dgru Democratic Governance and Rights Unit

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

OCTOBER 2013

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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. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research *inter alia* on the judicial appointments process and on the future institutional modality of the judicial branch of government.

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, monitoring and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for JSC interviews in September 2009, October 2010, April and October 2011, April, June and October 2012, and February and April 2013.

3. The intention of these reports is to assist the JSC by providing an objective 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. The report set outs summaries of the nominee's judgments, as far as possible in their own words. We do not advocate for or against the appointment, and do not provide analysis or criticism of the judgments summarised. Our intention in doing so has always been to attempt to move beyond the often partisan and personalised debates surrounding 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 enable stakeholders to assess how a candidate's judicial track record matches up to those criteria. The report does not seek to advocate, explicitly or implicitly, for the appointment of any candidate.

5. We have searched for judgments on the *Jutastat, LexusNexus* and *SAFLII* legal databases. We have attempted to focus, as far as possible, on judgments most relevant to the courts to which candidates are applying.

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

6. As with most of our previous reports, it is important to remember that this report provides a sample (we hope a fair one) of each candidate's judicial track record - not a comprehensive summary of all their judgments.

7. In selecting judgments to include, we have continued to be guided by factors that have informed our previous reports. These include looking for evidence of the importance and ground-breaking nature of judgments; of independent-mindedness; of a depth of research and analysis; of the candidate's capacity for hard work; and of the development of a candidate's judicial philosophy.

8. As with our most recent reports, we have continued to present the summarised judgements in thematic groups. Our aim in doing so is to try and make the report more accessible, and also to highlight more directly the candidates' track records on issues relevant to their suitability for appointment.

9. We have developed these thematic areas based on our observations of the JSC's interviews, and on our own assessment of issues that should be taken into account in appointing judges to the court in question. We recognise that this process of categorisation remains a work in progress, and that it does not necessarily cover all the themes that may be relevant. There will also often be an overlap between different themes. The categories have in large part been informed by the judgements given by the candidates for these interviews, and may well expanded on in future reports. With these caveats in mind, we hope the new structure of the report will be helpful.

10. The themes under which judgements are grouped are the following:
    10.1. Private law;
    10.2. Commercial law;
    10.3. Civil and political rights;
    10.4. Socio-economic rights;
    10.5. Administrative Justice;
    10.6. Labour Law;
    10.7. Civil Procedure;
    10.8. Criminal justice;
    10.9. Childrens' rights;
    10.10. Customary law; and
    10.11. Administration of Justice, within which we deal with issues such as the exercising of appellate functions, dealing with professional misconduct by members of the legal profession, and the awarding of costs.

11. We list all of the categories we have identified – not all of which will necessarily be applicable to all the candidates in a particular session of interviews.

12. We hope that together, these themes will bring out a pattern that might be called a philosophy or theory of adjudication. As we have previously submitted, we believe that analysing and

engaging with a candidate's "judicial philosophy" ought to be a central feature of the interview process.

SUBMISSION REGARDING THE INTERVIEW PROCESS

13. In our previous reports, DGRU has made numerous submissions on a wide range of issues arising from the interviews and the JSC's processes. We will endeavour to avoid repeating ourselves on any of these issues, and refer interested readers to recent submissions which remain, in our respectful submission, relevant to how the JSC goes about its work. We make two brief remarks on specific issues arising from the April interviews.

14. In the submissions to our report for the April 2013 interviews, we commented in some detail on the issue of gender transformation.[2]

15. It is encouraging to note that a significant number of the candidates for these interviews – 12 of the 21 shortlisted – are female. Prima facie this seems to give the lie to suggestions that the slow pace of gender transformation can be explained away by a lack of suitable female candidates. Of course, as we emphasised in our April 2013 submission, no candidate should be appointed simply by virtue of gender alone – other pertinent factors that go towards shaping the ideal judge must be taken into account.

16. Whilst is encouraging to see the healthy gender representation on the shortlist, gender transformation of the judiciary will of course only be achieved through appointments being made.

17. It would be remiss not to comment on one significant point of concern which emerged from the April 2013 interviews. In the interviews for the Supreme Court of Appeal, two candidates who from the outside appeared to be similarly matched, and who both happened to be white men, were subjected to strikingly different interviews, in terms of the length of interview and the intensity of scrutiny to which the candidates were subjected. The interview of one candidate (Justice Plasket) lasted around three times the length of the other (Justice Willis); while the former was asked extensive – and almost exclusively – questions about the separation of powers and, second, the transformation of the bench, the interview of the latter barely touched upon these matters.

18. Without getting into the merits of either candidate's qualities and jurisprudential track records and philosophy, it does seem to us that the difference in approach to the two interviews was patently unfair. It is unlikely, for example, that such a difference would be acceptable, or even lawful, in the context of an interview for ordinary employment. While we do not suggest that candidates for judicial office should be asked precisely the same questions, we do think that

[2] The submission may be found at http://www.dgru.uct.ac.za/usr/dgru/downloads/Final%20submission%20and%20research%20report%20April%202013%20email%20version.pdf

similar considerations of basic fairness mean that when substantive, controversial or difficult issues are put to one candidate then they another candidate or candidates competing for the same position on the bench should be given a similar or equivalent opportunity to address the issue.

19. To outside observers, such a striking difference in approach to the two interviews for the SCA position from the commission was baffling and disconcerting. The episode was unfortunate and likely served to further fuel mistrust and scepticism of the JSC's commitment to fair process. A constitutional body as important as the JSC can ill-afford such perceptions. We therefore urge commissioners to strive to ensure that all candidates are treated fairly and even-handedly in future interviews.

20. We aknowledge, however, that the construction and sustinance of a robust appointments process is a complex matter and that further careful consideration of how best to strengthen the integrity of the process and the outcomes that it delivers is justified. To that end, the DGRU is convening a symposium for stakeholders from the legal profession, the NGO/public interest litigation community, the academy and the bench, on 27 - 28 September 2013, with participation from four international experts. We will make available the record of the symposium and hope that the insights gathered there will be of interest and use to the JSC as it continues to perform its demanding yet vital constitutional role.

ACKNOWLEDGEMENTS

21. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was conducted by Chris Oxtoby, DGRU researcher, and Lara Wallis and Anisa Mahmoudi, DGRU research assistants.

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

DGRU

26 September 2013

SELECTED JUDGMENTS

PRIVATE LAW

NOMAHOMBA PRETTY-ROSE MPEPANDUKU V BEAUTY KHOLISWA SOCKIKWA N.O. AND ANOTHER, UNREPORTED JUDGEMENT (EAST LONDON CIRCUIT LOCAL DIVISION), CASE NO: 303/2007 ECD 703/2007

Case heard 20 March 2012, Judgment delivered April 2012

Applicant sought inter alia to review and set aside an Executor's rejection of a claim on behalf of applicant's daughter Mihlali.

Hinxa AJ held:

"What lies at the heart of the dispute herein is exclusively whether the deceased was or was not the biological father of Mihlali. …" [Paragraph 4]

"… I consider it relevant to refer to some crucial aspects: Firstly, a glaringly erroneous, yet pertinent averment in … the first respondent's affidavit. It reads as follows: "I, as Executrix, have asked for conclusive proof that the deceased was the child … of the applicant's daughter." The first respondent … proceeded to contend that this is sound practice in the administration of estates … "As is well known, the administration of an estate can be open to gross abuse unless the very strictness of controls are applied" … What followed in the same paragraph was then a conjecture, based on general practice of deceased persons being falsified because they cannot defend themselves. What engendered my disquiet on this aspect is reliance on "very strictness" premised on the grossly erroneous "less strict," if not reckless, reference to a "child" instead of a "father" … " [Paragraph 6]

"The second aspect … is to this effect: "The applicant … bears a burden to prove that the child is in fact the child of the deceased and I am firmly of the view that the only … satisfactory way … is a DNA test of partenity [sic]" At the outset, it bears pronouncing that this proposition is devoid of any basis. Any admissible evidence in cases of this nature (being civil proceedings), not exclusively the DNA evidence, that tends to prove the main point in issue on a preponderance of probabilities is not only satisfactory but is also cogent." [Paragraph 7]

Hinxa AJ then dealt with first respondent's contentions regarding a handwritten acknowledgement of paternity by the deceased. First respondent appeared to query why such a letter would be signed "if he was acknowledging, at all times, that he was the father of the child". Hinxa AJ held:

"This proposition presupposes, incorrectly so if my paraphrase is not ill conceived, that a man in the deceased's position would only do so if he was denying, at all times, that he was the father of the child. This revolts to logic because a man who is "not acknowledging" cannot sign any "acknowledging" letter unless coerced, coercion certainly not being the first respondent's claim …It does not worth one's while [sic] to cite many examples in practice wherein the "culprits" are readily available for signing "acknowledgement documents" solely because they unreservedly and wholeheartedly accept liability." [Paragraph 12]

"The denial of knowledge of the deceased's sister's and other family members' visits to Mihlali by the first respondent … is cogently controverted by his own family member … Therein Monwabisi [Sockikwa] categorically and emphatically confirmed that Mihlali was always regarded as a child of the family and has visited their rural home on a number of occasions." [Paragraph 17]

"Mr Cole further advanced an argument that Mihlali was never mentioned as one of the deceased's children during the deceased's funeral. Mr Silindela counter argued this, justifiably so in my view, on the basis that Mihlali was born out of wedlock, a fortiori, out of adultery, if I may venture to add. I may also add that Mihlali, in the circumstances, had to be handled clandestinely especially that even the first respondent maintained throughout that the deceased never told her about (Mihlali)." [Paragraph 20]

The application was granted.

CIVIL PROCEDURE

UNITRA COMMUNITY RADIO VS MAGXAJI AND CO. INC & ANOTHER [2011] JOL 27197 (ECM)

Case heard 18 April 2011, Judgment delivered 28 April 2011

This was an urgent application where the applicant sought a rule nisi calling upon the first two respondents to show why a final order should not be granted, inter alia, staying a warrant of execution pending the final determination of a rescission application, and interdicting the respondents from attaching and removing applicant's properties pending final determination of the rescission application. The warrant of execution arose from the taxing Master's allocator, and it was common cause that the taxation had taken place in the absence of the applicant, in contravention of rule 70 (3B)(a) and (b). The first respondent (amongst other things) contended that the taxed bill of costs can only be reviewed in terms of rule 48(1) and 53(1) of the Uniform Rules of Court and cannot be rescinded by rules 31 and 42 as the applicant sought to do.

Hinxa AJ held:

"The facts and circumstances in both cases were similar to the present, save that in both cases the applications were not moved on urgent basis. … [I]n Grunder's case, Conradie J expressed the view that the Taxing Master's allocator is a quasi-judicial administration act. He (the Taxing Master) must hear parties or their legal representative (and if need be also evidence) and exercise a judicial discretion. In as much as proceedings before the Taxing Master constitute an action in miniature, common-law principles applicable to the setting aside of the default judgments apply also to the setting aside of the Taxing Master's allocator. … [A] quantification in the absence of the litigants ought to be open to challenge on the same basis as on default judgments. Similar sentiments were echoed in Barnard v Taxing Master of the High Court of South Africa (TPD) … as the applicant, having failed to attend taxation due to his attorney's fault, applied for a review of the taxation in terms of rule 53. The court held that he should have followed the rescission of judgement procedure entrenched in rule 31. It is also useful to refer to Singh & another v JobaShairam t/a Ship & Anchor Liquor Store & others where Naidoo AJ acknowledged that rescission procedure in cases of this nature is settled law and ordered that the applicants were entitled to follow it in lieu of a review one. Similarly, it appears to me that the position in the present

matter is no different. The applicants are, accordingly, entitled to pursue the judgement rescission procedure. ....” [Paragraphs 13 - 15]

Hinxa AJ then considered the issue of the non-joinder of the Taxing Master:

“In the present matter, it is of critical importance to differentiate between the application for a stay of execution of warrant pending rescission application on one hand, and the actual application for rescission on the other. The first one forms the subject-matter of the present litigation, whilst the latter will be moved later .... The question of law and fact upon which the applicant's right to relief in the present matter depends is an interdict ... which does not impact on the Taxing Master's *allocatur*. The latter will remain intact even if the relief sought herein is granted. Only the later application for rescission of the *allocatur* can evoke the joinder of the Taxing Master since the question arising between the first respondent and the Taxing Master on one hand, and the applicant on the other, will depend upon the determination of substantially the same question of law or fact (ie rescission). The two remedies of the applicant depend on separate and distinct laws of interdict and rescission (with their separate and distinct attendant facts) which can, *a fortiori*, not substantially be the same, as each is governed by its own requisites. LTC Harms *Civil Procedure in the Superior Courts* ... advocates another requirement for joinder, to wit, direct and substantial interest. ... *In casu*, the interdict can be sustained ... without prejudicing the Taxing Master since his *allocatur* will still remain in force notwithstanding the interdict ...” [Paragraphs 17 – 18]

Hinxa AJ then found that the issue of the balance of convenience for granting the interdict had not been properly canvassed in the papers or in oral argument, and found:

“For the aforementioned reasons, I am inclined to agree ... that the applicant has failed to make out a case for the relief sought in prayer 3. The application is, accordingly, dismissed with costs, such costs to include the costs of opposition to this application” [Paragraph 25]

PAUL MAHLASELA V MINISTER OF SAFETY AND SECURITY AND TWO OTHERS, UNREPORTED JUDGEMENT, CASE NO: 1798/2010 (EASTERN CAPE DIVISION, MTHATHA)

Case heard on 13 May 2011, Judgement delivered on 17 June 2011

The applicants (defendants in the main action) excepted to the particulars of the plaintiff’s claim on the ground that paragraphs 12.1-12.4 thereof were vague and embarrassing. In the particulars of claim, the respondent/plaintiff in the main case claimed damages for unlawful arrest, malicious prosecution, and falsification of criminal charges.

Hinxa AJ held:

“Mr Hobbs, counsel for the applicants, premised his exception on the basis that paragraph 12 of the respondent’s particulars of claim is vague and embarrassing because, “The claims for general damages ... are all essentially claims for one and the same thing and should have been claimed under one head, yet on one hand the plaintiff claims the amount of R200 000,00 twice in paragraph 12.1 and 12.2, and on the other hand the plaintiff claims R100 000. 00 in paragraph 12.4” [Paragraph 4]

"In opposing the exception, Mr Makade for the respondent contended that an exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception ...must go to the whole of the cause of action, which must be demonstrated to be vague and embarrassing... In support hereof, Mr Makade referred to the case of Jowell v Bramwell Jones and Others and Southernport Development (Pty) Ltd v Transnet Ltd. Another useful test on exception is apparent in the dictum of McCreath J. in Trope v South African Reserve Bank and Two Others ... in the following terms, "An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by suprise may well be defeated"." [Paragraphs 9,11]

"Mr Makade also placed in contention the applicant's simultaneous reliance on Rules 18 and 23 of the Uniform Court Rules for the relief sought. He submitted that the procedures prescribed by these rules are distinct and separate and cannot co-exist. Failure to comply with any of the provisions of the Rule 18 cannot be remedied by resort to Rule 23 but by Rule 30, his argument continued. In my view, Mr Makade's submission is devoid of substance and credence. Whilst indeed Rule 18(12) provides for remedy in Rule 30 in cases of non-compliance with any of the provisions of Rule 18, and indeed there is essential difference between the two rules, there is nothing in principle and in the interests of justice that suggests that Rule 18 and 23 are mutually destructive. It is of crucial importance to observe that on a reading of Rule 18(12) the discretionary clause "shall be entitled to act" is glaring, whereas Mr Makade, for unexplained reasons, only refers to and relies on the abridged peremptory clause "shall act" ... Furthermore, the co-existence of, and the relationship between, the two rules were articulated by McCreath J in Trope case ... in the following observations, "It is desirable that I first state certain general principles of the law relating to an exception on a ground that a pleading is vague and embarrassing. Rule 18(4) of the Uniform Rules of Court provides that every pleading should contain a clear and concise statement of the material facts. The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) (my emphasis)." [Paragraph 12,14]

"In order to determine whether paragraphs12.1:12.2, and 12.4 are vague and embarrassing, it is apposite at this juncture to also refer to paragraph 11 of the particulars of claim which reads, "As a result of the said malicious prosecution the plaintiff was humiliated and degraded by the conduct of the 3rd defendant ..." [Paragraph 17]

"Upon a reading of paragraphs 12.1, 12.2 and 12.4 together with paragraph 11, I find that they can all be read in any one of a number of ways, a fortiori, they all either leave one guessing as to their actual meaning or are tainted with meaninglessness, It is my finding that the whole cause of action, and not a particular paragraph, is adversely affected by the aforesaid dubious meaning since it (whole cause of action) arises out of the allegations embodied in these three paragraphs...In my view, the excipient has directed the court to the vagueness and embarrassment triggered by paragraphs 12.1;12.2; and 12.4." [Paragraph 19-20]

The exception was thus upheld.

GOLIMPI V UNITRADE 117 CC T/A STOP DISCOUNT (996/2010) [2011] ZAECMHC 13 (23 JUNE 2011)

Case heard on 6 May 2011, Judgement delivered on 23 June 2011

In this matter the applicant instituted application proceedings against the respondent seeking that the respondent be directed to complete and sign unemployment insurance fund application forms of the applicant.

Hinxa AJ Held:

"When the matter came for hearing on an opposed basis, the respondents having filed the answering affidavits, it turned out that the applicant had already been furnished with the forms in question, duly completed by the respondent in compliance with prayer a, and b, supra. On this basis, the application became academic and only the issue of costs remained outstanding and fell to be considered and discussed. [Paragraphs 2-3]

"In the circumstances, I am persuaded to find merit in Mr Pangwa's submission that compliance with legal obligation only took place on 16 April 2010 when the respondent deemed it fit to notify the applicant about the readiness of the documents. The situation in this case is in all fours with the case of Mapela Fikiswa v Experian SA (Pty) Ltd and Fikiswa Mapela v Transunion (Pty) Ltd (both unreported cases from this division). In both cases the court held that where the respondent was obliged to comply with statutory obligation to furnish the applicant with the documents, and it does so only after the legal proceedings have been instituted, it would at the very least at that stage tender to pay the applicant's costs. At this junction it is apposite to refer to the remarks of Combrick AJA in Claase v Information Officer South African Airways (Pty) Ltd … (SCA)…where he said, "The present appeal illustrates how a disregard of the aims of the Act and the absence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation." [Paragraphs 10, 12, 14]

"In all the aforementioned three cases, the courts concluded by expressing the view that where the state body or private person or institution obdurately and unreasonably refuses to furnish records in circumstances where it obviously should have, the court may make a punitive order of costs to mark its displeasure. It is trite exposition of our law that the courts have discretion in the award of costs. In the exercise of such discretion, I find myself unpersuaded by Mr Pangwa's inexplicable mercy [Mr Pangwa did not argue for punitive costs, but for costs on a party and party scale]. In these circumstances, I am of the opinion that the stern approach adopted by the courts in the abovementioned cases on punitive costs should obtain with more vigour in this case." [Paragraphs 16, 18, 19]

CRIMINAL JUSTICE

S V NOMBONA AND TWO OTHERS, UNREPORTED JUDGEMENT, CASE NO. 215711 (EASTERN CAPE – MTHATHA)

The three accused stood trial in the magistrate's court charged with theft out of a motor vehicle. All tendered pleas of not guilty to the charge and were not invited by the trial court to, and consequently did not, disclose the basis of their defence in terms of section 115 of the Criminal Procedure Act ("the Act"). The accused were not legally represented. They testified in their defence and were convicted as charged and sentenced accordingly.

Hinxa AJ held:

"When the matter served before me on an automatic review … I formed an opinion that the conviction and sentences could not be sustained despite the evidence being perceptibly impeccable. This view was based on numerous irregularities confounding the trial which undoubtedly prejudiced the accused and vitiated the entire proceedings. I felt that the irregularities were of such a nature that it could not be argued with any measure of justification that they did not vitiate the legal validity of the trial."[Paragraphs 4-5]

"I now turn to the irregularities with which the accused, unlettered in law, were confronted … the accused were not apprised of their right to access to information … the defense was accordingly deprived of its crucial right to fully prepare for the trial…The trial commenced without the accused being alerted to the competent verdicts…the court did not explain to the accused the right to cross-examination and the purpose thereof. The spate of irregularities continued to unfold with no sign of abatement as the trial progressed. " [Paragraphs 12-13]

"…most of the irregularities besetting this matter are common occurrence, not only in the courts resorting under the jurisdiction of this division, but countrywide…The major underlying reason is the arduous task to be discharged by the presiding officers in undefended cases." [Paragraph 15]

"…in my view the maxim "res ipsa loquitur" applies herein. The facts speak for themselves to an extent that it will deal a nullity to the constitutionally entrenched right to freedom if the release of the accused is not hastened without further ado. I am thus not persuaded by the DPP's opinion that "from reading this record it does not appear that the proceedings were clearly not in accordance to (sic) justice. The Magistrate did explain the rights of the accused on numerous occasions (sic)"… Pertaining to the Magistrate's response, it cannot be gleared with certainty therefrom whether or not he unequivocally concedes to the gravity of the irregularities and their consequential fatal effect to the proceedings." [Paragraphs 17-19]

"The conviction of all the three (3) accused and sentences imposed on them are accordingly set aside." [Paragraph 20]

S V HEADMAN NDUMISO MBODLA, UNREPORTED JUDGEMENT, CASE NO. 214700 (EASTERN CAPE HIGH COURT: MTHATHA)

The accused was charged with one count of driving under the influence of liquor. He was not legally represented and pleaded not guilty to the charge, but was convicted and sentenced inter alia to pay a fine or undergo one and a half years imprisonment. The matter came to the High Court on an automatic review, where the issues of an accused's right to call witnesses, and the standard of proof in criminal cases came under scrutiny.

Hinxa AJ held:

"It is a hallowed principle of our criminal procedure that an accused is entitled to adduce relevant evidence of as many as possible witnesses to buttress his/her case. This principle is now entrenched in section 35 (3) of the Constitution..., which entitles an accused as integral part of the right to a fair trial to, inter alia, adduce evidence....it is trite exposition of our criminal law (which warrants not even citation of supportive authority) that the state must prove guilt of the accused beyond reasonable doubt." [Paragraphs 11-12]

"[Regarding the accused's right to call witnesses]The Magistrate's response that, "the matter stood down for that purpose and when the Court reconvened, it was accused himself who indicated that he was dispensing with the witnesses," is, to put it kindly as I can, belied by the record. The record reflects...that the court indeed saw the relevance of the witnesses; adjourned; and afforded the accused an opportunity to go and call them. The turn of events was on resumption when the accused apprised the court that one witness was working night shift and another was in Cape Town. For inexplicable reasons, the court, all of a sudden, deemed irrelevant the testimony of such witnesses....the view I take is that it (the court) discouraged the accused from adducing such evidence or painted such a strong impression on an unrepresented accused." [Paragraph 13]

"Before concluding on this aspect, I deem it apt to consider the probative value of the evidence sought to be placed on record by the accused. This can be effectively achieved by having recourse to the nature of the accused's defence... Accused maintained, in essence,...that he was not inebriated at all; the entire saga was triggered by the political differences between him (as ANC member) and the state witnesses (as COPE members); and because of this, he was not only arrested, but was also subjected to excrutiating handcuffing; teargas spraying; and assault...In the premises, at the heart of dispute in this case was whether the accused was tortured and arrested exclusively for political reasons as he contended, or whether he was merely arrested solely for drunken driving without any ill-treatment as asserted by the state witnesses. [Paragraphs 15-16]

"The sentiments expressed by Innes CJ in R v Mpanza (AD)...in this regard are as valid today as they were nearly a century ago. He held, "...any facts are...relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue." It is not open to doubt that if the above dictum were to be applied for the benefit of the accused in this matter, the torture would indubitably be a fact from which the inference of the existence of political intolerance...would be properly drawn. " [Paragraph 17]

"Having regard to the factual and legal issues outlined in the preceding paragraphs..., it is evident that the accused suffered both procedural and substantive prejudice. Accused was not only deprived of his constitutionally enshrined right to call his witness/es but also of evidence amounting to highly probative

value. The procedures adopted in the present case can thus not pass the muster hence the conviction and sentence fall to be set aside on this aspect alone. " [Paragraph 18]

"Notwithstanding the finding in the preceding paragraph, I consider it necessary to also deal with the last query (proof of guilt of the accused beyond reasonable doubt)... It may serve a useful purpose if I quote the sentiments of Kruger AJ in S v Goosen … "…in order to find a conviction as drunken driving the State must show…that the driving ability of the accused has been affected by the liquor he has taken." With regard to "liquor triggered driving inability," the State sought to rely on two intoxication characteristics apart from others which had nothing to do with driving… They are: (a) That the accused drove the vehicle with the lights off; and (b) He failed to stop when directed to do so … In considering these aspects one must bear in mind that both state witnesses formed a view that the accused was hopelessly drunk. In such circumstances, I find the version so highly improbable as to border untruthful, if not dishonest, that such a person can without a miracle manage, even for a few metres, to drive a vehicle at night with the lights off. " [Paragraphs 19-22]

"Coming to the allegation of failure to stop, the accused emphatically and specifically refuted it during the outline of his defence. The prosecutor never cross-examined the accused on this issue. " [Paragraph 23]

"In concluding, it behoves me to record some observations and the predisposition of the accused on the day in question. Firstly, it would deny human frailty that a person excessively inebriated like accused as potrayed by the State witnesses could concoct such a watertight defence; abide by it on the following day when he was presumably beset by excessive hangover; reconcile with, and rely on it even when in his normal, sober senses during trial. Secondly, the vivid memory…depicted by the accused defies and repels any reminiscence of intoxication, let alone an excessive one sought to be advanced by the State witnesses" [Paragraph 29]

"A fortiori, the magistrate's ratio dicidendi that "I find it difficult to fathom how you would be victimised in this fashion, when there has been no rally either of the African National Congress, or the Congress of the People, or any party for that matter" is misconceived. It does not resonate well with the common occurrence in our country where (because of the historical, painful, political past) the members, and even supporters, of adversant, and even rivalling, political parties go to the lengths of revenging against one another for political adversaries. It would thus not be preposterous to imagine that such members/supporters, whenever opportune, would even abuse their authority to perpetuate their political ideologies and/revenge for political differences. [Paragraph 30]

"It is thus my pronouncement that what at first sight appeared to be corroboration in this matter is in the final analysis a concoction…it deals a nullity to the very objective sought to be achieved by corroboration if it (corroboration) is considered in isolation…In the premises, the conviction and sentence cannot prevail and fall to be set aside. " [Paragraphs 31-32]

S V NOYISHILE ZITHA, UNREPORTED JUDGEMENT, CASE NO. 206408 (EASTERN CAPE: MTHATHA)

The accused (father of the complainant) was charged with rape in the Regional Court. He was legally represented and pleaded not guilty on the basis that that he never raped the complainant. The accused was convicted. The Regional Magistrate harboured some doubts about the propriety of the conviction and requested this court to review the matter in terms of section 304 A (1) (a) of the Criminal Procedure Act.

Hinxa AJ held:

"The central issues herein, as I see them, are two-fold (a) Procedural i.e. whether the review court can entertain matters of this nature in view of the fact that the accused was legally represented; (b) Substantive i.e. the appropriate remedy warranted in the circumstances of this case." [Paragraph 7]

"In the light of the aforegoing judicial decisions, it is not open to doubt that legally represented cases also resort under the realm of Section 304 A... this approach is also consonant with the constitutional dictates like section 39 (2) of the Constitution…." [Paragraph 13]

"It is settled law that the review courts accede to the lower courts' requests to review and set aside the conviction if new evidence surfaces and casts some doubt on the justification of such convictions … the Magistrate mero motu conceded in hindsight, a concession properly taken in my view, that the state did not prove its case beyond reasonable doubt … the trial court should have seriously considered the admission by the second state witness that a bad blood was flowing between the accused and the entire family (the witness inclusive). This was completely analogous and comfortable to the accused's defence that the rape was concocted pursuant to the enmity plaguing their relations. " [Paragraphs 14, 19]

"One last point elucidating why the conviction cannot be sustained, admits of scrutiny…the complainant was a single witness … I need merely emphasise that the caution adopted by the trial court should not just be lip service. The Magistrate, in her acknowledgment of the cautionary duty resting upon her, discharged same cursorily … Consequently, there is, with respect, nothing I can glean from her treatment and analysis of the complainant's testimony which is reminiscent of a cautionary approach. While it is emphasised that the cautionary rule should not be treated as an irrationally reverenced or mechanical yardstick, the trial court should go more than merely averring that the evidence of a single witness was treated with caution. It must be lucidly clear from the reasons advanced that in favourably considering the evidence of a single witness the trial court cautioned itself against particular peril attaching to convicting on the evidence of a single witness. This certainly did not happen in casu." [Paragraphs 21-23]

"In all the circumstances aforesaid of this matter, the conviction cannot stand. It is accordingly set aside." [Paragraph 25]

SELECTED JUDGMENTS

CIVIL PROCEDURE

MINISTER OF SAFETY AND SECURITY V MBUYISELI A DINIZULU AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO; 2329/2009 (EASTERN CAPE HIGH COURT, MTHATHA)

Applicant brought an interlocutory application to strike out the first respondent's answering affidavit. First respondent had previously filed another answering affidavit. Once attorneys placed themselves on record as the first respondent's attorneys, the second affidavit was filed.

Majeke AJ held:

"I will not attempt to deal with the issue of the purported withdrawal of the first answering affidavit as the application is for striking out the second answering affidavit. The issue is not so much of the withdrawal of the first answering affidavit but rather, whether the first respondent should be allowed to substitute it with the second answering affidavit."

"Suffice it to say that a litigant may not simply withdraw, amend or substitute a pleading or, applied to motion proceedings an affidavit filed of record without the leave of the court first having been obtained. Abuse and prejudice that may result from this is obvious. This applies particularly, when the party concerned seeks to replace an earlier affidavit by one that differs materially in its contents such as in the present case. The issue of possible prejudice to the opposing party may arise and may need to be considered. It is therefore not only a case of the second answering affidavit being field late, but also whether the 1st respondent should be allowed to substitute the first affidavit." [Page 9]

Majeke AJ found that the first respondent's second answering affidavit constituted an irregular step, and struck it out, permitting the first respondent to apply "to regularize his position" within ten days of the judgement.

ONKE MYATAZA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO. 1678/2011 (EASTERN CAPE HIGH COURT, MTHATHA)

Case heard 26 April 2012, Judgment delivered 19 July 2012

Plaintiff, a Magistrate, sued the defendants for alleged defamatory statements. Defendants excepted to the summons on the ground that it did not disclose a cause of action.

Majeke AJ held:

"An excipient who relies on the ground that the plaintiff's summons does not disclose a cause of action has a duty to persuade the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. …" [Paragraph 7]

"The exception … is predicated on the assertion that the communication giving rise to the action is conditionally protected because it falls within the scope of qualified privilege. It has been contended … that, to sustain a cause of action, the plaintiff ought to have stated … the respects in which the bounds of privilege had been exceeded." [Paragraph 8]

"The plaintiff was only compelled to aver sufficient facts to sustain a cause of action based on defamation. The inquiry at this stage … is limited to the question as to whether or not he has done so. The answer must be a resounding yes. … He was not required to anticipate all possible defences … and to couch his particulars of claim accordingly. His remedy in such an event would be to deal with any special defences in a replication." [Paragraph 12]

"To expect a plaintiff to plug up every possible defence is not practicable and could unnecessarily confuse the function which the pleading serves, namely to identify issues pithily." [Paragraph 13]

The exception was dismissed with costs.

ADMINISTRATIVE JUSTICE

MAKHWENKWANELE DAYENI V MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGEMENT, CASE NO. 1267/2007 (EASTERN CAPE DIVISION, MTHATHA)

Case heard 14 November 2011, Judgment delivered 17 May 2012

Plaintiff sued the defendant for wrongful and unlawful arrest and detention, pain and suffering as the result of an assault, contumelia, and emotional shock and distress. Plaintiff alleged that he had been arrest, detained and tortured by members of the police stock theft unit, and then released without appearing in court.

Majeke AJ considered the evidence of the witnesses, and then dealt with the question of onus:

"In an action for unlawful arrest and detention, the plaintiff must prove the arrest itself whereafter the *onus* will then be on the person responsible to establish that it was legally justified. … Accordingly, the plaintiff must first prove that he was indeed arrested and detained." [Paragraph 12]

"Assault on the one hand affects the bodily integrity of an individual. Assault is a physical interference which is wrongful and that it is for the plaintiff to establish the physical interference. …" [Paragraph 13]

Majeke AJ considered the case of National Employer's General Insurance v Jagers 1984 (4) SA (E), relied on by the plaintiff, and continued:

"… I do not agree that the onus rests with the defendant as contended … it is only when the plaintiff has proved the arrest and assault that the onus rests on the defendant to show justification … In the present case there are two mutually destructive versions. When the Court is confronted by two irreconcilable versions, it ought to weigh the versions by the parties and decide on a balance of

probabilities which of the two versions is more credible. …[Reference to High Court authorities]" [Paragraphs 15 – 16]

Majeke AJ noted that the plaintiff's witness had not witnessed the arrest, that the witness and plaintiff's versions differed on the time of the arrest and on where plaintiff was held in the police vehicle in question. Majeke AJ then considered the provisions of s 39 of the Criminal Procedure Act, dealing with arrests, and continued:

"There is no evidence that Inspector … Ndiya informed the plaintiff that he was under arrest. No evidence that he physically touched his body or that the plaintiff voluntarily submitted himself to the custody of Inspector Ndiya. The requirements of Section 39 do not appear to have been complied with. … It does not appear that … on the evidence of the police that they had control of the movements of the plaintiff hence he was able to go to his witness Dubulingqanga Faku without an escort to make a report that he was arrested. … The plaintiff remained alone in the Police vehicle while Ndinga was busy performing his duties at the pound. Plaintiff from the above facts does not appear to have been under arrest. The fact that … Faku contradicted himself on how the arrest occurred creates doubt on his credibility." [Paragraph 18]

"The evidence … clearly shows that the plaintiff was not detained at Mthatha Central Police Station hence his name was not recorded in the SAP 14 and the occurrence book. In the absence of evidence from the plaintiff disproving this fact, I come to the conclusion that he was not detained at Mthatha Central Police Station." [Paragraph 19.1]

"The doctor's report was … not produced in court. No proper and credible explanation was given … Why his legal team did not assist him is not clear. A doctor's certificate would have presented the Court with independent evidence and would have enhanced the probability that the plaintiff was indeed assaulted. … The marks caused by the handcuffs would clearly go a long way in supporting the plaintiff's version. Accessing the relevant medical records would not have presented a difficult task. In the absence of the medical report, the Court finds it difficult to believe that he was assaulted." [Paragraph 21.1]

"Plaintiff also testified that he laid a charge with the police. There is absolutely no evidence to back up his assertion. If a charge had been laid, the plaintiff would have been provided with a J88 to be completed by a doctor. I find it difficult to accept that indeed a charge was laid." [Paragraph 22]

"The defendant was highly prejudiced in that the version pleaded … differs materially … to plaintiff's oral evidence … The plaintiff was not a satisfactory witness and without evidence to corroborate his version, little reliance can be placed on his testimony. Whilst noting that the plaintiff is illiterate, nobody could have provided he details relating to dates, times and places other than himself." [Paragraphs 23 - 25]

The claim was dismissed with costs.

CRIMINAL JUSTICE

THE STATE V ANDILE MJANYELWA, UNREPORTED JUDGEMENT, CASE NO.: CC 109/10 (EASTERN CAPE DIVISION: MTHATHA)

Case heard 11 July 2013, Judgment delivered 26 July 2013

The accused was charged with one count of rape, involving a seven year old girl.

Majeke AJ held:

"The state relies on the evidence of a single witness who is young and was seven (7) years when the incident occurred. There is no statutory requirement in our law requiring corroboration of a child's evidence and our courts do not insists on a rigid rule of corroboration before the acceptance of a child's evidence." [Paragraph 1, Page 12]

"However in the present case a double caution is needed. Concerning the rape incident there is no evidence to corroborate the testimony of the complainant. In most rape cases sexual assault takes place in seclusion in the presence of the victim and the perpetrator in circumstances where there are no eye witnesses. The evidence of the complainant is to a large extent corroborated …" [Paragraph 2, Page 12]

"… [T]here is no suggestion that the complainant has an improper motive to implicate the accused though it was suggested in cross-examination that she is falsely implicating the accused. The accused finally settled with the view that the complainant was making a mistake in so far as her identification is concerned. No issues were raised by the defence to attack her observation that would lead to her making a mistake." [Paragraph 1, Page 14]

"The complainant related the events pertaining to the rape shortly after the sexual assault to her family members. Clearly nobody could have suggested anything to her before she narrated the events. The complainant did not appear to be imagining things. … Without hesitation she advised family members that accused raped her. Despite being subjected to tough cross examination for many hours, she was unshaken and insisted that the accused is the person who sexually assaulted her. She maintained that position … Some of the lapses in her testimony … were due to her emotional state of mind. …" [Pages 15 - 16]

"I am aware of the dangers inherent in accepting the evidence of a young complainant who is a single witness. I have also evaluated the merits and documents arising from the entire evidence given. The defence Counsel strongly criticized the failure of the complainant to immediately disclose the full story to his relatives. I find no fault on the part of the complainant. She was highly emotional and in a state of hysteria. … It is obvious that complainant whilst in a state of hysteria she could not be in a position to give an account of what transpired. It was therefore necessary to calm her down. When she composed herself, she without hesitation informed the family members that Andile from the Spaza shop sexually assaulted her." [Page 18]

"I am satisfied that the complainant was honest and reliable. I have considered the fact that the incident occurred when she was still seven year old and the case was heard about 4 years later. She made some mistakes that I considered immaterial." [Page 19]

The accused was found guilty of rape.

S V FANOE AND ANOTHER (CA&R 9/2009) [2011] ZAECGHC 70 (30 JUNE 2011)

Case heard 30 March 2011, Judgment delivered 30 June 2011.

The two appellants were convicted of fraud in the Regional Court. Appellants had been accused of falsely representing that blood samples submitted to determine the paternity of a child born from the relationship between the second appellant and one Anna Van Lingen were drawn from the second appellant. In fact, the sample had been drawn from the first appellant. The appeal was against conviction only.

Majeke AJ (Makaula J concurring) held:

"The appellants are appealing against conviction only. Appellant … argued that the state witnesses testified that they did not witness any tempering with the blood samples and in the absence of proof that the samples were tempered with, the state failed to prove the guilt of the appellants beyond reasonable doubt and it was further argued that if the evidence relating to the non-tempering of the blood samples is accepted all other evidence should fall away or be weighed with serious doubt." [Paragraph 33]

"The state did not submit evidence proving a direct act of tempering on the part of the appellants. It relied on circumstantial evidence out of which certain inferences were drawn. The state can discharge the burden of proof by relying on the circumstantial evidence provided. '(i) the inference which the state pleads is consistent with all the proved facts; and ii. no other reasonable inference can be drawn from those facts.'" [Paragraph 36]

"To suggest that the appellants should have been acquitted on the strength of the evidence of nursing-sister Haywood, Mountford and Da Silva because they did not see any tempering would amount of looking at the evidence in a piecemeal manner. Before reaching a verdict a court has to consider all the evidence before it, weigh its cumulative effect and decide if it points to the guilt or otherwise of the accused. … Such cumulative effect of the evidence must form a network *"so coherent in its texture that the appellants cannot break through it."* There is no doubt that the first appellant orchestrated the process leading to the drawing of blood samples … in order to misrepresent the true paternity of he child. Her initial step was to obtain sufficient information from nursing-sister da Silva of the pathology laboratory on how the paternity procedure worked. She falsely procured two additional tubes for blood samples under the pretext that the other two were broken." [Paragraphs 38 – 39]

"The first appellant took full control of the manner the blood samples were obtained … by falsely misrepresenting … that she had been authorised by the court to have the blood drawn … on an urgent basis and that the test tubes containing blood samples had to be left unmarked. She further misrepresented to the staff … that in terms of the *"court order"* she was the person authorised to transport and deliver the samples to the pathology laboratories …" [Paragraph 40]

"It is also noteworthy that the appellants failed to testify and chose to close their case. Basically there is nothing wrong with that approach as it is in line with Section 35 of the Constitution. It is trite law that the accused had no onus to prove his innocence. The state bears the onus of proof

throughout the proceedings. … In the absence of evidence rebutting the state's version, I am unable to do otherwise than accepting its evidence which leads to one inference that the first appellant fraudulently interfered with the blood samples." [Paragraphs 45 – 46]

"The role played by the second appellant in the commission of the crime of fraud is not as clear cut compared to what the first appellant did. There are a number of indicators pointing towards complicity on his part in that after paying maintenance for the child for a number of years, he suddenly stopped without any tangible reasons. He is the one who approached and persuaded Dr Le Roux to avail his rooms … to facilitate drawing of blood samples. He misrepresented the true state of affairs by advising … that the exercise was for private purposes and that there would be no legal consequences for himself or Medicross Clinic. The second appellant was in the company of the first appellant when the blood samples were transported to Dr Du Buisson's laboratory and as such present when the swapping of the blood occurred. The behaviour of the second appellant creates a strong suspicion that he was acting in concert with the first appellant. However, there is insufficient evidence to prove his guilt beyond a reasonable doubt and consequently his appeal succeeds."

The first appellant's appeal was dismissed, and the second appellant's appeal upheld.

SELECTED JUDGMENTS

PRIVATE LAW

GAMA-MPANTSHA & OTHERS V MPANTSHA [2011] JOL 27970 (ECM)

Case heard 10 June 2011, Judgment delivered 18 August 2011

Respondent succeeded with a vindicatory action in the court *a quo* for the return of ownership of an erf of land. Respondent was the second husband of the first appellant. They were married in community of property, and lived in a house situated on the property with the third appellant (first appellant's daughter) and first appellant's son from her first marriage. First appellant was subsequently appointed executor of her late first husband's estate, and during the same year issued summons for divorce against the respondent. The council of the erstwhile fifth respondent (Qaukeni Local Municipality) resolved to sell the property to the first appellant, and the erstwhile fourth respondent, as manager of the municipality, signed a power of attorney to effect the transfer. The transfer was duly effected.

On appeal to the full bench of the High Court, Stretch AJ (Dawood and Ebrahim JJ concurring) held:

"The respondent says that about a year after he married the first appellant he bought the property in question from … Arthur Homes … who then represented the municipality of Lusikisiki by virtue of the provisions of … the Municipalities Act … His founding papers are supported by a deed of sale reflecting an agreement entered into between the Lusikisiki Municipality as represented by Arthur Homes and the respondent. This document also describes the marriage between the first appellant and the respondent as being in community of property." [Paragraphs 19 – 20]

"The first appellant disputes that the respondent acquired the property in question after her marriage to him or at all. … She says that she acquired the property in February 1997, after the demise of her first husband … and before she married the respondent. … She says that when she was appointed as the executor of Gama's deceased estate … she, believing that this property formed part of a joint estate which she had enjoyed with the deceased Gama, used her powers as the executor … to transfer the property to the second and third appellants. The certificate recording her marriage to Gama however, reflects a marriage out of community of property." [Paragraphs 27 – 29]

"… I am of the view that it is necessary at this point to comment on the adverse credibility findings made by the court *a quo* particularly with respect to the appellants. … " [Paragraph 37]

"In the absence of any evidence explaining these misdescriptions [on a power of attorney signed by the first appellant to transfer the property to the second and third appellants] (which coincidentally are also reflected not only in the deed of transfer in favour of the second and third appellants, but also in the power of attorney to pass transfer to the first appellant allegedly signed by the Municipal Manager of the Qaukeni Local Municipality, as well as in both the deeds of transfer in favour of the first appellant and the second and third appellants jointly), I am constrained to accept that not only did this false information emanate from the first appellant, but that the second and third appellants, having been aware that the information was false, nevertheless appended their signatures to the relevant documents without correcting or questioning these misdescriptions." [Paragraph 41]

"The court *a quo* … found that the Registrar of Deeds would have refused to register the transfer of the property firstly into the first appellant's name and secondly into the names of the second and third appellants, had it been brought to the Registrar's attention that the first appellant was at the time of registration of transfer, married to the respondent in community of property. We agree." [Paragraph 42]

"From the aforegoing it is clear is that the court *a quo* correctly and with sufficient cause had serious misgivings about the credibility of the appellants." [Paragraph 44]

Stretch AJ then dealt with an argument that the parties' marriage was not in community of property:

"[Counsel for the appellants] argues that although the marriage was entered into and solemnised in what is now known as KwaZulu-Natal, it is governed by … the Transkei Marriage Ac … of 1978." [Paragraph 49]

"… Section 8 of the Transkei Marriage Act does not apply to this marriage entered into on 19 March 1999, as it did to the first appellant's marriage to Gama in 1986. … By 1999 the Transkei had already been reintegrated back into South Africa and as such neither the respondent nor the first appellant were either citizens of the Transkei or domiciled in the Transkei (assuming for the moment that there is evidence of this before us, which there is not). … Neither does section 10 of the South African Marriage Act apply to the marriage between the parties. This section refers to a marriage solemnised in a country outside the Union. The marriage in question was solemnised in Port Shepstone which is part of South Africa, formerly known as the Union." [Paragraph 55]

"The marriage between this respondent and the first appellant was entered into outside of the former Republic of Transkei and there is no evidence before us that the parties intended the marriage to be anything other than a marriage in community of property. Indeed, Mr *Noxaka* has conceded that there is also no evidence that the respondent (or either of the parties for that matter), was domiciled in and a citizen of the former Republic of Transkei when the marriage was entered into … This being the case, the court *a quo* correctly accepted that the marriage is in community of property." [Paragraphs 69 – 70]

"Notwithstanding the differences in these three versions, in respect of all of them, the property … falls squarely into the community estate. … It is clear from the provisions of section 15(2) of the Matrimonial Property Act, that the first appellant is prohibited from alienating or from entering into any contract for the alienation of any immovable property forming part of the joint estate, without the written consent of the respondent." [Paragraphs 75 – 76]

"I am of the view that these appellants … connived to prejudice the respondent's interest in the joint estate … Accordingly the court *a quo* did not err in making the orders resulting in the setting aside of the respective sales and in restoring the property to the joint estate. … The appellants have not challenged the remaining orders and I see no reason to interfere with them, save to amend the costs order to ensure that the joint estate is not mulcted with the costs order." [Paragraphs 80 – 82]

"None of these rules [in the Practice Rule regarding heads of argument] have been complied with by the parties. On the contrary, there has been substantial non-compliance on the part of the appellants' legal representatives." [Paragraph 87]

"The affidavits submitted on behalf of all the parties … exude emotion and are charged with irrelevant verbiage and sarcastic remarks. … I am constrained to express my disappointment and displeasure about the manner in which lawyers have failed this Court and their clients by burdening the record with this type of vitriol instead of confining the papers to the succinct issues before the court." [Paragraphs 89 – 90]

"I am of the view that this shoddy presentation of the appeal record and the deliberate abuse of this Court's lack of knowledge of the existence of relevant documents which served before the court *a quo*, is a serious abuse of the position of trust which lawyers hold when they present their clients' respective cases." [Paragraph 94]

The appeal was dismissed.

CIVIL PROCEDURE

STANDARD BANK OF SOUTH AFRICA LTD V ARTLAYK TRADING CC AND ANOTHER (4588/12) [2013] ZAKZPHC 27 (3 JUNE 2013)

Case heard 11 December 2012, Judgment delivered 3 June 2013

Plaintiff and first defendant entered an instalment sale agreement. The second defendant bound himself in favour of the plaintiff as surety and co-principal debtor with the first defendant. First defendant subsequently defaulted on the monthly instalment payments, and after commencing legal proceedings, the bank applied for summary judgement. The pertinent ground of opposition raised by the defendants was that, when summons was issued, the CC had made good its arrears with the bank in terms of an agreement entered into with the bank the month before summons was issued.

Stretch AJ held:

"It is contended on the respondents' behalf that the various invitations to – … contact the bank to make settlement arrangements … contact the bank to arrange a new payment plan … contact the bank (amongst others) to resolve any dispute … allowing the CC a period of 20 days to make good the default before blacklisting would be considered … allowing the CC a period of ten days to "respond" to the section 129 notice (as opposed to allowing the CC a period of ten days to actually make good the default itself) – are capable of being construed as invitations in various forms to digress from the non-variation clause reflected in the agreement. … I am inclined to agree" [Paragraphs 11 - 12]

"A further concern which I have regarding the bank's application at this stage of the proceedings is whether the affidavit of the bank's "collections legal manager, legal, credit rehabilitations and recoveries, personal and business banking credit" (as he describes himself) not only meets the requirements of rule 32(2) … but whether (regard being had to the respondents' claims of substantial further payments) it is such that it can safely be accepted that the amount which the deponent avers is due, is due as a result not only of non-compliance with the agreement but also that no payments had been effected during the month of May as contended for by the respondents. I would, for example, in an application of this nature have expected the deponent to make a factual averment in his affidavit (regard being had to the information he says is reliable and readily available) as to the number of instalments the CC was in arrears with at the time he deposed to the affidavit, and to give a brief overview of the CC's payment history as at that date (being 7 September 2012 and a substantial period of time after the issue of the certificate of balance)." [Paragraph 13]

"… I am of the view that this is one of those cases. Even if my view errs on the side of caution, the bank cannot overcome the hurdle of what I believe to be a fatal defect in its affidavit, *viz* the using of the

words “I verily believe that the defendant does not have a bona fide defence”, instead of the words “in my opinion there is no bona fide defence” as required by virtue of the provisions of rule 32(2). … This averment is essential and in my view a failure to make it can in a case of this nature result in summary judgment being refused [citation to Group Areas Development Board v Hassim 1964 (2) 327 (T)]” [Paragraphs 17 - 18]

“In Afcol Manufacturing Ltd v Pillay; Afcol Manufacturing Ltd v Buo … it was indeed held that the wording of the rule must be strictly adhered to and that the words “I verily believe” are not sufficient. Applied to the facts and circumstances of the case before me, I adhere to this view.” [Paragraph 19]

“I am in any event satisfied that the respondents have substantially complied with the requirements of rule 32(3)(b) in that they have adequately disclosed the nature and grounds for their defence and the material facts relied upon for what I deem to be a defence which is triable on the basis that it appears to be both bona fide and good in law.” [Paragraph 20]

The application for summary judgment was refused and the defendants granted leave to defend.

MACICI V SASSA [2011] JOL27988 (ECM)

Case heard 10 June 2011, Judgment delivered 13 October 2011

Appellant had applied, inter alia, for an order setting aside respondent’s decision to terminate appellant’s disability grant, and reinstating the grant. The High Court dismissed the application and directed the appellant’s attorney to pay the respondent’s costs de bonis propriis on the attorney and client scale. On appeal to a full bench of the High Court, the issues were whether the court a quo had correctly found that the respondent’s agency had duly complied with the provisions of item 13 of the regulations under s 32 of the Social Assistance Act (dealing with the notification of the outcome of social grant applications); and whether it has erred in finding that respondent had substantially complied with its undertaking in terms of the grant.

Stretch AJ (Dawood and Ebrahim JJ concurring) held:

“The appellant, in his grounds of appeal says that the court below ought to have found that the respondent failed to draw the appellant's attention to the contents of "MM1" [a document approving appellant’s application] when the appellant placed his thumbprint on this document on 1 December 2008.” [Paragraph 13]

“The purpose of regulation 13 is to ensure that the applicant is given notice (written notice suffices) of the nature of and the extent of the grant and to advise him of his options if aggrieved. The record being silent on whether the appellant only placed his thumbprint on the respondent's copy or whether he was also given his own notice, the court below did not err in any event in applying the principles laid down in Plascon-Evans Paints Limited v Van Riebeeck Paints … ” [Paragraphs 19 - 20]

“A proper application of these principles caused the court below to conclude (correctly in my view), that: … a copy of annexure "MM1" was hand-delivered to the appellant on 1 December 2008 as attested to by the respondent's representative; … the document (annexure "MM1") annexed to the respondent's

affidavit is a duplicate of the document which was hand-delivered to the appellant; … the appellant acknowledged receipt and notification by hand delivery by affixing his thumbprint to the respondent's copy; … the respondent subsequently confirmed that the appellant had received "MM1" on 1 December 2008 and that the contents thereof was explained to him." [Paragraph 21]

"In response to the appellant's attorney's threat of High Court litigation … the respondent, on 2 December 2009 not only advised the attorney that the appellant had been notified of the nature of and the extent of his grant when he applied on 1 December 2008, but also repeated this information, for the attorney's benefit. If the appellant indeed gained knowledge of the respondent's decision for the first time on 2 December 2009, his remedy was to invoke the provisions of section 18 of the Act instead of approaching this Court directly for relief." [Paragraphs 24 - 25]

"The appellant has, on either scenario, not only failed to exhaust his internal appeal remedies, but has prematurely approached this Court for final relief which relief this Court can only grant if the Minister of Social Welfare refuses to vary or set aside the respondent's decision, and then only if this Court finds that the Minster's refusal is clearly wrong. It goes without saying that the only other competent ground upon which the appellant may approach this Court is to request it to compel the Minster to entertain the appellant's internal appeal once evidence has been placed before this Court that the Minister has failed or refused to do so. But this is not the case." [Paragraph 26]

Stretch AJ then turned to consider the issue of compliance with the grant.

"Again, applying the Plascon-Evans test together with the fact that the appellant has been most evasive as to how much money he was paid, when the payments were effected and the number of instalments, the court a quo correctly accepted the respondent's version that the 12 emoluments due were made and received as follows … The only other issue which was pursued but not with any serious intent, is the suggestion that because annexure "MM1" appears to contradict itself (it states that the application had been approved for a period of 12 months, but thereafter refers to the period being from December 2008 until December 2009 being 13 months), this Court should give the appellant the benefit of the doubt and direct retrospective reinstatement of the grant to terminate in December 2009." [Paragraphs 27 - 28]

"At the risk of stating the obvious, this submission is frivolous and devoid of logical reasoning … " [Paragraph 29]

"This Court is not at liberty to direct the payment of any further emoluments. To do so would theoretically convert a temporary grant into a permanent one in the absence of any justification for doing so. In the premises I am satisfied that the court below did not misdirect itself in dismissing the application." [Paragraph 31]

"… I am of the view however that the court had sufficient information before it to support a *prima facie* view that *de bonis propriis* costs should be awarded against the appellant's attorney. … Having formulated this *prima facie* view, the court below thereafter should have afforded the attorney the opportunity to show cause why this costs order should not be made. … The failure … to afford the appellant's attorney this opportunity is, in my view, a misdirection which compels this Court to set aside and substitute the costs order with the usual order made on a party and party scale …" [Paragraphs 44 – 46]

"This does not of course mean that this Court is barred from formulating and expressing its own views regarding applications in matters of this nature. … In the matter of *Ngukela v SASSA* … the appellant was likewise represented by attorney Zono. … The relief which was sought in that application duplicates the relief which was sought in the matter before us. …What is cause for concern is that both applicants in their founding affidavits allege that the respondent is aware of the fact that they are destitute, unsophisticated and illiterate. Thereafter, both applicants in reply on oath, state that they are surprised that the respondent alleges that they acknowledged receipt of these documents by using their right hand thumbprints as they "can read and write". … It is highly improbable that two unrelated deponents in two separate applications would both describe themselves in two consecutive affidavits firstly as illiterate and then as literate. … It seems to me that the appellant's attorney at the very least in these two applications has embarked on a cut and paste exercise, the product of which has been a standard type affidavit which fails to cater for the independent merits of each case. This seems to have become a practice described by Wallis AJ (as he then was) as "indolent" in *Cele & others v SASSA* … This practice, if still in use, is an indictment on the legal profession and must cease forthwith." [Paragraphs 47 – 53]

The application was dismissed

CRIMINAL JUSTICE

S V TUSWA 2013 (2) SACR 269 (KZP)

Case heard 9 November 2012, Judgment delivered 12 November 2012

The accused had been charged with three counts of rape, two of which were withdrawn at the beginning of the trial. The prosecutor stated that part 1 of schedule 2 of the Criminal Law (Sexual Offences and Related Matters) Act was being relied on, in that the rape "involved the infliction of grievous bodily harm", for which the accused would face life imprisonment if no substantial and compelling circumstances existed to justify a lesser sentence. The original charge against the accused, however, had not alleged that the rape involved the infliction of grievous bodily harm. The district surgeon described the matter as "the worst rape case he had ever seen in his 40 years of practice." [Paragraph 20] The complainant was described as "a tiny-framed" woman "at least in her eighties" [Paragraph 42].

Stretch AJ held:

"An accused person's right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it. This right is set forth at s 35(3)(a) of the Constitution and is described therein as a non-derogable right … In my view, the fact that the involvement of grievous bodily harm can exacerbate the seriousness of a rape to such an extent that the perpetrator thereof runs the risk of life imprisonment as opposed to a minimum of ten years' imprisonment, compels the prosecution to advise the accused of this before he pleads. It is only fair that the charge should in no uncertain terms let the accused know what to expect …" [Paragraphs 4; 6]

The charge was amended, and though the accused initially pleaded guilty, a plea of not guilty was entered when it appeared to Stretch AJ that the accused was not admitting that the count of rape to which he was pleading guilty involved the infliction of grievous bodily harm [Paragraphs 8, 10].

"The state has argued that, regard being had to the age of the complainant and the seriousness of her injuries, coupled with the evidence that she was throttled, I am constrained to conclude that this rape

indeed involved the infliction of grievous bodily harm. On the accused's behalf it has been argued that for me to come to such a conclusion I would have to find that there was an intention to cause grievous bodily harm. I do not agree. The legislature has sought to place this type of rape into a separate and distinct category of its own. ...” [Paragraph 22]

“As can be seen from the ... drafting of the legislation ... rape involving the infliction of grievous bodily harm, is separate and distinct from the other two categories. In my view, in the event of the legislature having intended this type of rape to be on the same footing as, for example, the offence of assault with intent to do grievous bodily harm, where mere intention (as opposed to actual causation) is sufficient ... it would no doubt simply have included this type of offence in the first category ... and it would ... simply and unambiguously have read to say 'rape, when committed by a person with the intent to do grievous bodily harm'.” [Paragraph 24]

“It has further been argued that, unless the state can show beyond a reasonable doubt that the accused formed two separate and distinct intentions (that is, to rape and to inflict grievous bodily harm), this court should only convict of rape simpliciter ... It is further contended ... that not only must the state prove two separate intentions but there must also be separate sets of injuries: those inflicted during the act of sexual intercourse, normally being in the area of the genitalia, and those inflicted on other parts of the body. The reasoning then is that the second set of injuries should be inflicted by something other than a body part of the accused. This would, by way of analogy mean that even if the victim suffered the most horrendous genital injuries imaginable during the course of a particularly physically savage and brutal rape, it would still require an injury on another part of her body altogether to elevate the gravity of such a rape into the purview of one which involves the infliction of grievous bodily harm ... In my view, such an argument is fallacious, illogical and difficult to comprehend.” [Paragraph 25]

“I agree ... that when looking at physical injuries in isolation it can sometimes be difficult to decide where to draw the line between straightforward bodily harm and grievous bodily harm. This is when a broad consideration of all the facts and circumstances particular to the specific case becomes a useful and necessary exercise. ... [E]ven if mens rea were required for this court to find that the rape involved grievous bodily harm, in these circumstances and on these particular facts ... it can hardly be argued on the probabilities that it was not present. ... ” [Paragraphs 26; 28]

The accused was found guilty. Stretch AJ then proceeded to deal with sentence:

“Simply stated, and for the benefit of the many members of society present at the hearing and also for the benefit of the complainant who is a very elderly woman, this means that the accused has been found guilty of unlawfully and intentionally performing an act of sexual penetration with the complainant without her consent, which act has included as a necessary part, or result thereof, serious injury to be suffered by the complainant. ...” [Paragraph 36]

“Members of the public are repulsed, angry and tired of not only what the accused did to this aged victim, but by the general wave in this country of our elderly people and our children being sexually assaulted by young men. ... It is accordingly necessary that I give a clear and unambiguous message to society that this court is and will be addressing this problem with the determination to eliminate it. ” [Paragraphs 45 - 46]

“Without intending to be disrespectful towards the complainant, it goes without saying that any suggestion that the accused's brutal conduct was motivated by sexual arousal is rejected. Rather, and in the absence of any explanation from the accused, I am far more inclined to believe that his conduct was

motivated by a sense of power, control and the ability to despoil, destroy and vandalise a powerless and a vulnerable target … [o]ur children and our elderly people are our vulnerable members of society. They are both soft targets and they both require, expect and deserve our equal protection." [Paragraphs 54 – 55]

"… [T]he accused's conduct has reduced the complainant from an independent farming woman and a leader in her community to someone whom her niece describes as 'mentally disturbed, forgetful and frightened with no self-confidence'. … These are indeed seriously aggravating features particularly in that the complainant is theoretically old enough to be the accused's great-great grandmother. In my view, they significantly outweigh any prospects of the accused being integrated back into society …" [Paragraphs 60 – 61]

Stretch AJ reviewed Supreme Court of Appeal case law, and found that the imposition of the prescribed minimum sentence was appropriate [paragraph 72]. The accused was sentenced to life imprisonment.

SELECTED ARTICLES

'AN EQUITABLE APPLICATION OF THE SHABALALA DICTUM', The Human Rights and Constitutional Law Journal of Southern Africa Volume 1 No 3 October 1996 Pages 10 - 13

The article dealt with the issue of "docket privilege", in light of the decision of the Constitutional Court in Shabalala and Others v Attorney-General of the Transvaal and Another, and in the context of the abolition of the process of pre-trial preparatory examination.

"The preparatory examination as a pre-trial feature in the criminal justice system is today extinct. The procedure provides for the calling of material prosecution witnesses who could be challenged by the accused in open court. The accused person could testify at these proceedings. He/she was further entitled to any affidavits of any state witnesses who were not called by the prosecution."

"Forty-two years ago, without the benefit of a Constitution, our Appellate Division recognised that implicit in the notion of a fair trial, is the right of an accused person to viva voce prosecution evidence: alternatively, to witness statements for trial preparation. It is surprising therefore, that there has been such radical opposition to filling the lacuna which has remained as a result of the erasure of the preparatory examination. This has been the position in spite of the entrenchment of the accused person's right to a fair trial in section 25(3) of the 1993 Constitution Act and in the Bill of Rights introduced in Chapter 2 of the 1996 Constitution Act … " (Page 10)

"In sharp contrast [to decisions in other divisions], judges in the Transvaal provincial division continued to support the privileged principle [blanket docket privilege], holding that section 23 of the 1993 Constitution Act should be read subject to such privilege. This inevitably led to the referral of the matter to the Constitutional Court, resulting in the judgement of Mahomed DP … in Shabalala ……" (Page 11)

After setting out the findings in Shabalala, the article discussed benefits of the decision for the prosecution:

"A prosecutor is often confronted with the ethical dilemma of whether or not a contradiction between the viva voce testimony of a witness and that which is contained in the affidavit deposed to … is material in the sense that it warrants making the affidavit available to the defence for purposes of cross-examination. The prosecution is no longer burdened with this choice if the statement is made available to the defence in advance. … The presentation of formal State evidence which may be time consuming … may be disposed of by the making of the necessary admissions by the defence … if the accused is given adequate insight into the documents which the State intends using … An accused person who is guilty … may be encouraged to plead to this effect once the defence is made aware of the strength of the State's case … [T]he prosecution may be alerted to the weakness or potential weakness in the State's case if the prosecuting authority is present when the State witnesses are consulted. … By attending the consultation of the defence with the State witness, the prosecutor will no doubt be alerted to the potential of individual witnesses to deal adequately with pressing issues … The potential to isolate the crisp issues between the prosecution and the defence at this early opportunity is enormous and should not be overlooked. Unecessary delays in the trial itself may be effectively avoided … Particularly in the lower

courts, however, the practical application of such pre-trial conference may prove to be impossible. …" (Pages 11 - 12)

"Perhaps the re-introduction of the preparatory examination in all serious cases is a long-term solution, but for the moment the lack of police training in the procurement of sufficiently detailed statements, together with the language problem, are two particularly serious factors hampering the prosecutor in the presentation of the State's case. … The second example illustrates the general lack of insight displayed by well-meaning but inadequately trained police officials in the taking of statements from rural, unsophisticated witnesses. … An over-zealous cross-examiner armed with affidavits such as the two illustrated above could conceivably exploit the inaccurate information to confuse and exhaust the honest witness into capitulation." (Page 12)

The article proceeded to list practical suggestions, namely that a police officer taking a witness statement under adverse conditions should attach his/her own affidavit dealing with issues such as conditions and the demeanour of the witness; that moves be made to employ at least one trained interpreter at every police station; that complainants in sexual offence cases should not have their statements recorded by interpreters of the same gender as the alleged offender; and that defence counsel should make an affidavit available to the court as soon as it is referred to in cross-examination, to allow the court to control relevance of the examination.

The article concluded with observations about bail and co-accused:

"The accused … has a right to information contained in the police dossier to enable him to properly prepare for trial. There is no authority or justification in law for the proposition that an accused person … arrested at a stage when the investigation is incomplete and the matter has not been set down for trial, is entitled to the contents of the police docket. The applicant is however at liberty to challenge the strength of the case against him by cross-examining the investigator and any other witnesses the State may elect to call at the bail hearing. …"

"… [T]he accused is entitled to have access to all information required to exercise his right to a fair trial. Such information may very well include statements by co-accused persons implicating the accused, or even more importantly, exculpating him or her. The State is of course… entitled to resist such a claim with proper justification. … " (Page 13)

SELECTED JUDGMENTS

LABOUR LAW

HLANZEKA CLEANING COMPANY (PTY) LTD V NGWANE NO AND OTHERS (D615/08) [2011] ZALCD 26 (29 JUNE 2011)

Case heard 14 June 2011, Judgment delivered 29 June 2011

This case concerned employees who had been allocated duties for the day at the applicant's gate, where they waited to be given work on an *ad hoc* basis. The employees were informed that they would no longer be employed from the applicant's gate, and that they were required to forward their names to a labour broking company named Adecco, and that the applicant would procure their services from Adecco. The employees duly went to Adecco but were unable to secure registration as employees of Adecco. The employees referred a dispute with the applicant relating to their unfair dismissal to the CCMA. This was an application to review and set aside the CCMA's subsequent award, and to substitute it with an award to the effect that the employees were not dismissed by the applicant.

Pather AJ held:

"In my view, given the evidence that the employees would, some for up to seven years, wait at the gate to be called and be allocated duties on some days of the week but not always, they therefore, while not guaranteed employment, had the right to be considered for employment as and when the need arose. Accordingly, in terms of their continuing relationship with the applicant, the employees had such right to be considered for employment by the applicant, and no one else. In other words, the applicant had no right to unilaterally change the terms of the relationship so as to avoid its obligation towards the employees, some of whom had been in its employ for long periods. If the applicant had wanted to restructure its operation in relation to the recruitment of casual labour, it was entitled to do so, provided it acted within the parameters of the LRA and consulted with its employees. … The employees were not guaranteed employment from the applicant, except on an *ad hoc* basis, which until then suited their needs. However, by insisting that they register on the Adecco data base before the applicant could utilise their services again, the applicant attempted to free itself of its responsibility towards a class of employee whose existence it had encouraged for up to seven years previously. … Moreover, they [the employees] were unable to obtain work even on an *ad hoc* basis in terms of the applicant's new recruitment policy of not allocating work to casuals at the gate … While not guaranteed work from the applicant except on an *ad hoc* basis in terms of the dicta in the *NUCCAWU v Transnet* case… the chances of the employees ever obtaining work through the agency of Adecco, if they had succeeded in being registered on its data base, seems remote. … Which then leads to the question: why was it necessary for the applicant to have referred the employees to Adecco in the first place if in fact it did not intend to terminate their services or if it will continue to allocate work to them, as stated? If the reason was genuinely to formalise the recruitment of casual labour, then apart from consulting with the affected employees, the applicant would have been expected to invite Adecco to the consultation process so as to ensure that the affected employees were aware of the restructuring, and that new employment contracts through the agency of Adecco could be made available to them. Furthermore, the legal implications of the proposed new employment relationship between the employees and Adecco,

intended to replace their relationship with the applicant would have been explained fully. As it is, the applicant fobbed them off to Adecco, who in turn had nothing to offer them. In the process, the employees were not being allocated work because of the applicant's revised recruitment policy relating to casual labour; they were simply left without the prospects of further work being allocated. In my view, the applicant's conduct amounts to a dismissal of the employees. And, since no procedure was followed prior to presenting the employees with such a *fait accompli*, the dismissal was at least procedurally unfair. The applicant cannot escape liability for unfairly dismissing the employees, simply because, apart from the statement that there were no more jobs for them, it chose not to inform them in unequivocal terms that their services were being terminated by their having to apply for new employment with Adecco." [Paragraph 10]

"While it is true that the commissioner exceeded his powers by deciding that the issue in dispute was whether the employees were "employees' as defined in the LRA, this cannot be said to have prejudiced the applicant. The commissioner's acting *ultra vires* seems to have arisen as a result of his own doubts about the relationship, hence his indirectly alluding to the dominant impression test in concluding that the employees were "employees" as defined in the LRA." [Paragraph 11]

"However, based on the evidence presented to him, the commissioner's decision that the dismissal was procedurally and substantive unfair is without doubt, one that a reasonable decision- maker could have reached." [Paragraph 12]

The application to set aside the CCMA's order was dismissed and the applicant was ordered to pay costs.

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION OBO GURRIAH V ETHEKWINI MUNICIPALITY AND OTHERS (D350/09) [2012] ZALCD 23 (14 APRIL 2012)

Case heard 26 April 2011, Judgment delivered 14 April 2012

This case concerned the review of an arbitration award by the CCMA, in which the Commissioner found that the employee had failed to prove that in failing to promote him, the employer had committed an unfair labour practice. The employee had been employed by the employer since 1991. The employee applied for the post of Administrative Officer. His application was unsuccessful and he filed this dispute claiming that in not appointing him to the post, the First Respondent had committed an unfair labour practice

Pather AJ held:

"… I will confine myself to the grounds of review based on the contentions that the Commissioner had misdirected himself and that he had exceeded his powers." [Paragraph 16]

"There is no dispute that the Commissioner spent approximately three hours in attempting to resolve the dispute. … While commissioners are entitled in terms of section 138 (3) of the Labour Relations Act … if all the parties consent, to suspend the arbitration proceedings and attempt to resolve the dispute

through conciliation, in my view the Commissioner in this case ought to have exercised caution. This is because having invested much time and effort in trying to resolve the issue, one or some or all of the parties stubbornly refused to budge from her/his original position. It is probable that the Commissioner was fatigued after such effort. In my view, the Commissioner entered the arena all too often during the subsequent arbitration hearing. In this regard, the record contains several instances where his interventions and comments are found to be inappropriate. Not only are his comments inappropriate, but there are instances where his prior knowledge of the issue is evident and is inconsistent with the evidence presented. … It is difficult to escape the conclusion that the Commissioner had pre-judged the issue and had decided which documents would lend itself to such an outcome." [Paragraph 18]

"Given the Applicant's submission that the Commissioner had advised it of possible consequences should it have raised the issue of "demographics" coupled with the Commissioner's own comments in this regard, it is clear that the First Respondent's demographic profile was of significance to one or more of the parties. For the Commissioner to have turned off the tape and, when the hearing resumed, to place on record that he had "advised" the Applicant about the matter, creates a further inference that he preferred not to have had the full conversation recorded. … In the result, the Applicant's submission that the Commissioner had misdirected himself in the conduct of the arbitration proceedings is well-founded and reasonable. On this ground alone, the application stands to be granted." [Paragraphs 20-21]

"Turning to the question of the Commissioner's qualification as an arbitrator, it was contended on behalf of the First Respondent that the Commissioner had at the time, yet to complete "the conciliation arbitration course" but that he had been accredited for both "conciliations and arbitrations" for a period of one year. It is difficult to understand this reasoning. If the Commissioner had yet to complete the course, he surely would not have been accredited to perform the functions of a commissioner. The ground upon which it was submitted that the Commissioner exceeded his powers relates only to the lack of accreditation in respect of the functions of an arbitrator. … Therefore, and supported by the First Respondent's contention, the Commissioner is found not to have been accredited to arbitrate disputes at the time … in view of the finding that the Commissioner did not have the necessary qualification at the time to perform the duties of an arbitrator, by arbitrating the matter he had exceeded his powers. Therefore the application stands to be granted on this further ground." [Paragraph 22]

The arbitration award was set aside and the matter was remitted back to the CCMA to be arbitrated by a different Commissioner.

FUEL LOGISTICS GROUP (PTY) LTD V STEPHENS NO AND OTHERS (D902/08) [2011] ZALCD 15 (29 JUNE 2011)

Case heard 14 June 2011, Judgment delivered 29 June 2011

This was an application to review and set aside an arbitration award issued by the first respondent as a commissioner of the CCMA. The commissioner found that the dismissal in question, for alleged acts of misconduct, including damage to the company's property, was unfair and ordered the applicant to reinstate the employees retrospectively from the date of their dismissal.

Pather AJ held:

"At the arbitration hearing, video footage of an incident which led to the charges against the fourth respondents was presented as part of the applicant's case. … According to Sokhabase, in the course of his work as a Risk consultant for the applicant, he had been conducting an investigation, which led him to a park … The investigation involved his taking video footage of whatever it was that was under investigation, details of which he refused to divulge. It was common cause that a union meeting was being held at Berea Park on that day. While Sokhabase was sitting in the back seat of his vehicle and filming, one of a group of employees of the applicant who had gathered in the park … alerted the others that they were all being filmed. The group then approached Sokhabase's vehicle and demanded to see his police identity card, as he had informed them that he was a police officer conducting an investigation. When Sokhabase opened his wallet to retrieve a card, cards belonging to the applicant became visible. One of the group which had by now surrounded his vehicle then alleged that Sokhabase was lying to them. At that point, according to Sokhabase, the group became aggressive, and attempted to open the doors of the vehicle while hitting at it. Fearing for his life, he stopped filming, moved to the front seat and sped off in the vehicle. He stopped a few streets down the road where he inspected the damage to the vehicle. A colleague came and escorted him to the applicant's office. He was shown photographs of all the applicant's employees and from which he identified some whom he believed had been involved in the incident in the park." [Paragraph 3]

"Sokhabase denied that he had been investigating which of the applicant's employees belonged to the third respondent. He could not say who among the group in the park had approached his vehicle; neither could he say what the fourth respondents had been wearing." [Paragraph 4]

"In regard to the grounds of review based on the video footage properly identifying Mbulane, the commissioner in his award, makes the following observations: 'What the video tape did show was roughly 12 employees standing around in a circle, speaking. It did not show the incident of the vehicle being damaged…' Finding that The video footage was not clear; Mbulane could not be identified as being part of the group– he, Mbulane, denied that the person wearing a white cap was him; and a dispute of fact existed regarding the watch apparently worn by Mbulane which the applicant had used as a means of identifying him in the video footage, the commissioner, rightly in my view, did not consider the video footage as providing conclusive evidence of the alleged misconduct carried out by the fourth respondents." [Paragraph 7]

"Did the commissioner impose too strict a test in rejecting the applicant's evidence and video footage? This criticism of the commissioner's finding is unjustified as he was unable to positively identify any of the fourth respondents, in particular, Mbulane, as being part of the group of approximately "12 employees standing around in a circle". His not therefore having accepted the video footage as being conclusive evidence of the fourth respondents' participation in the incident in the park and involving Sokhabase, is reasonable. Moreover, it would have been expected of Sokhabase to have filmed the damage to the vehicle once he had left the vicinity, and presented this further footage to the disciplinary enquiry and the arbitration hearing. He had a video recorder and was in the process of filming when he was confronted. As it was, the video footage was not presented to the internal disciplinary enquiry; the fourth respondents were identified simply from their photographs which the witness, Sokhabase then pointed to as being part of the group of perpetrators of the incident in the park. The only evidence

therefore, of the alleged damage to his vehicle was that given by Sokhabase himself. The photographs presented to the arbitration hearing, do not show any damage apart from a missing number plate. Neither do the photographs show any damage that could reasonably be attributed to the actions of any of the employees in the park on that day, least of all the fourth respondents. Therefore, the applicant's submission… especially that the "damage cannot be sustained by the versions presented by the fourth respondents" is not understood. Two mutually destructive versions were presented at the arbitration hearing, only one of which would prevail. In the nature of disputes of fact, one party's version will invariably differ from the other's, and consequently, will not sustain that party's version." [Paragraph 8]

"… In the absence of any supporting evidence, and preferring the evidence of the fourth respondents to that of Sokhabase, the commissioner correctly concluded that the applicant, who bore the *onus* of proving that the dismissal was fair, had failed to discharge that *onus*." [Paragraph 9]

"The further grounds of review are based in essence on the commissioner's analysis of the evidence and his credibility findings of witnesses. In analysing the two conflicting versions before him, the commissioner considered the demeanour of the witnesses, and the fact that the fourth respondents and their witnesses corroborated one another's evidence. He compared their testimonies and found Sokhabase, the applicant's witness, to have been aggressive during cross-examination… It is clear that in weighing the evidence presented by the parties, the commissioner gave careful consideration to the demeanour of the witnesses and the probabilities of their respective versions. He remarks … that the fourth respondents had "submitted a credible alternative version of what happened on the day in question." His finding that the dismissal was substantively unfair is therefore one that a reasonable decision maker could have made based as it was, on the probabilities of each version; his preference for the fourth respondent's version is based on rational reasons." [Paragraph 10]

"Furthermore, that Sokhabase, the applicant's only witness, refused to answer questions relating to the nature of his investigation, could not have helped the case for the applicant. He had been caught in the act of filming a group of the applicant's employees who had gathered in the park for a union meeting. This led to those being filmed demanding answers from him as to the reason for his presence. When it became apparent that he was acting as an agent of the applicant, the employees understandably, became suspicious and angry. Sokhabase then sped off in his vehicle. In his haste to escape, according to the fourth respondent's version, he knocked his vehicle against the pavement. This is reasonable, given the fact that Sokhabase panicked when he saw the angry mob approaching him. Moreover, given the facts that: the meeting in the park was a union meting; the union had only recently organised at the applicant's premises; Sokhabase had come from Johannesburg to conduct an investigation on behalf of the applicant; and he refused to divulge the nature of the investigation, the inference is overwhelming that Sokhabase's investigation involved gathering information as to the applicant's employees' union activities. Therefore, faced as he was with the approaching, angry employees who had uncovered his role as spy, it is probable that the damage to his vehicle, if in fact damage occurred, was caused during his hasty retreat from the park when he fled in panic. If only the parties had a better understanding of a constitutional democracy such as South Africa is, there would be no need for such underhand gathering of information as conducted by the applicant … After all, the LRA provides the framework within which parties to an employment relationship relate to each other on the basis of mutual respect and openness. Acts of subterfuge, such as the filming of a group of employees engaged in a meeting has no place in a

constitutional democracy and can only lead to a breakdown in relations between employer, the applicant, and its employees and the third respondent being the employees' chosen representative." [Paragraph 11]

The application was dismissed with costs.

SELECTED JUDGMENTS

PRIVATE LAW

ERASMUS V JACOBS AND ANOTHER (5410/2011) [2012] ZAFSHC 111 (7 JUNE 2012)

Case heard 24 May 2012, Judgment delivered 7 June 2012

The case concerned an application to remove an executor from office in terms of section 54 of the Administration of Estates Act. Section 54(a)(v) states that an executor may be removed from his office by the court "if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned." The Applicant sought to remove her brother, the First Respondent, from the office of executor by reason of the fact that he is not a fit and proper person to be responsible for the administration of the estate; and that an independent executor should be appointed to investigate the circumstances regarding the conclusion of the sale of the farms forming the subject matter of their deceased mother's will.

Mhlambi AJ held:

"The thrust of the Applicant's claim, according to her, was the dishonest manner in which the sale agreement between her late mother and First Respondent's company was concluded, which she viewed as an orchestrated effort to prejudice her as a beneficiary. … She based her conclusion on the following: 1) She never knew of the will of 1 December 2005. 2) Both the will and sale agreement were concealed from her and she had no knowledge of their existence until after her mother's death. 3) The purchase price… was suspect as it was significantly lower than the valuation of the property as at the time of the sale. 4) Her late mother was diagnosed with Alzheimer's disease, a considerable period before her death. It was, according to the applicant, unlikely that her deceased mother could have been of sound mind as at the time of the sale." [Paragraphs 5-6]

"The First Respondent admits having purchased the farms from his late mother on 13 April 2006. Applicant and her spouse have been staying on the farms for free since 2003. He contends that the sale of the farms to himself occurred three years before their mother's death and had nothing to do with the deceased estate…. First respondent further maintains the amount owing to the Applicant by virtue of the Liquidation and Distribution Account was paid to her on 16 or 18 November 2011." [Paragraphs 8-9]

"He, furthermore, holds that the application to remove him as an executor of the deceased estate is as a result of the Applicant's dissatisfaction with the Sale Agreement concluded by him with their late mother, a transaction she was fully aware of." [Paragraph 10]

"Counsel for Applicant referred me to various authorities (for which I am grateful)…'The office of the executor should not be used in order to pursue a private agenda'. *Van Niekerk v Van Niekerk*….In *Harris v Fisher*…, it was said 'Executors or Administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate.' 'The Court has a discretion on removing an executor in terms of section 54(a) (v) of the Act and the main guide must be the welfare of the beneficiaries.' *Die Meester v Meyer En Andere*…" [Paragraphs 12-15]

"However, Solomon ACJ, in *Sackville-West v Nourse And Another* … quoted as follows…'But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity'….'If satisfied that the continuance of the trustee would prevent the trusts being properly executed,' might remove the trustee." [Paragraph 16]

"The cardinal question is: Can the First Respondent be said to have acted, in his capacity as Executor, dishonestly or in an untrustworthy manner? In my view, this question should be answered in the negative. The conduct complained of falls outside or took place before First Respondent took office." [Paragraph 17]

"Applicant has not furnished an iota of evidence or factual basis in support of the allegations she makes against the First Respondent. She has received her portion of the inheritance in terms of the Liquidation and Distribution Account and accordingly there is no indication that she was concerned with the manner the estate was being administered. I am inclined to agree with First Respondent's Counsel that the Applicant's main purpose is to achieve the setting aside of the Sale Agreement." [Paragraph 18]

"Respondent's Counsel advanced the following further arguments which, in my view, are sound: (a) The contract was concluded three years prior to the parties' mother's death. (b) There was no medical report or evidence to confirm that Applicant's late mother was of unsound mind as at the conclusion of the contract of sale. Equally strange is applicant's statement in her replication that, she handed the deceased the contract document for signature. (c) There are no prospects of success with Applicant's envisaged action against First Respondent even in the event another executor is appointed. (d) In replication, Applicant admits her signature on the contract, despite her having stated in the Founding Affidavit that it was concealed from her." [Paragraph 19]

The application was dismissed.

CIVIL PROCEDURE

FARMWISE GAINS (PTY) LTD V REINHARDT HAGEMAN [2012] JOL 29361 (FB)

Case heard 3 May 2012, Judgment delivered 24 May 2012

The case was an opposed application for a summary judgment based on breach of an agreement in terms of which the defendant was to supply maize to the plaintiff.

Mhlambi AJ held:

"There are, in my mind, three aspects in dispute in this matter, *viz*: a)Whether the claim is a liquidated amount of money. b) Whether the defendant raised a proper defence in terms of subrule 3(b). c) The concern whether the verification of the cause of action is proper." [Paragraph 1]

"Counsel for the plaintiff confirmed that the damages claimed are contractual, flowing from the two contracts for delivery of maize by the defendant to the plaintiff. He argued strongly that the claim should

be regarded as a liquidated amount in money as the ascertainment of the amount was prompt and a mere matter of calculation." [Paragraph 4]

"Defendant filed a notice of intention to oppose the summary judgment application by means of legal argument to be presented by counsel, and duly filed heads of argument ... This step, of not filing an answering affidavit, did not go well with the plaintiff, and more so in that no particulars were disclosed as to the legal argument to be made ... Briefly, the defendant's heads of argument highlight the following: (i) Plaintiff's claim is based on damages and, therefore, not on a liquidated amount. ii) The manner of calculation is based on clause 15(1)(b).iii) Consequently, in the absence of agreement as to the quantum the claim remains illiquid. iv) Plaintiff has not complied with rule 32." [Paragraphs 12-13]

"A defendant upon hearing of an application for summary judgment may in terms of rule 32: '(a)... (b) Satisfy the court by affidavit that he has a bona fide defence to the action; ... disclosing fully the nature and the grounds of the defence relied upon." [Paragraph 14]

"It is obvious that the defendant has not acted in accordance with the rule, and raise [*sic*] a proper defence as required. The question is, notwithstanding the finding, can the Court grant leave to defend ... In order to exercise the discretion under rule 32, the Court must examine whether the plaintiff's claim complies with rule 32(1) or (2)." [Paragraph 15]

"In our organized society with businesses, trades and professions organized as they are it is normally a matter of no difficulty to determine the usual and current market price of articles sold and the reasonable remuneration for services rendered. These are matters, which as a rule can be ascertained speedily and promptly. Generally speaking therefore a Court can, in exercising its discretion regard such a claim as a debt or liquidated demand unless of course there are features, appearing from the claim as framed or other relevant circumstances, which preclude the Court from regarding such a claim as a debt or liquidated demand in the sense discussed in this judgment': *Fatti's Engineering Co. Ltd v Vendick Spares"* [Paragraph 17]

"I am therefore satisfied that the defendant's heads of argument fill the lacuna created by the failure to comply with rule 32(3) (*Jacobsen van den Berg SA (Pty) Ltd v Triton Yachting Supplies*)...I therefore find it unnecessary to decide on the point *in limine* raised by defendant's counsel in regard to the noncompliance with rule 32 ..." [Paragraphs 18-19]

The application was therefore dismissed.

CRIMINAL JUSTICE

RAMAISA V S [2012] JOL 29081 (FSB)
Case heard 16 April 2012, Judgment delivered 3 May 2012

The appellant, a school teacher, was charged with the murder of his wife. The magistrate refused to grant bail, *inter alia* on the grounds that the appellant had made a threat against the child, the offence was very violent and led to a feeling of shock and anger in the community, the two children would be in a vulnerable position with regard to the appellant and could be manipulated by him to alter their testimony as well as that the release of the appellant would impact on public trust in the justice system. The present case was an appeal was against the refusal of the magistrate to release the appellant on bail.

Mhlambi AJ (Jordaan J concurring) held:

"The issues in this appeal are as follows: i) Has the appellant convinced the court on a balance of probabilities that the interest of justice do not require his detention; ii) Has the magistrate exercised her discretion to grant bail wrongly; iii) If so, is this Court sufficiently persuaded that this is so, without imposing its view on the court *a quo*." [Paragraph 6]

"In an appeal against the refusal of the bail, it should be stressed that no matter what the appeal court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail, exercised that discretion wrongly (*S v Barber*)"[Paragraph 9]

"On page 101 [of the decision of the court *a quo*]... the prosecutor addresses the court as follows:
'The State case as well as the defense (*sic*) case, has already been closed but in terms of section 63 of the Criminal Procedure Act, the court felt that it does not have enough evidence to come to a conclusion and instructed the state to call upon the domestic violence clerk, your worship, like I indicated...' In the light of the above, the only inference to be made is that, the evidence of the two witnesses clarified the doubt that the magistrate had in granting the bail or not... ... " [Paragraph 14- 15]

"The evidence surrounding the threat to the child was led before the court acted in terms of section 60(3) of the Act. This section is to the effect that if the court is of the opinion that it does not have reliable or sufficient evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court ... It was therefore unnecessary for the court to invoke the provisions of section 60(3), as it could have refused the application merely on the suggested threat of the child if the court believed in the credibility and/or reliability of the Police witnesses. Therefore, to rely on the latter factor to refuse to grant bail is very opportunistic." [Paragraph 17-18]

"It is quite evident that the court misdirected itself and failed to grasp the import of section 60 of the Act. The 'five pages of things that the court can take into consideration' must be read and interpreted correctly in order to make a proper analysis and evaluation of the evidence." [Paragraph 19]

“The court in terms of section 60(9), in considering the question in subsection (4) shall decide the matter by weighing the interests of justice against the right of the accused to his personal freedom… … taking into account the factors set out thereunder. These factors are clearly in favour of the appellant. The court failed to apply its mind as to the contents of this subsection and accordingly misdirected itself… the court quotes section 60(4)(e) in an attempt to justify the evidence of the woman from the ANC Women's League. This attempt is futile as this subsection has no application in the present case and as she had also found. It refers to exceptional circumstances, which are not applicable here. Consequently calling this witness was unnecessary” [Paragraph 21]

“It is clear to me that the magistrate is "clutching at straws" in order to arrive at the conclusion she did. It is further evident that on her dealing with section 60 of the Act, that she had embarked on a system of elimination of the grounds and factors which might or might not be applicable. This selective reasoning led her to quoting and interpreting the sections out of context and incorrectly.” [Paragraph 22]

“The word "probable" in section 60(4) above is defined as "capable of being proved, demonstrable, moveable, having the appearance that may reasonably be expected to happen". "Likely" is defined as "seeming as if it would happen or prove to be as stated" (see the *Shorter Oxford English Dictionary on Historical Principle*s) … I opine that the cross-examination of the appellant, despite its aggressive nature, did not reflect badly or portray him in a bad light. … What stands out clearly in his evidence is his denial that he will manipulate the children, his concern for the welfare of the children, their accommodation, transport to school, education and safety.” [Paragraphs 23-25]

“It is interesting to note that the prosecutor never pursued this matter any further. I am therefore convinced that the magistrate never considered the provisions of section 60(9) in coming to her conclusion. It is also evident that it was opportunistic to rely on the untested evidence of the Police in respect of the threat to the minor child, as she was in doubt as to her decision even after the State and the accused closed their cases. …What remains to mention is that from the onset, the appellant never denied to the Police that he could be responsible for her death. His legal representative advised the court (despite their refusing to answer questions about the "merits") at the inception of the bail application, that their defence was selfdefence. It is clear to me that the evidence on record militates against the appellant planning or wishing harm to his children.” [Paragraph 27-28]

“I am therefore of the considered view that the magistrate overlooked some important aspects in this matter, justifying a court on appeal to interfere with that decision …*”* [Paragraph 29]

The appeal was upheld and the accused was granted bail.

MOLOLO v S (A284/2012) [2013] ZAFSHC 23 (7 JUNE 2012)

Case heard 24 May 2012, Judgment delivered 7 June 2012

The appellant was convicted of murder in the regional court and sentenced to 15 years imprisonment. The appeal was against sentence only, based on Section 51(3) (a) of the Criminal Law Amendment Act, which allows for the imposition of a lower sentence if a court is satisfied satisfied that substantial and compelling circumstances exist such an imposition.

Mhlambi AJ (Molemela concurring) held:

"The appellant, as at the time of sentence, was 45 years old, married, a holder of a University Degree in Education and had worked for the Department of Education's office in Bloemfontein for 21 years. He earned a salary of R10 000.00 per month. He has a 17 year old daughter for whom he paid maintenance in the amount of R300.00 and paid R1 000.00 towards her grocery. He also cared for his sister's two children for whom he paid University fees." [Paragraph 3]

"He had one previous conviction of reckless and negligent driving which the court did not take into consideration and, for all intents and purposes, regarded him as a first offender. The court found that he had caused the two fatal stab wounds to the deceased when he stabbed him from the front. Thereafter, he had stabbed the deceased in the back when the latter turned around to flee." [Paragraph 4]

"The facts that led to the appellant's prosecution are briefly as follows: The deceased was quite displeased with the behaviour and attitude of the lady who had alighted from the appellant's car. He had approached the appellant, who was at the time seated in the driver's seat to register his displeasure. An altercation then ensued between the appellant and the deceased as blows were exchanged. The appellant got out of his motor vehicle, pursued the deceased and stabbed the deceased twice. The deceased sustained fatal injuries in the process." [Paragraph 9]

"The cardinal issue in this appeal then is whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances were non-existent and therefore precluded from departing from the sentences laid down by the legislature." [Paragraph 10]

"Counsel for the appellant referred to *S v Maleka*, arguing for a partially suspended sentence. The appellant in that case, a 30 year old teacher was convicted in a Regional Court of murder and was sentenced to ten years imprisonment. The following factors constituted mitigating factors in that case: The appellant was a first offender; The appellant is a useful member of society and occupies a responsible position as a science teacher holding a senior teaching diploma; The appellant supports his mother as the sole breadwinner; The appellant acted under extreme provocation; The crime was not premeditated and was committed almost on the spur of the moment; The conviction and imprisonment of the appellant is likely to render it extremely difficult for him to be re-employed as a teacher. On appeal the sentence was reduced to ten years imprisonment of which five years was suspended for three years." [Paragraph 11]

"In the seminal judgment of *S v Malgas*…it was emphasised that: 'The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders… and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances… But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'" [Paragraph 14]

"*Malgas, supra*, was followed in *S v Matyityi*…. See also *S v Serabo*…The main purposes of punishment are deterrent, preventive, reformative and retributive – *R v Swanepoel*… One should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all the factors." [Paragraph 15]

"In *S v De Kock*… it was stressed that the three factors of the Zinn triad have to be considered in conjunction with one another and that each should be afforded a certain weight depending on the facts of the case, taking into account the purposes of punishment." [Paragraph 16]

"In the present appeal there are a number of mitigating factors, *viz*: 17.1 The appellant is a first offender; 17.2. The crime was not premeditated and committed almost on the spur of the moment; 17.3. The deceased initiated the quarrel; 17.4. The appellant is a useful member of society who occupied a responsible position in the Department of Education; 17.5. The appellant was the breadwinner of his family and the next-of-kin; 17.6. The appellant acted under provocation; 17.7. The probability of his re-employment in the Educational field is probably zero as a result of his conviction and imprisonment." [Paragraph 17]

"On reading the record on sentence, it would appear that the learned magistrate did not put sufficient weight to these factors. Mr Van Rensburg's contention that appellant's personal factors were under-emphasised, does not appear to be misplaced." [Paragraph 18]

"Besides, it is apparent that the trial court did not consider the particular circumstances of this case in the light of the well-known triad of factors relevant to sentence and impose what is considered as a just and appropriate sentence… … The court therefore felt itself bound to comply with the prescription of the minimum sentence legislation. This constitutes a misdirection. In my view, the appellant's mitigating circumstances, cumulatively viewed, constitute substantial and compelling circumstances that warrant deviation from the prescribed sentence." [Paragraph 19]

"I am therefore of the considered view that this court is justified in interfering with the sentence imposed by the trial court and that an appropriate order is the following: The appeal succeeds … The sentence of 15 … years imprisonment is set aside and there is substituted for it a sentence of imprisonment for 10 … years. …" [Paragraph 20-21]

SELECTED JUDGMENTS

PRIVATE LAW

37 GILLESPIE STREET, DURBAN (PTY) LTD V THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. 12091/2005 (KWAZULU NATAL HIGH COURT, DURBAN)

Case heard 15 – 19 March and 9 April 2010, Judgment delivered 21 June 2010

Plaintiff sued the first defendant for damages arising from the execution of a preservation order obtained by the first defendant under the Prevention of Organised Crime Act. The preservation order was subsequently set aside by the High Court, a decision confirmed by the Supreme Court of Appeal. It was not in dispute that the seizure was effected in the course of a crime prevention operation in the building, in the course of which certain damage was caused to the building.

Naidoo AJ held:

"It is clear from the provisions of Section 42 of the [Prevention of Organised Crime] Act as well as the preservation order that the curator bonis was the person intended to be vested with the power to take possession and control of the seized property … It also appears … that the curator, acting in accordance with the powers conferred on him … was the most likely person to have requested SAPS to execute the preservation order … Even though it is very likely (and probably happens in the ordinary course of events) that the curator would have acted with the knowledge and cooperation of the first defendant, the factual position is that, in law, the curator was the person who bore the responsibility for the execution of the preservation order. …" [Paragraph 15]

"The plaintiff claims that the first defendant's liability for the losses it suffered is grounded, inter alia, in his obtaining an order… to which he was not entitled, rendering the act of obtaining the order wrongful." [Paragraph 16]

"The plaintiff's approach therefore, is that the first defendant should be held liable in law on the basis that two courts had found that he was wrong to believe that the building was an instrumentality of the offence. This, in my view, is incorrect. The correct approach is to examine whether the conduct of the first defendant was wrongful and unreasonable in order to determine whether such conduct attracted delictual liability. In other words it must be determined whether the first defendant instigated the proceedings … without reasonable and probable cause and with the intention to injure the plaintiff." [Paragraph 17]

Naidoo AJ referred to the Constitutional Court decision in *National Director of Public Prosecutions v Mohamed NO*, and continued:

"… [T]wo things are clear: firstly that the public interest is seriously under threat from organized crime and criminal gang activities generally and, secondly, that the Act provides for and empowers functionaries such as the first defendant and SAPS to act … to curb such activities in order to protect the public interest. Viewed in light of what has been set out above, and in the total absence of any evidence to the contrary from the plaintiff, I am not persuaded that the first defendant acted without reasonable

and probable cause. ... I do not agree ... that the first defendant acted recklessly and/or maliciously in spite of his appreciation of the harm that would be suffered by the plaintiff." [Paragraph 18]

"... In view of the applicable law ... and the evidence which was at the disposal of the plaintiff, it would be expected of the plaintiff to have joined the curator and the police as parties to this action. The plaintiff, however, specifically sought no relief against the second defendant (the curator) and failed to join the police as a party. The plaintiff furthermore failed to prove that the action of the first defendant was wrongful or ... caused the losses it allegedly suffered. The actions and events ... which the plaintiff alleges caused the loss it suffered, were directly within the purview of the powers and duties of the curator and did not involve the first defendant at all. ..." [Paragraph 21]

The action was dismissed.

GROUP FIVE CONSTRUCTION (PTY) LTD V ROYAL PALM PROPERTY HOLDINGS LTD, UNREPORTED JUDGMENT, CASE NUMBER: 1601/2010 (KWAZULU NATAL HIGH COURT, DURBAN)

Case heard 2 March 2010, Judgment delivered 26 March 2010

The applicant exercised a builder's lien over the affected units. It came to the applicant's attention that some of the lien notices had been removed from some of the affected units and that some of the units were occupied by the respondent or its representatives, without the knowledge or consent of the applicant. The applicant instituted proceedings to restore to the applicants' possession the affected units.

Naidoo AJ held:

"The onus is on the applicant to prove, on a balance of probabilities, the two requirements for the grant of mandament van spoile, namely that he was in possession and that he was in possession and that he was dispossessed forcefully or wrongfully or without his consent. The respondent has not denied that: (i) the applicant is in possession of the keys to the affected units; (ii) the applicant exercised its lien by affixing lien notices thereto; (iii) it removed some of those lien notices; (iv) third parties are occupation of some of those units. In addition it has not shown that the documents put up in support of its allegation that it is in possession of keys to the units as a result of being handed same by the applicant, relate to the units in question or to the period relevant to this application. The respondent also does not allege or state that the applicant gave it the keys to enable it to occupy or control the affected units. The delivering of keys or duplicate keys to the respondent did not result in the applicant losing possession of said units. It was dispossessed when the respondent illicitly removed the lien notices from some of the units and gave access and/or possession thereof to third parties, without the applicant's consent. It is consequently, my view that the applicant has established on a balance of probabilities that it was in possession of those units and was dispossessed of the affected units without its consent. The respondent, conversely, has failed to set out any facts to support its assertion that the keys to the affected units were handed over to it by the applicant." [Paragraph 18]

"... The constant presence of the applicant at the site was not required for him to exercise control/possession thereof. I do not therefore, consider it unreasonable, given the circumstances of the matter, for the applicant to have embarked on the action that it did. I am accordingly of the view that this is a case where it is appropriate for the court to exercise its discretion in the applicant's favour." [Paragraph 20]

"... [S]even of the affected units are occupied by third parties who have not been joined in these proceedings. It is not competent to grant a spoliation order against those parties, especially if they are purchasers who have acquired ownership of those units." [Paragraph 21]

The application was granted.

CIVIL PROCEDURE

2C PROJECTS CC V THE MANGOSUTHU UNIVERSITY OF TECHNOLOGY AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO. 4707/2013 (KWAZULU NATAL HIGH COURT: DURBAN)

Case heard 7 May 2013, Judgment delivered 17 May 2013

An urgent application was brought to restrain the first respondent from proceeding with actions in request of a tender awarded to the second respondent, pending review of the award of the tender.

Naidoo AJ held:

"... [I]t is clear that until the day before the hearing ... the Applicant was unaware of the existence of the letter [from the First Respondent] to the Second Respondent, [the letter established that no award of the tender had yet been made] and only on the day of the hearing had sight of the letter. ... If the Applicant had been informed at that early stage that no award had been made, that information may well have averted the need to bring this application on an urgent basis." [Paragraph 7]

"The First Respondent is an organ of state as defined in the Constitution ... and, as such, is under a statutory duty, in terms of the Promotion of Administrative Justice Act ... (PAJA) to furnish reasons for any administrative action or decision it takes, which materially affects the rights of a person. The Applicant ... gave notice to the First Respondent to furnish reasons for its decision to reject the Applicant's tender, and the other requested information, in terms of PAJA. ... " [Paragraph 8]

"... [First Respondent's] response [to Applicant's correspondence] dealt cursorily with the concerns raised by the Applicant, offering none of the details requested by the Applicant, nor providing the undertaking that it sought. ... The Applicant ... advis[ed] the First Respondent that if it failed to respond, the Applicant would approach this court on an urgent basis and seek interdictory relief as well as an order for costs ..." [Paragraphs 9 - 10]

"In deciding whether the Applicant could have proceeded to obtain the relief it seeks through other means, it is also noteworthy that the very information that would have enabled the Applicant to make that decision was solely within the knowledge of the First Respondent. ... First Respondent consistently resisted all requests by the Applicant for it to make available such information. ... Inherent in [First Respondent's] assertion that there may be objections, and hence the letter of intent to the Second Respondent was not to be construed as a letter of award, is the acknowledgement that there is a procedure in place to deal with such objections before the award can formally be made. ... [T]his is precisely what the Applicant asked in every single letter that it addressed to the First Respondent ... but the First Respondent deliberately and stubbornly refused to divulge this information, in spite of its obligation to do so in terms of PAJA. " [Paragraph 12]

"... [I]t is abundantly clear that the applicant did everything to afford the First Respondent the opportunity to afford the First Respondent the opportunity to provide the information it sought and thus to avoid litigation. The dilatory and dismissive conduct of the First Respondent is evident in the nature of its responses as well as its complete lack of response in some instances ... No attempt is made to explain ... that no award had been made and therefore no undertaking is necessary, or alternatively that no award would be made until the issues raised by the Applicant have been resolved. ..." [Paragraphs 15 - 16]

"In my view, the apprehension that the Applicant entertained at the time, that the First Respondent had awarded the contract to the Second Respondent and that the site was about to be handed over to the latter ... was well grounded. It was only the day before the hearing that the First Respondent alleged that the award was not made. The Applicant's apprehension was further fuelled by the high handed and uncooperative attitude of the First Respondent, causing the Applicant to feel compelled to bring this application on an urgent basis. ... Applicant has made out a case for the relief it seeks." [Paragraph 17]

A rule nisi was granted, interdicting the Frist Respondent from carrying out various activities in relation to the tender pending the outcome of an internal appeal.

SINGH & ANOTHER V RAAM HARICHUNDER JAIRAM T/A SHIP & ANCHOR LIQUOR STORE & OTHERS [2009] JOL 24113 (N)

Case heard 1 September 2008, Judgment delivered 1 October 2008.

The applicants sought an interdict preventing the respondents from proceeding with the issue of a warrant of execution in respect of the taxed costs in a case, pending the finalisation of the application. Applicants also sought an order rescinding the taxed bill of costs. The bill of costs referred to arose from an application in which the applicants sought a statutory review of the decision of the Chairperson of the KwaZulu Natal Liquor Board, granting a liquor licence in favour of the first and second respondents. There had been no appearance on behalf of the applicants at the taxation.

Naidoo AJ held:

"In order for the court to exercise its discretion in favour of the applicants in granting a setting aside of the taxation and a rescission of the Taxing Master's allocatur, considerations of justice and fairness to all parties before it, must be a feature of the court's deliberations. The applicants bear the onus of showing the existence of sufficient cause for the relief they seek. They have to satisfy the court, inter alia, that there was some reasonably satisfactory explanation for allowing the judgment (in this case the taxation) to go by default. The court's discretion under the common law extended beyond and was not limited to the grounds provided for in rules 31 and 42(1)." [Paragraph 9]

"... The present matter calls for a consideration of the interests of the respondents as much as those of the applicants. The respondents have at all times acted correctly and in compliance with the Rules of Court. Their representatives took the trouble to contact the applicants' attorney with a view to discussing the bill of costs with him, thereby reminding him of the taxation. He was prepared to discuss it with any attorney in that firm, but received no response. In my view, the respondents should not be visited with

the consequences of the failures of applicants' attorney. In addition, the applicants have not shown that they have any defence at all to the claim of the respondents for the payment of the amounts due to them in terms of the bill of costs. A bald statement by an attorney who was not involved in the matter ... that certain costs should have been taxed off, without providing reasons therefor is not, in my view, sufficient to show that the respondents have a defence to the respondents' claim for payment." [Paragraph 10]

The application was dismissed.

CRIMINAL JUSTICE

S V RANOHA (363/2011) [2012] ZAFSHC 20 (23 FEBRUARY 2012)

The accused was convicted in the Magistrates' Court on two counts of assault and one count of assault with intent to do grievous bodily harm, and sentenced to a fine and imprisonment. On review, the question arose as to whether correctional supervision would have been a suitable sentence.

Naidoo AJ (Mocumie J concurring) held:

"Sentencing requires a fine balancing act where the court must consider the well known triad expounded in S Zinn... namely the seriousness of the offence, the interests of society as well as the circumstances of the accused. The offence of assault with intent to do grievous bodily harm is indeed serious and in the present case, a great deal of force must have been used ..." [Paragraph 4]

"... [D]epending on the circumstances of each case, one or more of the factors ... may require more emphasis than the others. It is also required of a court to guard against over-emphasising one factor at the expense of the others, as this could well lead to an unjust sentence" [Paragraph 5]

"The magistrate, in my view, over-emphasised the interests of society and the seriousness of the offence and did not give sufficient weight to the personal circumstances of the accused and to the circumstances under which the offences in this case were committed. The accused, who is not permanently employed, is obliged to take care of his daughter, while the mother of the child, who is a police officer in receipt of a regular salary, does not contribute to the upkeep of the child. It would appear that the accused's sole source of income was the casual work that he undertook Against this background, the interactions he had with the mother of the child and her brothers on the day in question turned ugly and violent." [Paragraph 6]

"The magistrate correctly pointed out that this level of violence cannot be tolerated and that the courts need to impose the kind of sentences that reflect the unacceptability of this type of conduct. However, to my mind, the interests of the minor child were not taken into consideration when sentencing the accused to imprisonment for such a long period, nor the fact that he is a first offender who had made a genuine effort to care for his child with meagre resources. ..." [Paragraph 7]

Naidoo AJ considered the Constitutional Court decisions in *S v M* and *S v S* regarding the approach to sentencing where the person sentenced is the primary caregiver to a minor child, and held:

"... [M]y prima facie view is that the accused is not someone who needs to be removed from society at this stage, but someone who can benefit from correctional supervision and the programmes that are

offered under the auspices of such a sentence ... In this way the accused's deviant conduct would be addressed, the requirement for punishment would be fulfilled and the minor child would still have the benefit of the one parent who appears to care for her well-being. This, however, needs to be properly investigated and canvassed. This investigation must be undertaken urgently as the accused was sentenced on 3 August 2011 and has been in custody for over six months" [Paragraph 9]

The matter was remitted to the magistrate to reconsider the sentence.

ANDRIAS LEBELONYANE, GLADWELL NKOSI, BONGANI BEMBE & MFANAFUTHI KHUMALO V S, UNREPORTED JUDGMENT, CASE NUMBER: AR209/07 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 23 April 2009, Judgment delivered September 2009

The appellants were charged with one count of housebreaking with intent to rob, and robbery with aggravated circumstances. All four were found guilty as charged and sentenced to fifteen years' imprisonment each. This was an appeal against the sentences.

Naidoo AJ held:

"It is clear that the learned magistrate's actions in simply disregarding his earlier judgment and proceeding to finalise the matter as he did, amounts to an irregularity. I am also of the view that Section 176 of the Criminal Procedure Act is to be invoked only where, due to mistake, a wrong judgment is delivered, or where the judicial officer wants to clarify a point which was vaguely made in the judgment, or to correct the wording without altering the tenor thereof. That section does not apply to a situation such as this, and it was, therefore not permissible for the learned magistrate to have invoked Section 176. However, I am satisfied that this irregularity also did not taint the evidence in this matter or result in a failure of justice. It was a procedural irregularity which did not deprive the appellants of a fair trial. I am therefore of the view that in spite of the irregularities that have occurred, the interests of justice have not been compromised, nor have any of the appellants suffered any prejudice as a result thereof" [Paragraph 10]

"With regard to sentence, I find that the learned magistrate took into account all the circumstances placed before him in respect of the first and second appellants. I also find that he did not misdirect himself with regard to the application of the facts or the law in arriving at the sentence that he imposed on them. I therefore find it unnecessary for me to interfere with the sentence of fifteen years' imprisonment each imposed on the first and second appellants. In view of my finding in respect of the conviction of the fourth appellant, the sentence of fifteen years' imprisonment would be inappropriate and must be replaced with one that is more appropriate" [Paragraph 15]

The fourth accused's sentence was set aside and substituted with a sentence of three years imprisonment (Steyn J concurred).

ADAM JOHANNES POTGIETER V THE STATE, UNREPORTED JUDGMENT, CASE NO. AR 157/07 (KWAZULU NATAL PROVINCIAL DIVISION)

Case heard 19 May 2009, Judgment delivered 21 May 2009

The accused was charged with theft, unlawful possession of a firearm, and defeating or obstructing the course of justice. He was convicted on all three charges. On appeal, an issue was raised as to which legislation the accused should have been charged under in relation to the charge of unlawful possession of a firearm. It was argued by the appellant that the Firearms Control Act 60 of 2000 was not applicable, since it came into operation in 2004, and the events in question occurred in early 2001. The State argued that the Act's transitional provisions allowed the appellant to be charged under the Act.

Naidoo AJ held:

"... It is clear in this matter that although the offences were committed in 2001, which was prior to the coming into operation of the later Act, the appellant only pleaded to the charges ... in July 2006, some two years after [the] Act ... came into operation. Section 8(4)(a) ... was clearly intended to have retrospective effect and rendered the provisions of Act 60 of 2000 applicable ... While it would have been preferable for the learned magistrate to have dealt with this aspect and made such a finding, I am of the view that he was correct to have allowed the matter to proceed in terms of the later Act. More importantly, I am satisfied that this failure on the part of the magistrate did not render the trial unfair. If ... the previous Act was held to have been applicable, it is clear that the protection afforded thereunder would not have availed the appellant ..." [Paragraph 5]

"Counsel for the appellant further allege that the conduct of the magistrate throughout the proceedings was intimidating and indicative of his having prejudged the matter. ... I am unable to agree... While the magistrate appears to have been quite vocal, verbose and at times somewhat over-zealous in ensuring that proceedings were completely understood by all ... I am unable to find that his conduct was such that it amounted to an irregularity which rendered the trial unfair. It must be remembered that the appellant was legally represented throughout the trial. ... It is preferable, however for a presiding officer to be circumspect about the frequency and the manner in which he articulates his interventions, ... lest he create the impression that he has rendered the trial unfair ..." [Paragraph 7]

The appeal against conviction was dismissed, but the sentences were altered to run concurrently (Steyn J concurred).

CUSTOMARY LAW

MAMPHO ERNESTINAH NTHEJANE AND ANOTHER V THE ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO. 3183/2010 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 10 November 2011, Judgment delivered 1 December 2011

Plaintiffs sued the defendant for damages arising from the death of a Mr Azor, to whom First Plaintiff claimed she was married in terms of a customary union. The only issue to be decided was whether there had been a customary union.

Naidoo AJ held:

"It is common cause … that the lobolo negotiations as well as the customary ceremony and celebration … were performed after the [Recognition of Customary Marriages] Act came into operation … The defendant … contended that the plaintiff cannot claim to have entered into a customary union as the lobolo had not been paid. …" [Paragraphs 6; 8]

Naidoo AJ referred to academic authorities, and continued:

"The plaintiff is Sotho. Neither she nor her grandfather were asked about the customs and practises of the Sotho people, nor was it canvassed with them whether they practise teleka or not. From Mr Nthejane's evidence, it is clear that the arrangement regarding lobolo was acceptable to both families. In the absence of any evidence to the contrary, it must be accepted that this arrangement was not only suitable to both families but also that it was in accordance with their customary practices. " [Paragraph 9]

"… I am satisfied that the rituals and ceremonies performed by the two families incorporated the essential legal requirements, as provided for in section 3(1) of the Act, and that the plaintiff has established on a balance of probabilities that such a union was a valid customary marriage." [Paragraph 11]

"Mr Groenewald cross examined the plaintiff regarding the contents of certain affidavits and documents … The plaintiff's evidence was that her child was in hospital and she was fetched from the hospital and taken to the attorney's office in order to sign the documents. She signed them without being fully aware of the contents of these documents. She was accompanied by the deceased's mother, who it seems also deposed to an affidavit and pressured the plaintiff into signing the affidavit that she did. The plaintiff acknowledged that the documents referred to her as co-habiting with the deceased, and not that she was in a customary union with him. Although the plaintiff conceded that she understood some Afrikaans, it is my view that in the absence of evidence to the contrary, it is not implausible … that she would have signed documents upon the request of a legal representative, whose legal expertise she trusted and who was mandated to lodge a claim on her behalf. This is especially so in view of the fact that her child was in hospital and, therefore, it is not unreasonable to expect that she woud have been in a fragile or distracted state of mind. " [Paragraph 12]

Naidoo AJ accordingly held that the plaintiff had been married to the deceased in terms of a valid customary union.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

RADEBE AND OTHERS V PRINCIPAL OF LESEDING TECHNICAL SCHOOL AND OTHERS (1821/2013) [2013] ZAFSHC 111 (30 MAY 2013)

Case heard 17 May 2013, Judgment delivered 30 May 2013

The first applicant was forced to sit alone in the staffroom during school hours each day from the months of January to May 2013 due to the fact that the dreadlocks she wore as an integral part of her Rastafarian religion were in contravention of the school code of conduct. The applicants applied for, *inter alia*, an order on an urgent basis declaring that the conduct of the first respondent (the school principal) in banishing from the learner from her classroom during school hours to be unlawful and discriminatory on the basis that it violated her Constitutional rights of freedom of religion, to a basic education, belief, opinion, expression, association, and culture. They further sought orders, *inter alia*, that the applicant be allowed to participate fully as a Grade 8 learner with immediate effect and that the school implement an extra tuition programme to enable to catch up on the learning she had missed.

Phalatsi AJ held:

"Section 28(2) of the Constitution … provides that in every matter affecting the child, the child's best interests are paramount. The serious invasion of the first applicant's (a child's) right to basic education occurs on an on-going basis and every day that passes by without her being in class, receiving education. It is … incumbent upon this Court to grant the child urgent protection. To force her to await relief in the ordinary course will be tantamount to dereliction of duty. On the basis hereof, I find that this matter is urgent." [Paragraph 7]

Phalatsi AJ then detailed the contentions of the applicants:

"… … The instruction that she [the applicant] should cut her hair is an instruction to violate her faith. The applicants contend that: by preventing the first applicant from attending class, the respondents were treating her differently from other learners in that class; such differentiation is based on her religion; it is unfair discrimination; and that it is in breach of her constitutional right to equality." [Paragraph 13.1]

"The applicants further contended that whilst the governing body has the power to suspend a learner … this may only be done after following due processes. … They further argue that there is no provision in law that empowers a person to send a child home, away from school, unless the child has been lawfully suspended ….thereby depriving him/her of education." [Paragraph 13.2-13.3]

"I must at this stage emphasise that no attempt was made by the respondents to contradict these allegations and submissions." [Paragraph 13.4]

Phalatsi AJ then listed the three requirements for the grant of a final interdict as set out in the case of *Setlogelo v Setlogelo* and stated how the requirements were satisfied in this case with respect to each one:

" ….a) There must be a clear right on the part of the applicant…*In casu*, it is clear that the first applicant has a clear right to basic education … b) An injury committed or reasonably apprehended … the first

applicant has been unlawfully excluded from receiving education and for every day that she is so excluded, the injury continues. I, therefore, find that the injury, *in casu*, is not only apprehended, but is actually committed and continuing. … 3. The absence of any other satisfactory remedy available to the applicant. …I have already found that this matter must be dealt with as one of urgency, as delaying it only causes more harm to the first applicant." [Paragraph 21]

"It cannot be overemphasised that religion is a very sensitive issue and that religious intolerance can ruin the whole country. One needs not look at the whole world, as good examples of what religious intolerance can do, can be found in our own African continent, as in Northern Mali and Northern Nigeria. The courts of this country must be alert and proactive and root out the evil of religious intolerance in any form. They should nip it in the bud wherever and whenever it raises its ugly head." [Paragraph 21]

"I am, therefore, satisfied that all the requirements for the granting of a final order have been established by the applicants…." [Paragraphs 23-24]

CIVIL PROCEDURE

FIRSTRAND BANK LTD T/A WESBANK V HATTINGH (1325/2013) [2013] ZAFSCH 124 (4 JULY 2013)

Case heard 13 June 2013, Judgment delivered 4 July 2013

This was an application for summary judgment. The plaintiff sued the defendant in terms of an instalment agreement entered into by the parties in terms of which the plaintiff sold the defendant a car. The plaintiff averred that the defendant had breached the agreement by failing to pay the instalments in terms of the agreement. The plaintiff cancelled the agreement as a result of the breach, however the defendant stated in his affidavit resisting summary judgment that the vehicle had latent defects which existed at the time of the sale and impaired the vehicle's utility for the purpose for which it was sold. The defendant therefore tendered return of the vehicle against repayment of the instalments he had already paid.

Phalatsi AJ held:

"During the hearing of the matter, counsel for the plaintiff conceded that the defendant has raised a triable issue. … He, however, contended that since the defendant does not dispute that the plaintiff remains the owner of the vehicle and that all that the plaintiff requires at this stage is return of the vehicle, the court should grant summary judgment only on the basis of return of the vehicle to the plaintiff and the other issues to be determined during the trial." [Paragraph 6]

"The plaintiff's right to claim return of the vehicle is based on the fact that the defendant has breached the contract. Defendant denies that he has breached the contract. … I therefore find it difficult to comprehend how the court can order return of the vehicle to the plaintiff before deciding whether the defendant has breached the contract, as there would be no basis on which such an order is made. The plaintiff is not entitled to use a non-performance for which it is responsible as a foundation for a claim of cancellation and damages. I have also not been referred to any authority that the court can order restitution in piecemeal fashion in that part of restitution is ordered at summary judgment stage and the other part after the trial." [Paragraph 7]

"On the basis of the above, I find that summary judgment cannot be granted and therefore the application for summary judgment is dismissed." [Paragraph 8]

"The next question to consider is the one of costs. Counsel for the defendant argued that pursuant to the filing of the opposing papers, the plaintiff became aware of the defendant's defence and should not have proceeded with its application after becoming aware of same. The defendant therefore argues … that the plaintiff should pay his costs occasioned by the hearing of this matter on an opposed basis. I, however, find that it was not unreasonable for the plaintiff to proceed with this matter to hearing on an opposed basis and that the defendant can still argue the costs of this application at the end of the trial." [Paragraph 9]

The application for summary judgment was therefore dismissed.

CRIMINAL JUSTICE

MARAIS V S [2012] JOL 29004 (FSB)

Case heard 7 May 2012, Judgment delivered 27 May 2012

The appellant was convicted of murder and sentenced to 15 years' imprisonment in the regional court. The present case was an appeal against the sentence, and the exercise of the court's review powers in terms of section 304(4) of the Criminal Procedure Act to consider whether the conviction itself was proper. The issues for determination were (i) whether the defence of private defence raised by the appellant could succeed and (ii) whether the conviction for murder should be replaced by a conviction of culpable homicide.

Phalatsi AJ (Molemela J concurring) held:

On issue (i):
"The learned writer Jonathan Burchell … defines private defence … The elements of private defence arising therefrom are that the attack must be imminent, unlawful and must not have been completed. The defence must be necessary to avert the attack, a reasonable response to the attack and directed against the attacker." [Paragraph 13]

"Now, the first question to be decided is whether, in the light of the appellant's own evidence, it can be said that he acted in private defence. The evidence of the appellant negates the basis of private defence … the evidence that he stabbed the deceased because he was angry clearly negates the fact that he was responding to the attack; his evidence that he had pushed the deceased's hand at the time that he stabbed him negates the fact that the attack was imminent. He had already succeeded in warding off the attack… I consequently cannot find that the appellant succeeded in his defence, namely, private defence." [Paragraph 14]

On issue (ii):
"On the evidence before the court, there is nothing that suggests that the appellant had the intention (whether in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*) to cause the death of the

deceased. Indeed, his own evidence is that he never intended to stab him on the chest, but was aiming for his face. What led him to stab in the chest is that the deceased took an evasive step when he stabbed him. He also conceded that he ought to have foreseen that when he stabbed him in the direction of his upper body, that could cause his death. This clearly illustrates that he acted negligently and not intentionally. In the premises, I find that the appellant should have been found guilty of culpable homicide." [Paragraph 15]

"Both legal representatives conceded that, should the appellant be convicted of culpable homicide, the appropriate sentence to impose is that of 3 years' imprisonment. The mitigating factors in this matter are the following: The extreme provocation of the appellant by both Eddie and the deceased, who stabbed and chased him up to his home... The intake and effect of alcohol on...the appellant... The youthfulness of the appellant....the date of the incident... was his 21st birthday... is a first offender... appellant showed some measure of remorse and he testified that he felt very bad about what had happened... appellant spent some time in custody awaiting trial... I, however, find that, weighing the above factors against the seriousness of the crime, the prevalence thereof and the interests of the community, the appropriate sentence should be 4 years' imprisonment." [Paragraphs 16-17]

The appeal was upheld. The conviction of murder was replaced with that of culpable homicide and the sentence was reduced from 15 years to 4 years' imprisonment.

MPHUTHI V S [2012] JOL 29076 (FSB)
Case heard 2 May 2012, Judgment delivered 20 May 2012

The appellant was convicted on a charge of rape and sentenced to 13 years' imprisonment in the Regional Court. The court a quo relied on the evidence of a single witness. The present case was an appeal against both conviction and sentence.

Phalatsi AJ (Van Der Merwe J concurring) held:

"In its judgment, the court *a quo* found that although the complainant is a single witness, the court found her evidence to be credible as she did not contradict herself. I find this finding very strange indeed... I have quoted at length in respect of the complainant's evidence to illustrate a litany of material contradictions between her testimony in court and her statement." [Paragraph 7-8]

"The court *a quo* did not even take into account that crucial witnesses were not called by the State. The only conclusion which can be made is that the State did not call these witnesses as they were not supporting the complainant's version. In the circumstances the denial of rape by the appellant is reasonably possibly true." [Paragraph 9]

"Mr *Pretorius*, who appeared on behalf of the State, also correctly conceded that the conviction could not be supported, because of the complainant's contradictions and improbabilities in her evidence.... In the light of the above, it is clear that the conviction should be set aside." [Paragraphs 10-11]
The conviction and sentence were thus both set aside.

S V MOKOKOLO (10/2013) [2013] ZAFSHC 109 (30 MAY 2013)

This case was an automatic review in terms of section 302 of the Criminal Procedure Act. The accused was charged with contravention of section 59(4) read with section 89 of the National Road Traffic Act , in that the accused unlawfully exceeded the speed limit of 120 km/h by driving his vehicle at 171 km/h. The accused, who was unrepresented, pleaded guilty. The court proceeded to ask questions to determine whether the accused admitted all the elements of the crime. The court entered a plea of not guilty after questioning the accused, in that the accused did not admit that he had intention to commit the crime. Immediately thereafter, the State closed its case without calling any witnesses.

Phalatsi AJ (Lekale J concurring) held:

"It is trite that the State must prove the guilt of the accused beyond reasonable doubt. This means that the State must prove each and every element of the crime that the accused is charged with, beyond reasonable doubt, failing which, the conviction cannot stand." [Paragraph 9]

"The finding by the magistrate that where the accused places his intention in dispute, he/she has a duty to lead evidence as to what happened and what he/she believed, is not only against, but is also a danger to our whole criminal justice system and *juris prudence*." [Paragraph 10]

"In *S v Lubaxa* the court, dealing with applications in terms of section 174 of the Criminal Procedure Act, held that if there is no possibility of a conviction other than if the accused enters the witness box and incriminates himself, a failure to discharge an accused in these circumstances would be a breach of his/her rights guaranteed by the Constitution. … In *S v Nyanga*, the court held that if the court is satisfied that the admissions adequately cover all the elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty." [Paragraph 11-12]

"On the question as to whether the accused had a case to meet after the State had closed its case, it is clear from the record that the State had failed to prove the element that had been put in dispute by the accused, being intention." [Paragraph 13]

"This simply means that the State had failed to prove all the elements of the offence against the accused beyond reasonable doubt. I have already found that there was no duty on the accused to lead evidence to prove or negate intention and the accused, therefore, had no case to meet after the State closed its case." [Paragraph 14]

"I, therefore, find that the learned magistrate erred in convicting the accused as charged. Her reliance on the evidence of the accused to prove intention was an irregularity of such a gross nature that it vitiates the proceedings insofar as the accused's constitutional right against self-incrimination was violated thereby." [Paragraph 18]

"In the light of the above, the order of the magistrate is set aside and replaced with the following: 'The accused is found not guilty and discharged.' …" [Paragraph 19]

TSHABALALA V S (A138/2011) [2012] ZAFSHC 62 (5 APRIL 2013)

Case heard 19 March 2012, Judgment delivered 5 April 2012

The appellant was charged together with his co-accused for robbery with aggravating circumstances and the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, in that they broke into the complainants' house and raped them at knife point. Both accused found guilty on counts 2 and 3, but the court found that no robbery had been committed and the accused were instead convicted of theft. The accused were sentenced to nine years imprisonment on each of counts 2 and 3, and 2 years imprisonment for theft. The court then ordered the sentences to run consecutively so that they each have to serve 20 years imprisonment. This case was an appeal against sentence.

Phalatsi AJ (Rampai AJP and Daffue J concurring) held:

"In respect of the appellant's personal circumstances, the court relied on the probation officer's report … The learned judge quotes … from the report, but only factors that are adverse to the appellant, which leads to the … conclusion that he never applied his mind to the report as a whole. … He never mentioned any mitigating circumstances in respect of the appellant, as set out in the report." [Paragraphs 9.2 -9.3]

"Amazingly, he [the judge in the court *a quo*] did not even mention and take into account the fact that the appellant was 15 years of age at the date of commission of the crime, as a mitigating factor. It is therefore not surprising that there is no distinction made between the sentence of the appellant and that of his co-accused in the Court *a quo*. This is a serious misdirection which enables the court of appeal to interfere with the sentence." [Paragraph 9.5]

"The Court *a quo* further quotes with approval from the report, the fact that 'the act in question and the age does not correspond as he committed an offence suitable to be committed by an adult.' I do not know of any offences that are suitable to only be committed by adults, but I know that children do sometimes commit heinous crimes. This was so elegantly put by Cameron, J in the matter of *Centre For Child Law v Minister Of Justice And Constitutional Development and Others …*" [Paragraph 10]

"…[T]he court *a quo* correctly held that the appellant has committed very serious crimes … I have, however, already found that the learned judge virtually ignored the appellant's personal circumstances and failed to recognise that the appellant, as a child, had to be treated differently during sentencing." [Paragraph 11]

"I am of the view that this court should interfere with the sentence imposed by the Court *a quo*. In the light of the seriousness of the crime, the personal circumstances of the appellant, as set out in the report and the fact that the appellant was a child when the crimes were committed, I am of the opinion that the sentences imposed by the Court *a quo*, should run concurrently in such a way that the appellant should serve an effective sentence of 15 (fifteen) years imprisonment." [Paragraph 12]

MOSIA V S [2012] ZAFSHC 85 CASE NO.: A152/11 (Free State High Court, Bloemfontein)

Case heard 19 March 2012, Judgment delivered 3 May 2012

The appellant, together with his brother, was convicted on one count of rape and one of attempted murder. They were sentenced to life imprisonment in respect of the charge of rape and eight years imprisonment on attempted murder. This case was an appeal against the sentence.

Phalatsi AJ held:

"The facts of the case are as follows: the complainant, a mother of five children, the youngest of whom was eight months old at the time of the incident … was on her way going back home; when passing accused 1's house, the latter called her, but she declined and pointed out that she was in a hurry as she had left her child alone at home … accused 1 pulled her and accused 2 came and pushed her from behind into the house of accused 1; in the house, both accused hit her repeatedly with iron rods, she fell down and accused 1 raped her. After being raped by accused 1, accused 2 also raped her … they thereafter instructed her to climb on the drum so that they could hang her, but because of her weakness arising out of the assault, she was unable to climb on the drum…both accused, who were drunk all along, fell asleep and she managed to escape." [Paragraph 7]

"…It is trite that the court of appeal will interfere with sentence only if there was a material misdirection on the part of the trial court." [Paragraph 8-9]

"…It is…clear that the court *a quo's* finding of absence of compelling and substantial circumstances is solely based on the physical injuries of the complainant…" [Paragraph 11]

"I firstly want to deal with the evidence in respect of the injuries suffered by a victim of rape, which I will deal with in two categories: 12.1 **psychological trauma** Rape is a crime which is inherently traumatic. The court should readily accept the evidence of the rape victim in respect of psychological trauma, even in the absence of expert evidence, because, as I have already said, such psychological trauma is a natural consequence of rape; It is unthinkable to come across any rape victim who has not been traumatised by the incident, even in the absence of any physical and /or bodily injuries. 12.2 **Physical and/or bodily injuries**: In respect of physical injuries, the expert evidence of a medical practitioner is indispensable, as human nature dictates that a victim of violence will tend to exaggerate the seriousness of his/her injuries." [Paragraphs 12.1-12.2]

"Now, in this very case, the complainant testified in court that her face was so swollen that the people from whom she requested help could not even recognise her, that she had suffered genital injuries and that she was bleeding on her private part because of the assault and the rape. But the medical report does not reflect any of these alleged injuries. When she was confronted with this contradiction in cross-examination during the trial, all she could say was that she made the doctor aware of the said injuries and she did not know why they were not reflected in the medical report…It is fair for the court to accept that the victim is feeling pain on her body, but to accept that the pain is as a result of the assault during the rape, without any expert evidence, is treading on dangerous grounds… Even Cillie J, when granting the appellant leave to appeal, correctly held that the evidence and observations of the court *a quo* are not based on any medical evidence." [Paragraph 12.2.1-12.2.2]

"I therefore find that the reliance of the court *a quo* on its own observations and on the evidence of the complainant on the nature of her physical injuries and the effects thereof, is a material misdirection which entitles the court of appeal to interfere with its sentence." [Paragraph 13]

"...In the light of my finding that the reliance of the court *a quo* on the evidence of the complainant and its own observations was a material misdirection, can it still be said, based on the physical injuries of the complainant as depicted on the medical report, that this is the worst case scenario imaginable... it is trite that the courts will always deal with the fact that a person is a first offender differently from repetitive offenders. Indeed, this fact is even acknowledged by the legislature in that, in minimum sentencing legislation, the legislature makes a distinction in respect of sentence on certain offences based on the fact whether that person is a first or further offender." [Para 15-15.1]

"*In casu*, other than the appellant being a first offender, at the age of 36, he had minor children that he was supporting, he was drunk during the commission of the crime and he was in prison for a period of 30 (thirty) months before being sentenced." [Para 15.2]

"In deciding the appropriate sentence in a crime involving violence, like rape in the present case, the degree of violence will always be considered ... in aggravation or mitigation of sentence. The violence in respect of the rape should be distinguished from the one in respect of attempted murder, for the purpose of sentence on the charge of rape. Failure to do that will amount to the accused being sentenced twice for the same conduct, which would be unfairly prejudicial to the accused. It would simply vitiate against the principle that the sentence should fit the crime." [Paragraph 15.3]

"I therefore find that in the present case, the cumulative effect of the factors mentioned above, constitute substantial and compelling circumstances, which justify deviation from the imposition of life imprisonment." [Paragraph 16]

"This, however, does not detract from the fact that rape is a very serious offence and that more so if, as in the present matter, it is rape of the victim by more than one person...Taking into account the seriousness of the crime, the traumatic effect on the victim and the physical violence as set out in the medical report, I am of the view that the appropriate sentence should have been one of 20 (TWENTY) years imprisonment." [Paragraph 17-18]

The appeal was thus upheld and the sentence of life imprisonment was subsitutued for one of 20 years imprisonment, to run concurrently with the 8 year sentence for attempted murder.

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SELECTED JUDGMENTS

PRIVATE LAW

OBIE LOGISTICS (PTY) LTD V SIKHOLWANGUYE MAXIM MNQAYANA, UNREPORTED JUDGEMENT, CASE NO.: 366612011 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 29 May 2013, Judgment delivered 25 July 2013

This case was an action for damages arising out of a collision between the plaintiff's truck and defendant's stationery at about 03h00, left on the shoulder of the road by the defendant's driver due to a mechanical failure, with a triangle placed behind it. The plaintiff's truck was driving at a speed of 90km/h, 10km/h over the speed limit, at the time of the collision. The case concerned the merits only.

Sepato AJ laid out the *Kruger v Coetzee* test for negligence, which is effectively that liability arises if a reasonable person in the position of the defendant would have foreseen the reasonable possibility that his conduct could injure another person or property and would take reasonable steps to guard against such occurrence.

Sepato AJ then held:

"The question therefore arises whether a reasonable man in the defendant's situation should have foreseen that leaving the bus in the position it was would cause possible injury and patrimonial loss to another person or not…" [Paragraph 15]

"Based on all the above, I find that the defendant herein ought to have taken more steps than the one he took [in placing a triangle behind the vehicle] in order to avert the harm that eventually ensued as a result of the obstruction he had created on the road ." [Paragraph 31]

"On the other hand, the plaintiff cannot be said to be without any fault herein. Mr Tladi emerged from a bend driving a heavy laden truck at 90km/h, at night or in the darkness of the early morning. For some time, at least for more than 250m he was blinded by the lights of an oncoming vehicle but, he conscientiously failed to reduce speed because he felt he could see the road clearly, instead he kept more to the left to give more way to other oncoming trucks….He admitted that the maximum speed limit for his truck was 80km/h but added that he was allowed a grace of a further 10km/h." [Paragraphs 32-33]

"Both parties agreed that the collision occurred on a straight and flat tarmac road, which was dry and unlit. The photos at the least confirm this. Driving a heavy laden truck at 90km/h in the dark, on a busy road, certainly amounts to negligence, especially emerging from a bend." [Paragraph 34]

"This brings in the question of the extent of the apportionment of the liability of the two drivers. Even though the defendant had left the obstruction on the scene for about twelve hours without proper warning others, I find that Mr Tladi also, given his vast experience particularly as a licensed truck driver, equally contributed to the accident taking place. He actually created the emergency himself by choosing

to drive at a relatively high speed of 90km/h when he fully knew the operating mechanisms of a truck under those circumstances. I cannot find any of the two drivers to have displayed any greater degree of negligence than the other. I therefore apportion their liability equally, that is on a 50/50% basis." [Paragraph 39]

PETRUS JACOBS & 32 OTHERS V PIET SOET & OTHERS, UNREPORTED JUDGMENT, CASE NO.:472/2013, (FREE STATE HIGH COURT, BLOEMFONTEIN)

Judgment delivered 30 May 2013

This case concerned an application by 39 applicants for an order against 10 respondents to restore to them "peaceful and undisturbed possession of their property".

Sepato AJ held:

"I engaged the applicants' counsel … to say actually in the simple terms what is the nature of the relief sought herein. It has been clear to me from when I got the file and read through the applicants' cases that the applicants are not prepared to say straight that this is an application for eviction and there cannot be an application for ejectment under the common law currently. With the new constitutional dispensation the common law has undergone tremendous development so as to bring it in line with the spirit and purpose of the Constitution, in particular to give effect to the fundamental rights that are enshrined in Chapter 2 of the Bill of Rights. . Of relevant significance herein to which counsel for the applicants has also referred is section 26 of the Constitution, particularly section 26(3) which guarantees the right to every person in the republic not be evicted … without a court order and we know such a court order can only be granted after proper consideration of all relevant factors." [Pages 6-7]

"Many of these sections in the Bill of Rights, if we look at section 25 relating to expropriation of land, section 26 relating to housing, section 27 relating to the right to basic health care, the sections themselves also include a clause that says that the state has to come up with legislative measures in order to give progressive realisation of the rights that are referred to in this section. So section 26 also enjoins the state, that is the government, to come up with laws that would give effective to the progressive realisation of the right not to be evicted from your home or property without a court order and certainly that is why we have now what is called commonly the PIE Act, that is the Prevention of Illegal Eviction and Unlawful Occupation Act… and the Extension of Security of Tenure Act… These two Acts are to give effect to the provisions of section 26 of the Constitution." [Page 7]

"As a result they changed the common law so as to bring it line with the Constitution. There is no person who can approach a court and say I want to enforce a right, whether arising out of a contract or whatever interaction he may have had with another person, and that is a right to have that person evicted from the property without having to invoke either of the two Acts. You either go the way of ESTA or you go the way of PIE – there is no other way at all… I refer you in particular to this assertion that you cannot go circumventing either of the provisions of the Two Acts to the *High Court Motion Procedure, a Practical Guide…* There is quiet [*sic*] a lot of case law, particularly by our Supreme Court of Appeal, at least from

2003. I will quote just one for you, it is the case of *Ndlovu v Ncobo* and the case of *Bekker & Another v Gita*, both decided by the Supreme Court of Appeal and reported in 2003(1) SA 113…" [Page 8]

"We know of the series of cases that have been unfolding and coming before our courts now of late where a person sells property to another and another person is occupying that property despite that it has been sold to party B. The only way that this person who is resisting to vacate the property can be evicted therefrom is by bringing an application to a court of law either in terms of the provisions of PIE of the ESTA Act. No other way whatsoever." [Page 8-9]

"I have read and noted the judgment of my Sister van Zyl J herein delivered on 26 April 2012 in, I can say, this matter. In that case the 39th applicant was before her in terms of section 4 of the PIE Act… However, at the end of the whole case Van Zyl J found that actually the respondents were occupiers as envisaged in ESTA and therefore not unlawful occupiers because the PIE Act, whilst it may generalise every unlawful occupier as an unlawful occupier, it expressly says but not an occupier as intended in the ESTA Act. She gave reasons why she found that the respondents cited in that capacity in that case were occupiers in terms of ESTA and therefore dismissing the action in terms of PIE before her. I will not comment on the correctness or otherwise of the judgment as the applicant has sought to do in this case." [Page 9]

"Having said that, and I find that the law as it is currently any form of eviction by any person against another can only be brought through invoking the provisions of either the Prevention of Illegal Eviction and Unlawful Occupation Act… or the Extension of Security of Tenure Act.. I therefore find that this application before me is not in order at all. I cannot even go into the merits thereof… I accordingly dismiss this application. I make no order as to costs." [Page 9-10]

CIVIL PROCEDURE

MPS CONSULTING ENGINEERING AND TOWN PLANNERS (PTY) LTD V ARCHI-M ARCHITECTS CC (873/2013) [2013] ZAFSHC 82 (16 May 2013)

Case heard 16 May 2013

This case dealt with an application for summary judgement.

Sepato AJ held:

"I believe one can safely assume that for some time since the inception of the agreement, plaintiff and defendant enjoyed a fairly harmonious relationship, each performing in accordance with the agreement. This up until March 2012 whence from a series of correspondence at least from plaintiff's side, there appears a souring of the relationship, stemming from the fact that defendant had apparently been failing to make payments due to plaintiff as expected." [Paragraph 5]

"…Annexure "E2" is another letter by plaintiff's attorney referring to and demanding from defendant payment of account number 5 of February 2012 in the amount of R2 754 383.40 for professional services rendered….It is common cause that up until March 2013, defendant had not yet paid this amount at all, which compelled plaintiff to institute the current proceedings." [Paragraph 6]

"Clause 8 of the contract is titled 'Settlement of disputes'. Clause 8.1 reads: 'The parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to this agreement and may not initiate any further proceedings until either party has by written notice to the other, declared that such negotiations have failed.'" [Paragraph 8]

"Rule 32 of the uniform Rules of the Supreme Court provides: 'Upon the hearing of an application for summary judgement, the defendant may [a]… … [b] satisfy the court by affidavit or with the leave of the court by oral evidence that he has a *bona fide* defence…., such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon.'" [Paragraph 33]

"This means that an application is, in the absence of oral evidence decided on the affidavits on record. Heads of Argument are only to assist to set out the party's case with more precision, and certainly are not to substitute such case with another version as counsel may deem it fit. Above all, Heads are not in a form of affidavit that carries the weight of evidence." [Paragraph 34]

"The law is very clear as to what constitutes a *bona fide* defence. *Erasmus-Superior Court Practice* in their discussion of the Rule 32…states as follows: Firstly, that the term 'bona fides' should be given its literal meaning, i.e. the defence itself must be *bona fide*. Of significance, is that defendant must swear "to a defence, valid in law, in a manner which is not inherently or seriously unconvincing", or that his affidavit must show that there is a real possibility that the defence he raises may succeed, otherwise his defence must fail." [Paragraph 35]

"**The Nature of the claim**: I am satisfied that the plaintiff's claim herein is a liquidated amount of money as envisaged in Rule 32, and that defendant has not disputed this in any manner. Further that defendant has not established in what respect is the claim a dispute which is envisaged in Clause 8 of the contract as plaintiff correctly argued it." [Paragraph 38]

"**A *bona fide* defence**: Re the argument that plaintiff was not entitled to institute these proceedings without having referred the issue of the payment for mediation, Clause 8.2 of the contract, provides that a party may (my emphasis) refer the dispute or claim for mediation before taking any further steps in relation thereto." [Paragraph 39]

"The choice of the word "may" over "shall "by the parties themselves in the contract, means that a party is at liberty to go for mediation or take other further steps… Defendant has not attempted at all to explain why he, since March 2012 until in March 2013, seeing that he could not agree with plaintiff as to the payment of the account, failed to exercise his contractual right to seek mediation as provided for in Clause 8.2.Only when plaintiff chooses not to go that route does defendant want to hold him in breach. This simply shows that there was nothing to be mediated on as in accordance with their own contract, except that he wanted to effect payment as and when it was convenient for him. Is that *bona fides* or reasonableness in dealing with the other party? Certainly not." [Paragraph 40]

"Further… defendant alleges that plaintiff never engaged in good faith with him. However, he has not attempted to show any malicious conduct on the part of plaintiff since the account was rendered. The contract provides that payment will be made as agreed or within 30 days of the account." [Paragraph 41]

"I fully agree with plaintiff that defendant's case is based only on technicalities, which in law should not avail him of success in the case. He refers to the case of *Breitenbach v Fiat…* and *W M Mentz&Seuns (Edms) Bpk v Katzake*… In the latter case it was held that to give effect to purely technical defences in an application for summary judgment would frustrate the purpose of rule 32." [Paragraph 48]

"I find that there has not been any variation of the contract "B" at all, nor waiver of any right to payment. The only reasonable inference that the court can safely draw from the defendant's attitude presented herein is that, he just wants to delay payment of plaintiff's account unduly so, contra to the purpose of summary judgment. I therefore find that defendant does not have a *bona fide* defence to the claim. Seeing that defendant on the 19th April 2013 made a part payment on this claim, same had to be set off when judgment was granted on the 16thMay 2013, with interest and costs." [Paragraph 52]

The summary judgment was granted.

SELECTED JUDGMENTS

COMMERCIAL LAW

HBT CONSTRUCTION AND PLANT HIRE CC v UNIPLANT HIRE CC 2012 (5) SA 197 (FB)
Case heard 1 December 2011, Judgment delivered 1 December 2011

This case was an application on an urgent basis for the liquidation of the respondent close corporation on the basis that the respondent is unable to pay its debts.

Zietsman AJ held:

"Before the facts of the matter are to be considered, it is necessary to evaluate the provisions of the new Companies Act 71 of 2008, and their interrelation with the Close Corporations Act 69 of 1984…It is firstly interesting to note that although the chapter dealing with liquidation of a company, to wit, ch XIV of the Companies Act 61 of 1973, is still to be applied in respect of the winding-up of companies under the 2008 Act in accordance with item 9 of sch 5 of Act 71 of 2008, it is made subject, among others, to subitems 2 and 3 of item 9(1)…The relevant part of the aforementioned subitems is subitem 2, which states as follows: 'Despite subitem 1 sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company except to the extent necessary to give full effect to the provisions of Part G of chapter 2'." [Paragraph 2-4]

"With reference to part G in the present matter, s 81(1)*(c)* will be the relevant section. This section entails that a court may order a solvent company to be wound up if one or more of the company's creditors have applied to the court for a winding-up order on the grounds that business rescue proceedings have ended… and it appears to the court that it is just and equitable in the circumstances for the company to be wound up, or it is otherwise just and equitable for the company to be wound up." [Paragraph 5]

"The effect of the aforegoing, as far as companies are concerned, is therefore, in my view, as follows: (i)Although s 345 of Act 61 of 1973 is still in place as far as a solvent or insolvent company is concerned, s 344 only applies in the case of an insolvent company (ii) In order to liquidate, an applicant should therefore after the 2008 Act came into operation prove that the company is also insolvent, notwithstanding, for instance, the deeming provisions of inability to pay its debtors as contemplated in s 345 of Act 61 of 1973. .. (iv) Whereas s 344 of Act 61 of 1973 now only applies in cases of insolvent companies, such grounds for liquidation as taken up in s 344 are not available in cases of solvent companies. (v) The only grounds for liquidation of a solvent company are those as provided for in part G of ch 2. (vi) When a creditor of a company therefore applies for liquidation, the only grounds for liquidation of a solvent company will be those referred to in s 81(1)*(c)* of Act 71 of 2008 (vii) In summary, thus, the grounds on which a court can grant a liquidation order will be different depending on whether a company is solvent or insolvent. (viii) The only mutual ground on which a court can grant a liquidation order presently is the ground that it is just and equitable to do so. " [Paragraph 6]

"If, therefore, the applicant cannot prove the just and equitable ground in an application for winding-up, it shall be imperative for such an applicant to prove insolvency of the company before the whole ch XIV of the 1973 Act will be applicable." [Paragraph 7]

"In the instant matter the respondent is a close corporation and not a company. However, and in my view, the same principle will apply because of the fact that s 68 of the Close Corporations Act was repealed...and s 66 of the Close Corporations Act ... is amended to have the same effect on a close corporation as if it were a company with reference to item 9 of Schedule 7 of Act 71 of 2008." [Paragraph 8]

"...It is also necessary to mention that the words used by the legislature in s 81 of Act 71 of 2008, namely 'just and equitable', are the same as used in s 344*(h)* of Act 61 of 1973. Therefore it must be interpreted in the same way in which 'just and equitable' was interpreted by our courts through the years ...The aforementioned interpretation must also be understood in the light of the legislature's intention to emphasise rescue rather than liquidation." [Paragraph 9]

"In the instant matter the applicant relies on the inability of the respondent to pay its debts and more specifically the applicant's debt as contemplated in s 68... of Act 69 of 1984... It must therefore be borne in mind that s 68 of Act 69 of 1984 has been repealed and that the applicant can therefore only succeed if there is proof that the respondent is insolvent or that it is just and equitable that the respondent be liquidated...No proof of any nature was tendered by the applicant that the respondent is insolvent, which has the effect that it must be taken that the respondent is indeed still solvent. If solvent, s 68 is no longer available to the applicant." [Paragraphs 10-13]

"The only possibility is the ground of 'just and equitable'. The fact that a close corporation is not paying any of its creditors is not a catch-all ground under 'just and equitable'. It is rather a special ground under which the way in which a company is being run or conducted plays a role (see *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*)... In this instance the mere fact that the respondent is not paying the applicant's debt and that it made promises and/or settlement proposals since 2009 (as averred by applicant) is not a ground which makes it just and equitable to liquidate the respondent." [Paragraphs 14-15]

"Even if I am wrong with the interpretation of the Companies Act 71 of 2008, read with Act 69 of 1984, and even if it is accepted that the applicant need not prove insolvency in the present matter, it is clear from the evidence tendered in this matter that: (i) The indebtedness relied on ... emanates from a statement of account 86 to the founding papers in which the last invoice referred to is dated 16 January 2008. (ii) When a point in limine as to prescription was taken in the opposing papers, the applicant, contrary to its own case in the founding papers, replied thereto as follows: 'Suffice to indicate that seeing that the *quantum* in this matter cannot be ascertained without the co-operation of the respondent, this matter is not subject to prescription... The aforementioned must be seen in the light of the respondent's opposing papers wherein the indebtedness is disputed... ... A dispute arose which to date could not be solved. (iv) It is thus clear that the applicant is blowing hot and cold at the same time. It is in any event quite clear that prescription is a bona fide and arguable defence in this matter which should not be decided on the papers..." [Paragraph 16]

"In the matter of *Kalil v Decotex (Pty) Ltd and Another*…the Appellate Division confirmed the *Badenhorst* rule that a respondent only has to show on a balance of probabilities that its indebtedness to the applicant is disputed on bona fide and reasonable grounds…In my view the respondent did just that and the application can therefore not succeed…Although I also have serious doubts as to the urgency of this application with reference to the grounds thereof, I make no finding in this regard." [Paragraph 17-19]

The application was dismissed with costs.

CIVIL PROCEDURE

GMA FINANCE CC V LEONARD AND OTHERS (A6/2013) [2013] ZAFSHC 103 (13 June 2013)

Case heard 3 June 2013, Judgment delivered 13 June 2013

In this case, the plaintiff issued summons against the defendants. The defendants then raised a special plea that the plaintiff did not advance grounds upon which jurisdiction of the magistrates' court was based, and therefore the court did not have jurisdiction. The plaintiff made an application for leave to amend their particulars of claim, which was dismissed. On appeal against the dismissal of the application. Zietsman AJ identified two issues around which the appeal revolved. Firstly, whether the magistrate was correct in her finding in refusing the application to amend the particulars of claim and secondly, whether the order made by the magistrate was susceptible to an appeal. The second issue turned on the question of whether or not an interlocutory order, which is not final or definitive to the parties, is appealable.

Zietsman AJ (Rampai AJP concurring) held:

On the first issue:

"What the plaintiff sought in the notice of amendment and later the application for leave to amend, was to add grounds on which it could lead evidence to prove that the magistrates' court … has jurisdiction over the second and third defendants….There is no basis on which the magistrate could find that the amendment sought would have the effect of an excipiable pleading nor is there any basis on which it could be argued that the amendment sought would "oust the court's jurisdiction". On the contrary the proposed amendment was designed to plead averments necessary to lay the foundation that the court *a quo* has jurisdiction to entertain the action. The underlying purpose was to confer and not to oust jurisdiction…The finding by the magistrate is clearly wrong in that the amendment sought should have been allowed in the circumstances." [Paragraphs 4-6]

On the second issue:

"….[I]t is apposite to refer to a relatively recent Supreme Court of Appeal decision…*Phillips v South African Reserve Bank* … Farlam JA, as part of the minority decision (although the majority did not take issue with this part of the judgment and in fact concurred therewith) discussed the question whether the order is appealable or not as follows:

'Counsel for both respondents contended that the order was not appealable because it is not definitive of the rights of the parties and not the dispositive of at least a substantial portion of the relief claimed in the main proceedings. In this regard reliance was placed on what was said by this court in, *inter alia*, *Zweni v Minister of Law and Order*... It must be remembered, however, that, as Hefer JA said in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*...The passage in *Zweni*: 'Does not purport to be exhaustive or to cast the relevant principles in stone.'...The question of appealability in a case such as this, where a party seeks to attack on appeal an order made in judicial proceedings which have not yet terminated, was discussed by Nugent JA...in *NDPP v King*...where he said the following: 'There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life Association of Africa Ltd v Niselow* which was cited with approval by this court in *Beinash v Wixley*....I observed that when the question arises whether an order is appealable what is most often been asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course.... I pointed out ... that while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not one of principle ... ...The matter was further discussed in....*Government of RSA v Von Abo*....where Snyders JA (with whom the rest of the court concurred) said: 'It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of the substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.'" [Paragraph 8.5]

"In this instance, and although the order made by the magistrate can be argued, was not final in its effect, nor definitive of the rights of the parties and did not dispose of a substantial portion of the relief claimed, the further factors that must be taken into account in this instance, is convenience, the time at which the issue is considered, delay, expedience, prejudice, and the avoidance of piecemeal appeals, but most importantly the attainment of justice." [Paragraph 9]

"Where it is clear that the magistrate erred in her finding to dismiss the application to amend the plaintiff's particulars of claim, it is a real and substantial argument that such refusal, might lead to an injustice insofar as the plaintiff could drastically be hampered to present evidence during the trial to prove its grounds for jurisdiction, which will have the effect that the defendants' special plea might very well be upheld in the circumstances. It is also clear that the opposition to the application to amend was unreasonable and without substance." [Paragraph 10]

"Whereas our Supreme Court of Appeal in more recent times has been increasingly more flexible and pragmatic, I think that in the circumstances of this matter, this court should also be much more flexible and pragmatic." [Paragraph 11]

"On the aforesaid premises the appeal must succeed. It will be in the interest of justice that a clear wrong should be corrected in order to enable the parties to proceed with the hearing of the matter in the magistrates' court whilst all the relevant factors and evidence are taken into account in deciding upon the issues between the parties. In the circumstances I am inclined to uphold the appeal." [Paragraph 12]

The appeal was upheld and the plaintiff was granted leave to amend the particulars of claim.

CRIMINAL JUSTICE

S V KANETSI AND ANOTHER (408/2011) [2011] ZAFSHC 204 (1 December 2011)

Judgment delivered 1 December 2011

The accused was found guilty on 2 charges of contravention of Section 4(3) of the Precious Metals Act. Following this, during an address by the attorney for the accused for mitigating circumstances before sentencing, the magistrate discovered that there had been a splitting of charges and the accused should only have been found guilty on one charge of contravention of section 4(c) of the Precious Metals Act. This case was a special review confirming this finding.

Zietsman AJ (Jordaan AJ concurring) held:

"The magistrate remarks as follows: "When these two charges were put to the accused to plead I was under the impression that accused was found with the said gold bearing metal on the very same day but different places and at different times. Then it during the address by the attorney that accused was found at the very same time and date in possession of two plastic bags containing gold bearing material. I then immediately stopped the proceedings and realised that there is a duplication of charges after applying the "evidence test".'" [Paragraph 3]

"It is obviously, so that there was a duplication of charges and that the accused is only guilty of one charge of contravention of section 4(c) as refer to above." [Paragraph 4]

"In the light of the aforegoing, the conviction on both the counts is set aside and the matter is referred back to the magistrate of Welkom to deal with the matter accordingly." [Paragraph 5]

SELECTED JUDGMENTS

LABOUR LAW

SOLIDARITY AND ANOTHER V PUBLIC HEALTH AND WELFARE SECTORAL BARGAINING COUNCIL AND OTHERS (JA 71/10) [2013] ZALAC 2; [2013] 4 BLLR 362 (LAC); (2013) 34 ILJ 1503 (LAC) (22 JANUARY 2013)

Case heard 16 May 2012, Judgment delivered 22 January 2013

The second appellant (the employee) was employed by the third respondent, the Department of Health, in the position of Senior Administrative Officer. He complained that he was unfairly dismissed and referred a dispute of unfair dismissal to the first respondent, the Public Health and Welfare Sectoral Bargaining Council. At the arbitration a point *in limine* was raised that the Bargaining Council lacked jurisdiction to entertain the dispute, since the employee had not been dismissed but was discharged by operation of law. The point *in limine* was upheld by the commissioner. The appellants instituted review proceedings in which they sought orders, *inter alia*, setting aside the award of the commissioner. The Labour Court dismissed the application.

On appeal to the Labour Appeal Court, Tlaletsi JA (Wagley AJP concurring; Murphy AJA dissenting) held:

"This appeal turns on the interpretation and application of s 17(5)(a)(i) of the Public Service Act ("the PSA")... The employee was placed on precautionary suspension ... pending the finalization of an investigation of several allegations of misconduct (fraud). Whilst on suspension, the employee secured and assumed employment in Pretoria with Compu Afrika ... The employee however, conceded that he had not obtained permission but only assumed that he had approval to assume remunerative work outside the Public Service... [T]he employee received a letter from the third respondent informing him that: '...you are deemed to be discharged from the Public Service with effect from 3 July 2007 when you accepted alternative employment whilst you were still in service of the Department of Health. (sic)'" [Paragraphs 1-4]

"... [T]he commissioner made an award to the effect that the Bargaining Council does not have the jurisdiction to entertain the dispute as deemed discharge does not constitute a dismissal for purpose of the Labour Relations Act." [Paragraph 5]

"Section 17 (5)(a) and (b) ... entails is that if an employee of the department ... absents himself or herself from official duties for a period exceeding one month without having obtained permission from his or her head of the department, he or she shall be deemed to have been discharged from the Public Service on account of misconduct with effect from the first day on which he or she began the absence ... Subsection (ii) must be read in conjunction with subsection (i)... it provides that... for the employee to be deemed to have been discharged in terms of s 17 (5)(a)(ii), he/she must be absent without permission and assume other employment even if the period of one calendar month has not expired." [Paragraphs 10-12]

"For a deemed discharge provided for in s 17(5)(a)(ii) to take effect, no act or decision on the part of the employer is required. The discharge takes effect by operation of law as soon as the jurisdictional requirements are met. The jurisdictional requirements for the deemed discharge to take place is: it must

be an employee who is not excluded; who is absent without permission; assumes other employment without the permission of the employer. All what [*sic*] the head of the institution then does is to convey to the employee what has taken effect by operation of law. The head of the institution does not have the power to stop or suspend what takes effect by operation of law. It is therefore not within the head of the institution to decide or make an election on what cause to follow and ignore what has taken effect by operation of law and follow a procedure that he is in his opinion less draconian." [Paragraph 13]

"In my view, the employee's conduct fell within the circumstances envisaged in s 17(5) (a) (i) and (ii) of the PSA. He is an officer who assumed other employment without the permission of the executing authority. The employee even though on suspension, remained an employee of the department and was subject to its authority in terms of the contract of employment. The department was also contractually obliged to pay his remuneration during the suspension period. Accepting or assuming other employment amounts to being absent from duty because the employee is now rendering his services to another employer which conduct is irreconcilable with his employment with the department while under suspension. He left the Free State where he was stationed and moved to Pretoria to put his labour at the disposal of the new employer. In the circumstances, I am of the view that he was deemed to be discharged and there was no decision to dismiss him. The Bargaining Council therefore, lacked jurisdiction to entertain his dispute since he was not dismissed." [Paragraph 18]

"In my view, when an employee, who is prohibited by his/her contract of employment from taking any remunerative employment, takes up other remunerative employment he/she must be deemed to have resigned. The fact that such an employee may be serving a period of suspension on full pay at the time he/she takes up such other remunerative employment and even if the employment may only be for the period of his suspension does not change the fact that he/she will be deemed to have resigned. Section 17(5) read with s 30(b) means exactly that. Instead of resignation it uses the word discharged…" [Paragraph 19]

"In light of the above, the appeal should fail. It is in accordance with the requirements of the law and fairness that there be no order as to costs." [Paragraph 22]

KARAN T/A KARAN BEED FEEDLOT V RANDALL (JA 87/10) [2012] ZALAC 20; [2012] 11 BLLR 1093 (LAC); (2012) 33 ILJ 2579 (LAC) (22 JUNE 2012)

Case heard 4 May 2012, Judgment delivered 22 May 2012

This case was an appeal against the judgment of the Labour Court. The respondent was dismissed by the appellant in 2006 and considered his dismissal to be both substantively and procedurally unfair in that he was discriminated against because of his age. He referred a dispute of automatically unfair dismissal in to the Labour Court for adjudication after an unsuccessful conciliation of the dispute. The Labour Court found that the dismissal of the respondent by the appellant was automatically unfair and ordered the appellant to pay the respondent compensation equivalent to 24 months remuneration.

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

"The respondent, then 53 years old, was employed by the appellant on 01 June 1997 as a Financial Controller. On 01 August 1999 he was appointed the Group Financial Director, the position he held until

his dismissal. The respondent was *inter alia*, responsible for developing appellant's accounting system... It needs to be mentioned that the respondent's letter of appointment did not make any reference to the respondent's retirement age. He was a member of the Karan Provident Fund ... The Rules of the Fund provided that normal retirement age was 60 years. On 05 February 2003, the appellant took a resolution adopting the Rules of the fund effective from 01 August 2002. This meant that the respondent's retirement age became 60 years." [Paragraph 5-6]

"It is common cause that the dismissal of the respondent was based on his age. His dismissal would therefore be automatically unfair unless the appellant shows that there is a fair reason for it. The appellant relies, for justification of the dismissal of the respondent, on section 187(1)(f), which provides that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity." [Paragraph 17]

"In *casu*, the *court a quo* found, correctly on the facts, that there was indeed an agreed retirement age of 60 years that was applicable to the respondent. However, the court held further that the respondent having reached the retirement age, the appellant offered him new employment by medium of the letter dated 08 August 2003 without stating what his new retirement age would be and instead reserved to itself unilaterally decide when to retire the respondent from his new employment contract. The *court a quo* ruled that the appellant was not legally empowered to determine unilaterally, the date or age of retirement of an employee." [Paragraph 18]

"There are two plausible arguments concerning the application of section 187(1) (f) and 187(2) (b) in this matter. ... The second scenario is that, when there is an agreement reached between the employer and employee before the latter has reached the normal or agreed retirement age, to determine a new retirement age, the employer would enjoy the protection of section 187(2) (b), should he/she terminate the employment of the employee, once the new agreed employment date is reached." [Paragraph 19-20]

"... What is common cause is that the respondent was informed in the letters dated 08 August 2002 and 25 February 2004 respectively that the appellant required him to continue working beyond his retirement date and that it was left to the appellant to determine on notice when the respondent is to be retired. The Court *a quo* found, and it was also common cause in this Court, that the respondent did receive the aforementioned letters and did not respond to them. He instead continued with his employment beyond the date on which he reached his retirement age." [Paragraph 21]

"The finding of the Court *a quo* that the appellant was not entitled to unilaterally determine a retirement date is therefore, in the circumstances of this case, not correct. The respondent tacitly agreed to work beyond the normal retirement age and left it to the appellant to determine the retirement age or date on notice to the respondent. There is nothing unlawful or unfair in the agreement reached by the parties under these circumstances. It was open to the respondent to reject the condition imposed by the appellant at the time it was made and make a counter proposal. He also had an election to refuse to continue rendering his services beyond his agreed retirement age... The evidence further showed that this was appellant's standard practice was applied to other employees who at different occasions, found themselves in a similar position to that of the respondent." [Paragraph 22-23]

The appeal was thus upheld.

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

This case concerned an appeal against the judgement of the Labour Court in a review application against an award issued by the second respondent ("the commissioner"). In the award, the commissioner found that the dismissal of the employee was substantively unfair and ordered that she was to be reinstated immediate effect. A review application was dismissed in the Labour Court.

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

"… Prior to the incident that led to the respondent's dismissal, the latter approached the Executive Chef of the appellant (Mr. Stephen Walter) and reported that she was attending a 'traditional healer's course' … The entire staff had no problem with the request and agreed to accommodate the respondent…In the course of time, the respondent approached Walter and reported that she was about to complete her Sangoma "course" and that she was now required to attend full time for a month. She requested that she be allowed an unpaid leave for the entire month. Walter consulted the Human Resources Manager… the two were willing to accommodate the respondent by allowing her to utilise her leave days. However, they noted that the respondent did not have leave days. She was offered only one week unpaid leave of absence. The respondent found a week to be insufficient for the completion of her "course"." [Paragraph 4-6]

"The employee was subjected to disciplinary inquiry… [S]he was found guilty of all the alleged instances of misconduct. The chairperson of the disciplinary enquiry noted that the respondent's explanation for her absence was firstly to undergo 'the Sangoma training' and graduation or that she was ill 'since spirits of forefathers were bothering her'…The chairperson rejected 'all her excuses' and recommended the sanction of dismissal from the date on which she "absconded"." [Paragraph 10-11]

"The commissioner [at arbitration] went on to say: 'An average person values his or her life as more important than anything else and will do anything to save his or her life. The [respondent] was faced with two evils and she chose the lesser evil. In fact, she found herself in a situation of necessity where the only recourse was to break the employer's rules in order to save her life… In the normal course of events and according to human experience, any person would have acted like the applicant did to save her life. … Life ranks higher in the scale of legal values than property and other things. Therefore clearly, the life of the [respondent] was more important than the interests that the [appellant] sought to safeguard and protect when it declined to grant the [respondent] leave. The respondent would not have suffered any irreparable harm arising from the absence of the [respondent]. In the light of the exposition above, the inescapable conclusion at which I have arrived is that the applicant's absence from duty was due to circumstances beyond her control. In other words, the applicant was justified to disregard the respondent's instructions and attend the sangoma course. The respondent's instructions and refusal to grant the applicant unpaid leave was unreasonable as the consequence thereof would have been to place the life of the applicant at risk. Rather than risk the wrath of the ancestors, the applicant decided to act against her employer's wishes.'" [Paragraph 14]

"The Labour Court … Court remarked… that the commissioner found that the respondent had breached the appellant's rule but that she was justified to do so and concluded thus: 'It is common cause that the [appellant] knew that the [employee] was attending a course to become a Sangoma. It had assisted her in the past to attend the said course. Arrangements were made with her to work morning shifts and to attend the course in the afternoons. … The [appellant] was approached at the end of May 2007 for permission to take one month's unpaid leave to complete the training course. The appellant refused although the [respondent] had produced a traditional healer certificate that was treated with contempt by the [appellant]. The [appellant] knew what the reasons were for the [respondent's] absence. The duration of absence was going to be for a month. She had been working for the [appellant] for eight years. The explanation tendered for the absence was to attend a Sangoma course to appease her ancestors. This is not one of those cases where an employer did not know about the whereabouts of the employee. It was prepared to give her a week off as unpaid leave. The commissioner found that the explanation that she tendered was reasonable. This court cannot second guess the commissioner's findings.'" [Paragraph 16]

"The formulation of the test for review for reasonableness in *Sidumo*… is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The aim of the test … is to give effect to the constitutional right to fair labour practice and the right to administrative action which is lawful, reasonable and procedurally fair. Section 145 of the Act must therefore be read in such a way so as to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair. The Constitutional Court in *Sidumo* emphasised that the distinction between appeals and reviews continues to be significant in scrutinising a decision based on reasonableness and that 'a judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the constitution'. This means that in order to assail an award of the commissioner of the CCMA on the *Sidumo* test, it is incumbent on the party to also assail the result of the award and not the reasons of the commissioner only. Put differently, the focus is on whether the result of the award falls within a range of reasonable results and not whether it is in fact the correct one. The question is whether there is justification for the decision on the material before the commissioner." [Paragraph 20]

"It is unfortunate that much emphasis was placed on the fact that the employee claimed to be sick and that the certificate from her traditional healer did not constitute a valid certificate …. It 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. This conclusion is evident from the conduct of the parties when the issue started. The employee was accommodated without any question whether she was sick in the conventional sense. No medical evidence was required to prove that she was indeed sick. Her condition or what she claimed to have been going through her was accepted as such without questions." [Paragraphs 22-23]

"The problem seems to have started when the employee required a full month to conclude her sangoma sessions. It is only then that when it was found that she did not have sufficient leave days to take for a full month to comply with her request and when she found a week of absence offered to accommodate her to be insufficient, that the issue of illness and medical proof came to the fore. The appellant then

took the view that she could only be accommodated if she produced a "medical certificate" as proof of her "medical condition". On the other hand, the employee, in an attempt to comply with the requirements, obtained a certificate from the person who was in charge of treating her "condition"… [T]he argument that by enacting section 23 of the BCEA the legislature in express terms opted for standards in line with Western standards as opposed to African culture is misplaced as well. I am as a result unable to find, as we are urged to do, that the commissioner usurped the function of the legislature by elevating the role of traditional healers to that of medical practitioners." [Paragraph 24- 25]

"… [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. A good example of accommodation was demonstrated by Walter when the respondent first approached him … 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]

"Regarding the opening of the floodgates, I can do no better than to refer to what Langa CJ said in *MEC for Education*, *Kwazulu-Natal and Others* v *Pillay*, 'The other argument raised by the school took the form of a 'parade of horribles' or slippery slope scenario…The display of religion and culture in public is not a 'parade of horribles' but a pageant of diversity which will enrich our schools….acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the school, it may refuse to permit it.'… These authoritative remarks are equally relevant in this case. It must be left to employers and their employees to develop systems in their workplaces when confronted with these challenges." [Paragraph 27]

"In my view, the decision reached by the commissioner on the facts is not the one that a reasonable decision maker could not reach. Her conclusions are supported by reasons. I am not persuaded that a different approach in the reasoning process by the commissioner could have resulted in a different outcome, regard being had to the grounds of review and the submissions on behalf of the appellant. … Another commissioner may as well have arrived at a different conclusion. However, the matter was not on appeal but on review and the distinction between the two must be recognised. The appeal should therefore not succeed." [Paragraph 28]

"… 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:

"Having read the record of the proceedings, I had some doubts that the proceedings were in accordance with justice, or that the accused had been correctly convicted. I requested full reasons for conviction from the magistrate. ..." [Paragraph 2]

"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. In *casu* the accused was kept in the dark without knowing what conduct he was being punished for." [Paragraph 7]

"In the reasons for the decision in response to my enquiry, the Magistrate relied on the fact that both state witnesses testified that the accused drove the motor vehicle at a high speed and were corroborated by the fact that the two witnesses were injured. She further remarked that the accused admitted that he intentionally drove a vehicle with mechanical fault which caused the brakes to fail, and his failure to maintain or drive a motor vehicle with mechanical faults, she continued, amount to negligence on his part." [Paragraph 7]

"The Magistrate's conclusion that the accused was driving at a high speed which is in excess of 60km/h is not well founded. Both witnesses for the state were not able to state the speed at which the motor

vehicle was driven... The accused's version that he drove at a speed of between 30 - 40 km/h which is why it was possible for him to turn the motor vehicle until it stopped was not challenged... No reference to the record is made where the accused admitted that he intentionally drove a vehicle with a mechanical fault. This is the opposite of what he said in his evidence." [Paragraph 8]

"None of the state witnesses could dispute the fact that the brakes suddenly failed... It is clear from what the magistrate is saying that she accepted that the accused experienced brake failure, but blames him for not having detected the failure before embarking on the trip. This is a trap that the magistrate set for herself by not allowing herself time to consider the evidence and legal principles applicable, resulting in no room for afterthought or changing her mind in accordance with the dictates of the evidence." [Paragraph 9]

"In my view the state failed to rebut the defence raised by the accused. It cannot be said, considering the totality of the evidence, that the state proved the guilt of the accused beyond a reasonable doubt, and that his explanation is reasonably possibly not true. By overtaking the stationary taxi and driving across the road to avoid further collisions to his left or right are in my view, reasonable steps under the circumstances to avoid the imminent danger. On the facts of the case alone, I am unable to find that the proceedings were in accordance with justice. The conviction and sentence must be reviewed and set aside." [Paragraph 10]

SELECTED JUDGMENTS

PRIVATE LAW

GOODRICK V GOODRICK (21128/2009) [2013] ZAWCHC 126 (8 MAY 2013)

Judgment delivered 8 May 2013

Applicant sought rectification of a consent paper (annexure CG1) concluded between the parties which had been included in a final order of divorce, alleging that the paper did not reflect the common intention of the parties regarding the division of their joint estate (the parties having been married in community of property).

Boqwana AJ held:

"Rectification is a well established common law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement. … [B]oth parties agree that their common intention was that there would be a 50/50 split of the joint estate at the end of the day. The parties having been married in community of property, it is clear that CG1 was drawn with that common intention in mind." [Paragraphs 17; 19]

"On proper analysis of CG1 it is clear that that document was more than just a list of assets and liabilities. It is a document that assigned values of the joint estate as agreed by the parties and included calculations which led to a result that culminated in an amount of R 1089 018.00 due to the respondent. In other words this document formed the basis upon which the joint estate was to be shared or settled between the parties. Parties decided to put a deemed net value of R 1 400 000.00 next to the immovable property and divide such value in equal amounts of R 700 000.00 each. The important issue here is that when the amount due to the respondent was determined the value of the house was part of those calculations." [Paragraph 20]

"In my view the applicant's version sounds more probable that the amount of R739 018.00 had to be paid from the net proceeds of the sale of the house and the balance paid to him. By doing this he took a risk that should the house sell for less he would have to meet the shortfall but if it sold for more or the shortfall was paid up then the balance would come to him." [Paragraph 21]

"I am not convinced by the respondent's version that each party was entitled to 50% of net proceeds of the sale of the house over and above the amounts agreed to in CG1. The basis for this claim remains unclear to me. Counsel for the parties, particularly for the respondent brought a number of annexures with calculations trying to convince the Court of how the respondent would be disadvantaged by the applicant's argument. This in my view is indicative of the difficulty the respondent had in trying to convince the court that her version was more probable. In any event, these various scenarios … relied on in attempting to illustrate the 'fairness or otherwise' of the applicant's version to the respondent were not the basis of the calculations in CG1 or the consent paper." [Paragraph 22]

"I did not get a satisfactory answer from the respondent on why the value of R1 400 000.00 would be included in the CG1 document if the value due to her in CG1 was not intended to be a settlement figure

in respect of the joint assets. Had the value of the house not been included in the calculation in CG1 then one could say it would be proper that the shortfall be paid from the 50% of the applicant's net proceeds of the sale of the house. … I find it highly improbable that parties would agree that each would be entitled to an extra 50% of the net proceeds of the house over and above the settlement values calculated in CG1, which would result in the respondent being paid 1 089 018.00 plus 50% of her net proceeds and a shortfall of R739 018.00 being paid from the applicant's 50%." [Paragraph 23]

"That clearly puts the respondent's share out of kilter with the common intention of splitting the joint estate 50/50. The consent paper, insofar as that issue is concerned is not in conformity with the underlying intention between the parties." [Paragraph 24]

"… At the end of the day, how the error came about is not the primary issue to be determined. What is important is to find on the balance of probabilities what the true intention of the parties was. When the courts refer to common mistake it is not that the mistake must be mutual, but the underlying agreement must have been. I therefore find that the underlying agreement provided for a 50% spilt of the entire joint estate inclusive of the immovable property and not for an extra 50% share of the net proceeds of the immovable property." [Paragraph 26]

"As regards motor vehicles I am not satisfied with the applicant's version that the parties intended the motor vehicles to be the excluded from clause 4.1. The respondent's version is in my view more persuasive in that the reality accords with what is in the consent paper. Motor vehicles are movable property and the applicant was using the Pajero which was in his possession while the respondent used and still has in her possession the Toyota Corolla. It seems to me, the issue of the vehicles was an afterthought and not really a key issue … The parties had been separated for 5 years before the divorce and continued to use those cars separately for all those years. Clause 4.1 accordingly is not inconsistent with the reality of the parties at the time of the signing of the agreement notwithstanding the vehicles being registered under the applicant's name." [Paragraph 27]

Boqwana AJ then dealt with the question of costs:

"… I have taken into account the fact that this matter flows from a matrimonial dispute where each party have expressed their respective financial difficulties during the course of their evidence. Further, the applicant had signed the agreement without reading it and for that he is not entitled to costs in my view. On the other hand the respondent has opposed this application in an instance where the common intention was clearly set out in CG1. In that regard it is just that each party pay their own costs." [Paragraph 31]

Rectification of three paragraphs in the consent paper was ordered.

LABOUR LAW

SA TRANSPORT & ALLIED WORKERS UNION & ANOTHER V THREE FLAMES INVESTMENTS CC (2013) 34 ILJ 2093 (LC)

Case heard 16 – 17 August 2012, Judgment delivered 20 December 2012

The issue in this case was whether the dismissal of the second applicant (Hlahla) was automatically unfair in terms of because he was dismissed for participating in a protected strike, and whether the dismissal was procedurally fair. Respondent denied that the dismissal was automatically unfair, alleging that Hlahla was not a member of the first applicant (the union), nor was he an employee of the respondent, but instead was an employee of Motifprops CC. Therefore the National Bargaining Council for the Road Freight Industry lacked jurisdiction to conciliate and the conciliation certificate of outcome was null and void. It appeared that Motifprops CC and the respondent shared the same information on the CIPRO certificate of confirmation, except for their start dates, and had the same address and registered office.

Boqwana AJ held:

"It is common cause that the strike action that employees of the respondent participated in was protected. The entire defence of the respondent is that Hlahla was employed by Motifprops as a gardener and not the respondent, and accordingly the bargaining council had no jurisdiction to conciliate this matter. Secondly, Hlahla was not a paid up member of the union." [Paragraph 49]

Boqwana AJ considered whether union membership was a prerequisite for taking part in the strike, and cited the Constitutional Court decision in *SA Transport & Allied Workers Union & others v Moloto NO & another*:

"… I am of the view that the principles espoused in that judgment would cover a situation where all employees of the employer (whether or not in the same bargaining unit) go on a protected strike in support of the demands made by their union against the employer(s). I hold the view that once Hlahla is able to show that he was an employee of the respondent, whether or not he belonged to the union when he participated in the protected strike action with other employees of the respondent will become irrelevant. I, therefore, do not need to deal with whether or not Hlahla was a member of the union." [Paragraph 53]

Boqwana AJ then turned to the question of whether Hlahla was an employee of the respondent:

"… [T]he respondent raises a technical point that Hlahla was in fact employed by Motifprops CC and not by the respondent. In support of its assertion, the respondent submitted CIPRO documents showing the two entities registered separately, as well as a payslip … sent to Hlahla and timesheets. Both these entities were owned and managed by the Thompsons. Their employees operated in the same environment. " [Paragraph 59]

"The payslip indicates the company name as Motifprops. Hlahla does not dispute that he had seen such payslips before, but he avers that he never paid any attention to the name 'Motifprops' on the payslip. He maintained that all he knew in all his employment life was that he was employed by the respondent." [Paragraph 60]

“In my view, Hlahla's evidence is stronger than that of the respondent. It is supported by disciplinary documentation filed by the respondent and Thompson's non-committal statements where he could not conclusively rule out the possibility of Hlahla conducting certain duties for the respondent and his evidence that, as a general worker, the respondent had a prerogative to utilize Hlahla anywhere it deemed fit, at any point in time.” [Paragraph 61]

“Apart from Hlahla being asked to assist at the respondent, the two entities were owned and managed by the two Thompsons. It was not indicated to Hlahla when he received instructions whether those instructions were given by the management in their capacity as the respondent or as Motifprops. Further, the respondent itself referred to the respondent as the employer in disciplinary documents. This cannot be dismissed as a simple typographical error. The respondent represented itself as Hlahla's employer to the extent that even the chairperson of the disciplinary hearing referred to the respondent as the employer in her notes and the outcome of the disciplinary hearing, which outcome was signed by a representative of the employer ... No attempt was made to correct this alleged 'error' until a dispute was referred to the bargaining council where for the first time the respondent formally raised a point in limine. It does not help for Thompson snr to claim that he told those involved that there was an error when he became aware of it. The fact remains the documents filed as disciplinary documents were not rectified. The respondent cannot have its cake and eat it. Disciplinary papers went to the bargaining council citing the respondent as the employer. ... If there is any confusion as to who the correct employer is, it was created by the respondent and its managing members themselves. It, therefore, must be estopped from denying that it is Hlahla's employer.” [Paragraphs 66 - 67]

The dismissal was found to be automatically unfair, and the respondent was ordered to pay compensation equivalent to 24 months' remuneration.

VAN METZINGER & ANOTHER V CONSERVATION CORPORATION T/A CC AFRICA (2013) 34 ILJ 1309 (LC)

Case heard 13 August 2012, Judgment delivered 14 August 2012

At the beginning of a trial, respondent raised a point in limine that the court had no jurisdiction to determine a performance bonus claim sought by the first applicant due to non-compliance with s 74(2) of the Basic Conditions of Employment Act (the BCEA). Respondent argued that the first applicant did not refer a performance bonus dispute to the CCMA in terms of s 191(1) of the Labour Relations (LRA) and therefore the court could not determine the claim for an amount allegedly owing together with the unfair dismissal claim.

Boqwana AJ held:

“The first applicant's evidence in essence was that, although the referral documents may have been silent on the performance bonus issue, the matter was discussed at conciliation, amongst other benefits discussed. The first applicant sought to disclose details of the conciliation discussions.” [Paragraph 19]

“Rule 16 of the CCMA Rules does not permit reference to any of the discussions held at the CCMA. ... Evidence relating the conciliation discussions must therefore be rejected. Applicants' counsel suggested that even if those discussions may not be disclosed, the performance bonus issue has always been a 'dispute' that the respondent has been aware of. The basis of this submission is that correspondence

between the parties and evidence given by the first applicant would clearly suggest that the parties had during the s 189 discussions at the workplace discussed the performance bonus issue." [Paragraphs 20 - 21]

"I cannot agree with the applicants that these alleged discussions at the workplace indicate that the dispute was referred to the CCMA. Those discussions in my view are irrelevant. … I equally reject that the respondent had admitted in its response that the court had jurisdiction to hear the performance bonus claim. … In my view there is clear non-compliance with s 74(2) of the BCEA." [Paragraphs 22 - 24]

Boqwana AJ then turned to consider the argument that the court nevertheless had jurisdiction to hear the matter in terms of s 77(3) of the BCEA:

"The basis for this submission was that there was an oral employment agreement that was not disputed. … The only place where the performance bonus issue is mentioned in the body of the statement of claim (apart from the relief sought) is in para 24.7. … Apart from this there are no other allegations dealing with a performance bonus. If the first applicant believes that he is entitled to a performance bonus, it is necessary for him to allege so as to prove that he is contractually entitled to that amount. It is not sufficient for him merely to prove that failure to pay that amount was unfair. No basis is mentioned in the pleadings entitling the first applicant to the performance bonus he now seeks to enforce. He must allege the terms of the contract on which he seeks to rely. " [Paragraph 26 - 28]

"Jurisdictionally, the court is entitled to entertain the performance bonus issue as a contractual claim in terms of s 77(3) of the BCEA. However, the contractual claim has not been properly pleaded, which is a bar to the applicant leading evidence on the issue as the pleadings stand." [Paragraph 32]

The applicants were thus barred from leading evidence on the pleadings as they stood.

CRIMINAL JUSTICE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V FIELIES (A338/12) [2013] ZAWCHC 134 (21 MAY 2013)

Case heard 12 April 2013, Judgment delivered 21 May 2013

Respondent pleaded guilty to 39 charges of corruption under the Prevention and Combating of Corrupt Activities Act (POCCA), and sentenced to a fine of R 60 000.00 (payment deferred), or two years imprisonment in default of payment. He was sentenced to a further twelve months imprisonment suspended for five years on condition that the he was not convicted of fraud, theft or any contravention of the POCCA Act during the period of suspension. The appellant appealed against the sentence. Respondent had been a municipal official, and had received "kickbacks" of R350 000.00 for awarding contracts to one Fischer and/or Fischer's company in contravention of the municipality's procurement policy.

Boqwana AJ (Griesel J concurring) began by considering the Supreme Court of Appeal judgement in S v Sadler regarding "white collar crime", and held:

"In the Sadler case the respondent was a senior manager in NBS Corporate Bank. In order to ensure that certain persons received advances from the bank he either deliberately concealed the true extent of the bank's exposure to those persons and falsely represented it to be less than what it was or placed false and misleading information before the bank. In one instance he forged a signature of one of the directors of the bank upon a document in order to induce others in the bank to sanction an advance which would otherwise not have been made. As quid pro quo he received luxury goods and a large loan worth R400 000.00 on favourable terms. The trial court imposed sentences in the range of two to five years wholly suspended a fine of R500 000.00 and 1000 hours worth of community service. … The Court there concluded that a case like that called for the imposition of a period of direct imprisonment and that the trial court's sentence could not be left undisturbed. Marais JA subsequently echoed these sentiments in S v Makhudu …" [Paragraphs 6 - 7]

"The magistrate in his reasoning towards sentencing clearly mentioned the seriousness of the offence … and how the conduct of the respondent being a person who held a position of trust impacted on the community and the country. In deciding on a sentence to be imposed he however did not appropriately balance all the factors taken together. In my view he overemphasised the respondent's personal circumstances, the fact that he was a first offender and the fact that he pleaded guilty to all the charges. The magistrate concluded that the respondent had a young family to support and a term of direct imprisonment was not the only appropriate sentence that could be imposed. The court considered that a fine with a suspended sentence would be appropriate having, inter alia, considered that the appellant had paid back the amount he received as kickbacks to the municipality." [Paragraph 9]

"The appellant referred us to a number of decisions dealing with similar offences, where the perpetrators were subjected to direct imprisonment. Although this Court is not bound by those decisions, they serve as a guide on how our courts have treated cases of corruption having regard to the prevalence of white collar crime in society. Perpetrators would in many instances be people who are not destitute but who are earning decent salaries or enjoying decent lifestyles. They may be able to avoid terms of imprisonment by simply paying back the money owed to the complainant and fines imposed by the court. Such an approach in sentencing lacks a deterrent element and could send a wrong message to society as it provides no disincentive to the perpetrators of these crimes. … This is not to downplay the other factors that have been taken into account in the respondent's favour …" [Paragraph 11]

"Counsel for the respondent submitted that interference with sentence in this case would result in disparity of sentences imposed in respect of two accused who participated in the same offence. In his view, this Court is enjoined to have regard to the sentence imposed by the same magistrate in a separate trial involving … the respondent's co-accused, where Fischer was also given a non-custodial sentence. The approach … is not correct in my view for a number of reasons. Firstly, the fact that Fischer received a non-custodial sentence cannot bar this Court from interfering with the sentence imposed on the respondent which the Court views to be disturbingly inappropriate. … Secondly, the personal factors of the two individuals and their level of participation in the committal of the crime is not the same. The respondent held a position of a public officer who abused his position of trust and authority. He admitted to being the initiator of this corrupt relationship and the executor of these unlawful actions. The level of participation between the respondent and Fischer and the positions they held were clearly not the same. Thirdly, their personal circumstances were different. The respondent was 37 years old at the time of

sentencing, younger than Fischer who was 69 years old which is a factor that could also justify imposition of a different sentence in respect of Fischer. ...” [Paragraphs 12 -13]

“... [M]y view is that the sentencing magistrate erred by not imposing an effective term of imprisonment in these circumstances. The sentence he imposed was too lenient and not in keeping with the general sentencing approach followed by the courts in white collar crimes. My view is that the sentence is disturbingly inappropriate warranting this Court’s interference by substituting an unsuspended period of imprisonment for the sentence imposed by the magistrate. The fine that was imposed could be repaid to the respondent.” [Paragraph 14]

The appeal was upheld, and the accused was sentenced to five years imprisonment, with two years suspended for a period of 5 years, on condition that he was not convicted of fraud, theft or any contravention of POCCA committed during the period of suspension.

SELECTED JUDGMENTS

LABOUR LAW

PAWUSA OBO SKOSANA & OTHERS V PUBLIC HEALTH & SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCI & OTHERS [2011] 11 BLLR 1079 (LC)

Judgment delivered 17 June 2011

Applicant sought to review and set aside an arbitration award by the second respondent arbitrator, and to set aside the arbitrator's finding that the third respondent had correctly interpreted and applied the provisions of a collective agreement.

Shai AJ held:

"The law is now settled with regards to the test for review as enunciated in the well-known case of Sidumo & another v Rustenburg Platinum Mines Ltd & others, being "whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach"." [Paragraph 36]

"In Sidumo, Ngcobo J was of the opinion that although the provisions of section 145 of the LRA have been suffused by the constitutional standard, that of a reasonable decision-maker, when a litigant who wishes to challenge the arbitration award under section 145(2) must found his or her cause of action on one or more of these grounds of review …" [Paragraph 37]

"…. The crux of these grounds of review is that the arbitrator committed an irregularity in the conduct of the proceedings in that he displayed deference to the third respondent when he rejected the applicant's submission that there were factual issues in dispute, to the extent that she was not allowed to explain what the factual issues were in dispute." [Paragraph 39.1]

"The determination of this point would be made difficult by the fact that the said agreement was not reduced to writing nor recorded in any manner. However, the final submissions … give a clear state of mind of Faraah September, the applicant's representative, at the time of the said proceedings and probably until the time the award was issued, contrary to her vehement denial that there was agreement that the dispute could be disposed of on papers only. I say so because at the end of the said submissions Faraah September says the following words: "we await your award." Faraah September would not have said the said words if all along she was of the view that after submission there would still be a hearing. Instead she would have ended by saying "we are awaiting a date of hearing" or something to that effect. Taking this and the other factors stated above that she is a seasoned unionist, and the fact that she agreed to the timetable for submissions, etc. I have safely come to the conclusion that the parties concluded an agreement that there were no facts in dispute and that the matter could be disposed of by way of written arguments and, therefore, find no irregularities on the part of the arbitrator in this regard." [Paragraph 40]

Shai AJ then turned to consider the grounds of review which attacked the arbitrator's conducting of proceedings on the basis of heads of arguments and bundles of documents, arguing that oral evidence should have been heard due to the number of material disputes of fact.

"It is trite in our law that the disputes of fact are resolved through evidence. The trier of facts has to rely on assessment of the evidence and make credibility findings in respect of witnesses. In our law that is how the truth is established. … It is suggested that the above facts in dispute were apparent in the papers and whether such facts were material or could be disposed of on the papers is another matter. The crux of this question is whether the position of personnel Matron was a management position or not. Once this is determined, all the other facts would easily be determined." [Paragraphs 45; 47]

"… I must comment on the anomaly that I think the department occasioned by allowing Groote Schuur to create an anomaly of this nature. I say so because the third respondent in its papers contends that the position of personnel matron was declared a non-nursing post while on the other hand it contends that they did not occupy a nursing management position. This I think created expectation on the side of the members. However, the fact that the respondent created this anomaly does not mean that the members are entitled to a management position. The fact that the deployment did not result in monetary improvement and their designation did not change thereafter, clearly indicates that it was a deployment meant to assist the Nursing Manager after hours and, therefore, not a promotion into a substantive management position." [Paragraph 48]

"The arbitrator … accepted that the members were not occupying a non-nursing management post but a production level post and rightly so because this was based on their actual official position of Chief Professional Nurse, which they were at all times. In this regard, I find no fault with the arbitrator's conclusion." [Paragraph 49]

The application was dismissed.

DEPARTMENT OF CORRECTIONAL SERVICES V GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL & OTHERS (2012) 33 ILJ 216 (LC)

Case heard 9 February 2011, Judgment delivered 10 May 2011

An employee had been dismissed in terms of a Bargaining Council resolution, having been absent from work for a consecutive period of 30 days without permission, or without advising the employer of his whereabouts. Following arbitration under the auspices of the first respondent, the dismissal was found to have been procedurally and substantively unfair, and reinstatement with back pay was ordered. Applicant sought to have the arbitrator's decision reviewed and set aside.

Shai AJ held:

"The first attack on the arbitrator's award is that the employee was not dismissed but his services terminated ex lege in terms of Resolution 1 of 2006. Nevertheless the commissioner found that the employee was unfairly dismissed as per the Labour Relations Act …" [Paragraph 34]

After considering case law, Shai AJ held:

"A proper examination of the resolution leads one to conclude that the intention was to create a termination ex lege despite the use of the words summary dismissal. It must also be remembered that s 14 of the Employment of Educators Act also uses the words 'deemed dismissed' and despite this it is trite

that there is no dismissal within the meaning of the Labour Relations Act 66 of 1995 but termination following the operation of the law. I can read no other meaning into it other than that it is intended to create an ex lege termination. According to Phenithi, once the stipulated period lapses, desertion is inferred. However, the measure should not lightly be resorted to, it is an extraordinary measure reserved for extraordinary and the clearest cases." [Paragraph 42]

"... [T]he factors that trigger the ex lege termination are slightly different to those we find in s 14 of Employment of Educators Act. In the case of s 14 of the Employment of Educators Act the factors that trigger termination ex lege are absence from work for a period exceeding 14 consecutive days and without permission of the employer. In the case of [the] Resolution ... the factors that trigger termination ex lege are absence from work for 30 consecutive days without permission or without notifying the employer" [Paragraph 44]

Shai AJ found that, on the facts, the employer had been notified of the employee's absence, and the Resolution therefore did not apply. The arbitrator thus had jurisdiction to consider the matter. Shai AJ then considered the further grounds of review:

"The second attack against the award ... is that the employee during the arbitration admitted working for Netcare 911, but nevertheless, the arbitrator found that there was inconclusive evidence in relation thereto and that such finding was not supported by evidence. There is no merit in this attack. The employee admitted that after his dismissal he became employed by Netcare 911. Surely after the dismissal the employee was entitled to seek work anywhere else. Furthermore the employee admitted that he did voluntary work with Netcare 911 with the permission of the applicant and his supervisor. The purpose was for him to accumulate hours for his AA qualification (paramedic qualification). Initially his local office refused him permission but the provincial authorities intervened and he was granted permission. According to his evidence he did not undertake voluntary work for any further hours during the period of his absence as there was no need as he had accumulated the necessary hours. This evidence was not contradicted in any way. ... The arbitrator was within his rights to come to the conclusion that such evidence was inconclusive and hence no irregularity occurred that needs interference by this court " [Paragraphs 49 - 50]

"... [T]he arbitrator ordered reinstatement of the employee. The purpose of reinstatement is to place the employee in the position he would have been in had the dismissal not occurred. The arbitrator further ordered backpay in favour of the employee, which is consistent with placing the employee in the position he would have been in had the dismissal not occurred. The 'backpay' is not compensation within the meaning of s 193(1)(c) or 194(1), hence is not confined to 12 months. ...The arbitrator therefore has not committed any irregularity in this regard. " [Paragraphs 56 - 57]

The application was dismissed.

KGOBOKOE V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2012) 33 ILJ 235 (LC)

Case heard 22 March 2011, Judgment delivered 29 June 2011

Applicant sought to review and set aside a notice of withdrawal signed by the applicant at the instance of the third respondent (a commissioner of the CCMA), and to set aside subsequent refusals to reinstate arbitration proceedings. It was alleged that a settlement proposal had been made by the employer during the initial arbitration, whereupon the commissioner had adjourned proceedings. It was alleged that applicant had requested the offer in writing, but that the commissioner had been unwilling to postpone proceedings, and had insisted that the applicant sing a withdrawal notice. According to the commissioner, the applicant had willingly withdrawn the dispute.

Shai AJ held:

"Briefly stated, the court has to decide whether the applicant signed the withdrawal notice voluntarily and/or whether the commissioner coerced him to sign it." [Paragraph 28]

"It appears that towards the end of the time allocated, the commissioner asked the parties whether the matter was settled. It appears that he was informed of a possible settlement, because his evidence … was to the effect that it seemed the parties had come to an arrangement. It is in dispute as to who of the parties and the commissioner suggested the withdrawal of the dispute. However, what is not in dispute is that once the issue of the withdrawal was mentioned the commissioner went away and returned with a fully completed withdrawal form. What is further in dispute is whether the applicant was coerced to sign the withdrawal form." [Paragraph 33]

"It appears that once the fourth respondent had made certain undertakings, which appeared enticing to the applicant, but was not in a position to reduce them to writing, the commissioner faced an administrative problem. The case had to be closed. The only way of closing it was by way of a settlement or by arbitration. How could he arbitrate when it appeared to him that the parties had come to an arrangement? How would the applicant want to proceed with arbitration when it appears that the matter is resolved in principle and there are undertakings to finalize it after consultations? The only convenient way was to rely on a withdrawal of the dispute. …" [Paragraph 35]

"The applicant, although a single witness and his evidence needed to be treated with caution, appeared to me to be a credible witness. He remembered vividly what transpired on that day and some of his evidence is corroborated by both the commissioner and the fourth respondent's witnesses in certain cases … Morrison appears to have forgotten much of what transpired on that day and contradicted himself and persisted to do so when he was shown such contradiction. For that reason he is an unreliable witness. … What is also striking is that the person who led the fourth respondent's delegation, Mcineka, was not called to counter what the applicant said, which was clear from the papers. It was not indicated why he was not called to counter the applicant as he was the person best placed to know what happened as he was representing the fourth respondent and was the one who, according to the applicant's evidence, called for a reversion to conciliation. …. The correct course of action the commissioner should have followed was to adjourn the matter and give the parties time to explore further consensus on the

settlement. It was not correct for him to insist on withdrawal while on the other hand directing the applicant to visit the respondent … to discuss the matter further." [Paragraph 38]

"… I find that the commissioner unreasonably refused postponement when it was clear that it was necessary in the circumstances. It is my further finding that both the commissioner and the applicant laboured under the mistaken belief that the matter was resolved in principle, thereby causing the commissioner inadvertently to bring undue pressure to bear on the applicant to sign. It is therefore my finding that the applicant did not sign the said notice of withdrawal voluntarily. Secondly, it is also clear to me that the parties had not agreed and it appears to me that the applicant laboured under the mistaken belief that the matter would be resolved, which is not the case. I take into account that the applicant is a layperson in this matter. That being the case, I see no reason why the applicant cannot revert to his former claims." [Paragraph 39]

"As it now turns out, we have two opposing decisions on the issue of the withdrawal of a notice of withdrawal." [Paragraph 46]

"I must say at the outset that I am respectfully unable to agree with my brother Moshoana AJ, and inclined to agree with the latter decision …In the case of Public Servants Association of SA on behalf of Strydom v SARS, the court relied on a number of cases and rejected the case of Roupell v Metal Art (Pty) Ltd & another … as an authority for the proposition that a party can be allowed to withdraw a dispute and the court has a discretion to allow such a withdrawal. The court did so on the basis that Roupell did not deal with all legal arguments and therefore should not be regarded as an authority for the proposition. In that case, counsel for the applicant argued that the doctrine of election should be confined to instances of prosecuting an appeal. … Indeed almost all the cases that the court cited related to an appeal against a judgment. …" [Paragraphs 47 - 50]

"The issue that all these cases dealt with was prosecution of an appeal and in circumstances where the applicant acquiesced in the judgment either by payment of the judgment debt, costs of suit, wrote a letter indicating that he wanted to submit a bill for taxation, etc. In other words by making such payment or offers it is taken that he has waived his right to appeal." [Paragraph 51]

"In my view the authorities dealt with in the case of *Public Service Association of SA on behalf of Strydom v SA Revenue Services* dealt with the peremption of appeal and nothing else and should be confined thereto. On the other hand *Roupell* dealt directly with the withdrawal of a notice of withdrawal and it should serve as authority that such a withdrawal can be withdrawn. …" [Paragraph 54]

The application was granted.

MATJHABENG MUNICIPALITY V MOTHUPI NO & OTHERS (2011) 32 ILJ 2154 (LC)

Case heard 9 February 2011, Judgment delivered 12 April 2011

Applicant sought to set aside an arbitration award by the first respondent. The third respondent had not been shortlisted for a position with the applicant, and argued that he was better qualified and more suitable for appointment than the person appointed. On review, applicant argued that the referral by the third respondent referred to an unfair labour practice and unfair discrimination during the shortlisting

process, not during the appointment process. Despite this, the commissioner had ordered compensation as though the third respondent should have been appointed in the position, without it being shown that if he was shortlisted he would have been appointed to the post.

Shai AJ held:

"One of the complaints against the award of the commissioner is that the commissioner committed gross irregularities in the conduct of the arbitration proceedings in that he committed a material error of law pertaining to onus. The third respondent alleged unfair discrimination on an unlisted ground, viz on the ground of lack of experience." [Paragraph 34]

"It is clear … that a litigant who founds a cause of action on unfair discrimination based on an unlisted ground bears the onus to establish the discrimination and to prove that such discrimination is unfair. The applicant has the right to raise a defence of inherent requirement of the job in defence of such a claim. The raising of such a defence by the applicant cannot be elevated to the level of an onus to prove that such inherent requirement of the job is not unfair." [Paragraphs 40 - 41]

"The onus lies with the third respondent that the said discrimination on the basis of lack of experience is unfair and not the other way around. Consequently the commissioner committed an error of law which in turn has affected the trial of facts." [Paragraph 42]

"Secondly, it is contended that the commissioner exceeded his powers in that the order of compensation he made is not justifiable and no reasons were given in justification that the said order is just and equitable. It was decided in a number of court cases that failure to give reasons is not per se a reviewable irregularity. This is so especially where the reasons can be inferred from the body of evidence before the commissioner. …" [Paragraph 45]

"In the current case evidence was led that the incumbent of the contested post would receive R250,000 per annum. The commissioner then decided that R250,000 was a just and equitable amount without giving reasons why he came to that conclusion. In my opinion he should have gone further and given reasons why he accepted that the said amount was just and equitable, and perhaps also taken into account whether the third respondent was working, how much he was paid, etc. Even if he came to the same conclusion at least one would know why he came to that conclusion. On that basis, it is my conclusion that the failure on the part of the commissioner to justify the compensation amounts to a reviewable irregularity." [Paragraph 47]

"Commissioners should be vigilant at all times, especially where they decide not to grant compensation or they grant one or two months or so compensation, or where the maximum compensation is granted, to make sure that they give reasons therefor. Therefore, commissioners should be careful not [to burden] the courts with the task of making inferences from the body of evidence for the reasons for the compensation, although the courts will not fail in their duty in that respect." [Paragraph 48]

"… [T]he cause of action … arose … almost ten years ago, which is clearly not in line with the theme that runs through the Labour Relations Act … that of speedy resolution of labour disputes. These are bread and butter issues and should of necessity be speedily resolved. … In the circumstances the court undertakes to resolve the dispute for the parties" [Paragraph 58]

"It is clear to me looking at the profile of the two candidates that Mr Dasheka was a better candidate than the third respondent. … [L]ooking at the shortlisted candidates' profiles, it becomes clear that they had experience in either transport or security or safety spheres while the third respondent lacked this experience. It was the applicant's evidence that the appointed person needed to at least have experience in one or two spheres." [Paragraph 68]

"Given the fact that the third respondent bore the onus to prove discrimination and the unfairness thereof, I have come to the conclusion that he did not prove any discrimination and the unfairness thereof, if any. Even if I were to say that he had proved discrimination, such discrimination is not unfair. The applicant in advertising in the manner it did by requiring the stated qualifications and experience was doing so in compliance with legislation that governs it in respect of inherent requirements of that post. It was necessary that the incumbent comply with the requirements as stated in that legislation. It is the prerogative of the employer to determine the requirements of any post to ensure delivery on its mandate." [Paragraph 69]

Shai AJ thus ordered that the applicant's conduct had not amounted to unfair discrimination.

SELECTED JUDGMENTS

PRIVATE LAW

JEWASKEWITZ V MASTER OF THE HIGH COURT POLEKWANE AND OTHERS (53514/2012) [2013] ZAGPPHC 118 (16 MAY 2013)

Third respondent claimed maintenance against the deceased estate of her late husband, to whom she had been married for nine months before his death. Applicant and the fourth respondent, children of the deceased, had been the only beneficiaries of his will. Applicant lodged an objection to the third respondent's claim with the Master, who directed that the applicant approach the court for relief.

Bam AJ held:

"The Master, in considering the objection against the maintenance claim lodged by the third respondent, … had several options in terms of the provisions of section 35(9). The question … is whether the conclusion of the Master, to direct that the matter be heard by a court of law, was a competent direction …" [Paragraph 7]

"The Master is not a judicial officer. To expect the Master to adjudicate whether a claim for maintenance should, upon consideration of the facts and the applicable law, be allowed or rejected, where an objection had been lodged, in my view, would not be fair or in the interests of justice. In this regard t am in respectful agreement with the views expressed in Broodryk v Die Meester 1991 4 SA 825 (C) and Ferreira v Die Meester2001 3 SA 365(0). The learned authors of LAWSA … seems to also support this approach" [Paragraph 8]

"In terms of the provisions of section 2 of The Maintenance of Surviving Spouses Act … a surviving spouse is in principle lawfully entitled to a maintenance claim against the estate of the deceased spouse. It is common cause that the third respondent was married to the Deceased and that the marriage subsisted until his death. Therefore the third respondent is, in principle, in law entitled to lodge her claim for maintenance against the estate. …" [Paragraph 11]

"The remaining question is whether the third respondent is in the circumstances factually entitled to claim maintenance from the estate. This Court is clearly called upon to determine this issue before the Court would be able to decide whether the applicant should succeed with her alternative prayer or not. If the answer to this question is in the negative, the applicant should succeed with the alternative prayer. On the other hand, if the Court should find that the third respondent has in fact made out a case for maintenance, the said prayer is doomed for failure." [Paragraph 12]

"… [I]n my view, what is clearly lacking, is a proper actuarial calculation of the amount claimed by the third respondent. A proper actuarial calculation will enable the Court to determine and quantify, inter alia, the third respondent's needs, which calculation, in matters of this nature, is of cardinal importance. … The attack on the third respondent's calculation is, in my opinion, understandable, in view of the fact that it lacks a proper calculation and computation. All relevant issues have to be considered. Accordingly 1 found it impossible to determine whether the amount claimed by the

third respondent is justified and reasonable. To my mind it is indeed of importance to have comprehensive actuarial evidence before court before it can be decided whether, in the circumstances, the maintenance claim is reasonable and that it should be allowed or dismissed by the Master" [Paragraph 14]

"… Without the benefit of comprehensive expert evidence in that regard, no court will be in a position to find whether the claim of third respondent is justified and reasonable at all. Strictly speaking, it may be so that without proper evidence adduced by the applicant in that regard, the application should be dismissed. However, in that event the issue will remain unresolved and the Master will still be seized with the same problem experienced previously, namely that he would not be able not resolve the problem. Such order will therefore clearly not be in the interests of justice." [Paragraph 15]

"…. In the circumstances, especially in view of the fact that it would serve no purpose to burden the Master with the same problem as before, I am of the opinion that the matter should indeed be referred to evidence to ensure a just and expeditious decision. " [Paragraph 16]

The matter was referred to evidence to compute and quantify the third respondent's claim for maintenance.

SOCIO-ECONOMIC RIGHTS

MILLS V SHAWE & OTHERS [2010] JOL 24806 (GNP)

Case heard 2 November 2009, Judgment delivered 11 November 2009

Applicant sought to evict first respondent from the applicant's immovable property. First respondent was the stepson of two people, now deceased, who had been residents on a farm now belonging to the applicant. Applicant claimed that only the deceased persons were entitled to occupy the said residence. First respondent claimed to be entitled to occupy the farm on the basis of being a labour tenant in terms of the Labour Reform (Land Tenants) Act, and on the basis of being a successor of the deceased in terms of the same Act.

Bam AJ held:

"I am of the opinion that the probabilities regarding … whether the first respondent resided on the farm since 1984, favour the applicant … Apart from the respondent's allegation that he grew up on the farm there is no indication of whatsoever nature what he did on the farm or whether he was elsewhere employed. … " [Paragraph 9]

"What I further find of importance is a lack of detail in the first respondent's version regarding his alleged time of residence on the farm in view of, inter alia, his age. … [O]ne can safely assume that on the probabilities the first respondent was already an adult in 1984. One would have expected the first respondent, in the circumstances, to elaborate about his personal circumstances including his marital status, and children if any, and particulars of his employment." [Paragraph 9]

"The second point in limine taken by the first respondent turns about the jurisdiction of this Court. According to the argument the first respondent based his right of occupation on the provisions of the Land Reform Act ... It was submitted that the first respondent is in fact a "labour tenant" as defined in section 1 of the said Act. It was further submitted that any labour tenant may only be evicted in terms of an order of court, being the Land Claims Court instituted by section 22 of the Restitution of Land Rights Act ..." [Paragraph 14]

"I am of the opinion that in view of the version of the applicant regarding the basis of the residence on the farm of the deceased which I have already explained, that the first respondent does not fall within the ambit of the definition of a labour tenant. That includes my finding that the first respondent's late stepfather also did not fall within the definition of a "labour tenant"." [Paragraph 18]

"In view of my finding above, which includes that the first respondent in fact only attended to the negotiation regarding the removal of the belongings of his deceased mother from the farm after her death, I am of the opinion that there is no indication whatsoever on record from which I can infer that the first respondent was in fact the appointed successor." [Paragraph 21]

The application succeeded.

CRIMINAL JUSTICE

S V SITHOLE 2013 (1) SACR 298 (GNP)

Case heard 30 August 2012, Judgment delivered 21 September 2012

Appellant had been convicted in the regional court of raping a 14 year old girl. During the trial, the state applied for leave to adduce expert evidence via an affidavit in terms of section 212 of the Criminal Procedure Act. The affidavit purported to contain evidence regarding a forensic DNA analysis regarding paternity tests.

Bam AJ (Fabricius J concurring) held:

"When appellant's legal representative raised an objection against the admissibility of the statement, the learned regional-court magistrate requested him to explain why he objected. The attorney ... stated that he wanted to have the DNA results independently examined. The magistrate then insisted to be informed what the legal basis of the objection was. The magistrate even went further and asked the attorney whether he was aware what s 212 statements were all about. The result of the learned magistrate's conduct was that the attorney summarily withdrew the objection." [Paragraph 4]

"... [I]t is clear that the forensic evidence adduced by the state by way of the s 212 statement, primarily the so-called chain evidence linking the blood samples obtained for the purpose of the forensic DNA analysis, including the marking and safekeeping thereof during the time before it reached the forensic laboratory, was challenged and disputed. ... [T]he learned magistrate was,

without doubt, acutely aware that this was what the appellant's defence pertaining to the forensic evidence actually entailed." [Paragraph 8]

"In considering the contents of this particular s 212 affidavit, it appears that it indeed complied with the requirements of s 212(8)(a)(ii)(aa) and (cc), as far as, respectively, the receiving and custody of the samples by the deponent to the statement, at the laboratory, is concerned. It also complies with the requirements … pertaining to the actual forensic analysis. Accordingly only the receipt and custody of the blood samples at the laboratory, and the analysis thereof, were prima facie proved." [Paragraph 13]

"Regarding the receipt of the exhibits at the laboratory, the statement lacks any reference as to whom the samples were received from. … The s 212 statement makes no reference to any delivering or dispatching of the exhibits provided for and required by s 212(8)(a)(ii)(bb). It goes without saying that the exhibits were either delivered at or dispatched to the laboratory by somebody or some entity." [Paragraphs 14 - 15]

"… [I]t should also be noted that s 212 makes no reference to the gathering of evidence for purposes of forensic analysis, or to the safekeeping and marking thereof, immediately after the obtaining thereof and before it was delivered, or dispatched to the laboratory. In my opinion, these facts can therefore not be proved by way of a s 212 statement. Accordingly, the state will be obliged to adduce evidence in that regard unless it is formally admitted by the accused … No evidence was adduced by the state in respect of the delivering or dispatching and custody of the exhibits before same were received at the laboratory, neither was any evidence adduced pertaining to the gathering and the marking and custody thereof, immediately thereafter." [Paragraphs 16 - 17]

"Although the state is required to prove its case beyond reasonable doubt, an accused facing prima facie evidence allowed in terms of s 212 is obliged to rebut such evidence. However, the standard problem arising in matters of this kind, is what an accused is called upon to do to obtain and adduce 'other credible evidence' in rebuttal of prima facie proof." [Paragraph 20]

"This dictum in Veldthuizen [that the court may cause the person who made the s 212 certificate to be subpoenaed to give oral evidence], however, in my respectful view, does not remedy the problem faced by an accused regarding the collecting, marking and custody of exhibits before delivery or dispatching thereof to the laboratory. The person, who deposed to the s 212 statement regarding the receipt of the exhibits and the analysis thereof, is usually not the person who obtained or collected the exhibits. …" [Paragraph 22]

"…[T]he state is also required to prove the relevant chain evidence in respect of any forensic analysis." [Paragraph 24]

"… [I]t is every person's constitutional right to challenge evidence against him or her in a court of law. … In practice, an accused, faced with prima facie proof in terms of s 212, will usually find himself in the invidious position that he will not be able to adduce evidence to rebut the presumption, due to the fact that all relevant facts pertaining to the chain evidence, relating to the gathering of exhibits, as well as the marking and safekeeping thereof, are A exclusively in possession or control of the state." [Paragraphs 26 – 27]

"… [I]t is obvious that an accused will be severely prejudiced if he is virtually precluded from contesting and rebutting prima facie proof in terms of s 212, if the state does not adduce such evidence. What is accordingly of importance is to determine in what circumstances, if any, the state will be obliged to adduce evidence substantiating prima facie proof contained in a s 212 statement. … [A]n accused challenging prima facie proof will be obliged to lay a basis for contesting such evidence before the state can be required or compelled to adduce the evidence in question, or, at least, to make all necessary information available to afford the accused the means and opportunity to rebut the prima facie proof. It should, however, in my view, not be required from an accused to state in detail what the basis for the challenging of such evidence is. …" [Paragraphs 28 – 29]

"In this case the state did not adduce any evidence, extraneous to the s 212 statement, regarding the challenged chain evidence. Accordingly, the appellant was effectively precluded from rebutting the prima facie evidence contained in the s 212 statement. … [I]n view of the lack of the said linking chain evidence, the s 212 statement in any event became irrelevant and inadmissible evidence. It should therefore have been disregarded by the trial court." [Paragraphs 32 – 33]

Bam AJ then considered the evidence and found that the evidence of the complainant had not been satisfactory, and that the state had failed to prove its case beyond a reasonable doubt [paragraphs 50 – 51]. He also found that the court *a quo*'s handing of the s 212 affidavit issue had been substantially unfair to the appellant, such that there had not been a fair trial [paragraph 56]. The appeal succeeded.

MATWA V S (A443/2011) [2012] ZAGPPHC 129 (13 JUNE 2012)

The accused had been convicted in the Regional Court for the rape of a seven year old girl in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and sentenced to life imprisonment. He appealed against the sentence.

Bam AJ (Raulinga J concurring) held:

"Act 32 of 2007 repealed the "common low offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. …" [Paragraph 3]

"It is further of importance to bear in mind that section 276 of the Criminal Procedure Act provides for punishment of a person convicted of an offence … The problem regarding the principle nulla poena sine lege, arising from the fact that no penal provision is provided for in Act 32 of 2007 pertaining to certain offences, was in depth considered and ruled upon in the matter of Director of Public Prosecutions, Western Cape v Arnold Prins, Case number A134/08, Western Cape High Court [subsequently overturned by the Supreme Court of Appeal in Director of Public Prosecutions, Western Cape v Prins and Others 2012 (2) SACR 183 (SCA)]. That court concluded that due to the lack of a penal provision in the Act in question, the charge of contravening the provisions of section 5(1) of the said Act did not disclose an offence. It was however stated in the said case that the

offences in terms of section 3 and 4 of the said Act were not affected in that they are dealt with by section 51 of Act 105 of 1997. …" [Paragraphs 7 - 8]

"Whilst the reasoning of the full bench of the Western Cape High Court is respected, it appears that the provisions of section 276 of the Criminal Procedure Act, to what I have alluded above, were not considered in the Prins case. I am of the humble opinion that if the provisions of section 276 of the Criminal Procedure Act are taken into account, this Court is entitled to find that a penal provision pertaining to a contravention of the provisions of section 3 and 4 of Act no 32 of 2007 is also provided for in the provisions of that section." [Paragraph 9]

"[Counsel for the appellant] submitted that the regional court did not have jurisdiction to impose a life sentence in this matter in view of the fact that no punishment is provided for in Act 32 of 2007. For the reasons set out above, I do not agree." [Paragraph 10]

"The learned regional court magistrate, after having admitted a pre-sentence report of the appellant, delivered a comprehensive and well-reasoned judgment on sentence, consisting of more than forty pages, referring to applicable case law. It would be rather difficult to add anything to the magistrate's judgment. All relevant issues were considered and discussed. I cannot do any better. … The learned magistrate considered all relevant aspects including the personal circumstances of the appellant. Pertaining to the effect of the personal circumstances of an accused when sentence is considered, I wish to add that those circumstances necessarily recede into the background when sentencing in serious crimes of this nature is considered. See S v Vilakazi 2009(1) SACR 552 SCA …" [Paragraph 13 - 14]

"It was submitted on behalf of the appellant that he showed remorse when he changed his plea to guilty. However, a mere plea of guilty is not perse proof of remorse or contrition, it has to be substantiated by acceptable evidence, which is lacking in this matter. It should be noted that the plea of guilty was entered after the admission of the DNA evidence. The said evidence clearly linked the appellant to the crime. … Accordingly it was an open and shut case against the appellant. His plea of guilty is accordingly a totally neutral factor." [Paragraph 15]

"The learned magistrate found no substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum. It is correct … that a court should not, for flimsy reasons, deviate from a prescribed minimum sentence. In this matter, however, it appears that the following circumstances may well be regarded as substantial and compelling reasons justifying a lesser sentence than the prescribed life imprisonment.(i) The appellant was, pertaining to the nature of the crime, a first offender; (ii) The complainant, although she suffered serious mental anxiety, was not physically injured." [Paragraph 18]

The appeal against sentence succeeded, and the accused was sentenced to 22 years imprisonment.

THE STATE V MABLE MANCIYA, UNREPORTED JUDGEMENT, CASE NO CC9/09, 14 DECEMBER 2010 (NORTH GAUTENG HIGH COURT, PRETORIA)

The accused had been convicted on one count of murder and one count of robbery with aggravating circumstances by the High Court. The court proceeded to sentence the accused.

Bam AJ held:

"The relevant considerations in imposing sentence are the triad consisting of the nature of the crime, the personal circumstances of the accused and the interests of the community. [Citation to S v Zinn and other cases. After quoting from an extract in the Constitutional Court decision of S v M, Bam AJ continued] …To this I would like to add, with great respect, that "the impact of the crime on the community, its welfare and concern" should include more specifically the impact on the victim and or the victim's relatives or lifelong companion." [Paragraph 2]

"The four generally recognized purposes of punishment are deterrence, prevention, rehabilitation and retribution. … The element of mercy should be considered at the same time. …" [Paragraph 3]

"It is … of cardinal importance that the Court should guard against overemphasizing any of the elements at cost of the others. The Court is obliged to give a balanced consideration to all the relevant issues. The aforesaid considerations should be applied on equal footing, subject only to the specific facts of the matter." [Paragraph 6]

"… [I]t is important for a Court, in the first place, to investigate the individual as a human being together with the person's personal circumstances. …" [Paragraph 8]

Bam AJ found that the minimum sentence for the murder charge was life imprisonment, and for the robbery charge 15 years imprisonment.

"I have … considered the principle of restorative justice, which, to my mind, is not an option in this matter. … I am in respectful agreement [with Bertelsmann J in S v Maluleke] that restorative justice, where and when applicable, should be considered during the sentencing process and be implemented in appropriate circumstances, but that it should be approached with "circumspection" … This is not a case where any traditional apology would or could have had the effect of reparation or a healing and reconciliation process as envisaged by the doctrine. In the circumstances the injury committed to the family of the deceased, to my mind, by far overshadows any regret or apology, sincere as it very well may be, expressed by the accused and/or her family." [Paragraph 20]

Bam AJ found that there were substantial and compelling circumstances justifying lesser sentences on both counts, namely that the accused was 26 years old and a first offender, that the crimes were not proved to be premeditated, that the accused had a stable personal record, and that the accused had a family to care for [paragraph 21]. Bam AJ found that he was not, however, persuaded that the accused was truly remorseful [paragraph 22].

"It must be remembered that the accused took the life of another human being. There was no reason at all for the accused and her accomplice to resort to the stabbing of the deceased. Murder is

a common phenomenon these days. People committing crimes of this nature deserve to be removed from society. The general public further needs to be protected against criminals randomly committing murders. In this matter the element of retribution overshadows the balance of the elements discussed above … a court has to be fair in imposing sentence and no court is expected to go out of its way to accommodate an accused in imposing a sentence which is to [sic] light in the circumstances. That would be a miscarriage of justice." [Paragraph 23]

"The issue of the accused's children is a very important and difficult aspect … The accused has two children aged 3 and 4. She also, to some extent, assist [sic] in the upbringing of her siblings aged respectively 9, 12 and 16. They all live together with the accused's mother in circumstances that seem to be far from ideal. … The fathers of the accused's two children do not contribute to the maintenance of the children on a regular basis." [Paragraph 24]

"Section 28(2) of the Constitution provides that "*(a) child's best interests are of paramount importance in every matter concerning the child"* and thus requires that a court, in considering the imposition of a custodial sentence on a primary caretaker of a child, should give consideration to the impact of such a sentence on the life of the child. [Citation to the S v M case]…" [Paragraph 25]

"… I have come to the conclusion that the circumstances of this case justify, as the most appropriate sentence, direct imprisonment, though I have to record that I did not arrive at this finding easily." [Paragraph 26]

"I am fully aware of the fact that the imposition of direct imprisonment will have severe consequences for the accused's children. I am however satisfied that the needs of the accused's family, more specifically that of her children, have come to the attention of the authorities and have been properly investigated. …" [Paragraph 27]

The accused was sentenced to 18 years imprisonment on the count of murder and 8 years imprisonment on the count of robbery, the sentences to run concurrently.

SELECTED JUDGMENTS

CIVIL PROCEDURE

THE STANDARD BANK OF SOUTH AFRICA LIMITED AND M S Y DAWOOD, UNREPORTED JUDGEMENT, CASE NUMBER: 7034/2004 (DURBAN AND COAST LOCAL DIVISION)

Case heard 1 December 2005, Judgment delivered 5 December 2005

The applicant applied for judgment against the Respondent for money owed in terms of a mortgage agreement as well as an order declaring the mortgaged property executable. The application was preceded by an action proceeding, which was subsequently settled on the basis that the Respondent would pay the amount in arrears and would continue to make monthly payments towards settling the debt owed to the Applicant. These proceedings were brought on account of the Respondents failure to adhere to the settlement agreement. The court invited Respondent's counsel to show cause as to why the property should not be executable. In response, counsel submitted that the Applicant had failed to comply with a Practice Direction in that it failed to draw to the Respondent's attention section 26(3) of the Constitution.

Hassim AJ held:

"In Jaftha v Schoeman and Others; Van Rooyen v Scholtz and others … ("the Jaftha judgment") the Constitutional Court was concerned with the constitutionality of the execution procedures in the Magistrate's Court which allowed the sale of debtors' residential properties in the light of section 26(3) of the Constitution. The Constitutional Court held that section 66(1)(a) of the Magistrate's Court Act … was unconstitutional. To remedy the defect the Constitutional Court ordered that section 66(1)(a) of the Magistrate's Court Act … is to be read as though the words 'a court, after consideration of all relevant circumstances, may order execution' appear before the words 'against the immovable property of the party'." [Paragraph 28]

"The Constitutional Court was satisfied that where a Court orders execution against a debtor's immovable property the debtors rights in terms of section 26(3) of the Constitution are sufficiently safeguarded. The Jaftha judgment then creates a prerequisite that must be satisfied before such an order issues, namely that the Court consider all relevant circumstances." [Paragraph 29]

"The question arises then is whether it is for the Applicant to disclose facts that justify an order in its favour or whether it is for the Respondent to disclose facts that justify the refusal of such order." [Paragraph 30]

"In my view the Applicant's entitlement to an order declaring the immovable property executable arises from the contractual relationship in terms whereof the morgagor has consented to the hypothecation of his immovable property as security for his debt to the morgagee. Once the morgagee has proved the terms of the contract and its breach it is entitled to an order hypothecating the immovable property." [Paragraph 31]

"The rights afforded in section 26(3) to the morgagor creates a defence for the morgagor. In terms of section 26(3) the court ordering the eviction of an occupier is required to consider "all relevant circumstances" before issuing an eviction order." [Paragraph 32]

"It is for the morgagor to demonstrate what those relevant circumstances are and to show that they militate against an order declaring the immovable property executable. This approach is fortified by the fact that in most instances the morgagor will not have any knowledge of the debtor's personal circumstances. This was accepted by the Supreme Court of Appeal in Ndlovu v Ngcobo; Bekker and another v Jika 2003 (1) SA 113 (SCA) ... " [Paragraph 33]

"Not only has the Respondent not alleged any facts to show that the "relevant circumstances" do not favour an order declaring the immovable property executable but no reference at all was made to the provisions of section 26(3) of the Constitution in the answering affidavit nor in the oral argument. I mention that the Respondent's heads of argument were delivered out of time. These too did not raise the provisions of section 26(3) of the Constitution as a basis to oppose an order declaring the immovable property executable. To my mind the opposition to the property being declared executable was an after though. It was only raised after Counsel had concluded their arguments and I had indicated that I was going to grant an order with provision for the two rates of interest (viz 9.5% and 9% to apply to the capital.) " [Paragraph 34]

"Having found that section 26(3) constitutes a defence to a morgagee to the extent that he must demonstrate "relevant circumstances" that justify the refusal of an order it follows that the Applicant was not obliged invite [sic] the Respondent's attention to the provisions of section 26(3) of the Constitution." [Paragraph 35]

"Insofar as the Practice Direction in this Division is concerned I am entitled to depart from it and do not consider myself being constrained to refuse the order declaring the immovable property executable by reason of it." [Paragraph 36]

"Even if I am incorrect in my approach that the provisions of section 26(3) require the morgagee to advance facts that justify the refusal of the order the Respondent's rights will be safeguarded if this Court before issuing an order declaring the property executable considers all the relevant circumstances. ..." [Paragraph 37]

"No particulars of the Respondent's personal circumstances are available to the Court. This is through no fault of the Applicant. It is unlikely that the Applicant has any information on the Respondent's personal circumstances. The Respondent has chosen not to take the Court into his confidence by disclosing his personal circumstances." [Paragraph 38]

An order was therefore granted against the respondent.

DIRECTOR GENERAL, DEPARTMENT OF PUBLIC WORKS v KOVAC INVESTMENTS 2010 (6) SA 646 (GNP)

Case heard March 2010, Judgment delivered 10 August 2010.

The Defendant raised two exceptions to Plaintiff's claim. The first dealt with the absence of consent given by the Defendant in terms of section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, thereby claiming that the court lacked jurisdiction to hear the claim. The second claim was that the plaintiff did not have locus standi to institute this action.

Hassim AJ held:

"Whether the plaintiff is obliged to notify the defendant of its intention to institute legal proceedings in satisfaction of a debt depends on whether the plaintiffs claim constitutes a "debt" as defined in the Act." [Paragraph 4]

"The enquiry does not stop at section (a) of the definition of "debt" in the Act. Section (b) of the definition lists in addition to the features mentioned in section (a) another feature that the contractual, delictual or other claim must possess; it must be a claim for which an organ of state is liable for the payment of damages. There are therefore two legs to the enquiry whether a claim is a debt in terms of the Act. First it must arise from a contract, a delict "or any other liability". Second it must render the organ of state liable for damages." [Paragraph 8]

"For purposes of the second leg of the enquiry the claim needs to be characterized. If the claim is for specific performance, then the claim while it would amount to a debt in the context of the Prescription Act, it does not qualify as a debt for purposes of the Act." [Paragraph 9]

"The plaintiff seeks an order that the defendant pays to it money in pursuance of a contractual obligation. Such a claim would be a claim for specific performance5. In terms of the lease agreement the defendant was obliged to pay to the plaintiff rent and other charges for its right to occupy. It occupied the leased premises in pursuance of that right and became obliged to pay money in terms of the contract. The fact that the plaintiff pleads that the defendant breached the lease agreement by not paying the rent and other charges due does not result in the claim for payment becoming a claim for damages arising out of the breach." [Paragraph 10]

"The plaintiff seeks an order that the defendant pay to it that which it undertook to pay in terms of the contract. The plaintiffs claim is therefore a claim for specific performance and not for damages." [Paragraph 11]

"Having found that the plaintiffs claim against the defendant is not for damages, I find that the plaintiffs claim is not a "debt" as defined in the Act and therefore the provisions of section 3 of the Act do not apply to the plaintiffs claim. I therefore find that the exception based the absence of jurisdiction must fail with costs" [Paragraph 12]

SELECTED JUDGMENTS

COMMERCIAL LAW

ABSA BANK LTD V LOWTING AND OTHERS (39029/2011) [2013] ZAGPPHC 265 (19 AUGUST 2013)

This case dealt with an amount allegedly owing to the plaintiff by the defendants in terms of a deed of suretyship. At issue in the trial was the enforceability of the suretyship agreements.

Jansen AJ began by considering the potential applicability of the National Credit Act, and then held:

"The test is if the surety agreement was signed in the ordinary course of the spouse's business and not in the ordinary course of the close corporation's business. … [I]t is clear that the defendants signed the co-principal debtor and suretyship agreements in their capacity as members of PRATZ TRADING 24 CC. Although, as set out below, they were apparently not aware of the instalment sale agreement, they knew that the documents that they were signing pertained to the business of the close corporation and on their version, a loan application. …" [Paragraph 58]

"… [B]ecause of the fact that the first defendant's defence is that he did not realise that he was standing surety for the close corporation, and because he did not realise that an instalment sale agreement had been entered into, the question as to whether he was acting in the ordinary course of business of PRATZ TRADING CC is inextricably interwoven with the defence of iustus error. The question is: to what did the first defendant's wife believe that she was consenting? … Nonetheless, on the first defendant's own version, he was applying for a loan for the close corporation which falls within the concept of managing a close corporation's business. …" [Paragraphs 63 - 64]

"It is wholly unsatisfactory that ex facie the detailed certificate of balance attached to the particulars of claim, no amounts were deducted from the amount allegedly still owing by the defendants, because it is trite that when the principal debt is reduced, or paid in toto, so is that of a co-principal debtor and surety. … The state of affairs is wholly unsatisfactory. No details regarding the sale of the vehicle and the amount obtained by the plaintiff, nor any amount realised as a result of the liquidation of the close corporation, or subtraction of the loan accounts ceded to the bank, have been included in the detailed certificate of balance, attached to the particulars of claim. … The end result is that the court is left in doubt as to the accuracy of the alleged amount due and owing to the plaintiff." [Paragraphs 69; 71 - 72]

"The question to be answered is: what is the position of a party who signs an agreement without reading it? In the instant case, the suretyship that the defendants signed, boldly declared at the top of the document that it is a suretyship. However, the uncontested evidence of the defendants was that the nature of the documents that they were signing was never explained to them by Mr Daniels and that he simply asked them to sign where crosses had been inserted by him on the documents." [Paragraph 119]

"On the defendant's version of the events, they did not expect any suretyship agreement or any clause that related to a suretyship agreement in the documents presented to them by Mr Daniels, as he never told them that he was asking them to sign suretyships. This could not be gainsaid by the plaintiff … When all hearsay evidence is discounted, the fact remains that the documents were given to them without any explanation … with crosses … indicating where they had to sign. It is also a fact that the signing procedure took only about five minutes and that the defendants did nor read the documents." [Paragraph 126]

"On an analysis of the probabilities, the preponderance of probabilities favour the defendants' version, and could not be gainsaid by the plaintiff. It was clear that both defendants did not have the funds to sign any suretyship agreement, and they were adamant that they would never have done so. No cogent evidence was advanced to counter the defendants' version." [Paragraph 131]

"However, there is a second leg to the inquiry as to whether a signatory's mistake is justifiable because it was induced by the other contracting party, which is not a subjective enquiry. This enquiry is objective, namely: would a reasonable person have been misled in the circumstances …" [Paragraph 132]

"Given the circumstances in which the defendants were requested to sign the documents, it cannot be stated that a reasonable man would have acted differently. It is human nature not to read contracts (specifically when set out in miniscule font) in circumstances where the signatories are under the impression that the document can have no serious ramifications and particularly in circumstances less then ideal, after 20h00, outside a residential house, on the roof of a car within the time span of approximately five minutes. Even though it was put to both defendants during cross-examination that credit would not be granted to a legal entity without some form of security, which the defendants conceded, they stated that they were under the impression that such security had been granted by the third defendant." [Paragraph 135]

"However, the question can legitimately be posed is whether it was not the third defendant who caused the first and second defendants to be misled as he told them that they had to go to Mr Daniels to sign applications for credit. In this regard the matter of Slip Knot Investments 777 (Pty) Ltd v Du Toit 2011 (4) SA 72 (SCA), … is instructive. The Supreme Court of Appeal was not prepared to uphold a plea of iustus error where the mistake in question was caused by third parties and not the contract assertor." [Paragraph 140]

"… [T]he causa causans of the defendants' being misled, was the conduct of their own chosen representative whom they initially trusted implicitly. The court is bound, in the circumstances of this case, by the Supreme Court of Appeal judgment Slip Knot Investments 777(Pty) Ltd supra." [Paragraph 146]

Jansen AJ thus held that the defendants were liable to pay the amounts due and owing to the plaintiffs [paragraph 147]. Jansen AJ found further that the plaintiff had failed to prove the amount due and payable, and plaintiff was ordered to state on oath whether the returned vehicle had been sold, and for what amount, and if not, which its losses had not been mitigated.

SOCIO-ECONOMIC RIGHTS

PRETORIUS ELISABETH HELENA V THE ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO: 33640/2011 (NORTH GAUTENG HIGH COURT)

Judgment delivered 18 April 2013

This case dealt with the quantum of damages in an action in terms of the Road Accident Fund Act. The mother of the deceased claimed damages for loss of support.

Jansen AJ held:

"… [I]t was emphasised by counsel for both the plaintiff and the defendant that the only real contentious issues were whether a motor vehicle, motor vehicle insurance and a life policy were "bare necessities" as defined by the relevant case law, and whether the plaintiff, an indigent, was entitled at law to claim such loss of support from the defendant." [Paragraph 23]

"… [I]n … Ngubane v South African Transport Services … Kumleben JA held … that a motor vehicle could be a necessity, depending on the circumstances. … It depends … on the position in life occupied by the plaintiff and her personal circumstances … In the circumstances of this case, no evidence was led to justify the necessity of a motor vehicle. …. However, nobody seems to have taken account of the fact that were the plaintiff to make use of public transport that, in itself, would entail daily expenses which would accumulate …" [Paragraphs 31 - 32]

"This Court has an arbitrium, which is very wide, to exercise regarding the necessities that the plaintiff can claim. The object of the Road Accident Fund Act is to give prejudiced plaintiffs the fullest possible compensation by placing them, insofar as possible, in the same position in which they were before the damage-causing event." [Paragraph 38]

Jansen AJ then considered academic writings on human dignity and socio-economic rights:

"There is therefore a strong link between socio-economic rights and the fundamental constitutional values of human dignity, equality and freedom." [Paragraph 45]

"… [T]aking section 39(2) [of the Constitution] into account, this Court is not only entitled, but enjoined to ensure that the plaintiff shall have the financial means for food, housing (which includes water and electricity), medical treatment, clothing, some form of transport (if only in the form of money for public transport), basic toiletries and basic items such as bedding, etc. Hence, the Court is entitled to order that the amounts … be paid to the Plaintiff by the defendant in respect of such basic human necessities. This Court would be remiss in not making provision for such basic needs of the plaintiff even in the absence of any specific claim therefore. The mere fact that the precise nature of her perceived basic human needs were stated to be a motor vehicle, insurance thereon and a policy, does not detract from the fact that, but for the collision, such funds would have been available to her. … " [Paragraph 48]

"In terms of the Constitution the plaintiff has a basic human right to health care, food, water and social security as set out in section 27 … of the Constitution … Given this section, this Court is in no position to deny the plaintiff her basic human rights as set out in section 27(1) of the Constitution. No factors, which would trump these rights, as envisaged by section 36 of the Constitution were mentioned in argument … [T]he Court has to take account of the provisions of section 27(1) of the Constitution. Without money for clothing, basic medical necessities, basic toiletries and the like, the plaintiff finds herself in an invidious situation, stripped of any sense of self-worth. … " [Paragraphs 54 - 55]

"What should be borne in mind in Road Accident Fund matters, is that the Road Accident Fund is funded, inter alia, with state funds … Hence … the Constitution's socio-economic rights become applicable. Apportionment of resources gives rise to the problem of polycentricity. … Nonetheless, polycentric issues can be adjudicated upon. … " [Paragraphs 59 - 60]

After considering further academic articles on the adjudication of socio-economic rights, Jansen AJ continued:

"... [T]he matters of *Soobramoney v Minister of Health* ... and *Government of the Republci of South aFrica and others v Grootboom* demonstrated how these polycentric elements should be approached when read with section 27(2) of the Constitution." [Paragraph 63]

"... [I]t is considered not only appropriate but just that the plaintiff be awarded the entire amount of money which was paid to her by the deceased when she was still living with her. The plaintiff is entitled to her dignitas, and to seek to subtract amounts as having been paid to so-called "non necessities" is not only unconstitutional, but deprives the plaintiff of the right to be compensated, as an indigent, for her basic human necessities ... " [Paragraph 64]

SELECTED JUDGMENTS

CRIMINAL JUSTICE

MAZIBUKO V S (A236/2013) [2013] ZAGPPHC 250 (16 AUGUST 2013)

Judgment delivered 16 August 2013

This case was an appeal against sentence. The appellant pleaded guilty to the charge of murder and was sentenced to 25 years imprisonment.

Janse Van Nieuwenhuizen AJ (Lamprecht AJ concurring) held:

"In terms of section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act … the court must impose a sentence of life imprisonment, if it is found that a murder was planned or premeditated." [Paragraph 9]

"The court a quo found that the murder of the appellant's son was premeditated and sentenced the appellant in terms of section 51(1) read with section 51(3) to 25 years imprisonment." [Paragraph 10]

"The court a quo, therefore found, correctly so, that substantial and compelling circumstances existed to justify the imposition of a lesser sentence than imprisonment for life." [Paragraph 11]

"Mr Kgagara, who appeared on behalf of the appellant, submitted that the murder was not premeditated and that the court a quo erred in sentencing the appellant in terms of section 51(1) of the Act." [Paragraph 13]

"In the premises, the question arises whether the appellant thought out the murder beforehand." [Paragraph 16]

"Flaving [sic] regard to the appellant's emotional condition and the manner in which the murder was committed, there are clearly no facts to substantiate the finding that the murder was premeditated. It would appear that the murder was committed at the spur of the moment without properly considering the result." [Paragraph 19]

"The court a quo erred in this regard and the sentence falls to be set aside." [Paragraph 20]

"In the Mtshafi matter a 10 year sentence wholly suspended coupled with correctional service was imposed on the accused." [Paragraph 33]

"The appellant had legal representation at trail. [sic] It is disconcerting that neither the appellant's attorney nor the presiding magistrate requested a social worker and/or probation officer's report prior to sentencing." [Paragraph 34]

"Be that as it may and having regard to the following remark by Smalberger JA in S v Ingram 1995 (1) SACR A …: 'Murder, in any form remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime.'" [Paragraph 35]

"In the premises, I propose the following order: 1. The appeal is upheld. 2. The sentence of 25 years imposed by the court a quo is set aside. 3. The sentence is substituted with the following order:

"The accused is sentenced to 5 years imprisonment in terms of section 276(1)(i) of Act 51 of 1977. 4. The sentence is to run from the date of the appellant's arrest on 1 June 2011." [Paragraph 36]

S V VAN DEVENTER (A292/2012) [2012] ZAGPPHC 340 (18 DECEMBER 2012)

Judgment delivered 18 December 2012

This was an appeal against the imposition of a life sentence on the appellant following conviction on a charge of rape.

Janse Van Nieuwenhuizen AJ (Louw and Ranchod JJ concurring) held:

"B was … raped by the appellant, her father, from the tender age of 10 years for a period of four years. According to the evidence, she was on some occasions raped three times a week." [Paragraph 4]

"The Act does not define 'substantial and compelling circumstances' The courts have similarly not given a clear and definitive answer as to the ambit and meaning of 'substantial and compelling circumstances" Reported cases provide a mere guideline as to what a court considers to be substantial and compelling circumstances" in a specific set of circumstances. …" [Paragraph 8]

"In order for this Court to interfere with the sentence imposed … the Court need to consider whether the facts which were considered by him are substantial and compelling or not. …" [Paragraph 11]

"On behalf of the appellant. Ms Henzen-Du Toit. argued that the court a quo erred in not finding that following factors constitute substantial and compelling circumstances:

(a) The personal circumstances of the appellant:

(i) he was 41 years of age at the time of the sentence,

(ii) he is a first offender;

(b) Both the complainants still love their father irrespective of the crimes committed against them;

(c) The appellant was sexually abused himself as a child;

(d) The family depends on the appellant financially;

(e) The appellant pleaded guilty and took responsibility for his actions;

(f) The appellant alleged that his wife was sexually distant as she was raped before:

(g) No evidence was led to prove any physical injuries the complainants sustained

(h) The appellant is not a threat to society;

(l) The appellant is remorseful of his actions

(j) The appellant ts willing to share his pension money with his family" [Paragraph 12]

"In submitting that the circumstances set out supra constitute substantial and compelling circumstances. Ms Henzen-Du Toit, did not have regard to the provisions of section 5l(3)(aA) of the Act which reads as follows:

'When imposing a sentence in respect cl the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence

(i) The complainant s previous sexual history.

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed' '" [Paragraph 13]

"in view of the provisions supra, this Court may not take cognisance of the fact that no evidence was led to prove that B had suffered physical injuries. in considering whether substantial and compelling circumstances exist" [Paragraph 14]

"The fact that B still loves her father, having regard to her vulnerable age and the conflict she experiences because her father, the one person that was supposed to protect and adore her, took the most precious part of her youth away in a very cruel manner, is not a factor that counts in the appellant's favour. To the contrary, it is indeed very sad that the father B loves deprived her of the privilege to lead a normal and fulfilled life." [Paragraph 17]

"The fact that the appellant failed dismally in his responsibilities as a father, is further borne out by the fact that, due to his conduct, he has left his family financially destitute Financial dependence on the appellant is not a substantial and compelling circumstance justifying a lesser sentence." [Paragraph 18]

"The appellant might have pleaded guilty, but he did not take responsibility for his actions neither can this court, in view of the evidence, find that the appellant is -emorseful of his actions The appellant chose not to testify, but relied solely on a report by Ms van Dyk. a social worker, in mitigation of sentence." [Paragraph 19]

"Remorse should at least include insight into the seriousness of the offence committed Remorse should also be borne out by the appellant's subsequent conduct This is sadly not the case in the present matter..." [Paragraph 22]

"I am of the view that the remaining factors, to wit the sexual distance of the appellant's wife after she was raped that the appellant is not a threat to society and the fact that he is willing to share his pension money with his family, do not constitute substantial and compelling circumstances that justify a lesser sentence." [Paragraph 23]

The appeal was dismissed.

ADMINISTRATION OF JUSTICE

BUSANGANI PETROS SIBUSISO NHLABATHI V DEPARTMENT OF HOME AFFAIRS AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 58855/2012 (NORTH GAUTENG HIGH COURT)

Judgment delivered 14 June 2013

This case dealt with the restoration of the applicant's status as a South African citizen. Applicant was born in South Africa to a South African mother and was therefore a citizen by birth. He lost his citizenship in 1983 when he became a citizen of Swaziland. He returned to South Africa in 1984 and had been living in South Africa since.

Janse van Nieuwenhuizen AJ held:

"In the premises, the applicant may, in terms of the provisions of section 13 of the Act, apply to the second respondent for the resumption of his former South African citizenship. … The application is therefore premature." [Paragraphs 7 - 8]

"Ordinarily, a successful party will be awarded the costs of the application. A court, however, has a discretion to make any cost order it deems fit. The conduct of the parties prior to and during the litigation are factors to be taken into account in considering an appropriate cost order." [Paragraph 9]

"The applicant's journey to rectify his status started during May 2010 at the Home Affairs offices in Carltonville. I pause to mention that the first respondent did not see it fit to advise the applicant of the change in his status. " [Paragraph 10]

"The applicant, being unaware of the change in his status, therefore, proceeded to Carltonville offices to obtain a new passport. After scanning his thumb he was told that, according to the system, he is an illegal immigrant." [Paragraph 11]

"No one at the Carltonville offices could provide any reason for the change in the applicant's status and he was referred to the offices in Piet Retief, where he obtained his first identity document." [Paragraph 12]

"Notwithstanding frequently visits to Carltonville offices, the applicant's problem was not solved. The applicant became understandable desperate and decided to addressed a letter to the Director-General of the first respondent. In the letter … the applicant explained his predicament and requested urgent help from the first respondent. He did not receive the courtesy of a reply." [Paragraph 15]

"Due to the first respondent's absolute disregard for the applicants predicament, this application was launched on or about 12 October 2012." [Paragraph 20]

"In the application, the applicant explained that he transport people cross-boarder [sic] and without a passport he was without an income and could not support his family. In view of his status as an illegal immigrant, the applicant's presence in South Africa is precarious and he lives with the daily threat of deportation." [Paragraph 21]

"The applicant's right to freedom of movement, dignity, security of tenure and ability to earn an income is violated by the first respondent's flippant disregard for his plight." [Paragraph 22]

"I am dismayed at the treatment meted out to the applicant by the first respondent. Every person in the Republic is entitled to be treated with the necessary respect. Officials at the respondent are appointed to serve the public at large. It should not be necessary for any person to approach the court, because officials do not do their work." [Paragraph 23]

"Lastly, the first respondent's conduct in the present litigation left much to be desire." [Paragraph 24]

"Notwithstanding the applicant's baptismal certificates, his mother's evidence under oath, the wealth of copies of identity documents and passports issued by the first respondent to the applicant in the past, the first respondent maintains that the applicant was never a South African citizen. This averment is without any factual basis and demonstratively wrong." [Paragraph 25]

"The Act is one of the pieces of legislation that prescribes the functions of the first respondent. Yet, no one in the employment of the first respondent, advised the applicant of his remedies in terms of the Act." [Paragraph 26]

"As a mark of my displeasure with the first respondent's conduct, I am not granting a cost order in favour of respondents." [Paragraph 27]

The application was dismissed.

SELECTED JUDGMENTS

PRIVATE LAW

CACOURIS V LEMMETJIES AND ANOTHER (41135/09) [2012] ZAGPJHC 76 (4 APRIL 2012)

The plaintiff instituted action against the first and second defendants alleging that he was arrested without a warrant. After the arrest, he was maliciously and unlawfully detained from 26 September 2008 until on 29 September 2008 when he was granted bail.

Mphahlele J held:

"The plaintiff's evidence is briefly as follows: He was arrested and charged with possession of a stolen motor-vehicle in respect of a trailer that the plaintiff sold to one Mr. Fryer in 2002 for R6 000-00. On 26 September 2008…Mr. Fryer requested him to come to the Sandton police station to help identify the trailer. A driver of Mr. Fryer was arrested whilst in possession of the trailer. Mr. Fryer had also summoned his attorney, Mr. Pritchardt to the police station for legal assistance." [Paragraph 4]

"Despite being placed in possession of the relevant documents by the plaintiff, Mr. Fryer did not change the details of ownership of the trailer with the relevant authorities. The plaintiff positively identified the trailer … Constable Lemmetjies then informed the plaintiff that the trailer was reported stolen in 2007 and he was going to charge him for being in possession of a stolen motor-vehicle and then released Mr. Fryer's driver. The plaintiff reacted by stating that constable Lemmetjies was mad as the trailer was already sold to Mr. Fryer in 2007. Constable Lemmetjies proceeded to charge him in front of his mother and Mr. Pritchard … Constable Lemmetjies estimated the value of the trailer to be R20 000-00 notwithstanding the available details of the purchase price in the documents." [Paragraph 5]

"This, plaintiff was advised, was done to make it difficult for him to secure police bail. Further bail could not be secured for him as constable Lemmetjies left with the docket and he could not be found. He was detained at the Sandton police station in a small cell together with six other people. They had no access to water and drank water from the shower during the day. The toilet was out of order. He was given a blanket infested with fleas. The food was horrible and he refused to eat …On 29 September 2008 the plaintiff and approximately forty other people were taken by a police van to Wynberg Magistrate's Court. There was not enough space in the police van and they were crammed in. Some of the people in the van were smoking. Constable Lemmetjies has misled the plaintiff by saying that he was going to appear at the Randburg Magistrate's Court. His attorney made a bail application at Wynberg and he was accordingly released. The matter was subsequently struck from the trial roll on 20 January 2009." [Paragraph 6-7]

"The plaintiff was 55 years old and a business broker at the time of his arrest. His business partner had to cancel his business meeting which was scheduled to take place …His business partner had to disclose the reason for the cancellation … as a result his arrest was widely publicized. [Paragraph 8]

"I now turn to the issue of quantum. It is trite law that the trial judge has a discretion to award what, in the circumstances, is considered to be a fair and adequate compensation to the injured

party for the sequelae of his or her injuries... [citation to Supreme Court of Appeal case law]." [Paragraphs 18-19]

"The plaintiff was charged for being in possession of a stolen motor-vehicle even though the trailer was found in the possession of a third party. The trailer was alleged to have been stolen six years after the plaintiff had sold it to Mr. Fryer. The plaintiff was detained for approximately sixty-four hours despite the available information that the trailer was registered in the plaintiff's name. Constable Lemmetjies had in his possession an official e-natis certificate indicating that the plaintiff was the registered owner of the trailer. The plaintiff attended at the police station at the request of Mr. Fryer. There is no evidence that there was reason to believe that the plaintiff would have absconded or failed to appear in court if a summons to appear in court was obtained." [Paragraph 20]

"I find the circumstances of the plaintiff's arrest and the conditions under which he was detained unacceptable ... Constable Lemmetjies could not have reasonably believed in the validity of the charges on the basis of the information available to him. Constable Lemmetjies further abused the court process by intentionally and wrongfully setting the law in motion by initiating a criminal charge against the plaintiff. Constable Lemmetjies was therefore instrumental in making and prosecuting the charge against the plaintiff." [Paragraph 22]

"The criminal prosecution lasted for four months which included two court appearances. I therefore find that the actions of constable Lemmetjies were malicious and without any reasonable and probable cause...." [Paragraph 23]

"It is clear from the evidence that the plaintiff suffered humiliation by reason of the arrest. The humiliation and appalling conditions of the detention did have a negative emotional impact that may endure, although there is no evidence that the plaintiff received any treatment after he was discharged. The news of the plaintiff's arrest was publicized by his business partner and his mother. The business partner disclosed the reason for the cancellation of the meeting to the plaintiff's prospective clients ... The plaintiff submits that the arrest affected his business negatively but he failed to provide evidence on the extent of the negative impact. It is clear from the evidence that the plaintiff suffered considerable indignity during the detention." [Paragraph 24]

"In Greenberg v De Beer ... Masipa J awarded R90 000-00 for the wrongful arrest and detention that lasted for three days. The plaintiff was employed in the computer industry and a high profile member of the Jewish community. He was incarcerated with criminals under unhygienic conditions. The court found that malice was established on the part of the first defendant, the arrestor." [Paragraph 25-26]

"Having regard to the circumstances of this matter, an appropriate award for general damages in respect of malicious arrest would be R90 000-00 and R60 000-00 in respect of malicious prosecution." [Paragraph 27]

The defendants were ordered, jointly and severally, the one paying the other to be absolved, to pay the plaintiff a sum of R150 000-00 together with interest at the rate of 15.5% per annum a tempore morae from 25 May 2009 to the date of payment.

MOSES V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO.: 36711/09

The plaintiff sued the defendant for damages arising from a motor-vehicle accident on 4 April 2012. The plaintiff was driving a motorcycle and was involved in an accident with two motor-vehicles. The issue of liability was separated from quantum in terms of Rule 33(4). This case thus proceeded on the merits only.

Mphahlele AJ held:

"The plaintiff testified that she was the driver of the motor-cycle traveling in Power road at approximately 18h30. She had to slow down considerably to turn left into Russell road and at the same time had put on her motor-cycle's indicator… As she was in the process of executing the left hand turn into Russell road, her motor-cycle was struck from behind. She was flung off her motor-cycle. After she fell and she lost consciousness briefly. When she regained consciousness, she was lying on her back on the pavement. The lights of the motor-cycle were on. She said that the driver behind her ought to have seen the back lights, the brake light and the indicator of her motor-cycle." [Paragraphs 4-5]

"… Mr Anderson, the driver of the first insured motor-vehicle testified that he was travelling in the left lane in Power road from Germiston… At the intersection with Russell Street a motor-cycle approached from his right hand side and drove in front of him. It happened so fast he did not have time to react. He then heard the impact and then began to brake but carried on pushing the motor-cycle. When his motor-vehicle came to a standstill he had to get out of the passenger door as the driver's door could not open. After the accident, the second insured motor-vehicle was facing the opposite direction. As the impact with the motor-cycle was too loud, he could not say with certainty if the impact with the motor-cycle happened before or after the impact with the second insured motor-vehicle…" [Paragraph 8]

"Van Wyngaard approached him whilst he was inspecting the damages… while talking, van Wyngaard noticed the motor-vehicle. Under cross-examination, he testified that he was shocked to see the motor-cycle because he did not know what he had hit. They found the plaintiff on the road behind the first insured motor-vehicle." [Paragraph 9]

"Anderson was adamant that the motorcycle was not travelling in front of him but admitted that he only saw the motor -cycle for the first time when the same was pointed out to him by van Wyngaard after the accident. He would not say if the motor-cycle approached from the left or the right hand side. He could not point out exactly where his motor-vehicle hit the motor-cycle…" [Paragraph 10]

"This court is faced with two irreconcilable versions or mutually contradictory versions, the resolution of which will depend on my finding regarding a) credibility, b) reliability and c) the probabilities. See: Stellenbosch Farmers Winery Group Ltd & another v Martell Et Cie & Others…" [Paragraph 19]

"The evidence of the plaintiff is to a certain extent corroborated by some other evidence but in certain respects she is a single witness and the cautionary rule is applicable to her evidence. The plaintiff made a good impression. Her version was consistent, coherent and logical. I accept as correct and credible the plaintiff's case that she was travelling in the same direction as Anderson and

van Wyngaard and the accident took place whilst she was executing a left hand turn. Again, if one looks at the damage to the motor-cycle, it is consistent with the plaintiff's case." [Paragraph 22]

"According to Anderson, he only saw the motor-cycle for the first time *after* the accident. So the defendant's case that the plaintiff entered the lane of travel of Anderson on either the left or the right hand side is not supported by any evidence and cannot be right. I reject it. According to van Wyngaard everything happened in a split second. She saw the light of the approaching motor-cycle and Anderson applying the brakes of his motor-vehicle. Contrary to this, Anderson testified that he only applied the brakes after the collision. So it is probable that when van Wyngaard noticed the motor-cycle's light and Anderson's brakes, the accident had already occurred." [Paragraph 23]

"In my view, the balance of probabilities favour the version that Anderson failed to keep a proper lookout and knocked into the plaintiff's motor-cycle. If Anderson was concentrating on the motor-vehicles travelling in accordance with his version, he should have noticed the motor-cycle executing the turn across his line of travel. This version cannot, therefore, be true. I therefore reject Anderson's version." [Paragraph 25]

"On the analysis of the evidence I am satisfied that the plaintiff was driving in the same direction as Anderson and van Wyngaard. I accept the evidence of the plaintiff as clear, credible, reliable and probable and accordingly reject the evidence for the defendant." [Paragraph 26]

"I now turn to deal with the defendant's submission that the plaintiff also contributed to the accident. The question as whether either of the drivers was negligent or not must be inferred from all proven facts. One does not draw inferences of negligence on a piecemeal approach. One must consider the totality of all the facts and then decide whether the driver has exercised the standard of conduct that the law requires. The standard of conduct so required is that which a reasonable man would exercise in the circumstances. The question is whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision. See *Coetzee v Kruger*..." [Paragraph 27]

"The accident took place at approximately 18h30 and visibility was good. The road was flat and there were no obstructions. The plaintiff testified that she failed to observe the following distance of the motor-vehicles travelling behind her. She started indicating her intention to turn to the left hand side about 7,4 metres away from the intersection. At the same time she applied her brakes and slowed down from about 60km/h to 20km/h. This is too close a distance taking into account the level of the speed reduction. This will give any person following her closely almost no time to react. Failure to observe the following distance of the motor-vehicles travelling behind her indicate [*sic*] that the plaintiff failed to ensure that it was safe for her to take a left hand turn. Obviously the act of turning off a road to the left is not as dangerous a manoeuvre as a turn to the right, but it is nevertheless an act which must be undertaken with due regard to presence of other users of the road. See *Reemers v A A Mutual Insurance Association Ltd*... It appears from the evidence ... that the plaintiff also contributed to the accident. However the plaintiff's negligence is much less than that of the insured driver. I therefore, find that the plaintiff was 10% to blame for the accident." [Paragraph 28]

CIVIL PROCEDURE

MOCWIRI V S A TAXI DEVELOPMENT (PTY) LTD (08125/2012) [2013] ZAGPJHC 9 (1 FEBRUARY 2013)

Case heard 22 November 2012, Judgment delivered 1 February 2013

This was an application for rescission of a default judgment for the return of a motor-vehicle that had been repossessed by the sheriff based on a warrant of execution. The application is based on the provisions of rule 42 of the Uniform Rules of Court in that the judgment was sought and/or granted erroneously; or alternatively on the provisions of rule 31 in that there was good cause to rescind the judgment since the applicant was not in wilful default of defending the action and has a defence to the respondent's claim.

Mphahlele AJ held:

"The applicant denies the summons was served on his father at his chosen domicilium citandi at executandi as stated on the sheriff's return of service. To this end, the applicant submitted an affidavit by his father confirming that he was never served with the summons by the sheriff … It was submitted for the respondent that the denial by the father does not help the applicant as the summons was served at this domicilium. The Counsel for the applicant therefore submitted that the failure to serve the summons on the applicant would render the proceedings a nullity and warrant the judgment being rescinded in terms of rule 42. The respondent contends that the summons has come to the applicant's notice but failed to respond thereto. The applicant accordingly remained in wilful default. The judgment was granted upon the correct information and the Registrar of this Court relied on the return of service which proved correct and proper service of the summons. The judgment was not sought or granted in error and this rescission application does not fall within the ambit of rule 42." [Paragraph 2]

"Section 129 of the NCA is a prerequisite for the institution of legal proceedings. The main aim of section 129 (1) (a) is to place a duty on a credit provider to notify the consumer of the possible assistance. Therefore a creditor provider may not commence legal proceedings to enforce the agreement before first providing the default notice to the consumer as contemplated in section 129 (I)(a). In this matter, the section 129 default notice was sent to the applicant by registered post on 13 February 2012. The respondent then proceeded to issue the summons against the applicant on 02 March 2012 and upon not being served with a Notice to Defend, the respondent proceeded to apply for a default judgment on 22 May 2012 which was granted on 31 May 2012. The default notice was subsequently returned to sender on 23 March 2012." [Paragraph 4]

"A credit provider may not commence any legal proceedings to enforce an agreement before at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 129(I) (a) and the consumer has not responded to the notice or responded to the notice by rejecting the credit provider's proposals. A credit provider is therefore required to establish to the satisfaction of the court that it has delivered a notice to the consumer as contemplated in section 129. In Ebola v Standard Bank … Cameron J stated that '…The Statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer… If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim.'" [Paragraph 5]

"In this matter I am satisfied that the section 129 default notice never reached the applicant, and therefore there was no compliance with the procedure as set out in section 129." [Paragraph 6]

"In view of the attitude I take of this matter, it is not necessary for me to traverse or discuss the other issues raised by the applicant, that is reckless lending and the defective subject matter of the respondent's claim. In my view the issue relating to the compliance or otherwise with the provisions of section 129 of the NCA is dispositive of the matter." [Paragraph 9]

I accept the applicant's version that he did not receive the requisite letter. I therefore find that there was no proper compliance with the provision of section 129(1) of the NCA. It then follows that, in terms of section 130(4) (b), the court must adjourn the proceedings and set out the steps that the respondent must take before the matter may be resumed…" [Paragraph 10]

The application for rescission of judgment was granted and the warrant of execution that had been issued was set aside. The respondent was ordered to serve a written notice as contemplated in section 129(1) of the NCA on the attorneys of record for the applicant before the matter could continue.

CRIMINAL JUSTICE

IVAN DON VAN DER LINDE AND OTHERS V THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 27899/2008 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 21 February 2013, Judgment delivered 10 April 2013

Applicants sought an order under the Prevention of Organised Crime Act (POCA) to rescind a restraining order, on the basis that the criminal proceedings against the first applicant had been concluded. First applicant had been charged with fraud in the Magistrate's Court, and was ultimately discharged. The state delivered a notice of intention to lodge an appeal. The appeal was subsequently struck from the roll due to the lack of a proper record of proceedings in the court below.

Mphahlele AJ held:

"… [T]he applicants have to establish that the criminal proceedings against them have been concluded as contemplated in section 17 of POCA. … [C]ounsel for the applicants, submitted that, in the context of chapter 5, where a defendant has been acquitted (as opposed to been convicted), 'conclusion of proceedings' does not entail the setting aside or not of such acquittal on review or appeal. On the other hand, if convicted, the 'conclusion of proceedings' is defined as the setting aside of the conviction … I do not agree with this interpretation. It misses the point that the words "the defendant is acquitted or found not guilty of an offence … and "the conviction in respect of an offence is set aside on review or appeal …" substantively mean one and the same thing. The difference, if any, being merely procedural as in the one instance there is no review or appeal after the acquittal, this only being necessary only in the event of a conviction. It is also argued … that nowhere in POCA is it provided that a restraint order remains in force pending an appeal against the

acquittal of a defendant. It may well be so, but this should be seen as a lapse in drafting as opposed to a clear intention to frustrate the very purpose of POCA." [Paragraph 12]

"... [I]t is also necessary to look at the general purpose of the legislation in order to help arrive at an appropriate interpretation that gives effect to the legislation. POCA was conceived of the state's resolve to introduce effective measures to combat organized crime in an endeavour to respond to its duty to respect, promote and fulfil the rights in the Bill of Rights. This is against the background that organized crime infringes on people's rights enshrined in the Bill of rights and presents a danger to public order and safety and economic stability and has the potential to inflict social damage. The aim is also to ensure that no person convicted of an offence should benefit from the fruits of that or any other offence. The legislation is intended to provide for a civil remedy for the preservation and seizure, forfeiture of property which is derived from unlawful activities or concerned in the commission or suspected commission of an offence. ... " [Paragraph 14]

"The purpose driven interpretation of legislation is supported by the Supreme Court of Appeal decision in Natal Joint Municipal Pension Fund v Endumeni Municipality ... It is common cause that a discharge ... is for all intents and purposes meant to be an acquittal. However, that acquittal is, where the prosecution decides to appeal, subject to the provisions of section 310 of the CPA and the general purpose of POCA." [Paragraphs 15 - 16]

"... [T]he first applicant is married to the second applicant, is a sole member of most of the applicants and a director of the other applicants. The first applicant seems to enjoy extensive control and influence over the other applicants. This case presents a classic case where it may be appropriate to pierce the corporate veil ... Taken individually and collectively the relief sought ... if granted, will have one effect, namely to put the assets that are suspected to have been obtained through the proceeds of crime back in the hands of the applicants whilst there is still a possibility that the first applicant could be successfully prosecuted. This goes against the very purpose of POCA and the spirit of the Bill of Rights. In the circumstances, the application must fail." [Paragraph 18]

SELECTED JUDGMENTS

PRIVATE LAW

MYHILL, ELE N.O (SWALIBE MINORS) V ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO: 2009/30430 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 5 March 2012

This is an action for the setting aside of compromises entered into some 13 years previously between two minor children as represented by their mother and the Road Accident Fund. Settlement offers were made, which were accepted by the mother of the children. The main issue for decision was whether the settlement agreements could "be set aside on a legal basis affording the minors a further opportunity to claim compensation." [Paragraph 3]

Strydom AJ held:

"As far as concessions made by Mr. Dickenson relating to the reasonableness of the compromises entered into, the court should not attach much weight to these opinions. It is for the court to decide, considering the available evidence at the time, whether the compromises were in the best interest of the children. The court must decide reasonableness against objective standards." [Paragraph 25]

"… As the parties agreed to a separation of issues excluding evidence on what the payment allegedly should have been, the court will now have to decide this issue on the available evidence. For instance, as far as claim B is concerned, the court will have to decide whether, objectively speaking, the compromises were in the best interest of the children without having regard to the allegation that reasonable compensation would have been R850 000 per minor. The court will have to assess, what reasonable compensation would have been considering the seriousness of the injuries and the sequelae to such injuries." [Paragraph 28]

"… Mrs Swalibe, according to the documentation referred to in evidence, accepted the compromises without an undertaking from the defendant to pay for future medical expenses. Provision for such an undertaking appeared on the printed forms she has signed, but was deleted. Considering her knowledge at the time that the children suffered from epileptic fits, she should not have, objectively considered, accepted these settlements without an undertaking from the defendant to pay for future medical expenses. By doing this she did not act in the best interest of the minors." [Paragraph 30]

"For settlement purposes anything may be taken into account, but to consider whether a particular comprise was in the best interest of another, not only the end figure will be considered, but also how this figure was calculated and arrived at. The apportionment applied by the defendant for settlement purposes, by deducting 30% of the estimated value of the claims, was similarly not in the interest of the minor children. If the minor children's mother was contributory negligent in causing their damages, they would have had a claim against her to the extent that her negligence contributed to their injuries, alternatively, the defendant being liable for the full amount, would have had a counterclaim against Mrs Swalibe. On behalf of the defendant it was argued that the defendant was entitled to make an offer for

settlement and it clearly was entitled to take into account that it had a counterclaim on its view of the merits. " [Paragraph 31]

"The question is not whether legally some form of set-off could be applied in this kind of circumstance. It might be legally correct to do so, but is it in the best interest of the children when a mother avoids a counter-claim against her by reducing her minors' claims? I am of the view that set-off under these circumstances will not be in the best interest of minors. Considering that the amount offered is already an amount less than full value, such amount should not be reduced by 30%. The effect of the apportionment is that the minors only received 70% of that which was calculated to be the value of their claims. It would have been in the best interest of the minors to receive 100% of the calculated value of their claims. I find it difficult to understand why, under such circumstances, their claim should have been apportioned. Although possible litigation was avoided between the defendant and Mrs. Swalibe in her personal capacity, this should not have been done at the expense of the claims of the minor children. Accordingly, the avoidance of litigation between the defendant and Mrs. Swalibe is not a factor which renders the settlement figures more acceptable. The 30% reduction of the claims were substantial and not in the interest of the minor children. Considering all the evidence available at the time, I am of the view that the settlement figures were unreasonably low and, accordingly, prejudicial to the interest of the minor children. " [Paragraph 32]

"Once a finding is made that the compromises were not in the best interest of the children, the next enquiry should be whether these settlement agreements could legally be set aside." [Paragraph 33]

"The parties could not refer me to any decided cases on the issue whether a contract in the form of a compromise entered into by a guardian on behalf of a minor could legally be avoided if it was so prejudicial that the minor will suffer serious loss it is not set aside. Ultimately, the test should be whether the compromise was concluded in the best interest of the child at the time that it was concluded. In exercising the court's discretion as upper guardian, the court's paramount consideration is always the best interest of the child in question. This principle has been echoed in constitutional and international law that enshrine "the best interest of the child" standard as paramount or a primary consideration in all matters concerning children. In terms of section 28(2) of the Constitution of the Republic of South Africa … it is so legislated: "A child's best interests are of paramount importance in every matter concerning the child" This constitutional principle is also echoed in section 6(2) of the Children's Act … " [Paragraph 37]

"Mr Van der Linde, on behalf of the defendant, argued that the plaintiff's case to obtain an order for estitution in integrum, as pleaded, was premised on an absolute duty in law or in terms of the Act to pay reasonable compensation, not only in relation to claims of minors, but also in relation to all claims. He argued that, should I find that such a duty in law does not exist, then this claim for estitution in integrum should fail. I do not agree with this argument. Sufficient allegations are made in the particulars of claim, substantiated by evidence, to sustain a claim for restitution in integrum without finding that a legal duty exists to pay reasonable compensation. It is not the breach of a duty that brings a minor within the requirements for a claim of restitution. Restitutio in integrum is available to a minor who can prove that he or she was prejudiced by an agreement entered into on his or her behalf. This may be an agreement pursuant to the Act, which provides for settlement of claims, or any agreement for that matter. The court can make a finding that the plaintiff is or is not entitled to estitution in integrum without finding whether an absolute duty in law exists to pay reasonable compensation. If I am of the view that the compromise was not in the best interest of the minor, the settlement should be set aside. … " [Paragraph 38]

"… I have already come to the conclusion that the compromises were not in the best interest of the minors. In arriving at this conclusion, I have taken cognizance of the seriousness of the injuries and the evidence of epilepsy, the 30% apportionment applied, the lack of an undertaking given to pay for future medical costs, and the fact that possible litigation was avoided. I accept that a compromise should not be lightly set aside and that, in the words of Voet, 'manifest damage in a compromise is shown with difficult'. I am of the view again in the words of Voet, 'that a clear right of minor have been foregone in a compromise;. The 'best interests of minor children' standard tipped the scale, even considering that litigation was avoided, in favour of a finding setting aside these compromises. These compromises are prejudicial to the interest of the minor children." [Paragraph 41]

"The compromise entered into on 14 May 1999 between the defendant and Martha Seani Swalibe on behalf of the minors Phillipine and Lufuno Swalibe, are set aside." [Paragraph 47.1]

The decision was upheld by the SCA on appeal in Road Accident Fund v Myhill NO (505/2012) [2013] ZASCA 73 (29 May 2013).

COMMERCIAL LAW

COSIRA NAMIBIA (PTY) LIMITED V AREVA PROCESSING NAMIBIA (PTY) LIMITED AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 17248/2013 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 16 July 2013

Applicant had contracted with first respondent to perform construction services, and in terms of the contract had to furnish a performance guarantee to the first respondent. Second respondent had issued a similar guarantee to the first respondent. First respondent called up the applicant's guarantee, alleging breach by the applicant. Applicant then sought to interdict the first respondent from receiving payment pursuant to the guarantee. The decisive issue was whether the guarantee was a "demand bond" or a "surety bond".

Strydom AJ held:

"… This is a legal question and requires interpretation of the performance guarantee. A demand bond is a bond where there is no requirement of an obligation of liability on the part of the contractor under the construction contract. All the beneficiary needs to do is to demand payment and comply with the specified events mentioned in the bond. The only basis on which liability can be avoided is fraud on the part of the beneficiary. … [A] surety bond, also often referred to as a conditional bond, requires from a beneficiary to establish liability on the part of the contractor in terms of the contract. It is in the nature of a suretyship and the liability is accessory to the principal liability. A contractor may raise any defence which it has in terms of the construction contract. " [Paragraph 4]

"It is common cause that the demand was made within the time limit and was formalistically in order. … The ordinary rules applicable to contractual interpretation should be applied. The words in the bond must be given their ordinary grammatical meaning. Unless there is ambiguity when this is doen the court

will not have to go beyond the interpretation of the ordinary meaning to establish the intention of the parties. … " [Paragraphs 6 - 7]

"… On a proper interpretation of the wording of the performance guarantee it becomes clear that what is stipulated as a requirement for liability is nothing more than a statement that the principal (applicant) is in breach of its obligation under the contract. It is not required go beyond [sic] a mere statement alleging that the applicant is in breach … I find that the performance guarantee is a demand bond as the undertaking to pay is not depended [sic] upon any condition or term other than receipt by the surety … of the first respondent's demand in writing … The mere statement that the principal is in breach is sufficient to create the obligation to pay. … " [Paragraph 8]

"… [T]he further issue for decision is then whether the applicant has shown … that it has a defence to prevent the payment of the guaranteed amount. The only relevant defence … is the allegation that the first respondent with full knowledge of the true situation misrepresented the facts by stating that the applicant was in breach of its obligations under the contract, whilst this was not the case. According to the applicant, the contract between it and the first respondent was terminated by agreement and consequently the applicant could no longer have been in breach …" [Paragraph 9]

"… [T]he question is … whether the applicant has shown, on a prima facie basis, that the first respondent's allegation, that the applicant was in breach of the construction contract, was knowingly false, as the construction contract was already terminated by agreement, when the statement was made." [Paragraph 11]

"… I am of the view that on the applicant's own version it has not established an agreement to terminate. …" [Paragraph 13]

"… On the contrary, on the papers before me a finding can be made that the contact was terminated as a result of the applicant's default by suspending its performance in terms of the contract. This action amounted to a repudiation of the contract which was accepted by the first respondent." [Paragraph 17]

The application was dismissed with costs.

SELECTED JUDGMENTS

COMMERCIAL LAW

ABSA BANK LIMITED VERSUS MARIUS JULIUS TERBLANCHE AND ONE OTHER, UNREPORTED JUDGMENT, CASE NO.: 17330/2012 (WESTERN CAPE HIGH COURT)

Judgment delivered 30 November 2012

This case concerned an application for summary judgment in which the plaintiff claimed payment from the first and second defendants, who were husband and wife married out of community of property, jointly and severally of an amount in respect of money loaned and advanced against three mortgage bonds. Defendants raised two main defences, (i) "the agency defence" and (ii) "the securitization defence".

Davis AJ held:

On (i):

"The defendants allege … that the agreements relied on by the plaintiff (i.e. the loan and mortgage bonds) are invalid… It is significant that the defendants do not in fact deny that the plaintiff advanced moneys to them. Nor is there any denial that they acquired the property on the strength of the mortgage loan. The gist of the defendants' complaint is that the plaintiff was not the institution which advanced the monies to them because the monies loaned belonged to the Reserve Bank, that it was the Reserve Bank which loaned the funds to the defendants, and that it is therefore the Reserve Bank, and not the plaintiff, which has the requisite locus standi to enforce the claim, because, so it is said, the plaintiff was at all times acting merely as the agent of the Reserve Bank." [Paragraph 7]

"The defendants provide no basis or support whatsoever for the bald factual allegations made in …their affidavit about complex matters of banking which one would not expect to fall within the ambit of the personal knowledge of the average consumer. Without a basis being laid for this specialist knowledge, I cannot but entertain serious doubts whether the defendants have the professed personal knowledge of these facts, and therefore whether the defence is put up in good faith. It seems to me that the defendants have simply latched onto the defences put up in the Tellinger case without any personal knowledge of or-sound foundation for: the material facts said to underlie the defence, which appears to be based entirely: on speculation. This seems to me, at best, to be opportunism on the part of the defendants" [Paragraph 8]

"Moreover, the allegation that it was the Reserve Bank, and not the plaintiff; who loaned moneys to the defendants, flies in the face of the clear wording of the written loan agreement and mortgage bonds attached, to the summons. These documents - the contents whereof have not been denied by the defendants - make it quite clear that the lender was the plaintiff" [Paragraph 9]

"I further consider that the agency defence rests on several flawed premises: and is not good in law … First, it is not correct that the Banks Act precludes the plaintiff from utilising its clients' deposits for making loans … the business of a bank as defined in the Banks Act specifically includes the use of deposits for the making of loan … Second, even if it could be established that the moneys which plaintiff used to

make the advance to defendants did in fact emanate from funds loaned by the Reserve Bank to plaintiff … it is trite law that a loan of money, a consumable thing, is classified as a loan for consumption *("mutuum"),* and that the borrower in terms of such a loan becomes the owner of the thing when it is delivered… Third, the contention that the plaintiff was acting as agent for the Reserve Bank in making the loan to defendants flies in the face of section 13(c) of the Reserve Bank Act, which expressly precludes the Reserve Bank from lending or advancing money on the security of a mortgage of immovable property. The plaintiff, on the other hand, is a registered credit provider in terms of section 40 of the National Credit Act… ("the NCA"). The effect of such registration is that plaintiff is duly authorised to provide credit and to enter into credit agreements in terms of the NCA, including mortgage loans such as the one in question in this matter." [Paragraphs 10-14]

On (ii):

"… As in the case of the agency defence, it seems to me that these allegations concern facts which do not fall within 'the personal knowledge of the defendants, and amount to nothing but speculation on their part. It is well known that securitization is a highly sophisticated commercial transaction resting on complex agreements, the preparation of which requires specialist legal and financial knowledge … the important point … is that there is simply no evidence on the papers to suggest that the plaintiffs claim; under the loan agreement and mortgage: bonds has been ceded to a third party." [Paragraph 17]

"Mr Zazeraj argued that the defendants should not be penalised for mounting a defence based on facts which fall within the exclusive knowledge of the plaintiff and of which they can therefore have no personal knowledge. He argued that they should be allowed to defend the action and to request discovery in order to ascertain whether or not the claims relied upon by the plaintiff have in fact been subject to securitization, I do not agree. Summary judgment, where a plaintiff is otherwise entitled thereto, ought not to be refused merely because the defendant wishes to embark upon a fishing expedition in the hope of coming up with a defence. To my mind this particular argument, which involves an implicit concession that the defendants do not have knowledge of the material facts said to underlie the defence, merely serves to underscore the fact that the securitization defence was knowingly put without any factual basis therefore, and that the defence cannot therefore be said to be advanced in good faith…" [Paragraphs 19-21]

"The defendants were legally represented at all material times and were duly notified in the summons of their rights in terms of sections 26(1) and (3) of the Constitution and in terms of rule 46(1) (a) (ii) …. Having had ample opportunity to do so, they did not allege that execution against the property would infringe their constitutional right to have access to adequate housing." [Paragraph 24]

"The defendants have failed to pay the installments owing on the mortgage bond for a period in excess of eighteen months. The arrears owing are substantial… There is no suggestion of any abuse on the part of the plaintiff bank in seeking to execute against the property. Nor would the results be disproportionate in my view. In the circumstances the plaintiff must be allowed to realise its security in terms of the mortgage bond … For the reasons given I do not consider that the defendants have disclosed a bona fide defence to the plaintiff's claim. The plaintiff is therefore entitled to summary judgment as prayed." [Paragraphs 25-27]

GOBEL V GOBEL, UNREPORTED JUDGMENT, CASE NO.: 6935/13 (WESTERN CAPE HIGH COURT)

Case heard 11 June 2013, Judgment delivered 28 June 2013

This was an urgent application for the sequestration of the respondent's estate. The applicant and the respondent were engaged in divorce proceedings in which the applicant claimed, *inter alia,* payment of lifelong maintenance from the respondent. Applicant also sought interim interdictory relief preventing the respondent from encumbering or disposing of assets in his estate in the event that the application was postponed.

Davis AJ held:

"The respondent opposes the application for the sequestration of his estate on the grounds that the applicant lacks the requisite *locus standi* as a creditor, that he has not committed an act of insolvency, that he is not insolvent, and that the application has been brought for an ulterior purpose and is an abuse of process." [Paragraph 3]

"The applicant alleges that the respondent is indebted to her in an amount of at least R 289 557.31 in respect of arrear maintenance owing to her … The respondent alleges that he complied with the order until and including July 2012, and that in July 2012 he launched an application … to vary the order …"[Paragraph 5]

On the issue of *locus standi:*

"Section 9(1) of the Insolvency Act requires that an applicant creditor shall have a liquidated claim against the debtor… The respondent argues that the effect of the November rule 43(6) application, which preceded the present application, is that the applicant does not have a liquidated claim against the respondent inasmuch as the *quantum* of maintenance payable by him … is as yet to be determined… The applicant's alleged claim against him is at best conditional and un-quantified, and does not, therefore, qualify as a liquidated claim for the purposes of section 9(1) of the Act." [Paragraphs 8-9]

'To be regarded as a liquidated claim the petitioner's claim must be fixed and determined. This Court, in the case of *Stephan v Khan* … held that "liquidated claim", as those words are used in sec. 9(1) of the 1916 Insolvency Act, mean a claim the amount of which has been determined by a judgment of the Court, by agreement or otherwise…. [T]he essential principle…. is that where the amount of the claim, or indeed its very existence, is subject to alteration and therefore uncertain, it cannot be said to be liquidated for the purposes of section 9(1) of the Act."….In *Van den Bergh v Kyriakou…* Caney AJ reasoned as follows in this regard: 'I find that, inasmuch as the quantum – and indeed the very existence – of the applicant's claim is undecided pending outcome of the rule 43(6) application, the applicant has failed to establish a liquidated claim as contemplated in section 9(1) of the Act. The application therefore falls to be dismissed on this ground alone.'"[Paragraph 15- 23]

"In the light of the conclusion which I have reached regarding *locus standi* and abuse of process, it is not necessary for me to deal at length with the questions of whether or not the respondent has committed an act of insolvency or is actually insolvent. … To sum up, it appears that the respondent's financial situation is in flux at this point in time and is likely to settle and improve in the next few months. It seems

to me that his liquidity problems are due in no small measure to the acrimonious divorce and concomitant lack of co-operation and sound financial management between the parties. The respondent's ability to earn a living would likely be impaired were his estate to be sequestrated. In all the circumstances I consider that it would be premature and unduly prejudicial to respondent to grant a provisional order for the sequestration of the respondent's estate at this stage…" [Paragraphs 25-43]

On the issue of abuse of process:

"It is trite law that sequestration proceedings are not designed for the resolution of disputes at to the existence or non-existence of debts, and that it is an abuse of the process of the court to resort to such proceedings to enforce payment of a claim which is disputed on *bona fide* and reasonable grounds." [Paragraph 44]

"On 3 April 2013, in the context of ongoing divorce settlement negotiations… the applicant sent an email to her attorney, which she copied to the respondent, in which she stated as follows: 'I am instructing you to continue with the sequestration procedure tomorrow 4 April 2013 after 12 noon, should our offer not be met. Three years of negotiating a reasonable settlement with the other side will come to an end. We are too far apart. Klaus is who he is, he will not change. My parents and I have peace with this decision.' To my mind the fact that this letter was copied to the respondent is indicative of an attempt to bully the respondent into giving in to her demands using the threat of sequestration as a weapon. The applicant candidly admits that she would not have brought the present application if the divorce had been settled and the respondent had complied with the terms of the settlement." [Paragraphs 52-53]

"In all the circumstances the conclusion is inescapable, in my view, that the applicant's objective in launching the present application was not a *bona fide* attempt to bring about a sequestration of the respondent's estate for its own sake, but a tactical manoeuvre aimed at pressuring the respondent into settling the divorce on her terms. The application was therefore brought for an ulterior motive, and falls to be dismissed as an abuse of process." [Paragraph 54]

"In her notice of motion the applicant sought an order that, in the event of the sequestration application being postponed, the respondent be prohibited from encumbering or disposing of his assets… The applicant did not make out a case in her founding affidavit that the applicant's conduct in disposing of certain of his assets was *mala fide.* It was apparent … that the respondent had for some time been contemplating the sale of assets with a view to reducing debts and releasing funds… I considered it appropriate to grant interim relief which was significantly narrower in scope than the relief sought by the applicant and was calculated to operate only until the finalization of the sequestration application….'" [Paragraphs 55-62]

"There is ample precedent for the granting of attorney and client costs against a litigant in circumstances where there has been an abuse of process. I have found that the application was an abuse of process on two scores, namely that the applicant's claim was, to her knowledge, disputed, and that the application was brought for an ulterior motive. The respondent was put to unnecessary expense in resisting the application. In all the circumstances I consider it both fair and appropriate to grant costs on the scale of attorney and client, as requested. In the result I ordered that the application be dismissed with costs, such costs to be paid on the scale of attorney and client." [Paragraphs 64-65]

CRIMINAL JUSTICE

JACK V S, UNREPORTED JUDGMENT, CASE NO.: A385/2012 (WESTERN CAPE HIGH COURT)

Judgment delivered 26 October 2012

The appellant was convicted in the Regional Court of three counts of pointing a firearm in contravention of section 120(6) (a) of the Firearms Control Act. All three counts were taken together for purposes of sentence and the appellant was sentenced to 24 months direct imprisonment. This case was an appeal against sentence and conviction.

Davis AJ (Bozalek J concurring) held:

"The appellant's version essentially boiled down to a denial that he had had a gun on him on the night in question. During the course of cross-examination important elements emerged which had not been put to state witnesses, such as the allegation that Smith and the person who was with him in his car were carrying pangas. In short, the appellant's answers to the prosecutor's questions were riddled with inconsistencies and conveyed the distinct impression that he was fabricating the answers as he went along." [Page 4]

"The magistrate rejected the version of the appellant on the basis that the version which unfolded during his cross- examination was not even a distant cousin to the version put up in his evidence in chief and had not been put to State witnesses. Stanley Joseph also failed to make a good impression on the magistrate, who felt that he had been more under the influence of alcohol than he was prepared to admit. Elzane Josephs, Smith and Khane, on the other hand, all created a favourable impression on the magistrate. As regards the question of contradictions between the police statements of Elzane Josephs and Plaatjies Smith and their oral evidence, the magistrate found that these contradictions were not material and did not impair their credibility." [Page 4-5]

"It was argued on behalf of the appellant that the magistrate had misdirected herself by failing to attach due weight to the appellant's evidence that he did not point a gun at the complainants and the fact that no gun was found…In my view these contentions are without merit. The fact that no gun was found does not in any way derogate from the overwhelming evidence presented by the State that appellant had a gun which he pointed at Stanley and Smith. The incident took place at night and the appellant fled from the police through various yards, giving him an opportunity to dispose of any firearm in his possession." [Page 5-6]

"Such contradictions as there were in the State's evidence related to peripheral issues and details which were irrelevant in the greater scheme of things. The approach which the magistrate took to the contradictions between the oral testimony and the witness statements was entirely correct … It is well established that an appellant court should be slow to upset the factual findings of the trial court which has enjoyed an advantage in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. It is also trite that where there has been no misdirection on fact by the trial court, the presumption is that its conclusion is correct… An appellate court will only interfere when

it is convinced that the trial court is wrong. … In the absence of demonstrable and material misdirections by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'" [Page 6-7]

"In short, I can find no indication of a misdirection of any nature such as to warrant interference with the factual findings of the magistrate- Having regard to the totality of the evidence presented by the State, I am satisfied that the appellant's guilt was proved beyond a reasonable doubt. Thus, in my view, the appeal against conviction must fail." [Page 7]

"In arriving at the sentence the magistrate had regard to the appellant's previous convictions, to the ex parte submissions made by the appellant's attorney and to the aggravating circumstances raised by the State, namely that the accused had previously been declared unfit to possess a firearm, that he had committed the offences while out on parole and that he had violated the conditions of his parole by being at a tavern and consuming alcohol…. The State argued that a custodial sentence was the only appropriate sentence given the appellant's apparent contempt for the law…" [Page 7-8]

"The Firearms Control Act… provides for a fine or imprisonment not exceeding 10 years for the offences with which the appellant was convicted. Furthermore, appellant's counsel did not refer to any cases suggesting that the sentence imposed was in any way out of kilter with sentences imposed in similar matters, I can find no indication that the magistrate misdirected herself in regard to the sentence … nor do I consider then sentence imposed was in any way unreasonable or excessive having regard to the appellant's previous convictions and the relevant aggravating circumstances. There exists no basis, therefore, for interfering with the sentence imposed by the magistrate on appellant. It follows in my view that the appeal against sentence must therefore also fail." [Page 8-9]

The appeal was dismissed.

SELECTED JUDGMENTS

CRIMINAL JUSTICE

KRUGER V S, CASE NO.: A224/2012, UNREPORTED JUDGMENT (WESTERN CAPE HIGH COURT)

Judgment delivered 10 August 2012

The appellant was convicted of the rape of his daughter in the Regional Court and sentenced to life imprisonment. The appellant raped his daughter in their home on multiple occasions when she was between the ages of 12 and 14. The appellant was refused leave to appeal the conviction and the case was an appeal against sentence.

Nyman AJ (Ndita J concurring) held:

"The trial court introduced the reasons for the sentence by confirming that the appellant was found guilty of the charge of rape which occurred over a period from 2008 to 2010 and that the victim in the case, is the appellant's biological daughter... What had to be considered is the seriousness of the offence, the interest of the community, the personal circumstances of the appellant and the interest of the minor child who is the victim in the matter... In its assessment of the circumstances under which the offence occurred, the trial court commented that these circumstances were not rosy but constituted aggravating factors. The appellant, an adult male, had raped his own daughter over a period..." [Page 6]

"The trial court placed great stress on the need to send a clear message to the community that perpetrators of this kind of offence will receive a severe punishment... The trial court confirmed that the minimum sentence of life imprisonment was applicable where the victim was below the age of 16 years except where there substantial and compelling circumstances present... In considering whether substantial and compelling circumstances were present... the interest of the victim has to be considered. Important factors are that the victim is a minor and is the appellant's biological daughter. These factors also include the trauma that the complainant must have suffered every day at home. Additionally she suffered injuries as a result of the rape... The trial court referred to the decisions of *S v Blaauw*; *S v D* and *S v Knightly* wherein the horrific impact of rape on children was spelt out... The trial court did not find any mitigating factors to justify deviation from the minimum sentence of life imprisonment." [Page 8]

"It is agreed law that I should follow the approach to minimum sentencing set out in the decision of *S v Malqas* where it was held that when a minimum sentence is applicable to an offence, the court must be conscious that the legislature ordained life imprisonment. Therefore, the minimum sentence should ordinarily be imposed except where there exist truly convincing reasons to justify a deviation... A court of appeal may only interfere with the sentence imposed in instances where the trial court materially misdirected itself or where the sentence is shockingly inappropriate..." [Page 11]

"I agree with the trial court's assessment of the seriousness of rape. ... Our courts have also decided that rape violates a plethora of women's fundamental rights. ...'" [Pages 12-13]

"It is with poignancy that notice has to be taken that on the day when this judgment is handed down is

the day after Women's Day. Close to two decades into our new constitutional democracy one more of many judgments is handed down in a case concerning violence against a girl child. Despite the gains that have been made there are still tremendous challenges to the advancement of women and children's rights. The two grounds of appeal to the affect [*sic*] that the complainant suffered no serious trauma or any long lasting trauma due to the incident, cannot be upheld in the light of Subsection 51(3)(aa)(ii)... In my opinion the complainant will carry deep-seated emotional scars which will require therapy. The violent acts committed against her got to the heart of the trust relationship that she had with her father... I also dismiss the second ground of appeal... Illiteracy cannot be used as a mitigating factor in circumstances where the appellant knew that his actions were wrong and punishable in law." [Page 14]

"It is my view point that the appellant is not a good candidate for rehabilitation and therefore the fourth ground of appeal cannot be upheld even though the appellant's previous offences may be classified as minor offences, the nature of the offences speak to his violent streak and oppressive attitude towards the women in his life. ... [T]he uncontested evidence shows the pattern of violence prevalent in the household in which the complainant lived. The appellant ruled his common law wife and children with an iron fist through verbal and physical abuse to such an extent that he spent time in prison for the assault on his common law wife. He furthermore beat the complainant with a hosepipe. In respect of the final ground of appeal, it is my opinion that the appellant's incarceration for a period of eight months as at date of sentencing cannot be proffered with any success as a mitigating factor against sentence. During his period of incarceration, instead of using the opportunity to reflect on his ways and develop remorse for his wrongdoing, the appellant concocted ways of letting himself off the hook that included fabricating a written statement on behalf of the complainant, it is my view point that the trial court did not materially misdirect itself nor is the sentence shockingly inappropriate. I find that the trial court did not err in the exercise of its discretion by imposing a sentence of life imprisonment." [Page 14-15]

"The sentence is necessary to serve as deterrence to the unabated rape of children and women. The sentence does not induce a state of shock. It is the reprehensible nature of the appellant's conduct that induces a state of shock. In my opinion the punishment meets the crime. In the result I would dismiss the appeal and confirm the sentence." [Page 16]

JACKSON V S, CASE NO.: A353/2012, UNREPORTED JUDGMENT (WESTERN CAPE HIGH COURT)

Judgment delivered 7 September 2012

The appellant was convicted of rape and sentenced to 7 years imprisonment. In an appeal against conviction, at issue was was the fact that the complainant, the complainant's husband and the appellant all gave contradictory accounts of the events of the evening in question.

Nyman AJ (Davis J concurring) held:

"In its judgment, the court a *quo* drew attention to the fact that the state relied on the evidence of the complainant as a single witness and that in terms of section 208 of the Criminal Procedure Act the appellant may be convicted on this basis. However, the evidence of the single witness must be

satisfactory in all material respects and must be approached with caution at all times. It was the trial court's opinion that there was a guarantee of reliability in the complainant's version because she immediately made a first report to her husband after the rape, while the appellant did not make a good impression as a witness. In the opinion of the court a *quo* the witnesses for the defence, supported the complainant's version that she was not with her husband and the appellant in the lounge and that she was at another place." [Page 6]

"This evidence lends credibility to the complainant's evidence that she had gone to bed before the appellant. The trial court rejected the appellant's version that the complainant had invited him to have sex with her and furthermore, that they have had an affair on the ground that it was improbable that the complainant would have woken up her husband, if she had; a secretive affair with the appellant. The court a quo therefore concluded that on an evaluation of all the evidence, it could not come to any conclusion other than that the version of the appellant was: *"Onsinnig en leuenagtig".* In consequence, the State had proven its case beyond a reasonable doubt. In the grounds of appeal submitted on behalf of the appellant, it is contended *inter alia* that the court a *quo* erred in finding that the State proved its case beyond a reasonable doubt, by accepting the evidence of the complainant as a single witness because the complainant's evidence as a single witness should have been approached more consistently. It is furthermore contended that the court a *quo* erred in not considering the totality of the evidence. I agree." [Pages 6-7]

"In my opinion, … the court a *quo* failed to consider the evidence of the complainant's husband who had testified that the complainant had sat together with him and the other men in the lounge. This version corroborates the appellant's version and contradicts the complainant's version. It would have been expected that in all probability the complainant's husband, whose evidence should be approached with caution, given that he had an inherent bias in the proceedings … would have given evidence in his wife's favour. In my view, his evidence in this respect is therefore reliable. He furthermore contradicts the complainant's evidence in another material respect. He testified that the complainant had told him that she was feeling drunk and that she was going to sleep, while the complainant testified that she had told her husband that she was going to sleep because the baby was crying and had to be breastfed. The court *a quo* ignored these material contradictions." [Pages 8-9]

"The court *a quo* failed to evaluate other relevant evidence such as the fact that the appellant's mother and brother had testified that the appellant and complainant had a close relationship which transcended the normal boundaries… Given that such evidence if accepted, lends credibility to the appellant's version that the sexual interaction between him and the complainant was at the behest of the complainant and was consensual. In my opinion the trial court could not ignore this evidence but should have evaluated the weight to be attached to such evidence, which it failed to do. The trial court placed great emphasis on the evidence that the complainant had made a first report of the alleged rape to her husband… two inferences can be drawn from the proven fact that the complainant had made such a report. The court a *quo* accepted one of the two possible inferences, namely that such a first report makes the complainant a reliable witness… [but] failed to consider the second inference which is the version that was proffered by the appellant … that the complainant felt compelled to make a report to her husband because she was under the impression that she and the appellant were caught in the act when they were disturbed by someone who was on his way to the bathroom…." [Pages 9-10]

"A troubling aspect of the reliability placed by the court *a quo* on the complainant's evidence is the proven fact that the complainant was very drunk when she went to bed. Doctor Collison had testified that the complainant had informed him that she was very drunk during the incident and that she was not sure whether the appellant had worn a condom during the incident. In my opinion, the complainant's condition at the time when she went to bed undermines her credibility. If she could not remember whether or not the appellant had worn a condom, how could she remember whether or not she had given her consent to the appellant." [Page 10]

"In *S v Van Aswegen*... the court relied on the following passage in *S van der Meiden*... for its decision that a court should not base it's decision on whether to convict or acquit on only a portion of the evidence, but that the decision had to take into account all the evidence. **'**The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond; reasonable doubt and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be born in mind however is that the 'conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored'." [Page 10-11]

"Given the material contradictions in the evidence, it is my view that the State has failed to proof its case beyond a reasonable doubt. On the conspectus of all the evidence, in particular the material contradictions in the evidence, it is reasonably possible that the appellant is innocent. In the result I would dismiss the conviction." [Page 11]

The appeal was thus upheld and the appellant was acquitted.

ADMINISTRATION OF JUSTICE

ADAMS V COMMUNICARE, CASE NO.:1853/2013, UNREPORTED JUDGMENT (WESTERN CAPE HIGH COURT)

Judgment delivered 19 February 2012

This case concerned an application to stay an Eviction order brought on an urgent basis, pending the outcome of the appeal brought by the Applicant.

"The background in this matter illustrates that the matter has been dragging on for a considerable period of time, due to no fault of the Respondent. The Respondent was diligent in prosecuting the eviction application and was reasonable in giving indulgences and notification to the Applicant. It is understandable that the Respondent wants finalisation of these proceedings." [Paragraph 31]

"On the other hand, it is evident that most of the delays were caused by the poor legal representation given by Mr Khan, the Applicant's former attorney. He failed to make an appearance on the day when

the eviction application was argued, and hence the Eviction Order was granted by default and he also failed to make an appearance on the day when the rescission application was set down. At the hearing of these proceedings, the Applicant stated from the Bar that he had reported Mr Khan to the Cape Law Society (CIS) on two occasions. He also stated that he had paid Mr Khan to represent him. I should therefore ensure that Mr Khan's conducted is investigated by the CLS." [Paragraph 32]

"Ms Liebenberg, appearing on behalf of the Respondent, submitted that there is a limit to the extent that a litigant may advance the negligence of his attorney, as a reason for his tardiness, in prosecuting his or her case, I do not find merit in this argument, given the common cause fact of the case pertaining to the conduct of Mr Khan." [Paragraph 33]

"In my view, the applicant was not afforded the opportunity to ventilate his defence, as a result of the conduct on the part of his former attorney. In circumstances where the applicant had already given his attorney instructions to represent him, it would not be just to close the door to the Applicant, to have his defence aired in Court. In my view, the possible inconvenience that may be caused to the Respondent if the eviction Order is not executed, does not outweigh the balance of convenience that would be served by maintaining the *status quo* until the appeal is decided. In my view, it would result in a substantial injustice to have the Applicant evicted from the premises, given his personal circumstance. Furthermore, an important consideration that influences my decision is that it seems, through the conduct of his attorney, the Applicant was denied the right to have his say in Court. I also take into account that the right of access to housing constitutes a fundamental human right. In my view it would be just and equitable to grant the stay of execution." [Paragraph 34]

"For the afore-going reasons and taking all the circumstances into account, to my thinking, no substantial injustice will result if I grant a stay of execution, pending the decision on appeal. Given the undue delay already caused in the proceedings, in my view, the appeal should be prosecuted expeditiously and without undue delay. I propose to make an Order staying execution upon terms set out hereafter." [Paragraph 35]

It was thus ordered that the Eviction Order was to be stayed, pending the outcome of the appeal by the Applicant. The Cape Law Society was further ordered to investigate the conduct of Mr Kahn in his capacity as the former attorney of record of the Applicant.

SELECTED ARTICLES

'"SO MANY LEGISLATIVE CHANGES WITH SUCH LITTLE IMPACT" – A GENDER ANALYSIS OF LABOUR REFORM' (1998) 2 Law Democracy & Dev. 225

This article was an examination of the status of women in the labour market. The article provided an overview of the constitutional rights that have a special impact on women. It then dealt with obstacles experienced by women in the workplace and provided an analysis the Basic Conditions of Employment Act and the Employment Equity Act.

"Equality, equity and affirmative action are each "catch all" phrases that aim to redress political, social and economic imbalances that result from discrimination. Various groups of people experience discrimination; black people, women, black women, children, people with disabilities, poor people, gays and lesbians. Many forms of discrimination cannot easily be separated into different categories because they are interconnected. For example, a black domestic worker could experience racism, sexism and economic exploitation at the same time... South African labour and social security legislation have undergone considerable change. The Basic Conditions of Employment Act, Labour Relations Act and the Employment Equity Act have introduced many new provisions. These legislative reforms form part of the Department of Labour's five-year programme of labour law reform that includes as its aims giving and extending worker rights, addressing the perceived rigidities of the labour market and promoting "regulated flexibility"..." (Page 225)

"...Both on a political and socio-economic level, the rights enshrined in the Constitution represent a victory for South Africans against apartheid... Socio-economic rights such as housing, education, health care, food, water and social security, are significant for black women who constitute the most impoverished grouping. These rights concern women as workers, mothers and unemployed South Africans ... While government, through its legislative reform process, is in a strong position to eradicate direct discrimination, the eradication of indirect discrimination and the creation of equality in the social and economic sphere is not an easy task. Nevertheless, the establishment of the Human Rights Commission and the Commission on Gender Equality, combined with the ratification of the United Nation's Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), indicate a government commitment to eliminate gender discrimination. These international instruments provide an enabling environment for gender-sensitive labour law reform..." (Page 225-226)

"Women workers' long-standing struggle against exploitative and oppressive working conditions have set the legislative reform agenda... The gains made by women through the legislative reform process are minimal as most women workers continue to face obstacles... Such obstacles include low wages, wage discrimination, the sectoral concentration of women in "typical female jobs", sexual harassment, inadequate childcare facilities, maternity benefits..." (Page 226)

"Some of the more significant provisions of the Basic Conditions of Employment Act (BCEA) will now be examined... The BCEA lays down a minimum floor of rights for workers. ... The Act also incorporates sectoral employment standards (former wage determinations) that were previously regulated by the

Wage Act... Women workers in particular benefit from the BCEA because many of them are not unionised and consequently do not enjoy an improvement in their working conditions through collective bargaining... Black women especially need legislative protection, as they are the most vulnerable grouping of workers. Therefore, for the vast majority of women, minimum standards become maximum standards." (Page 227)

"Probably the most progressive aspect of the BCEA is the extension of key provisions to all workers. Domestic workers are now entitled to sick leave and annual leave... While more workers now enjoy rights concerning basic conditions of employment, not many of them know their rights... A concern is that the BCEA stipulates that these rights should be displayed in the official language which is spoken at the workplace. The official language is generally the language that is spoken by the employer...It would be preferable if this document is drafted in workers' first language." (Page 227-228)

"...The maximum period of maternity leave has now been increased from three to four months.... The BCEA introduces greater flexibility with respect to maternity leave...A landmark introduction is three days paid family responsibility leave during each annual leave cycle to which an employee is entitled when a child is born or when a child is sick. Both mothers and fathers are entitled to this leave. While three days is a short period, its ideological impact cannot be overstated. This is a good example of legal activism in that men are encouraged to play an active role in child care responsibilities. Law can contribute to the evolution of an environment that will facilitate a change in consciousness..." (Page 228-229)

"Undoubtedly, the most flawed aspect of the BCEA is the Minister's discretionary power to replace or exclude any basic conditions of employment in respect of any employees or employers... [The Act] fails to include maternity leave and family responsibilities from the list of exclusions even though such downward variation will have a special impact on female workers who are normally more vulnerable... Clearly, downward variation will make it easier for employers to bypass minimum standards..." (Page 229)

"The Employment Equity Act's primary aim is to achieve workplace equity and thus forms an important framework for the eradication of sex discrimination. Employment equity comprises two aspects: firstly, the prohibition of unfair discrimination and, secondly, affirmative action. While unfair discrimination includes all forms of discrimination listed in the Constitution, affirmative action measures encompass three designated groups; black people, women and people with disabilities. An employer has the responsibility of promoting equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice." (Page 230)

"The Constitution's human rights framework which has triggered changes in labour laws, can contribute to an improvement of the working conditions of women workers. The extension of the BCEA and Wage Act to workers located in vulnerable sectors should provide protection to many women workers. Furthermore, an increase in maternity benefits and the introduction of family responsibility leave will assist many women and men to combine work and family responsibilities. The Employment Equity Act is an important stepping stone towards eliminating discrimination in the workplace. The legal obligation on employers to introduce employment equity plans will contribute to women's struggle towards employment equity... While legislative reform is essential for many women workers, a substantial

number of them will not reap the benefits from such reforms. Their location in the vulnerable and unorganised sectors of the workforce places them out of reach of many of the legislative changes. As women make up a substantial number of the unemployed, legislative reform has to be coupled with a radical socio-economic programme that will lead to job creation. Furthermore, the limited success of a legislative reform programme depends substantially on whether women have the confidence to ensure compliance from employers. Their organisation in trade unions will place women workers in a better position to enforce existing standards and to improve the legislative minimum standards." (Page 241)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

ASLA CONSTRUCTION (PTY) LTD AND OTHERS V MINISTER OF HUMAN SETTLEMENT, WESTERN CAPE GOVERNMENT AND OTHERS (3159/2013) [2013] ZAWCHC 117 (20 JUNE 2013)

Case heard 22 May 2013, Judgment delivered 20 June 2013

Applicant sought to review and set aside three tenders awarded by the second respondent (the Department) to the third respondent (G5M) for the construction of various housing units, and to review and set aside the decision to disqualify the applicants' bids in respect of the tenders, as well as to set aside contracts concluded between the Department and G5M.

Savage AJ held:

"The applicants seek the review and setting aside of the decisions taken by the Department on the basis of material mistakes of law and/or fact and on grounds of the failure by the Department to properly to apply its mind to the matter under s6(2)(d) and (i) of PAJA. … In performing its task a review Court must not lose sight of the distinction between appeal and review. 'Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality…' Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA) … " [Paragraphs 33; 35]

"Section 5 of PAJA provides for reasons to be furnished by the administrator and the adequacy of reasons will depend on a variety of factors, such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action, and the nature of the functionary taking the action. The reasons must from the outset be intelligible and informative to the reasonable reader of them who has knowledge of the context of the administrative action. If the reasons refer to an extraneous source, that extraneous source must be identifiable to the reasonable reader. …" [Paragraph 40]

"The interpretation of the document is a matter of law whether it is a statute, a contract or a tender specification. … The tender specification clearly sought bids in respect of alternative, unconventional, non-standard systems not covered by conventional building standards or codes and not falling within the "deemed-to-satisfy" provisions of the NBR [National Building Regulations]. The applicants' system on their version was "not fully covered", or put differently was partially covered by these standards or codes, or the NBR, but was nevertheless alternative with non-standard foundations. It is the applicants' case that its bids were compliant in that a non-standardised system does not consist exclusively of non-standard components but requires that material elements be non-standard components." [Paragraph 45]

"The tender document was not a model of clarity in providing that alternative systems had to be approved by the "Agrement South Africa, NHBRC, City of Cape Town, PDHS and SABS" while "any unconventional system" required Agrément certification. There was no suggestion made by the Department that Agrement South Africa, NHBRC, City of Cape Town, PDHS and SABS approval had to be obtained and I tend to agree with the applicants in the circumstances that their submission of a NHBRC approved rational design in respect of an alternative system was compliant. I am not persuaded that the

fact that NHBRC approval does not address whether the system is non-standardised, alternative or unconventional goes to compliance with the tender specifications which do not require that such approval determine a system to constitute an alternative one." [Paragraph 46]

"An assessment as to what constitutes an unconventional, alternative or non-standard building system requires a thorough understanding and analysis of the various systems available using expert knowledge ... I accept that the test must be one of materiality. However, given the technical nature of the subject-matter, the exercise of the discretion as to what system best meets the requirements of the tender is one that is properly vested in the administrative decision-maker. ..." [Paragraph 52]

"... I accept that it is permissible for an administrative functionary to provide further reasons for a decision after the fact, even in answering papers placed before the review Court, provided these elaborate on the reasons provided contemporaneously. In this regard it must be noted that the functionary is often an expert in his or field but not necessarily a lawyer involved in crafting a careful defence to any later legal action that may ensue. While this does not however insulate a functionary from the requirement that different and unrelated reasons cannot be substituted after the fact in order to cure a defect, I am satisfied in this case that the BEC did consider the bids' compliance with tender requirements and that its reasons provided bear this conclusion out." [Paragraph 56]

"The degree of irregularity is therefore limited to the statement that the Agrément certificate was required in circumstances in which it was not and when it was apparent that the NHBRC rational design had been considered. The degree of irregularity is required to be weighed in balance. ... [W]hile I accept that the decisions taken by the Department to disqualify the applicants due to no Agrément certificate having been provided was not in compliance with the tender requirements, the conclusion that the rational design approval did not have reference indicated that it had been considered by the BEC. I am not persuaded that a material mistake of law accordingly arose in relation to the apparent reason that there was a lack of the Agrément certificate when considered in the context of the substantive content of the bids considered, or that it is illustrative unlawfulness in a material respect. ... [G]iven the technical nature of the subject matter of the bids and the assessment and consideration of these individual bids against the bid requirements, I am of the view judicial deference should be given to the administrative functionary to determine such substantive compliance with the bid requirements." [Paragraphs 57 - 58]

The application was dismissed.

LABOUR LAW

MPHIGALALE V SAFETY & SECURITY SECTORAL BARGAINING COUNCIL & OTHERS (2012) 33 ILJ 1464 (LC)

Case heard 10 November 2011, Judgment delivered 7 December 2011

Applicant sought to review and set aside an arbitration award to review and set aside an arbitration award made by the second respondent (the commissioner), finding the dismissal of the applicant for corruption (in accepting R500 from an illegal immigrant) to be procedurally and substantively fair.

Savage AJ held:

“A commissioner is required to determine which of the conflicting versions before him or her is more probable and in doing so to make some attempt to assess the credibility of the witnesses by reference to any internal and external inconsistencies that might exist, to assess their reliability and to consider the probability or improbability of each party's version. Faced with two mutually exclusive versions, the technique set out in SFW Group Ltd & another v Martell et Cie & others per Nienaber JA is to be applied … ” [Paragraph 12]

“ It is clear that the commissioner considered the credibility and reliability of the evidence tendered by witnesses at the arbitration and that he undertook the materially different versions before him (sic). … The commissioner's further findings with regards to the commission of the offence are also reasonable based on the material placed before the commissioner. The applicant's case is that there was no direct evidence to prove that he had accepted the money and that he was not aware that Ms Masomere and others were from Zimbabwe as they spoke Venda and gave a satisfactory account of why they were at the border. This court does not sit as a court of appeal. On a conspectus of the facts before the commissioner, I am satisfied that the decision made by him and the conclusions drawn with regards to aspects of the evidence are rationally connected to the material before him. Furthermore, the commissioner applied the appropriate legal principles and considerations in dealing with the materially different versions before him. ” [Paragraphs 13 - 14]

“… I am unable to fault the approach taken by the commissioner with regard to his analysis of the competing versions before him. His conclusions with regard to these competing versions fall clearly within the required band of reasonableness. Having heard the evidence of witnesses, the commissioner was placed in a position to consider the credibility, reliability, demeanour, candour, calibre, veracity and cogency of the witnesses and to assess the quality and integrity of such evidence in weighing up the probabilities in the matter. A review court should not interfere with a credibility finding given that the court, unlike the commissioner, lacks the advantage of first-hand observation of the witnesses and their demeanour, and where there is no apparent basis from the record to justify calling a commissioner's finding into question.” [Paragraph 15]

“The applicant's further ground of review relates to the inconsistent application of discipline by SAPS and the commissioner's conclusion that SAPS would not be able to trust the applicant to perform his duties without constant supervision in the absence of evidence to this effect. The evidence before the commissioner was that in a previous instance of corruption the chairperson had in error imposed a sanction short of dismissal upon two other policemen. There was no evidence tendered at the arbitration hearing relating to the existence of any distinguishing features which differentiated the previous decisions from the decision taken to dismiss the applicant. There was also no evidence tendered of any steps taken by SAPS to reiterate to its employees that corruption as an offence would lead in future to dismissal. The commissioner concluded that the error of the chairperson in imposing a sanction short of dismissal in previous instances of corruption did not justify the reinstatement of the applicant and that there was no evidence that the third respondent had habitually or frequently condoned such misconduct in the past. ...” [Paragraph 16]

“This 'sensible operational response to risk management' [dismissal] is one which must be undertaken fairly. In determining whether a decision to dismiss is fair, a commissioner must take cognizance of the fact that the discretion to dismiss lies primarily with the employer and interference with the sanction imposed should not be lightly contemplated, with a measure of deference afforded to the sanction

imposed by the employer. ... As a general rule, fairness requires that like cases be dealt with alike, whether in the consistent enforcement of a rule or in the imposition of a penalty. ... Inherent in making the decision as to whether to dismiss or not, there exists inevitably the potential for some degree of inconsistency." [Paragraphs 18 - 19]

"The evidence before the commissioner was that the chairperson's decision in respect of the two previous instances of corruption by police officers had been made in error. Applying the judgment in SACCAWU, the SAPS is not required to repeat a decision made in error or one which is patently wrong. This is all the more so given the nature of the misconduct committed. In S v Shaik ... the Constitutional Court warned that corruption is 'antithetical to the founding values of our constitutional order'. ..." [Paragraph 22]

"Corruption by a police officer, employed in a position of trust and with a duty to perform his or her functions in the interest of society and in accordance with the fundamental values of the Constitution, is a material factor to be considered in determining the appropriateness of the sanction to be imposed. Not only is it a 'sensible operational response to risk management' but it provides a sound reason to justify a finding that the imposition of the sanction of dismissal was fair in the circumstances. ... Given the nature of the serious misconduct committed, his position as a policeman and the impact of the misconduct on society, I am satisfied that the finding of the commissioner that dismissal was a fair sanction was a reasonable conclusion made with regard to and based on the evidence before him. Dismissal amounted to a 'sensible operational response to risk management' given that the misconduct is 'completely indefensible on any ground' ... more so when perpetrated by an employee from whom an employer is entitled to expect trust and honesty in the performance of its functions." [Paragraph 24]

"... I am ... satisfied that the decision of the commissioner that the dismissal of the applicant was fair, in spite of the existence of a previous inconsistent sanction imposed on two policemen previously for the same misconduct and mitigating factors, was reasonable. ... In conclusion, it is not the correctness of the commissioner's decision that this court must determine on review. In finding the dismissal of the applicant to be procedurally and substantively fair, I find that the result falls within the band of reasonable decisions which stood to be made by the commissioner based on the evidence before him and that there exists no basis on which to interfere with such decision." [Paragraphs 25; 28]

The application was dismissed.

CRIMINAL JUSTICE

S V DE GOEDE (121151) [2012] ZAWCHC 200 (30 NOVEMBER 2012)

Judgment delivered 30 November 2012

The court was seized with two matters concerning the same accused. In the first, a special review, the accused had been convicted of the theft of two deodorant sprays, and committed to a treatment centre in terms of the Prevention and Treatment of Drug Dependency Act.

Savage AJ (Henney J concurring) held:

"Given that the proceedings in which the sentence was imposed in the second matter were brought to the attention of this court as opposed to the matter being raised by the accused, this matter is distinguishable from S v Taylor 2006 (1) SACR 51 in which a review referred by an accused was permitted in terms of the inherent power of the Constitutional Court, Supreme Court of Appeal and High Court in terms of section 173 of the Constitution "to protect and regulate their own process, and to develop the common law, taking into account the interests of justice". The fact that the accused was legally represented and had entered into a plea and sentence agreement with the state does not preclude the provisions of section 304(4) from finding application given that the matter was brought to the notice of this court in the circumstances contemplated in the section." [Paragraph 5]

"For this reason, the record of proceedings in the second matter was requested from the regional court ... From the record it is apparent that the accused entered into a plea and sentence agreement … in respect of a charge of robbery with aggravating circumstances committed prior to the commission of the theft in the first matter ... In this agreement the accused consented to his conviction on one count of robbery with aggravating circumstances ... Consequently, the accused was convicted by the regional court of robbery with aggravating circumstances and was sentenced to an effective five years imprisonment." [Paragraph 6]

"The plea and sentence agreement signed recorded that the accused had no previous convictions despite the fact that the accused had been convicted in the first matter prior to signature of the agreement. The agreement also made no reference of the fact that the accused had following his conviction … been committed to a treatment centre for treatment for drug dependency ... In the circumstances, given that this fact was not placed before the regional court magistrate it was not considered by the magistrate as a relevant fact in determining whether the sentence agreed to by the parties was just." [Paragraph 8]

"Furthermore, whilst the date of commission of the offence in the first matter post-dated the date of commission of the offence in the second matter, a conviction for a crime committed after the crime for which the accused stands to be sentenced in the second matter is indicative of the character of the accused and can therefore be taken into account. … This is in spite of the fact that this conviction is not a previous conviction 'in the true sense of the word' ... The relevance of this earlier conviction is that for the court to satisfy itself in accordance with section 105A(8) that the sentence agreement is just, all other facts relevant to the sentence agreement must be stated in such agreement in order to enable the court to apply its mind appropriately to the issue. The earlier conviction of the accused and his committal to a treatment centre, although not strictly a previous conviction given the date of commission of the offence, constitutes a fact relevant to the sentence agreement in the second matter in that the committal to a treatment centre in the first matter could not be implemented given the subsequent sentence imposed by the regional court. It follows that the practical effect of omitting mention of the prior sentence was that all facts relevant to the sentence agreement were not placed before the magistrate, as a consequence of which the magistrate lacked the relevant material before her to consider whether the sentence agreement was in the circumstances just." [Paragraph 9]

"The test as to whether the proceedings in which a sentence was imposed were just does not focus only on whether the proceedings were technically sound but also whether their practical effect was just. If not, the reviewing court will intervene. ... The determination as to whether a sentence agreement is just will therefore depend upon the circumstances of each case being directly related to the unique facts of a matter." [Paragraph 11]

"The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused's constitutional rights. It follows therefore that where section 105A has not been complied with, the proceedings are susceptible to review ... This does not imply that any failure to comply with section 105A in all its intricacies must necessarily result in a successful review. The success or otherwise of a review under section 304 is dependent on the unique facts placed before a court. Whether proceedings are susceptible to review requires a court to apply its mind to these unique facts within the context of the prevailing statutory provisions. Accordingly, where a sentence agreement does not contain reference to a prior conviction it does not necessarily follow that the sentence agreement is not just." [Paragraphs 12 - 13]

"The plea and sentence agreement did not comply with the provisions of section 105A(2)(b) insofar as the magistrate did not have all facts relevant to the sentence agreement before her. As a consequence the magistrate was not able to satisfy herself that the sentence agreement was just. ..." [Paragraph 15]

The conviction and sentence in the second matter was therefore set aside and referred back to the court a quo. The Director of Public Prosecutions was permitted to reinstitute proceedings against the accused afresh. The proceedings in the first case were held to be in accordance with justice, and it was ordered that the committal of the accused to the treatment centre be implemented immediately.

SELECTED ARTICLES

'A DUTY TO ANSWER QUESTIONS? THE POLICE, THE INDEPENDENT COMPLAINTS DIRECTORATE AND THE RIGHT TO REMAIN SILENT', 16 SOUTH AFRICAN JOUNAL ON HUMAN RIGHTS 71 (2000) [Co-authored with D. Bruce and J. De Waal]

The article identifies problems experienced by the Independent Complaints Directorate (ICD) due to the refusal of members of the South African Police Services (SAPS), whose actions are the subject of investigation, to answer questions put by ICD investigators. The article considers ways of compelling police co-operation in ICD investigations and internal disciplinary hearings.

"Members of the SAPS are public servants who exercise powers not available to ordinary members of the public, including powers to use force and arrest. In general, therefore, it appears reasonable to require that the police be fully accountable for their actions, particularly if these are performed in the course of their duties. This would appear to imply that members of the SAPS should be regarded as having a duty to answer questions during an ICD or internal disciplinary investigation or inquiry, particularly in instances in which death or serious injury arises. Any duty of accountability that is placed on SAPS members must, however, also accord with the provisions of the 1996 Constitution. …" (Page 73)

"An ordinary ICD investigation may … have consequences that are both criminal and disciplinary in nature, although this may not be determinable at the initial stages of the investigation. When findings or recommendations are handed over to the relevant Police Commissioner, with disciplinary action proposed, the ICD's investigation may be indistinguishable from an internal police investigation. However, ICD investigations may also be precursors to criminal prosecution. Due to this fact, members of the SAPS who are the subject of investigation should have at least the same rights as would any other person in the course of a criminal investigation and possible trial, unless there are compelling arguments to the contrary. …" (Page 75)

"According to the traditional approach to statutory interpretation, if the legislature intended to impose a duty to co-operate with the ICD, an explicit provision … should have been included in the Police Act. Instead, the power of the Executive Director to 'request and obtain the co-operation of any member' is open to the interpretation that … there is no obligation of police members to co-operate. Even if a duty to co-operate may be read into the Police Act, what appears to be absent is an effective sanction to ensure that members comply with this duty. …" (Page 76)

"The issue of co-operation by SAPS members with the ICD is broader than the duty of subject officers to answer questions and does not necessarily conflict with constitutional principles. … [T]here appears to be no real statutory mechanism currently in place that expressly enables the ICD to compel co-operation from members of the police service or other government institutions. Irrespective of the conclusions reached on the possible duty of SAPS members to answer questions put to them by ICD investigators, it is therefore recommended that the ICD be provided with the necessary powers to compel police cooperation in its investigations. The absence of such a provision clearly limits the capacity of the ICD to perform its functions effectively. …" (Page 77)

The article then considered whether SAPS members could be compelled to answer questions in internal disciplinary inquiries, noting that SAPS' internal regulations appeared to allow the subject of an inquiry to remain silent or refuse to answer specific questions:

"... [T]he internal police disciplinary regulations may be unnecessarily liberal and limit the potential for the SAPS to ensure accountability from its members. A preferable option would be for members to be required to answer questions in disciplinary proceedings, but for such evidence, in so far as it is self-incriminating, to be regarded as compelled evidence that may not be admitted in criminal proceedings, at least against the member concerned. ..." (Page 79)

The article then considered the impact of the Constitutional rights to a fair trial, to silence, and to freedom of the person:

"It is clearly possible, therefore, in relation to a body such as the ICD that is intended to ensure police accountability, to develop a mechanism that requires the disclosure of information without violating the constitutional protection against self-incrimination ... We suggest that there are grounds for imposing limitations on the right to remain silent under the general limitation clause. It would appear that the type of limitation proposed would not be understood as a limitation on the right against self incrimination as the latter right has been interpreted thus far by the courts." (Page 82)

The article then considered current statutory provisions that required the answering of questions:

"In the case of s 28 of the NPAA [National Prosecuting Authority Act], the limitation on the right to remain silent is justified under s 36 of the 1996 Constitution, for two reasons. First, no evidence regarding the questions and answers of the examinee in the investigative inquiry may be used against the examinee in any criminal proceedings. Second, there is a rationale for limiting the right that appears to be 'reasonable and justifiable in an open and democratic society'. Section 28 only applies to certain specified offences ... where the state will find it extremely difficult to conduct a proper investigation without the co-operation of witnesses, including possible offenders. ... The s 28 mechanism ... represents an attempt by the legislature to comply with the demands of the 1996 Constitution while ensuring that an investigation may be properly undertaken and the relevant information obtained. A similar mechanism could be incorporated into the Police Act or its regulations. ..." (Page 89)