my view, failure to deal with labour disputes promptly and effectively may render the purpose of the LRA manifestly nugatory. Mr Noosi did not provide a plausible explanation for the wanton delay. He failed to provide the dates in respect of which he interacted with his union representatives and those in respect of which he instructed his attorneys of record to assist him. This would have enabled the Court to assess the legitimacy of the explanation proffered for the delay. The remissness on the part of the union officials to file the review application in time ought to squarely be imputed to him." [Paragraph 31]

The appeal was dismissed with costs.

CRIMINAL JUSTICE

SCHALKWYK V S (CA&R 119/14) [2015] ZANCHC 5 (27 FEBRUARY 2015)

Case heard: 11 December 2014; Judgment delivered 27 February 2015

Appellant was convicted in the magistrates' court on one count of murder and one count of obstructing the course of justice. On appeal ,the issue was whether the state had proved beyond a reasonable doubt that the appellant had murdered the deceased, with intention n the form of dolus eventualis.

Phatshoane J (Tlaletsi AJP concurring) dismissd the appeal:

"The appellant was convicted of an attempt to defeat or obstruct the course of justice … The appeal before us does not lie against that conviction because he did not succeed in obtaining leave to appeal against it. Therefore it cannot avail him to argue that the witnesses were untruthful that he urged them to subvert the truth. In any event, the evidence of the two State witnesses remained unshaken that the appellant was angry when he hit the deceased with the hay-bale hook. … [T]hese witnesses also gave evidence favourable to the appellant on certain aspects. Out of exasperation over the deceased's misconduct during the weekend of 12/13 February and the morning of 14 February 2011 the appellant struck him with the hay hook. The Acting Regional Court Magistrate's rejection of the accidental death is justifiable on the facts." [Paragraph 28]

"Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. On the facts, the only reasonable and inexorable inference to be drawn is that when he gave vent to his ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action." [Paragraph 35]

On appeal, in **Van Schalkwyk v S (680/2015) [2016] ZASCA 49; 2016 (2) SACR 334 (SCA) (31 March 2016)**, a majority of the SCA overturned the murder conviction and substituted a conviction or culpable homicide. Lewis JA (Tshiqi JA and Plasket AJA concurring) held that the state had failed to prove actual foresight of the possibility of death.

"As the regional magistrate said, 'by striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality'. The test, as noted by the full bench, was incorrectly stated by the magistrate. But it appeared not to worry the full bench since it found on the facts that the appellant had had actual foresight of the death of the deceased. No such finding was made by the magistrate, however, and it is far from clear to me how the full bench reached that conclusion." [Paragraph 39]

Baartman AJA and Willis JA dissented, and would have upheld the conviction for murder.

MEDIA COVERAGE

It was reported that during the sentencing stage of the trial of former ANC Northern Cape chairperson, John Block, and others in the so-called Trifecta case, Block sought a special entry and to make a complaint to the JSC over allegations that Judge Phatshoane had been influenced by her Judge President in convicting the accused:

"Earlier sentencing procedures were disrupted because of an urgent application after Block reported Phatsoane to the Judicial Services Commission. He claims she bowed to pressure to convict him in the Trifecta trial.

According to Block's legal representative, Advocate Salie Joubert SC, a judge, who is known to the defence, overheard a telephonic conversation between the presiding officer (Phatsoane) and Northern Cape High Court Judge President Frans Kgomo, indicating that she should "convict the bastards".

Joubert stated that while he did not know the judge who had overheard the conversation, a number of lawyers and advocates in the legal fraternity knew the identity of this individual.

"My client met with his attorney, Dali Mjila, and senior advocate Moses Mphaga, from the Pretoria bar, on October 24 at the Protea Hotel in Kimberley, to discuss certain issues pertaining to litigation.

"Mjila conveyed that he had received information from a reliable source where this particular judge was in the presence of the Judge President (Kgomo) when Phatsoane advised him that she had no grounds to convict Block."

He added that Kgomo was out of town when the conversation took place.

"If he admits that this conversation took place, the Judge President should be in a position to reveal who had listened in on the conversation. The nature of the application is not frivolous, neither is it an abuse of the legal process."

Joubert added that the judge, who was privy to this private discussion, shared this information with an attorney, who in turn felt that it "needed to be followed up".

"At a Black Lawyers Association meeting this year, the discussion was conveyed to Mjila in confidence."

Joubert added that it was decided that this information should be disclosed to the Judicial Services Commission as the "life of his client was at stake".

"While my client was considering an application for recusal, it is clear that Phatsoane had succumbed to pressure to convict the accused. Block has no reason to doubt the validity of this information.""

- Sandi Kwon Hoo, "It's not over yet, says ANC's John Block", *IOL*, available at http://www.iol.co.za/news/crime-courts/its-not-over-yet-says-ancs-john-block-7116795

JUDGE RONALD HENDRICKS

BUIGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 11 December 1964

BLC, University of Pretoria (1988)

LLB, University of Pretoria (1990)

CAREER PATH

Acting Judge President, North West High Court (2012, 2014, 2016)

Acting Judge of Appeal, Labour Appeal Court (2010)

Acting judge, Labour Court (2007)

Judge, North West High Court (2003 -)

Acting Judge, North West High Court (2003)

Acting regional court magistrate, Mmabatho (2000)

Advocate (1993 – 2003)

State advocate (1991 – 1993)

Regional Court prosecutor (1990)

Member, NADEL (2000 -)

North West Bar Association:

- Secretary (1997 – 1999)
- Vice chairman (2000 – 2001)

Member, African National Congress (1994 – 2003)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S v NKUNA 2012 (1) SACR 167 (B)

Case heard: 3 October 2005; Judgment delivered 17 November 2005.

The central question in this case was whether an accused could be convicted of murder in circumstances where the body of the deceased had not been found. No direct evidence was led and the state relied on circumstantial evidence for a conviction.

Hendricks J held:

"To require the production or discovery of the body (*corpus delicti*) in all cases would be unreasonable and unrealistic and, in certain cases, would lead to absurdities. To my mind it would lead to a gross injustice particularly in cases where a discovery of the body is rendered impossible by an act of the offender himself. … It is thus proper for a court to convict an accused on circumstantial evidence provided it has the necessary probative force to warrant a conviction, and the fact that death can be inferred from circumstances that leave no ground for a reasonable doubt. … It is not hard to think what the state of affairs would be in this country if the legal position were to be that, whenever a murder is committed and the body (*corpus delicti*) of a deceased is not found, the accused is then entitled to his acquittal; and that being so, despite the existence of overwhelming circumstantial evidence that points a finger to the accused person." [Paragraphs 111 – 113]

Hendricks J found that no evidence had been presented to suggest that the victim might still be alive [paragraph 141]. The accused was convicted of murder.

CUSTOMARY LAW

PILANE AND ANOTHER V PHETO AND OTHERS (582/2011) [2011] ZANWHC 63 (30 SEPTEMBER 2011)

Case heard: 11 August 2001; Judgment delivered: 30 September 2011

Respondents has placed a newspaper advertisement calling on members of the Bakgatla – Ba – Kgafela Royal Family to attend an urgent meeting. Applicants sought to interdict the meeting. Respondents brought a counter – application to compel the applicants to submit financial documents, and to refer the matter to the Premier to appoint a commission of inquiry into allegations of financial maladministration b the Applicants. At issue was whether respondents were members of the Royal Family, and thus whether they were entitled to call a meeting of the Royal Family.

Hendricks J found that:

"Adopting a robust approach to the issues in dispute, it is abundantly clear that the Respondents are not members of the inner circle or core of the Royal Family of the Bakgatla-Ba-Kgafela tribe and also not royalty." [Paragraph 24]

"Being debarred from holding community meetings, the Respondents holds themselves out as members of the Royal Family … and attempt to, under the disguise of being the Royal Family, to hold a meeting in an attempt to circumvent the court order prohibiting them as individuals to hold a tribal community meeting. …" [Paragraph 32]

"Whilst everybody and anybody has the right to call a meeting and enjoys freedom of association, nobody is allowed to call a meeting for and on behalf of an entity or body corporate whilst he/she does not have the necessary *locus standi* to do so. The Respondents who are not core members of the Royal Family cannot call a meeting under the guise of the Royal Family and even hold out in an advertisement that the First Respondent … is the chairperson or chairman when in fact this is not the case. Without any stretch of the imagination, the placing of this advertisement was intended to create confusion amongst members of the tribal community of the Bakgatla-Ba-Kgafela tribe who the Royal Family is and who has the right to call a meeting." [Paragraph 39]

The interdict was granted, and the counter – application dismissed. On hosts, Hendricks J held:

"[T]he Respondents weren't candid with this Court. Furthermore, it is quite apparent that the Respondents are doing everything within their means to unseat and undermine the authority of the Applicants and to litigate as often as possible in an attempt to create confusion within the tribe. This behaviour borders on being vexatious. This, to my mind, calls for a punitive costs order. In my view too, the complexity of this matter is not questionable, this was the view of counsel for both the Applicants and the Respondents." [Paragraph 55]

Respondents were ordered to pay costs on an attorney and client scale.

The judgment has been criticised by Aninka Claassens and Boitumelo Matlala ["Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires", *New South African Review* 4 (2014), 117]:

"Judge Hendricks found that Nyalala Pilane, being 'the nominated representative of the *kgosikgolo* in South Africa, has the necessary standing and clear right as a member of the royal family, as defined in terms of Bakgatla custom and law, to bring this application.' This is a disconcerting and novel interpretation of customary law – that membership of a royal family, and chiefly status depends on the discretion of a 'paramount' based in another country. … Judge Hendricks's interpretation has far-reaching consequences for the concept and exercise of chiefly accountability. In effect it means that a traditional leader such as Nyalala Pilane cannot be held accountable by anyone in the customary community, including his royal family, apart from a more senior traditional leader. This flies in the face of a wide-ranging historical and anthropological literature about the role of councils and interlocking customary structures at various levels in mediating and shaping the exercise of chiefly power …" [page 129].

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE NORTHERN PROVINCES V GABARONE MOTHOGAE & ANOTHER [2007] JOL 19024 (B)

Case heard 24 November 2005, Judgment delivered 12 January 2006.

Applicant sought an interim order, suspending the first respondent from practising as an attorney. Respondents argued *in limine* that applicant lacked *locus standi*; that section 84A of the Attorneys Act was unconstitutional; and that the Bophuthatswana Law Society had exclusive jurisdiction over the first respondent.

Hendricks J dismissed all three points in *limine:*

"It is contended ... that section 84A is unconstitutional and invalid because it unfairly discriminates against attorneys belonging to the Bophuthatswana Law Society in that, they are subjected to the control and regulation of two Law Societies, quite different from their counterparts who belongs to Law Societies of the then Republic of South-Africa, which did not fall under the former homelands."

"I am unconvinced that the dual membership amounts to unfair discrimination.

The fact that two Law Societies have concurrent jurisdiction over an attorney and exercise control over such attorney is in my view not discriminatory. Either of the two Law Societies may take action or appropriate steps against a member. ... If however, these Law Societies take separate action against an attorney, for the same misconduct, such an attorney will have the appropriate remedies or defences at his or her disposal." [Pages 11-12]

"Although it might be said that the regulation of an attorney who practices in the territory of the former Republic of Bophuthatswana is a little complicated and not altogether satisfactory, because of the concurrent jurisdiction over such an attorney also by the Law Society of the Northern Provinces, I am of the view that it is not unconstitutional. I also do not agree with the contention that such an attorney is at a disadvantage, as compared to his/her counterparts in the areas of the Republic of South Africa which did not fall under the erstwhile homeland areas." [Pages 13-15]

JUDGE SHANE KGOELE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 18 June 1964

BProc, University of the North (1987)

LLB, UNISA (2005)

LLM, UNISA (2008)

CAREER PATH

Judge, North West High Court (2009 -)

Acting Judge, North West High Court (2008)

Magistrate, Regional Court (2008)

Trainer, Justice College (2001)

Senior Magistrate (1999)

Magistrate (1991)

Prosecutor (1988)

International Association of Women Judges

- Member (2004 -)
- Provincial Executive Member (2010 – 2013)
- President, South African Chapter (2014 -)
- President, Southern African Region (2014 -)

Member, JOASA (2001 – 2009)

SELECTED JUDGMENTS

PRIVATE LAW

PELSER V MIRUKA (898/2014) [2015] ZANWHC 69 (29 OCTOBER 2015)

Case heard: 11 August 2015; Judgment delivered 29 October 2015

Plaintiff, a former university lecturer, claimed damages against a former colleague for defamation, flowing from an e-mail circulated among university staff, inter alia accusing the plaintiff of plagiarism.

Kgoele J held:

"The submission by the defendant that the statements complained of are not defamatory of the plaintiff is in my view a bald statement which is not even substantiated. The meaning of the word "*Plagiarism*" is clear and in the academic world as the plaintiff correctly stated, is a very serious allegation that denotes that plaintiff acts fraudulently by imputing other people's work as his and therefore conducts himself in an unethical manner. In my view, the statement in its ordinary construction is capable of conveying to the reasonable reader a defamatory meaning which tends to lower or diminish the esteem with which he is held by others. The plaintiff therefore discharged this onus." [Paragraph 20]

"In my view, the defendant failed to discharge the onus of establishing either some lawful justification or excuse or the absence of *animus iniurandi* on his part."]Paragraph 25]

Plaintiff was awarded damages of R100 000, plus interest and costs.

CRIMINAL JUSTICE

S v SHELDON-LAKEY 2016 (2) SACR 632 (NWM)

Case heard 20 May 2016; Judgment delivered 4 July 2016.

Appellant was convicted of committing a consensual act of sexual penetration with a boy under the age of 16, in contravention of section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. She was sentenced to four years' imprisonment. Appellant had bene a temporary educator at the school where the victim was a learner. Appellant raised a defence that the victim had deceived her into believing that he was 16 years or older, and that she at the time reasonably believed that he was older than 16 years.

Kgoele J (Gura J concurring) held:

"Although the appellant was not a professional counsellor/therapist, I find it strange that she could embark on the exercise of counselling a learner without establishing his/her age. Her reason, that she only wanted to show and make the victim understand that God would help him biblically, does

not exonerate her. Instead, it is one of the reasons why she should have started by enquiring and verifying the age of the victim. Age is also important in discussing religious beliefs with children. It is even more so when dealing with emotions of children. In addition, she admitted during cross-examination that, from the backdrop of her studying a law degree, she knew that the age of a child is important inasfar as relationships are concerned. The appellant nevertheless, besides counselling the victim without verifying his age, recklessly proceeded to an extent of falling in love with him without verifying his age first, and ended up having sexual intercourse with him." [Paragraph 19]

"While due weight must be given to the appellant's personal circumstances, the offence she committed remains a serious one. Sexual offences are prevalent in our society. The legislature, reflecting social morals of society, enacted legislation in an attempt to curb sexual intercourse between adults and children, and for good reason. Right-thinking members of society expect adults to protect children, not to abuse them. The exploitation of emotionally immature children and the risks of sexually transmitted diseases are causes for serious concern. … [T]he offence pertains to an instance of consensual intercourse between a 39-year-old woman, who is married, and a school- boy of at least 16 years at the time of the commission of the offence. The fact that the appellant was in a educator – learner relationship with the child aggravates the matter. What compounds the matter further is that the sexual encounter occurred more than once, even after the appellant received the birth certificate of the victim. The offence was committed by a person who clearly knows what the law and the Scripture say about morality." [Paragraphs 29 – 30]

The appeal was dismissed.

CHILDRENS' RIGHTS

RUDI V SONJA (115/13) [2014] ZANWHC 3 (9 JANUARY 2014)

Case heard: 31 October 2013; Judgment delivered 9 January 2014.

The court was required to determine whether the applicant had acquired parental responsibilities and rights in respect of a minor child, in terms of section 18(2) and (3) of the Childrens' Act. The parties were the biological parents of the child, but had never married or lived in a permanent life partnership.

Kgoele J held:

"The Act does not require that the father must only prove that he contributes to the child's upbringing, but that he can also prove that he has attempted in good faith to contribute to the child's upbringing. I am satisfied that the applicant has managed to prove that he has attempted to contribute to the child's upbringing, and what remains for this Court to consider is whether the said attempt was for a reasonable period." [Paragraph 18]

"Once again the Act does not define what a reasonable period is. It therefore goes without saying that the phrase "reasonable period" is problematic to deal with. The only solution is to rely on the circumstances of a particular matter to determine what is reasonable. The problem that I find with

the submission of the respondent is that she based the sufficiency of contact of JD and applicant to numerics. According to her Legal counsel 15 times in 8 and half years is not sufficient. The question that remains unanswered is, when will the contact and/or visit with the child be numerically enough to be regarded as "reasonable"? …It has been proved in this matter that the applicant beside paying maintenance, visited the child and had contact with him at the least, 15 times as alleged by the respondent. On other numerous occasions he attempted to come and visit or have contact with JD but the contact was refused apparently by JD himself. The fact remains he had attempted to have an interaction with the child and stopped when he was ordered to when the proceeding in this matter started. …. It is quite clear … that the condition / circumstances were not always conducive for the applicant to have contact with his child. Therefore, the circumstances that prevailed must in my view be taken into consideration in evaluating whether 15 times contacts which the applicant had with JD is sufficient to constitute "reasonable period". In my view, they do." [Paragraphs 19 – 20]

The application was granted.

MS TEBOGO DJAJE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 4 February 1974

BProc, University of the North West (1996)

LLB, University of the North West (2000)

CAREER PATH

Acting Judge, North West High Court (2013 – 2017)

Magistrate, Regional Court (2004 -)

Magistrate (2001 – 2004)

Supervising attorney, University of the North West Law Clinic (2000 – 2001)

Commissioner, Small Claims Court (1998 – 1999)

Setshedi Makgale Attorneys

- Candidate Attorney (1996 – 1998)
- Professional Assistant (1998 – 2000)

President, South African Women Lawyers' Association, North West (2007)

Chair, ARMSA, North West (2006)

Chair, JOASA, North West (2003)

Secretary, BLA, North West (1997 – 2000)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

MAFATE AND ANOTHER V BAPO BA MOGALE TRADITIONAL COUNCIL AND OTHERS (M139/2015) [2016] ZANWHC 44 (22 SEPTEMBER 2016)

Case heard: 8 September 2016; Judgment delivered 22 September 2016

Applicants sought to review and set aside the decision of first respondent to suspend them as members, and to reinstate the applicants as members. Applicants had been elected members of the first respondent in terms of the North West Traditional Leadership and Governance Act.

Djaje AJ held:

"It has not been disputed that the decision by the First Respondent constitute administrative action as defined by PAJA. The traditional council is an organ of the state as it exercises public power and performs a public function in terms of legislation. The council derives its powers and functions from the NWA. The decision by the First Respondent to suspend the Applicants was not authorised by legislation and is therefore subject to judicial review.' [Paragraph 16]

"The First Respondent in suspending the Applicants had no lawful basis or authorisation by any empowering statute. According to the Applicants there were no internal remedies provided for in the empowering legislation that they could have exhausted before approaching the court for review. The Respondents failed to provide this court with the Council By-laws that empowered the First Respondent to suspend the Applicants or convene bodies that have the power to suspend members of the traditional council. As such it is my view that the action of the First Respondent in suspending the Applicants was irrational, procedurally unfair and falls to be set aside." [Paragraph 18]

The application was granted.

CRIMINAL JUSTICE

S v MATSHABA 2016 (2) SACR 651 (NWM)

Case heard: 19 August 2016; Judgment delivered 1 September 2016

The accused was convicted and sentenced to life imprisonment for housebreaking with attempt to rape, and rape. The appellant had been arrested, and his blood extracted for DNA testing. It was found to match bloodstains found on the appellant's nightdress. On appeal, the chain of custody of these exhibits was put in issue.

Djaje AJ (Gutta J concurring) upheld the appeal:

"[T]he forensic expert's evidence lacks reference from whom the samples were received, contrary to what is provided for in s 212(8)*(a)*(ii)*(aa)* of the CPA. The same goes for the delivering of the samples to the laboratory ... The investigating officer also testified that he was not the one who delivered the samples to the laboratory for testing, but that it was Const Mofokeng. The state failed to call Const Mofokeng to confirm that he delivered the samples to the laboratory. ... The state has not adduced any evidence in respect of the delivering and receipt of the exhibits at the laboratory. There was also no evidence in relation to the gathering and marking of the samples. The investigating officer did not give evidence as to who gathered the evidence from the scene and where it was stored." [Paragraphs 12 – 13]

"The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of the exhibits. If no admissions are made by the defence the state bears the onus to prove the chain of evidence. The state must establish the name of each person who handled the evidence, the date on which it was handled and the duration. Failure by the state to establish the chain of evidence affects the integrity of such evidence and thus renders it inadmissible. ... The court a quo in convicting the appellant relied on the DNA evidence as the only evidence that links the appellant to the commission of the offence. The investigating officer testified that blood was extracted from the appellant by a doctor at the hospital and the blood sample was then stored in SAP13 at the police station. There is no evidence that the said blood sample was sealed and of what number was allocated thereto. Therefore, the sequence from collecting the appellant's blood sample to the DNA-testing is flawed." [Paragraphs 14 – 15]

MS MALETSATSI MAHALELO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 6 April 1963

BJuris, North West University (1988)

LLB, North West University (2000)

CAREER PATH

Acting Judge, South Gauteng Local Division of the High Court (2011 – 2016)

Regional Magistrate (2003 -)

Acting Regional Magistrate (2003)

Magistrate (1993 – 2003)

Acting Magistrate (1991 – 1992)

Public Prosecutor (1988 – 1991)

Member, South African Chapter of the International Association of Women Judges (2004 -)

Member, ARMSA (2004 -)

JOASA

- Provincial Chairperson (2002 – 2003)
- Provincial Deputy Chairperson (2001 – 2002)

Provincial Treasurer, NADEL (2000 – 2001)

SELECTED JUDGMENTS

CIVIL PROCEDURE

S V S (2014/04605) [2016] ZAGPJHC 357 (22 FEBRUARY 2016)

Case heard: 1 February 2016; Judgment delivered 22 February 2016

Applicant, the defendant in the main divorce action, sought a further contribution to her legal costs in terms of Rule 43(6).

Mahalelo AJ held:

"Even if I accept – upon a generous interpretation of the applicant's papers – that she has made out a *prima facie* case entitling her to substantial success in her claims, and that her papers disclose an inability to fund her own litigation costs, I cannot accept that she has made out a case for the scale of the contribution she seeks. An applicant seeking a contribution towards costs must set out the anticipated reasonable legal expenses with sufficient detail to enable the court to properly assess what is reasonably required in order to do justice between the parties." [Paragraph 10]

"Upon weighing the facts of the present matter, it becomes clear that the applicant is entitled to a further contribution towards her costs which would ensure that she litigates on the same scale with the respondent in a divorce action. However she is not entitled to have her entire legal costsl covered in advance. She is entitled to a contribution only. It is open for her to approach the court for a third and further contribution in due course if need be. But a substantial contribution is now necessary to ensure that she is not disadvantaged as a litigant." [Paragraph 17].

Respondent was ordered to make a further contribution of R90 000.

CRIMINAL JUSTICE

NGWENYA V MINISTER OF POLICE (SS24398/2013) [2015] ZAGPJHC 326 (23 NOVEMBER 2015)

Case heard: 7 September 2015; Judgment delivered 23 November 2015.

The Plaintiff sued for damages for unlawful arrest, unlawful detention and malicious prosecution. Plaintiff had been arrested without a warrant and detained n a charge of possessing illicit cigarettes.

Mahalelo AJ dismissed the claim:

"According to the evidence of Sergeant Kuilder he received information, went to the address pointed out by the informer, found the plaintiff in the bedroom, searched and found illicit cigarettes. He never came across the owner of the premises other than the plaintiff at that house. ... There was no

other person except the plaintiff who was arrested in connection with the illicit cigarettes found at the said address." [Paragraph 29]

"Taking into account the fact that the plaintiff was found alone in the bedroom in which the illicit cigarettes were found and was not able to explain the presence thereof, it is reasonable that the arresting officer entertained the suspicion that a crime was committed in his presence, consequently it was not necessary for him to obtain a warrant." [Paragraph 31]

"It is common cause that the plaintiff is a Zimbabwean citizen , at the time of his arrest he did not possess a valid passport. Sergeant Kuilder testified that he took into account the fact that the plaintiff was an illegal immigrant for purposes of considering bail. He concluded that the detention of the applicant was an appropriate way of ensuring his attendance in court ... A warning of the plaintiff or his release on bail at the police station under these circumstances would not serve the interest of justice." [Paragraph 32]