



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

APRIL 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 compiled for JSC interviews in September 2009, October 2010, April and October 2011, April, June and October 2012 and February 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. This report follows similar principles to our previous reports. We set out 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 report for the Constitutional Court interviews in February 2013, we have attempted 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. Civil Procedure;
 - 10.7. Criminal justice;
 - 10.8. Childrens' rights;
 - 10.9. Customary law; and
 - 10.10. 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.
 - 10.11. All of the judgements summarised for the candidate for Judge President of the Competition Appeal Court relate to competition law.
11. We hope that together, these themes will bring out a pattern that might be called a philosophy or theory of adjudication. As we have frequently submitted in our previous reports, 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 AND THE ISSUE OF GENDER TRANSFORMATION

12. Members of the commission will doubtless be aware that the DGRU has, over the past year in particular, consistently raised concerns regarding the issue of gender transformation. Commissioners will be aware that we, together with partner civil society organisations, were party to a complaint submitted to the Commission for Gender Equality (CGE) regarding the slow pace of gender transformation in the judiciary.
13. In our submissions in our February 2013, we remarked, with specific reference to the lack of female candidates for the Constitutional Court:

“We have previously commented on the importance of a diverse bench in order for the judiciary to play the transformative role contemplated for it by the Constitution. The importance of a diverse bench is not just in allowing for people to identify with its composition, although this can be an important factor. It is to ensure that a wide variety of viewpoints and life experiences find expression when crucial matters of constitutional governance are being decided. Gender diversity must surely play an important role here.”
14. We would like to take this opportunity to express ourselves a little more fully so as to clarify our views on the issue, and how we see the JSC's role in addressing the problem.
15. A cursory glance at the demographic breakdown of the South African judiciary suggests that, whilst great progress has been made in transforming the judiciary in terms of race, progress has been significantly slower in transforming in terms of gender. As of October 2012, only 28% of the judicial officers nationwide were women. In 1994, there was only one woman on the bench and though the number has risen to 69 women, it still means that on an average only three to four women have been appointed yearly as judges since then. While it is noted that the last few years have seen an increase in female appointments, the overall figures nationally are still of a grave concern.
16. We acknowledge that the JSC is not the only stakeholder with a role to play in addressing gender transformation. We accept that the JSC does not have an unconstrained role to appoint whoever it likes – it must appoint from the candidates who make themselves available, and it must satisfy itself that such candidates are appropriately qualified and fit and proper persons, in terms of s 174(1) of the Constitution, as well as considering the need for racial and gender representation in terms of s 174(2).
17. It is for this reason that the CGE complaint cited the Chief Justice as head of the judiciary, the Minister of Justice and Constitutional Development, and the President – all of whom play a role at various stages of the process. It is clear that a great many factors interact and that the issue is a complex one. The role of the professions and the process of appointing acting judges are both factors which seem to us to require serious attention. We accept that the JSC's role is fairly limited here.

18. Having said this, the JSC is empowered to advise national government “on any matter relating to the judiciary or the administration of justice” (Constitution, section 178(5)). It would therefore, in our view, be appropriate for the JSC to engage proactively with other stakeholders in order to address the shortfall of women judges. In light of the complex nature of the problem, the JSC could play a particularly useful role due to the diverse nature of its membership. One possible way to engage proactively with the process is to specifically state in the vacancy announcements for judges that female applicants are strongly encouraged in cases where there is a obvious need for more women on the bench, for example in the case of the Constitutional Court.
19. The most obvious role for the JSC is in conducting interviews and recommending appointments of candidates for judicial appointment. While it is certainly true that the JSC has been placed in a very difficult situation on occasions, most recently with the ‘all male’ list of nominated candidates for the vacancy on the Constitutional Court bench, and while recognising that in the case of the Constitutional Court it is the President who makes the final choice from a shortlist provided by the JSC, we respectfully submit that fit and proper women candidates have been overlooked for appointment in the past when the requirement to ensure that the judiciary reflect broadly the gender composition of South Africa should have weighed heavily in favour of the female candidate concerned.
20. However, it is in our view crucially important that a call to improve the situation of gender transformation should not be seen as a call to appoint female candidates without assessing any quality other than gender. This call is not focused on just the numbers, i.e flooding the bench with women, but on having a judiciary that is broadly reflective of South African society as mandated by the Constitution. This is of vital importance to the courts legitimacy, and to instil confidence in society that courts are broadly representative of the whole of South African society, and are therefore more likely to be aware of and sensitive to the nuanced issues and challenges facing different sectors of society, particularly those which have been historically marginalised.
21. To emphasise the point: we fully recognise that it is clear from the Constitution that the JSC may not appoint judicial officers who are not appropriately qualified or fit and proper. This must always be borne in mind.
22. Moreover, we recognise that so deep and complex are the structural causes of the problem that they cannot be solved overnight. There is a need to avoid ‘quick fix’ solutions, including the appointment of women candidates in the short term simply because they are female, to improve the numbers.
23. This is not to say that the vital need for transformation should be subverted. We certainly should not be heard to be contradicting our argument and suggesting that appointing female candidates would weaken the judiciary. We do not believe that a sincere and rigorous effort to increase the number of women judges should do anything but improve the quality of the bench. But for this to be so, considerations of technical expertise, legal knowledge and experience, the

ability to write judgements and manage the court room environment, as well as a candidate's potential, must all continue to play a fundamental role.

24. We acknowledge that women, and especially black women, may not have been exposed to varied areas of law and gained experience that most men have. This should however not be seen as an excuse to keep the numbers of women low. There are more women in legal practise and in the Magistracy than there were five years ago, and hence well qualified, competent, legally astute women are definitely available nationwide.
25. A call to improve the gender profile of the bench should also not be seen as an attempt to subvert the transformation of the judiciary in terms of race. In fact, any discussion about race should always bear in mind the intersectionality of race and gender. One should spare a thought for the black female potential judges who potentially encounter discrimination on the basis of race and gender.
26. We recognise that the intersection between race and gender may at times present complexities – for example, appointing large numbers of white women will improve gender transformation but not racial transformation. Nevertheless, these are the tough issues that section 174(2) requires those selecting judicial officers to engage with. The constitutional imperative to strive for gender transformation cannot be ignored. And it cannot be denied that much work still needs to be done in this regard.
27. Having observed the JSC interviews, it is apparent that a candidate's acting experience on the bench is pivotal to the success of one's application. Bearing in mind that at present, the statistics available to us indicate that only 9% of acting appointments made are women, this creates a situation where women are already disadvantaged before they appear before the JSC. We call upon the JSC to engage with the Heads of Court and the Minister of Justice as regards how to ensure that more women are given opportunities to act as judges. This will ensure that female candidates gain experience and exposure to the bench.
28. Whilst it is encouraging to see so many female candidates putting themselves forward for these interviews, this alone is not enough. It remains to be seen whether this pattern is an anomaly, or whether it marks a decisive shift. It also remains to be seen what patterns of appointment will follow the interviews, and how the candidates will be dealt with in the interviews.
29. In the submission for our February 2013 report, we urged:

“the JSC, along with other stakeholders, to engage seriously with the question of why there is such a dearth of female candidates putting themselves forward. If the commission's own practices are in any way seen as part of the problem, it will be necessary to address such issues openly, transparently – and urgently.”

Whilst there is not a dearth of female candidates on this occasion, we respectfully submit that such reflection by the JSC continues to be necessary. An improvement in the number of

candidates making themselves available in this round should not lead to the inevitably assumption that the many complex structural issues impacting on gender transformation have suddenly dissipated.

ACKNOWLEDGEMENTS

30. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was carried out by Chris Oxtoby and Tabeth Masengu, researchers of the DGRU, and Lara Wallis, research assistant of the DGRU.

31. We are grateful for the financial support of the Open Society Foundation and the Royal Danish Embassy for making this project possible.

DGRU

28 March 2013

SELECTED JUDGMENTS**PRIVATE LAW****ENGELBRECHT v MERRY HILL (PTY) LTD AND OTHERS 2006 (3) SA 238 (E)****Case heard 29 November 2005, Judgment delivered 11 January 2006**

This was an urgent application for an interim interdict to restrain the first respondent from transferring two erven to the second respondent and the third respondent, pending an application for a final order. The relief was premised on the existence of a contract of sale by instalments of the properties entered into between the applicant as purchaser and the first respondent as seller. The point in issue was whether, when the first respondent purported to cancel the sale of the properties to the applicant, he complied with s 19(2)(c) of the Alienation of Land Act. The section requires a seller of immovable property who decides to take action consequent upon a breach of contract by the purchaser to furnish, in the notice required by s 19, 'an indication of the steps the seller intends to take if the alleged breach of contract is not rectified'.

Plasket J held:

"... [O]n 16 October 2003 the applicant and the first respondent concluded an agreement of sale by instalments in terms of which the properties at Cintsa were sold by the first respondent to the applicant. Paragraph 9 of the agreement dealt with breach and cancellation. ... The Act mentioned in para 9 of the agreement is the Alienation of Land Act. The applicant paid a certain amount of the instalments due, but later fell into arrears. His explanation is that an employee of his was to blame for failing to make the required payments as and when they fell due. Be that as it may, he accepted that he was in breach of the agreement at the relevant time. He only became aware of the breach and, more importantly, of the fact that notice had been given, purportedly in terms of para 9 of the agreement, in October 2005, when he discovered a letter dated 8 August 2005. ..." [Paragraphs 5 – 7]

"... [T]he only issue in dispute is whether the first respondent's notice to the applicant complied with s 19(2) of the Act in the sense that the first respondent indicated the steps that he intended taking against the applicant in the event of a failure on the applicant's part to rectify the breach. It is argued that the notice was defective in two respects. These are: first, that the notice did not give an indication of the steps the first respondent intended taking, but rather contained a statement of what the first respondent was entitled to do in the event of a breach of the agreement on the part of the applicant; and, secondly, that the first respondent was required ... to elect which of the steps available to him, in terms of the agreement, he intended to follow, and that he was not entitled to set out his remedies in the alternative as he did." [Paragraphs 13 – 14]

"In order to deal with these issues, it is necessary to consider the nature and purpose of the requirements of s 19(1) and (2) of the Act. Two points bear mention in this respect. The first is that 'the section, like its predecessor, is peremptory in its terms'. Secondly, the purpose of the section is to protect the purchaser. ..." [Paragraph 15]

"... I can see no difficulty in requiring unequivocal conduct on the part of the seller when he or she gives notice in terms of s 19: first, as a general proposition, when a person gives notice of his or her intention to cancel a contract, that notice is required to be 'clear and unequivocal'. Section 19(2)(c) requires little more. Secondly, if, as the courts have held, the intention of s 19(2) is to protect the purchaser, that self-

same unequivocal conduct on the part of the seller is the least that one could require of him or her to give effect to the intention of the Legislature. Thirdly, it seems to me that it is also an inevitable consequence of affording the purchaser a reasonable measure of protection that the seller has to make an election at an early stage, but clearly it is not a final and binding election because all he or she has to do is to 'give an indication' of what he or she intends to do about the breach"[Paragraph 20]

"For much the same reason mentioned in *Miller [v Hall 1984 (1) SA 355 (D)]*, by informing the purchaser of the choices available to the first respondent in terms of clause 9 of the contract, Mr Bax cannot be said to have given an indication of what steps the first respondent intended to take: in effect, all he did was to remind the applicant of what the contract said of the possible consequences of breach on the part of the applicant. To hold that this would suffice for compliance with s 19(2)(c) would dilute the section to such an extent as to make it a meaningless formality and it would provide no protection, reasonable or otherwise, to a purchaser, as intended by the Legislature. In *Miller*, Page J held that the requirement that the seller must give an indication of what he or she intended to do, meant more, in context, than the giving of a mere hint or suggestion. ..." [Paragraphs 22 – 23]

"The second point taken on the invalidity of the notice was that it did not disclose an election but rather mentioned the steps that were possible in terms of the applicable provision of the contract. ... I am in respectful agreement with the interpretation of the section in both *Miller* and *Oakley* ... When that interpretation is applied to the facts of this case, the conclusion I have reached is that no indication was given to the applicants of the steps that the first respondent intended to take pursuant to the applicant's breach of their contract, as required by s 19(2) (C) of the Act, and that, as a result, the notice was invalid. ..." [Paragraphs 24 – 25]

The decision was overturned on appeal: *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA).

ADMINISTRATIVE JUSTICE

CHAIRMAN, STATE TENDER BOARD V DIGITAL VOICE PROCESSING (PTY) LTD; CHAIRMAN, STATE TENDER BOARD V SNELLER DIGITAL (PTY) LTD AND OTHERS 2012 (2) SA 16 (SCA)

Case heard 10 November 2011, Judgment delivered 24 November 2011

These two appeals were against the decisions of the High Court to set aside the blacklisting of the respondents by the appellant from doing business with government.

Plasket AJA (Navsa, Lewis, Bosielo and Seriti JJA concurring) dealt first with the DVP appeal. After noting that it was common cause that DVP had not been afforded a hearing before the blacklisting decision had been taken, Plasket identified the issue for decision as being whether the decision was reviewable as it had not been communicated to DVP. Appellant argued that the application was not ripe (DVP having only discovered that they were blacklisted during the course of the Snellers proceedings). Plasket AJA held:

"To the extent that some of the case law tends to suggest that, as a general principle, notification is the touchstone for ripeness, I am of the view that this is too rigidly expressed. ...To the extent that this case [*Lek v Estate Agents Board*] suggests as a general principle that, at common law, notification per se, and nothing else, renders an administrative decision ripe for review, I am of the view that it overstates the position and is to that extent wrong. In any event, the statements in *Lek* relied on by the STB concerned territorial jurisdiction, not ripeness ... " [Paragraphs 18 - 19]

“Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process. ... Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.” [Paragraph 20]

“Now that the review of administrative action is dealt with in terms of the PAJA, the position is clear. An administrative action is defined in s 1 to be, inter alia, a ‘decision’ which has a ‘direct, external legal effect’. ...” [Paragraph 21]

“The adverse impact of the decision on DVP is clear. It could tender for as many contracts with the government as it wished and it would never be successful — and it would not know why. In these circumstances it is clear to me that the decision was ripe for challenge even if it had not been communicated to DVP by the STB itself.” [Paragraph 23]

“In any event, even on the appellant's version, the decision had been communicated to DVP, albeit vicariously. When the rule 53 record was furnished by the appellant's attorneys to DVP's attorneys, ... [t]he decision was communicated to DVP at this point, despite the fact that the STB, for its own undisclosed reasons, wished to keep its decision to blacklist DVP a secret. It does not matter ... whether the notification was given personally to DVP by the STB or not. With the filing of the rule 53 record, the decision entered the public domain and DVP became aware of the decision.” [Paragraph 24]

Plasket AJA then turned to deal with the Snellers appeal. After rejecting an argument that the power to blacklist was a private and not a public power, Plasket AJA found that the only possible source of the power was the regulations under the State Tender Board Act:

“It has been definitively determined by this court in *Chairman, State Tender Board, and Another v Supersonic Tours (Pty) Ltd* that an exercise of power in terms of reg 3(5)(a) constitutes administrative action. ... The decision to blacklist the respondents was clearly an administrative action in terms of the PAJA with the result that it is, in terms of s 6(1), susceptible to review if any of the grounds of review specified in s 6(2) are found to be present.” [Paragraphs 30 - 31]

“It is now well established ... that a material error of fact is a ground of review. This is so even though it is not one of the grounds specifically listed in s 6(2) of the PAJA. It has been held that it falls within the ground specified in s 6(2)(e)(iii) — the taking into account of irrelevant considerations and the ignoring of relevant considerations — but it may just as easily be accommodated in s 6(2)(i), the catch-all provision that allows for the development of new grounds of review. This section provides that administrative action may be reviewed and set aside on the basis of it being ‘otherwise unconstitutional or unlawful’.” [Paragraph 34]

“The STB erred factually when it concluded that the second to sixth respondents had been appointed ... after the tender had been submitted. If the STB had taken its decision based on the proper facts it could not have concluded that the respondents had made fraudulent misrepresentations to it. Its factual error was material as it was the direct cause of the decision to blacklist the respondents.” [Paragraph 36]

“The decision was also irrational. The STB chose to ignore the true position in relation to when the second to sixth respondents were appointed as directors, and it did so without reverting to their attorney who had offered proof in the form of an auditor's certificate. A reasonable administrator, faced with these circumstances, would not have taken the decision without first obtaining the certificate. Instead, the STB closed its mind to facts that disproved its suspicion that the respondents were guilty of

fraudulently misrepresenting that the second to sixth respondents were directors at a time when they were not.” [Paragraph 37]

“Furthermore, the STB failed to apply its mind properly or at all to whether the conduct attributed by it to Sneller Digital amounted to a fraudulent misrepresentation that induced the contract. ... The STB also chose to ignore the information it had been given about each of the directors ... when it decided that the respondents were guilty of ‘fronting’. There is simply no evidence to support this suspicion. ...” [Paragraph 39]

“In order to be rational, the decision must be ‘based on accurate findings of fact and a correct application of the law’. That being so, no rational basis existed for the STB’s conclusions: the administrative action that it took was not rationally connected to the information before it, as required by s 6(2)(f)(ii)(cc) of the PAJA.” [Paragraph 40]

“It is necessary to comment on the defences raised by the appellant in both matters and the conduct of the STB throughout this dispute. ... The decision to blacklist DVP and the directors of Sneller Digital was a decision that had very real and prejudicial consequences for them. The fact that the STB had not bothered to tell DVP that it had been blacklisted for a period of almost nine months from the taking of the decision until the filing of the rule 53 record is not explained. Then it opposed the application brought by DVP on spurious grounds and persisted in them on appeal, raising the same spurious ground against the directors of Sneller Digital. The other grounds raised in the Sneller Digital matter are not much better. All of this speaks of an organ of State that has conducted itself with contempt for the rights of DVP, Sneller Digital and its directors and with disdain for the constitutional values of accountability, responsiveness and openness.

Both appeals were dismissed with costs.

EHRlich v MINISTER OF CORRECTIONAL SERVICES AND ANOTHER 2009 (2) SA 373 (E)

Case heard 24 April 2008, Judgment delivered 5 May 2008

The applicant, a sentenced prisoner, brought an application for the review and setting-aside of the decision of the second respondent, the head of Mdantsane prison, to deny medium category offenders supervised access to the gymnasium in the maximum security section of the prison for the purposes of development programmes. The essence of the applicant’s case was that he had been denied his right to participate in a development programme as envisaged in s 41 of the Correctional Services Act, in circumstances that were unfair, unreasonable and amounted to unequal treatment.

Plasket J held:

“Section 195(1) of the Constitution binds those who, like the second respondent, are public administrators, to ‘the democratic values and principles enshrined in the Constitution’, including the provision of services ‘impartially, fairly, equitably and without bias’.” [Paragraph 9]

“The Correctional Services Act contains a number of provisions that are important for present purposes. ... One of its objects ... is to provide for ‘the custody of all prisoners under conditions of human dignity’. Section 2(b) defines one of the purposes of the Act as being the detention of prisoners ‘in safe custody whilst ensuring their human dignity’, and s 2(c) speaks of its purpose of ‘promoting the social

responsibility and human development of all prisoners and persons subject to community corrections’.” [Paragraph 10]

“... [T]he applicant is a sentenced prisoner. He is also a qualified karate instructor. Karate, he says, is one of the prescribed development programmes for purposes of s 41 of the Act, in terms of the department’s sport, recreation, arts and culture policy. I accept this to be the case because, if it were not, I am sure that the second respondent would have denied the applicant’s averment.” [Paragraph 18]

“In July 2005 the applicant submitted a proposal for the introduction of karate as a development programme at the prison. He received no response to the proposal but the programme was eventually implemented in December 2005 after the applicant had obtained an order from this court directing the department to do so. ... Prisoners from other sections of the prison who were part of the karate development programme, including the applicant, were brought to A-Section to attend classes and other activities of the programme. ... On [the 8th of October] ... the applicant was refused access to the gymnasium to teach a karate class. He took the matter up with the second respondent who informed him that he had decided that no medium category prisoners were to be allowed into A-Section because it was now a maximum category section.” [Paragraphs 19, 22 – 23]

Plasket J noted that the respondents had applied (unsuccessfully) for an order that the applicant provide security of R20 000 for costs, and commented that this “reflected poorly on the respondents’ sense of fairness, and on their obligation to ‘respect, protect, promote and fulfil’ the fundamental rights” [paragraphs 25 -26], and continued:

“... [T]he second respondent never denied the applicant’s detailed averments ... that from September 2007 onwards ‘numerous mediums have been allowed unsupervised daily access to A-Section with the express knowledge and permission of the second respondent’. ...” [Paragraph 35]

“... [T]he applicant has represented himself throughout these proceedings. While the legal basis upon which the relief is sought should ordinarily be identified by the applicant, this rule cannot be applied rigidly and certainly not when a lay litigant represents himself or herself. [citation to the judgment of O’Regan J in *Bato Star Fishing*] ...” [Paragraph 36]

“In this case the decision taken by the second respondent is an administrative decision. It was the exercise of a public power taken during the course of administering the prison in terms of the Correctional Services Act, it affected the rights of the applicant and others to take part in a development programme, as envisaged by s 41(5) of the Act; and, as it put a stop to the karate development programme, it had a direct, external legal effect. While the applicant has not mentioned PAJA it is clear that it applies. After all, it is intended to ‘cover the field’ – to provide the mechanism to review administrative action, the grounds of review and the remedies appropriate to each case. He has, however, identified the source of the right that he seeks to vindicate. That is the right to participate in a development programme vested in sentenced prisoners by s 41(5) of the Act. ...” [Paragraphs 37 – 38]

“Section 3(1) of PAJA provides that when administrative action ‘materially and adversely affects the rights or legitimate expectations of any person’, it must, in order to be valid, have been taken in a procedurally fair manner. If not, it may be set aside ... It is not in dispute that the applicant, like everyone else involved, had a statutory right to participate in the karate development programme. That right was materially affected ... He was also, obviously, adversely affected. As he was not given any notice, or afforded any other aspect of a procedurally fair process prior to the decision being taken, it must be set aside. ...” [Paragraph 39]

“In my view the second respondent’s decision falls foul of the fundamental right to lawful administrative action as well because it was based on an error of law: the second respondent erred in interpreting his powers. ... The second respondent appears to have taken the view that he had no choice but to enforce segregation soon after maximum category prisoners were moved into A-Section. He erred materially in believing that he had no discretion when in fact he had discretion. This error was material in that it resulted in him not applying his mind properly to the matter. On this account the decision must be set aside.” [Paragraph 40]

Plasket J further found that the second respondent’s decision was unreasonable [paragraphs 41 – 44], and set aside the decision to deny medium category prisoners supervised access to the gymnasium to take part in the karate development programme. Second respondent was ordered to file an affidavit confirming that he had acted in accordance with the order.

POLICE AND PRISONS CIVIL RIGHTS UNION AND OTHERS v MINISTER OF CORRECTIONAL SERVICES AND OTHERS (No1) 2008 (3) SA 91(E)

Case heard 1 December 2005, Judgment delivered 12 January 2006

The applicants (a trade union and a number of its members who had been employees of the Department of Correctional Services) applied for an order reviewing and setting aside the dismissal of the second to 76th applicants. The dismissed applicants had been summarily dismissed for gross insubordination after a disciplinary procedure had been conducted. It appeared from the affidavits before the court that the procedure followed in the disciplinary process and the subsequent appeal had not followed the prescribed procedure in a disciplinary code and disciplinary procedure set out in a collective agreement, which was, in terms of s 23 of the Labour Relations Act, binding on the department.

Plasket J held:

“The first set of grounds of review relates to the lawfulness of the administrative action taken against the applicants. At its most basic, and in general terms, the right to lawful administrative action means that ‘administrative actions and decisions must be duly authorised by law, and that any statutory requirements and preconditions that attach to the exercise of power must be complied with’. Administrators may only exercise powers that have been lawfully reposed in them, and when they exercise such powers they are required to stay within the four corners of their empowerment. They have no free hand to stray outside of the boundaries of their empowerment. The fifth respondent [who had conducted the disciplinary process] only had power to discipline in terms of the prescribed procedure. He had no power to abandon it and discipline employees in terms of an ad hoc procedure that he decided was expedient in the circumstances. By doing so he violated the fundamental rights of the applicants to lawful” [Paragraph 66]

“... [I]n order to be able lawfully ... to take disciplinary action against the applicants, the fifth respondent was required to comply with the procedure agreed to between the parties and embodied in the binding collective agreement. He failed to do this, not even attempting to comply substantially with the terms of the disciplinary procedure. ... His failure to comply with this procedural precondition of the power to discipline the applicants constituted a violation of their right to lawful administrative action, rendering the fifth Respondent’s decision to dismiss a nullity. ...” [Paragraph 68]

"The same is true of the appeal procedure. The sixth respondent, as chairperson of the appeal hearing, was robbed of jurisdiction to hear the appeal because the preconditions for his jurisdiction were absent: a valid disciplinary hearing at first instance had not been held and for this reason no record of the evidence existed on which an appeal could be based. Indeed, he then compounded the irregularity by allowing evidence to be led by the initiator to create a record, when he had no jurisdiction to allow such a procedure. If the purpose of the leading of evidence was to attempt to justify the abandonment of the prescribed procedure at first instance, he had no jurisdiction to condone that. His decision in the appeal was vitiated by these material irregularities ..." [Paragraph 69]

"The conduct of the first applicant ... reflects an arrogant and disgraceful contempt for the courts empowered by the Constitution, the law that acquired its force from the Constitution, the democratic order that was created by the Constitution, the public interest that the Constitution was designed to further and the Constitution itself. ..." [Paragraph 79]

"It strikes me as ironic that the applicants, who have displayed a lack of respect for the Constitution and its democratic processes and institutions - and who, indeed, actively engaged in undermining those processes and institutions - called in aid, when their lawless conduct resulted in their dismissal, the selfsame Constitution that their behaviour suggests they hold in contempt." [Paragraph 80]

"The respondents, however, are far from blameless. They acted with no regard for the disciplinary code and procedure that they were bound to apply. In so doing they acted cynically and in bad faith ..." [Paragraph 82]

"But for the fact that the respondents displayed a cynical disregard for the Constitution and the law similar to that displayed by the applicants, a disregard that cannot be tolerated in a constitutional State, I would have considered withholding any remedy to which the applicants would otherwise have been entitled. The applicants and the respondents all have dirty hands. On the one hand, I consider it necessary in order to vindicate the Constitution to grant the bulk of the relief sought by the applicants. On the other, in order to mark the court's displeasure at the conduct of the applicants, I intend to deprive the applicants of the costs that would otherwise have followed the result." [Paragraph 83]

Plasket J thus set aside the convictions and summary dismissals of the applicants, and directed the respondents to reinstate the applicants.

NTAME v MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE AND TWO SIMILAR CASES 2005 (6) SA 248 (E)

Case heard 4 December 2004, Judgement delivered 11 January 2005

The applicants sought orders reviewing administrative action by the Department of Social Development of the Eastern Cape Province. In the first application ('the *Ntame* case') the applicant had been in receipt of a disability grant for 11 years until it was stopped in December 1996 without notice to her. In June 1999 it was reinstated and she was given an amount of R1 100 as 'back pay'. She applied for an order setting aside the suspension of her grant and an order directing the respondent to pay the amount of R13 460 that was owed to her. In the second and third matters ('the *Mnyaka* cases') the applicant had applied in June 1997 for a maintenance grant in respect of her two children. By the time that maintenance

grants were phased out in April 2001 she had still not had a response to her application. Ms Mnyaka applied for an order directing that the respondent's failure to consider the application be declared unlawful.

Plasket J held:

"The main issues to be decided in the three applications ... are: whether claims for the payment of a disability grant, in the first case, and for the payment of maintenance grants, in the second and third cases, have prescribed; whether a court can raise prescription *mero motu*; whether, if so, this renders what I would term the primary relief sought – the review of a decision to stop paying the disability grant, and the failure to decide on the applications for maintenance grants – moot; and whether, if not, the applicants' delays in launching proceedings are unreasonable and, if so, whether they should, nonetheless, be condoned." [Paragraph 1]

"It will be noticed that the debts that are central to each case – the disability grant that was not paid for a period, and the maintenance grants that would have been paid had decisions favourable to the applicant been taken – related to precisely defined periods, with precisely defined end-points... In all three cases the debt, to use the terminology of the Prescription Act ... would have prescribed three years after the dates mentioned above, if the respondent had opposed and taken this point in answering papers. That would, ordinarily, have rendered the relief claimed in these matters moot because, while the applicants seek the review of the administrative action and inaction concerned, their purpose in doing so is, understandably, to force the respondent to pay them what was unlawfully withheld: if the underlying debts could not be enforced, then the exercise of pronouncing the administrative action and inaction concerned to have been invalid, would have had no practical effect and would have been academic." [Paragraphs 8 – 9]

After finding that the common law rule of delay, rather than the relevant provisions of PAJA, applied, Plasket J held:

"[T]he conclusion is inescapable, in my view, that the delays from the time of the causes of action arising to the launching of all three of these applications, when viewed objectively, are unreasonably long, even though, once the applicants were placed in contact with attorneys who could advise them and represent them, the steps that followed were taken with reasonable haste. I have, in the exercise of my discretion, decided to condone the unreasonable delays for the reasons that follow." [Paragraph 24]

"... [T]he issue of condonation must be addressed mindful of the fact that s 34 of the Constitution enshrines a fundamental right of access to court and that s 39(2) enjoins a court either interpreting legislation or developing the common law or customary law to 'promote the spirit, purport and objects of the Bill of Rights' of which s 34 is part. ..." [Paragraph 25]

"The applicants are unsophisticated people with little formal education. When this is taken together with their poverty, their access to court is severely hampered and a more lenient approach to the time they took to find attorneys to advise them is warranted. ... Didcott J's comments in *Mohlomi v Minister of Defence* on the relationship between poverty and access to justice is apposite to these cases. He described South Africa as 'a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these...' [Paragraph 26]

“As Ms Ntame was not afforded a hearing prior to the stopping of her disability grant, the administrative act of stopping it was performed in a procedurally unfair manner. It was, accordingly, invalid and a nullity. ... Ms Mnyaka’s complaint is not that decisions adverse to her were taken but rather that no decisions were taken when they should have been. The principle is a simple one: it is that ‘where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised’. A failure to exercise a discretion when a duty is cast on an administrative decision-maker to do so constitutes a violation of the fundamental right to lawful administrative action.” [Paragraphs 35 – 36]

“In order to strike effectively at the violation of Ms Ntame’s fundamental rights to just administrative action and of access to social assistance, it is necessary, in my view, to do more than simply declare the administrative act of stopping her disability grant to be inconsistent with the Constitution. It would be just, equitable and appropriate to order the respondent to rectify the violation by paying what should never have been withheld and to pay interest on that debt. ...” [Paragraph 41]

“In respect of the applications brought by Ms Mnyaka, I am likewise of the view that a mere declaratory order will not be an effective remedy. It will also be necessary to grant relief that compels the respondent to take the decisions that should have been taken a long time ago, ... if the applicant is found to have qualified for the maintenance grants, she must be paid what she would have been entitled to, together with interest. ...” [Paragraph 43]

SELECTED ARTICLES

“HUMAN RIGHTS IN SOUTH AFRICA: AN ASSESSMENT” 2006 OBITER

This article examines the development of South Africa’s progress to democratic government from the Langa Massacre of 1985 until 2005.

“It seems to me that very often we tend to focus on what is not working in our society, rather than what we have achieved. While it is necessary to always be critical and to always strive for better, it is as important to stop every now and again to take stock and to assess our progress. This is necessary as a way of affirming what observers have sometimes referred to as the miracle of South Africa’s largely peaceful transition to democracy, but also so that we can make sure that we are travelling in the right direction in the creation of our new society.” [Page 2]

The article then discusses South Africa’s constitutional system and the pre-constitutional history of discriminatory and repressive practices, before briefly discussing the drafting of the Constitution. The article then discusses the right to life:

“These rights [to life and dignity], as well as certain other fundamental rights ..., were at the heart of the judgment of the Constitutional Court in *S v Makwanyane*, in which the death penalty was struck down as unconstitutional. ... One of the most important points to emerge from this foundational building-block in the creation of our new constitutional jurisprudence is that those who exercise public power are required by the Constitution to justify their exercises of power on rational grounds. ... The requirement of justifiability is evident in a further case dealing with the right to life, namely *Ex parte Minister of Safety and Security: In re S v Walters* ...” [Pages 9 - 10]

“As Mathews has commented, detention without trial was a common and, indeed, everyday part of South African life. The new dispensation makes it impossible in all but the most limited circumstances. Section 12 of the Constitution entrenches a fundamental right to freedom and security of the person. ...” [Page 13]

“From what I have quoted already the laws that regulated detention without trial, it will be noted that a large measure of discretion was vested in members of the police to deprive citizens of their right to freedom ... The rules of administrative law played a central role in the efforts of human rights lawyers to control these exercises of power, as well as the other invasive powers enjoyed by State functionaries ... What made the task of controlling these excesses of power all the more difficult was that a sovereign parliament could oust the jurisdiction of the courts if it wished to, could provide that these types of powers could be exercised without giving those affected by them a hearing and it could empower its officials with the broadest and most unrestrained types of discretions. ...” [Pages 14 – 15]

“Section 33 of the Constitution creates a fundamental right to just administrative action. ...Section 34 ... bolsters section 33. ... These provisions, when read with section 38 of the Constitution ... render ouster clauses ... unconstitutional: it is very difficult to imagine the circumstances in which an ouster clause may be held to be a reasonable and justifiable limitation of these fundamental rights. ...” [Page 16]

“One could engage in the same sort of exercise with every fundamental right in the Bill of Rights and the result would be the same: a picture would emerge of a legal system that is at the same time more caring and more rational, and it would be evident to any observer that the country ... is a far better place now than it was 20 years ago, or 10 years ago for that matter.” [Page 17]

“ADMINISTRATIVE JUSTICE AND SOCIAL ASSISTANCE” (2003) 120 South African Law Journal 494

“Despite the fact that South Africa is now a democratic state that respects human rights, there are immense problems in the system of social assistance, resulting in hardship and privation for many of the most vulnerable and marginalized members of society. One of the major causes of these problems is the fact that the system of social assistance was fragmented by apartheid, so that after 27 April 1994 the new national and provincial governments had to integrate these different systems into one system for each of the nine provinces. The hardships that this process has visited on many poor people, as well as corruption, gross inefficiency and often appallingly callous attitude on the part of officials to those who require social assistance, has meant that social assistance issues have become something of a focal point for those lawyers and human rights activists who are interested in seeing that proper is given to the socio-economic rights that form an important part of the Bill of Rights.” [Page 495]

“... The principle difference for administrative law between the state of affairs prior to and after 1994 is this: prior to 27 April 1994, administrative law was constrained by the doctrine of parliamentary sovereignty that allowed ... an ... unrepresentative executive hostile to human rights, and the judiciary, drawn exclusively (until close to the dawn of democracy) from the ranks of the white elite, failed to develop significant legal controls over administrative power and at times, even appeared to facilitate the executive’s increasingly draconian conduct ...” (Pages 495 - 496)

The article then considered the application of administrative law principles in social assistance cases.

“A number of cases have dealt with the lawfulness of the actions, and of the inaction, of welfare officials in the exercise of their powers. The first case was *Bacela v MEC for Welfare (Eastern Cape Provincial Government)*. The applicant had qualified for an old age pension ... She returned each pension payday for the following five months but on each occasion she was told that there was no money for her. ... The respondent [had] issued a circular to all regional directors ... instructing them to stop paying arrears to successful applicants ... This decision was apparently motivated by ‘serious budgetary constraints’ ... Mpati J held that the respondent was not authorised by law to suspend payment of arrears to successful applicants for pensions; she was, he held, ‘bound in her administrative capacity to act in terms of the Social Assistance Regulations and to make the payments for which the Regulations provide’. The result was that ‘the respondent’s decision not to backdate pension payments to the date on which such pension payments accrued is unlawful and of no force or effect’. ... *Maluleke v MEC, Health and Welfare, Northern Province* illustrates the problems of rationalising the disparate systems of social assistance that existed in the country before 27 April 1994. ... Ms Maluleke brought an application in which she purported to act on her own behalf, as well as for everyone else in apposition similar to hers, for orders declaring that the suspension of her old age pension, and of the grants of everyone else in a similar position, were invalid, and directing the respondents to pay interest on the amounts withheld. Southwood J held that the suspension of the applicant’s pension because she had been identified as a ‘suspect beneficiary’ whose particulars needed to be checked was unlawful, as the enabling statute ... did not authorize suspension for such purpose.” (Pages 497 - 499)

“The Supreme Court of Appeal has questioned the correctness of Leach J’s approach [in *Mahambehlala v MEC for Welfare, Eastern Cape and another* and *Mbanga v MEC for Welfare, Eastern Cape and another*], in the matter of *Jayiya v MEC for Welfare, Eastern Cape and another*. Conradie JA held that now that the Promotion of Administrative Justice Act is of application, any remedy ... must be one contemplated by s 8 of the Act. ... Conradie JA appears to suggest that the type of relief that Leach J granted would not be possible in terms of the Act. This is based on a narrow and incorrect interpretation of s 8: it fails to give effect to its constitutional pedigree ... the specific remedies mentioned in s 8(1) do not constitute a closed list as Conradie JA appears to suggest.” (Page 504)

“... [T]he concept of procedural fairness is a universal feature of systems of administrative law based on the rule of law or a similar doctrine. In administrative law, procedural fairness is an important part of the various mechanisms and techniques courts use to control the exercises of power by administrative functionaries. The essence of the concept is that those who are affected by official decisions are entitled, prior to any decision being taken, to be heard by an unbiased decision-maker. ... In *Rangani v Superintendent General, Department of Health and Welfare, Northern Province*, Kirk-Cohen J held that pensioners were entitled to a hearing before a decision was taken to suspend their pensions. He held that [the applicant] ... had a legitimate expectation to a prior hearing before her pension was terminated or suspended. Procedurally fair administrative action in casu includes the right to be heard prior to any deprivation. ...” (Pages 504 - 506)

After considering further cases dealing with procedural fairness in social assistance cases, the article proceeds to deal with the issue of reasonableness:

“... In order for an administrative act to be reasonable, it must not be taken in bad faith, it must not be arbitrary or capricious, it must not be tainted by irrelevant considerations having been taken into account or relevant considerations having been ignored or having been given undue weight, it must be justifiable or rational, it must not result in inequality or uncertainty and must not be oppressive in the sense of having an unnecessarily onerous impact on those affected or be excessive or disproportionate in its impact. The essence of reasonable administrative action therefore, is that it is rational and proportional. There appear to be two obvious aspects of the administration of the Social Assistance Act that are vulnerable to challenge on the basis of the right to reasonable administrative action. The first is the decision as to whether an applicant for a disability grant is ... disabled for purposes of the Act. The second is the decision to categorize a disabled person as either permanently ... or temporarily disabled.” (Page 508)

The article also deals with the requirement of giving reasons for decisions, and issues surrounding standing, deceased estates, failures to comply with orders and administrative inefficiency, before concluding:

“It may be tempting to view the cases discussed ... as a limited number of isolated claims by individuals ... Such a view would ignore that fact that each applicant’s problem is replicated over and over ... [E]ach case in this field – and not only those in which extended standing was recognised – has either had an impact on a significant number of people, or will positively affect a large number of people when the administration either complies with judgments or is forced to do so...” (Pages 522 - 523)

“Secondly, it is significant that it is in the field of social assistance that the extended standing provisions of the Constitution have been given life ... [T]he cases dealing with standing may be seen as cases that vindicate and extend the rule of law and constitutionalism. ... Thirdly, the cases illustrate the vitality and importance of administrative law as a means of ensuring that official action complies with the Constitution, its commitment to the rule of law, and the values of accountability, responsiveness and openness. ... ” (Page 523)

SELECTED JUDGMENTS**PRIVATE LAW****STRIKE PRODUCTIONS (PTY) LTD V BON VIEW TRADING 131 (PTY) LTD 2010 BIP 327 (GSJ)****Case heard: 10 December 2010, Judgment delivered: 10 December 2010**

Applicant wished to interdict the first respondent from employing the third respondent, Jacobs, as a lighting technician on the IDOLS television show, and an interdict restraining Jacobs from working on or being employed on the show. On or about 4 March 2010, Strike Productions issued new contracts of employment which prevented all members of staff from working for any company doing business in competition with Strike Productions. Jacobs refused to sign the new contract. He resigned thereafter and became employed with Bon View as a lighting technician and began working on the IDOLS production. The applicant claimed that the Jacobs was preparing for IDOLS 2010 while still in the employment of Strike Productions and attempted to “hi-jack” the applicants business with the intention of taking over the applicant’s customer base.

Saldulker J held:

“No person can be unreasonably prevented from earning a living in the public domain. The right to trade and practice a profession is highly prized. In the workplace, restraint of trade agreements have become valuable tools in the hands of employers, protecting the circulation of their identifiable confidential information and trade secrets by employees post-employment. However, where employees are not bound by an appropriate acknowledgement of confidentiality, the question whether employers have some protection against the use of confidential information by ex-employees raise issues that are not always easily resolved.” [Paragraph 1]

“Central to the issues in this matter, is the fact that Jacobs is not bound by a restraint of trade agreement with his former employer, the applicant. Principles governing employer/employee relationships and the obligations arising therefrom are to be found in the judgment of Stegmann J in *Meter Systems Holdings Ltd v Venter and Another* where the following was succinctly stated: ‘...When the fiduciary relationship is not based on contract, it is necessary to look to the law of delict, and in particular to the principles of Aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence...’” [Paragraph 13]

“In the absence of a restraint of trade agreement, it is difficult for an employer to monopolise the services of its employee (*Triangle Film Corp. v. Artcraft Pictures Corp*)...A party that seeks to protect its confidential information, its trade secrets, and intellectual property must show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within the public’s knowledge(*Hirt Carter (Pty) Ltd v Mansfield and Another*...)...” [Paragraph 19-20]

“Trade secrets are clearly a species of confidential information ... However, in certain circumstances, information may be used after termination of employment. ...”. [Paragraph 21]

“For the applicant to succeed in this case it must establish that it has trade secrets, confidential information and intellectual property worthy of protection and which is ‘proprietary’ to it, which Jacobs is allegedly using. The claim to confidentiality must be made on reliable facts. It is not sufficient for a party to merely state that it has ‘intellectual property’, ‘know-how’, ‘*modus operandi*’ or that certain aspects of its business are secret or confidential (*Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*)” [Paragraph 22]

“...The applicant has not specified the precise nature and detail of the confidential information and trade secrets relied upon it in regard to these claims... Without any specific information or sufficient particularity in regard to these claims, this court must accept that the applicant has no unique nor any confidential business plans, trade secrets or intellectual property relating to the IDOLS programme worthy of protection. The case made out by the applicant falls far short of establishing that there is a protectable interest in the form of confidential information or trade secrets worthy of legal protection.” [Paragraph 35]

“The question, whether an employee, in the absence of a restraint of trade agreement, can use his employer’s customer connection with impunity and in direct competition after the termination of his employment, appears to have been answered in *Premier Medical and Industrial Equipment (Pty) Ltd v Winkler and Another*, where it was held that, where a written contract of service is in existence the court will not readily read into it an implied covenant in restraint of trade...” [Paragraph 51]

“As there is no restraint of trade agreement between Jacobs and the applicant, the latter does not enjoy any contractual power to restrain Jacobs from using his skills in the free economy. It must follow therefore, that a new employer is free to poach an employee, in the absence of a restraint, as long as the employee is free to leave...The applicant’s inability to convince Jacobs to sign a restraint, was to its own detriment...What the applicant has tried to do in this matter is to imply a restraint of trade agreement into Jacobs’ contract of employment where a restraint clearly does not exist...No contract exists between the applicant and Jacobs, precluding him from using his expertise as a lighting technician for any entity, including a competitor of the applicant...” [Paragraph 56]

“The applicant has failed to establish that Jacobs attempted to ‘hijack’ the applicant’s business using its ‘IDOLS intellectual property’ with the intention of taking over the applicant’s customer base to further his plans for ‘IDOLS’ and to continue doing so after the 2010 IDOLS production. The applicant has failed to establish that it has any trade secrets, confidential information or intellectual property relating to the IDOLS programme worthy of protection...An interdict is a remedy providing protection against future conduct...An interdict in these circumstances is an inappropriate remedy as the infringement has already occurred, and there is no fear that it will be repeated. The applicant is therefore not entitled to the interdicts sought. The applicant has not satisfied the requirements for the granting of a final interdict.” [Paragraphs 58-59]

The application was dismissed with costs.

BOQO MXOLISI V MINISTER OF CORRECTIONAL SERVICES (06/5172) [2008] ZAGPHC 107 (17 APRIL 2008)

The plaintiff claimed damages arising from bodily injuries sustained whilst he was a prisoner when he was assaulted with a razor blade by another prisoner at the Krugersdorp Correctional Centre. The incident took place in the presence of two Correctional Services Officials (Masemola and Chonco), the defendant's employees. Prior to the incident, on that same day, the perpetrator (Chikoto) had been found assaulting inmates with a belt to which a viral lock was attached. At the time of the assault of the plaintiff, the officials were walking approximately one metre behind the perpetrator who was not restrained by handcuffs or any other means. The issue for determination in this case was whether the officials acted negligently and whether their negligence caused the plaintiff to be injured.

Saldulker J held:

"Section 35 of the Bill of Rights spells out the rights of all detained persons clearly. Section 35(2)(e) ensures that a prisoner has a right to conditions of detention which are consistent with human dignity." [Paragraph 38]

"The Constitution and the Bill of Rights entrenches the right to life, human dignity, freedom and security of a person. There is a duty imposed on the state and all of its organs not to perform any act that infringes the rights enshrined in the Constitution. The state and its organs are obliged to provide appropriate protection to everyone through laws and structure designed to afford such protection." [Paragraph 40]

"In *Kruger v Coetzee* the foreseeability test for the determination of negligence was formulated... In determining the issue of negligence this court must be satisfied that a reasonable man in the position of the defendant: a. Would have foreseen the harm/danger which would occur to the plaintiff; b. Would have foreseen the result of such harm/danger; c. Would have taken steps to guard against the harm/danger; d. Failed to take such steps." [Paragraphs 41-42]

"Imprisonment necessarily makes inroads into a prisoner's personal rights but he is not stripped of these rights. He has the right to be protected against any infraction of these rights. It is so that he has to submit to prison life and conduct himself according to the prescripts of prison rules and regulations. However his right to bodily integrity and human dignity are inviolable." [Paragraph 57]

In response to the defendant's argument that, at the time of the assault, the plaintiff was in an area of the prison where he was not authorised to be, Saldulker J held:

"The fact that a prisoner may be loitering unauthorised in a particular section of the prison grounds and sustains an injury, does not mean that he has consented to such injury, nor does this absolve or excuse correctional officials from their duty in maintaining the safety of prisoners...The plaintiff does not give up his right to physical and bodily integrity as a result of such loitering." [Paragraph 58]

With regards to the function of correctional services officers generally, Saldulker J held:

"Prisoners are at the mercy of their gaolers. It is to them that prisoners look for protection and safe custody. Their gaolers have a duty to maintain their safe custody until they leave the prison..." [Paragraph 59]

“Correctional services have an enormous task regulating and maintaining law, order and discipline in prisons. However maintaining discipline amongst inmates remains their duty as does the safe custody of the prison population. A prison is insulated from the outside world. A prisoner’s right to freedom of association, movement and security is also severely curtailed. His choice of company are his fellow inmates and their supervision is the primary responsibility of correctional officers.” [Paragraph 61]

“The functions of correctional officers are to ensure that every prisoner detained in any prison be kept in safe custody and not pose a danger to himself or to other inmates until lawfully discharged or removed from there. Leg irons and handcuffs, if the circumstances justify it, must necessarily be used in order to restrain violent behaviour where the prisoner is likely to endanger his own or another inmate’s safety...” [Paragraph 62]

“It was the duty of Masemola and Chonco to protect the plaintiff from Chikoto whose criminal character was known (he was a habitual criminal) and who had displayed violent tendencies a short while earlier. Exposing him to other inmates whilst he was unrestrained constituted an unlawful intrusion into the plaintiff’s freedom to walk in the prison without fear of being assaulted.” [Paragraph 63]

“Both Masemola and Chonco should have foreseen that an unrestrained Chikoto would be a danger to other inmates and that the possibility of Chikoto assaulting another inmate existed, in particular for the plaintiff standing at the spiral gates. The correctional officials failed in their duty to provide safe custody to the plaintiff as they ought to have done. In my view the unprovoked and serious attack with a razor blade on the plaintiff by an unrestrained Chikoto was clearly foreseeable and both correctional officials failed to take steps to guard against the assault on the plaintiff...” [Paragraph 64]

“A reasonable correctional official in the position of Masemola and Chonco should have:

65.1 realised that Chikoto was dangerous;

65.2 restrained him by holding on to him or by handcuffing him;

65.3 performed a proper search and would have found the razor blade in his possession.

65.4 warned other inmates and more particularly the plaintiff to be on their guard.” [Paragraph 65]

“From all of the foregoing, in my view the plaintiff has proved on a balance of probabilities that the conduct of the defendant’s employees, Masemola and Chonco was negligent. Their conduct clearly falls short of that of a reasonable man in the circumstances and is clearly negligent. On the evidence their negligence is causally connected to the injury sustained by the plaintiff.” [Paragraph 67]

The defendant was ordered to pay to the plaintiff all of the proven damages that he suffered as a result of the injuries he sustained in the incident.

CIVIL PROCEDURE

BASIL READ (PTY) LTD V NEDBANK LTD AND ANOTHER 2012 (6) SA 514 (GSJ)

Case heard: 9 April 2012, Judgment delivered: 13 April 2012

The case concerns a request for the reconsideration of an urgent order granted in the absence of the opposing party in terms of Rule 6(12)(c) of the Uniform Rules of Court. The applicant had sought an urgent interim interdict which served to interdict and prohibit the first respondent, Nedbank Ltd, from making payment to the second respondent, (the opposing party), of any sum or sums which were referred to in advance payment guarantees.

The opposing party contended that the applicant's failure to join the opposing party and provide for service of the application rendered the application fatally defective. The opposing party also contended that the interlocutory application to supplement the founding affidavit sought by the applicant must be denied and the application must be reconsidered on the papers filed in the original application.

Saldulker J held:

"It appears that the authorities...all support the proposition that a party that seeks a reconsideration of an urgent order made in his absence, if it wishes to, may present facts on affidavit which a court may take into account in reconsidering the order. However, none of these judgments provide the authority for the contention that an applicant for an urgent order may supplement its original founding affidavit with additional matter when faced with an application for reconsideration under rule 6(12)(c). The *Rhino* case in my view remains the authority for the proposition that a party in the position of the opposing party is entitled to seek reconsideration on the original application without reference to anything else." [Paragraph 22]

"It is trite law that in a founding affidavit an applicant must set out the relevant and material facts it relies on. It was on the facts that were averred in the founding affidavit of the original application that the interim order was granted. The opposing party contends that the applicant has applied to file a supplementary founding affidavit in an attempt to bolster its original application, which has a paucity of information, and that no new grounds for the order originally sought are set out. Furthermore despite the applicant's contentions, significantly, no grounds of fraud are alleged against the opposing party in the supplementary founding affidavit nor proved by the applicant on the part of the opposing party. The applicant is not permitted in this reconsideration application to file a supplementary affidavit to bolster its original application." [Paragraph 25]

"The applicant alleges that the opposing party is not entitled to call upon the first respondent to pay the amounts claimed under the guarantees because of some dispute between the applicant's subsidiary and the opposing party..." [Paragraph 27]

Saldulker J quoted from the SCA judgement in *Loomcraft Fabrics CC v Nedbank Limited*, regarding irrevocable documentary credits, and continued:

"Clearly, the existence of an alleged dispute between the applicant's subsidiary and the opposing party is no bar to the first respondent paying the guarantee upon proper demand being made by the opposing party, nor can it provide a basis upon which an interdict can be granted restraining the first respondent from paying in terms of the guarantee." [Paragraph 29]

"The applicant contended in the urgent application that the conduct of the opposing party in attempting to obtain payment on the guarantees was devious, and now seeks to contend in the reconsideration application, that the conduct was also fraudulent. However, what the actual fraud is, is not referred to in the supplementary affidavit it proposes to file. Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. This was clearly not proved." [Paragraph 32]

"Where an applicant seeks to interdict the performance of an established contractual obligation as the applicant does *in casu*, it must allege and prove that it has such a right, at least on a *prima facie*

basis at the interim relief stage, or at least when seeking final relief. This the applicant failed to establish on a *prima facie* basis. The payment of a demand on guarantee in the absence of fraud, is valid, enforceable and most importantly lawful. The opposing party's conduct appears to have been lawful. The applicant has clearly not made out a case of fraud on the part of the opposing party on the papers before me." [Paragraph 34]

"On many occasions, commercial cases involving millions of rands are brought to the Urgent Court on a hurried basis and *ex parte* without knowledge of the parties whose rights are affected. The Urgent Court sometimes makes decisions on these matters on the basis of commercial urgency, being deprived of the benefit and advantage of argument on behalf of all the interested parties. Had there been service of the urgent application on the opposing party whose rights were affected by the order sought, and had the opposing party been given an opportunity to answer to the allegations in the applicant's founding papers, the urgent court would have been better placed to arrive at a decision *au fait* with all the facts. It is doubtful whether the court would have made an order in the terms that it did. The latter view is strengthened by the fact that the applicant itself has sought to apply to supplement its founding papers, the very papers it relied on to justify the order it sought and was granted in the urgent court against the opposing party." [Paragraph 35]

"In my view ... the fact that the opposing party was not joined in the application and that service on the opposing party was not even provided for in the order sought and granted, where such an order affected the rights of the opposing party, the order must be set aside. The opposing party's rights to the payment were clearly affected by the order that was sought. The applicant's interlocutory application to file a supplementary affidavit is a belated attempt in my view, to justify an order that should clearly not have been sought or granted without notice. In such circumstances, this court does not permit the filing of the supplementary affidavit." [Paragraph 36]

"To permit a litigant, who has sought an order, without notice in terms of Rule 6(12), against a party whose rights were affected by the order granted in the urgent court, to file a supplementary founding affidavit in a reconsideration application by the aggrieved party, is to afford him another opportunity to bolster the original application, especially where the aggrieved party has not filed any affidavits. Furthermore to allow a litigant to do so would be creating an untenable precedent contrary to the function and the purpose of Rule 12(6)(c). It would not redress the imbalances in, the injustice and the prejudice resulting from the order sought and granted in his absence." [Paragraph 37]

The orders sought by the applicant, both to condone its failure to cite the opposing party in the urgent application and to permit the applicant to supplement its founding affidavit, were refused. The Rule Nisi was reconsidered and discharged and the order is set aside.

CHILDRENS' RIGHTS

SS V PRESIDING OFFICER, CHILDREN'S COURT, KRUGERSDORP AND OTHERS 2012 (6) SA 45 (GSJ)

Case heard: 19 April 2012, Judgment delivered, 29 August 2012

The case concerned a 12 year old orphaned child (SS) who was living with his aunt and uncle (the Ls) who cared and provided for him from their limited means. The children's court commissioner refused the

application for a foster care order which would allow the Ls to qualify for a foster child grant. This refusal was on the basis that, because the Ls were taking care of him, SS did not meet the criteria for the grant of a foster care order as envisaged in section 150(1)(a) of the Children's Act, namely that a child is "in need of care and protection" due to the fact that "the child has been abandoned or orphaned without any visible means of support." On appeal to the High Court, Saldulker J (Potgieter AJ concurring) held:

"Children are the soul of our society. If we fail them, then we have failed as a society. Mr ML and Mrs NL did not fail SS. He was brought to live with them in 2002 by his mother, Ms PS, during her lifetime, when he was just over one year of age. They raised him as their own child, supporting him from their meagre earnings..." [Paragraph 1]

"The question that needed to be addressed was the proper interpretation of the words 'without any visible means of support' and whether the words pertained solely to the means of the child and not the caregiver... The interpretation of the clause in section 150(1)(a) must be in accordance with section 39(2) of the Constitution, ... and in keeping with the spirit, purport and objects of the Bill of Rights and the best interests of the child." [Paragraph 7]

Saldulker J held that the commissioner's reliance on section 150(1)(a) in the context of a foster care order was misplaced, as its purpose is not to mean that such a situation is in accordance with the law and therefore may not be legalised by means of a foster care order.

Saldulker J then held:

"The application of section 150(1)(a) of the Children's Act involves a factual enquiry that enables a determination that is consistent with the best interests of the child, abides by the spirit of the Children's Act and is consistent the Constitution of the Republic of South Africa..." [Paragraph 27]

"The first stage of inquiry under section 150 is for presiding officers to determine whether the child is in need of care and protection if the child falls under the definition of "orphaned" or "abandoned". This is a factual inquiry which can be easily determined. Section 1 of the Children's Act defines an orphan as 'a child who has no surviving parent caring for him or her' and 'abandoned' means 'a child who has obviously been deserted by the parent, guardian or caregiver'... This first stage will be reliant on the reports of the social workers who are deployed to carry out an investigation... A child who has been orphaned or abandoned and who is living with a caregiver who does not have a common law duty of support towards such child, must be placed in foster care with that caregiver." [Paragraph 28-29]

"The commissioner must then turn to the second stage of the inquiry and determine whether the minor child is 'without any visible means of support'... This inquiry includes a consideration of whether there is a duty of legal support resting on someone in respect of the child, and whether, in addition to the status of being orphaned or abandoned, the child has the means currently of, or whether the child has an enforceable claim for, support. The focus of the inquiry at the second stage is on the child and therefore the commissioner must look at the minor child's personal financial resources... The questions to be asked are: Does the minor child have the means to support him/herself?; and is the means of support readily evident, obvious or apparent? The inquiry into the means of the minor child is a factual one, focusing on the financial means of the minor child and not on the financial means of the proposed foster parents. The fact that annexure C to the regulations to the Social Assistance Act states that 'a) the foster parent

qualifies for a foster grant regardless of such foster parent's income' makes it abundantly clear that it cannot be the foster parent's means of support that is under scrutiny. " [Paragraph 30 – 31]

"In the case before us, the minor child is an orphan, is 12 years of age, and has neither parents, nor siblings nor grandparents. The Ls, the present caregivers of the minor child, are the minor child's aunt and uncle... They owe him no parental duties and responsibilities, nor do they have a legal duty to support him. Section 32 therefore cannot be an adequate substitute to foster care. The commissioner erred in finding that because the minor child was in the care of de facto caregivers ... he therefore had 'visible means of support', and this meant he was not in need of care and protection, and therefore could not be placed into foster care... The commissioner found that because the minor child had a caregiver he could not be placed in foster care, a finding which is completely at odds with the spirit of the Children's Act." [Paragraph 38]

"It will not be in the interests of children to take a rigid, overly formalistic approach to the interpretation of section 150(1)(a). With reference to the guidelines set out above, the children's courts should take a flexible approach appropriate for the determination of the best interests of the child in each case... the role of judicial officers is to interpret section 150(1)(a) of the Children's Act in a constitutionally compliant way and not to concern themselves with 'reducing the number of children's court cases with more or less 70%' [reference to a statement by the commissioner in the children's court below]. As observed by the Constitutional Court in *S v M...* – 'a truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved...' " [Paragraph 39]

"It would appear that the intent of the legislature was for judicial officers to read s 150(1)(a) to require two stages of enquiry and the application of the phrase 'without any visible support' being confined to the child, without regard to the caregiver. This would be consistent not only with the plain meaning of the statute, but also with the legislative intent. Interpreting the phrase in the foregoing way will also promote familial caregivers." [Paragraph 40]

"Having regard to the foregoing, I find that in terms of s 150(1)(a) of the Children's Act the minor child, who is an orphan, is in need of care and protection, and is without any means of support, and is placed in foster care of the Ls" [Paragraph 40]

The appeal was upheld.

CRIMINAL JUSTICE

S V MDLONGWA 2010 (2) SACR 419 (SCA)

Case heard: 12 May 2010, Judgment delivered: 31 May 2010

The appellant had been convicted of robbery with aggravating circumstances. He was implicated in a bank robbery by eyewitness and video evidence. The appellant did not testify, but put forward an alibi defence. He was sentenced to 20 years imprisonment. The High Court dismissed his appeal against both his conviction and sentence. With regard to the appeal against conviction, the sole issue raised by the

appellant was the correctness of the identification, which he challenged on several grounds, including that the eye witness testimony and dock identification of the appellant by the bank security guard (M) was unreliable, and that the police officer (N) who conducted a facial comparison did not have academic qualifications and as a result was not an expert. With regards to the appeal against the sentence, it was argued that the court below failed to properly exercise its discretion in sentencing the appellant to 20 years imprisonment, five years more than the prescribed minimum sentence.

Saldulker AJA (Mthiyane and Mhlantla JJA concurring) dealt first with the challenge to the conviction based on the identification of the accused:

“Merely because Mbatha made a dock identification of the appellant... does not make his evidence less credible. Generally, a dock identification carries little weight ... But there is no rule of law that a dock identification must be discounted all together, especially where it does not stand alone.” [Paragraph 10]

“...Mbatha’s [M’s] testimony is not the sole testimony relied upon by the state... his description of how the robbery unfolded is corroborated by the video footage. Although there were contradictions in his testimony as to the clothing worn by the appellant... when his evidence is assessed as a whole these contradictions are not material and pale into insignificance. He may have been innocently mistaken about the apparel of the robbers, which is understandable in the circumstances, given that a gun was pointed at him.” [Paragraph 11]

“I am satisfied that Mbatha’s evidence ... taken together with the other evidence in this case, establishes the appellant’s participation in the robbery” [Paragraph 12]

On the second challenge, Saldulker AJA held:

“In this case there appears to be every reason to accept Inspector Naude as an expert. A lack of academic qualifications may sometimes be regarded as indicative of a lack of sufficient training, but this is not the case here if one has regard to the vast experience that Inspector Naude accumulated over a number of years...” [Paragraph 18]

With regard to the issue of identification as a whole, Saldulker AJA held:

“Having regard to the totality of the evidence, the appellant was properly identified as one of the robbers of the NBS bank. In the face of incriminating evidence that the appellant was involved in the bank robbery, he adduced no countervailing evidence in his defence.” [Paragraph 25]

“An accused has the constitutional right to remain silent, but this choice must be exercised decisively, as the ‘choice to remain silent in the face of evidence suggestive of complicity must, in an appropriate case, lead to an inference of guilt.” [Paragraph 26]

“In my view all of the State’s evidence, cumulatively, established the identification of the appellant as one of the robbers ... beyond a reasonable doubt.” [Paragraph 27]

Saldulker AJA then turned to consider the appeal against the sentence:

“It is trite that a court may only interfere if misdirection has been committed by the sentencing court. In view, no such occurred. The aggravating features of this robbery far outweigh the mitigating ... the brazen conduct of the appellant and his co-accused in entering a bank, and robbing it with impunity in

the presence of innocent members of the public, and assaulting a staff member, is deserving of the sentence imposed. It is not a shocking sentence, but a salutary one. In my view, their brazen conduct is deserving of the sentence imposed. It is neither excessively severe, nor harsh that it must be interfered with.” [Paragraph 29]

Accordingly, the appeal was dismissed.

SKUTA V S [2006] JOL 17498 (W)

Judgment delivered: 25 May 2006

The appellant was convicted of housebreaking with the intent to steal, and theft. He was sentenced to 6 years imprisonment. The appellant was unrepresented in the court a quo and appealed against both the sentence and conviction. He appealed on the grounds that the Magistrate had committed several irregularities that were cumulatively sufficiently serious that the proceedings should be set aside *in toto*, and failed to conduct the trial with the requisite open-mindedness, impartiality and fairness.

Saldulker J (Kuny AJ concurring) held:

“A perusal of the record of the proceedings in the court a quo indicates the following: ... the magistrate clearly descended into the arena in that he and not the prosecutor led evidence of the complainant... The learned regional Magistrate on several occasions allowed hearsay evidence without even ascertaining whether the relevant persons would be called... and therefore this evidence was inadmissible. The learned regional Magistrate did not allow the appellant to cross-examine the complainant fully. Throughout the cross-examination of the appellant and the complainant the regional magistrate interrupted the appellant... From the evidence it appears that the regional court magistrate started questioning the appellant at the time that the appellant was supposed to cross examine the complainant... “ [Paragraph 5]

“The court interrupted questioning by the appellant and informed the appellant as follows: ‘...he further says that he found the key of his house in your pocket at the police station, and obviously that is how you broke into his house...’ The words ‘obviously this is how you broke into his house’ clearly illustrates that the court a quo had predetermined the guilt of the appellant.” [Paragraph 8]

“When the appellant told the court about his difficulty with the tracing of the defence witness the court stated the following: ‘Would you like me to keep you here for the rest of your life in custody. [*sic*] Please you must help the court now can you tell us how we can trace your witness please?’ In my view, all of the above questioning of the appellant by the court a quo was highly irregular indicating that the magistrate had prejudged the case against the appellant and disbelieved his version...” [Paragraphs 12-13]

“The conduct of a trial must leave no doubt in the minds of an accused and the public that the proceedings having [*sic*] been conducted in a fair and impartial manner without any suggestion of bias or suspicion...Conduct which creates the impression that a judicial officer has prejudged the issues before him does not augur well for the impeccable impartiality that our administration of justice is premised on.” [Paragraphs 14-15]

“Judgments of our court reveal significant principles being enunciated regarding the accused’s right to a fair trial as enshrined in our Constitution. See *S v Mabuza*... where it was held that the standards which a judicial officer should maintain in the questioning of an accused must be such that its impartiality must not be questioned or doubted... In *S v Maseko*... it was held that a trial judge should guard against conduct which would create the impression that it was descending into the arena of conflict between the appellant and the State or that he was partisan or had predecided issues which should only be decided at the end of trial.” [Paragraphs 18-19]

“... In my view, the conduct of the magistrate in the questioning of the appellant was highly improper and constitutes an irregularity in the proceedings in the court a quo... By reason of the foregoing it cannot be said that the appellant has had a fair trial nor can it be said that he was not prejudiced” [Paragraphs 21-22]

The appeal was upheld and the conviction and sentence set aside.

S V MNCUBE [2006] JOL 18068 (W)

Case heard: 10 May 2004, Judgment delivered: 4 March 2005

The accused was convicted in the Regional Court of the rape of a 9 year old girl, and was referred to the High Court for sentencing. Saldulker J confirmed the conviction and proceeded to deal with the issue of sentencing.

Saldulker J held:

“It is clear from the above sections [the minimum sentence provisions of the Criminal Law Amendment Act] that the legislature intended that the perpetrators of these serious offences, and in this case rape, be dealt with harshly....” [Paragraph 10]

“This is the rape of a 9 year old child who was in Grade 3 at the time... She was raped in the sanctuary of her home, where she was supposed to have felt protection and security... The circumstances of the rape can only be described as brutal and cruel. She was picked up by the accused in her school clothes and placed on a bed and raped. This can only be described as a cowardly and arrogant act, indicating the physical power that the accused wielded over his victim.” [Paragraphs 17-18]

“Although the J88 medical report records that no physical injuries were seen, the psychological scarring as a result of the rape, according to the pre-sentencing report, exists. However the extent, the duration and the intensity of the psychological harm is not clear.” [Paragraph 19]

“In considering the appropriate sentence I have to take into consideration the obligation cast on me by the Act and the intention of the legislature to mete out harsher punishment to those who are convicted of serious offences, such as rape. As was stated in the *Mahomotsa* case, there are bound to be differences in the degree of seriousness. There should be no misunderstanding about this. All rapes are serious, but some are more serious than others.” [Paragraph 21]

"I am persuaded that the rape *in casu* was not accompanied by any brutal assault... no violence was perpetrated against the complainant. The accused did not use any dangerous weapons to force the victim's compliance. Further, the long term effects of the psychological scarring that the victim may have suffered are known... In *S v Abrahams* ... Cameron JA ... stated the following: 'But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.'" [Paragraph 22-23]

"After careful consideration I am satisfied that the cumulative effect of a number of circumstances fall to be regarded as substantial and compelling circumstances... These are the following: the accused is a fairly young man, he has no previous convictions which counts substantially in his favour. The complainant was a nine-year-old-girl who was fortunately not seriously injured as a result of the rape. She has suffered psychological trauma the true extent of which is not known. The accused has been in custody for one year and two months... Against this must be weighed the aggravating factors; that the complainant is a nine-year-old, who has suffered psychological trauma and has become withdrawn..." [Paragraph 25-26]

"I am satisfied, taking all of the above into account, that the circumstances are such that they justify a departure from the prescribed sentence of life imprisonment. The rape of a nine-year old girl is appalling and abhorrent, and in my view lies on the border line of the very serious category of rapes." [Paragraph 27]

"An examination of various authorities reveal the following... In *Jansen's* case the accused was sentenced to 18 years' imprisonment for the rape of a 9-year-old girl. In *S v Abrahams*, the accused was convicted of raping his daughter who was under the age of 16 years. The state appealed against the sentence of seven years imposed and this was increased to 12 years by the Supreme Court of Appeal. In *S v Dithotze*, the accused was sentenced to 18 years imprisonment for the rape of a 12 year old girl... The rape before me was a callous and brutal crime... It was a heinous crime, taking into consideration the tender age of the complainant... The accused's action in raping a defenceless child and violating the sanctity of her body in her own home can only be described as arrogant, cowardly, and such, that he must be severely dealt with." [Paragraph 28]

"Society demands that persons who make themselves guilty of offences of this kind must be severely dealt with. The visions and expectations of the community is a relevant factor. The rape of children in our society is increasing alarmingly." [Paragraph 31]

"In my view, having already considered that there are substantial and compelling circumstances that justify a departure from the prescribed sentence of life imprisonment, a suitable sentence in my view, taking into account the crime, the criminal and the interests of society, is a sentence that does not bring the administration of justice into disrepute. Having found that a lesser sentence is justified does not mean a lenient sentence must be imposed." [Paragraph 32]

"A sentence of 18 years' imprisonment in my view is the only appropriate sentence, and in the result the accused is sentenced to 18 years' imprisonment." [Paragraph 33]

SELECTED JUDGMENTS**CIVIL AND POLITICAL RIGHTS****WOOLWORTHS (PTY) LTD V WHITEHEAD 2000 (12) BCLR 1340 (LAC)**

The appellant had interviewed the respondent for a vacancy. The Respondent was later informed that she could not be offered a permanent position by reason of her pregnancy and was instead offered a different post for a fixed term. The Respondent brought an application in the Labour Court, who granted Respondent relief on the basis of an unfair labour practice claim (the Appellant's conduct constituted discrimination on grounds of sex).

On appeal, Zondo AJP, concurring separately with Willis JA, held that the respondent had not shown that, but for her pregnancy, she would have been appointed to the position. Conradie JA dissented, holding that the requirement of continuity in the post in question had not been shown to be so important that it would have been unreasonable to expect the appellant to employ the respondent.

Willis JA held:

"...[I]t is important to have regard to the fact that not only item 2(1)(a) of Schedule 7 but also our Constitution prohibits unfair discrimination and not discrimination per se." [Paragraph 119]

"Given the facts of this particular case, it seems to me that there is nothing arbitrary in the employer taking into account the applicant's pregnancy in deciding whether or not to offer her a contract of permanent employment. The employer testified that ... it needed continuity in the position for an uninterrupted period of time of at least twelve months. ... [I]t is difficult to disbelieve this evidence." [Paragraph 129]

"[The employer] took into account perfectly rational and commercially understandable considerations ... It did not act out of bigotry or prejudice which, it seems to me, is the mischief that item 2(1)(a) of Schedule 7 to the LRA is principally designed to prevent." [Paragraph 131]

"We live in a country with pervasive poverty, poor social security, high unemployment and a low growth rate ... At this stage of our history, to hold that an employer cannot take into account a prospective employee's pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society." [Paragraph 136]

The appeal was upheld.

SOCIO-ECONOMIC RIGHTS

JOHANNESBURG HOUSING CORPORATION (PTY) LTD V UNLAWFUL OCCUPIERS, NEWTOWN URBAN VILLAGE 2013 (1) SA 583 (GSJ)**Case heard 17 October 2012, Judgment delivered 15 November 2012**

Applicant, the registered owner of immovable property on which the Newtown Urban Village had been erected, sought to evict the occupiers of the village.

Willis J held:

“The respondents are not the tenants of the applicant. It is common cause that, at common law, the respondents have no right to occupy the property. There appears to be no real dispute that the property is controlled by one Zacharia Matsela who ... has hijacked the property.” [Paragraph 7]

“To the extent that the respondents had rights at common law to occupy the property, these expired years ago. What would have been a legally straightforward matter before the coming into operation of PIE ... has now become fraught with complexity. ...” [Paragraph 14]

After considering the Constitutional Court judgement in *Port Elizabeth Municipality v Various Occupiers* and section 26 of the Constitution, Willis J held:

“None of those who trace their intellectual and moral commitments to constitutionalism back to the Putney Debates could, conceivably, have the slightest difficulty with this section [s 26]. As for the prohibition on legislation which permitted arbitrary evictions, this evokes the horrendous forced removals of black people through administrative action authorised by a shameful litany of ... notorious pieces of legislation ...” [Paragraph 17]

“It is now trite that PIE has its roots, inter alia, in the provisions of s 26 of our Constitution. ... None whose intellectual and moral paradigms are consistent with the rationalism born of the Enlightenment could have any difficulty with the requirement that a court, before deciding to make an eviction order, should consider all relevant circumstances, including the rights and needs of children, the elderly, the disabled and households headed by women. ...” [Paragraphs 19 - 20]

“The words 'just and equitable' glide from the tongue with facility. Their precise meaning eludes easy description. It must also be borne in mind that if one reads s 4(7) and s 4(8) of PIE together, the court has to make two 'just and equitable' determinations: the first as to whether it would be 'just and equitable' to grant an order for eviction, and the second as to the date upon which it should be ordered that the occupier is to vacate the property. The determination as to the date upon which the occupier is to vacate the property is then followed by another determination, which presumably should also be 'just and equitable', even though the subsection does not expressly say so, as to the date when the occupier should be evicted.” [Paragraph 33]

“When Harms JA endorsed the Perskor test and the Knox D'Arcy test in their application to the PIE matter in the Ndlovu case (followed by Maya AJA in the Wormald v Khambule case), this may have had far-reaching implications. It seems to mean that a court ... can make only one right decision, not only as to (a) whether to order an eviction or not, but also (b), if it succeeds in correctly deciding to order an eviction, as to the precise date of the eviction order. This, in my respectful view, is not helpful. It would create an

intolerable situation, rendering the functioning of the courts in regard to eviction matters unworkable. ...” [Paragraph 36]

“It is questionable ... how there can be only one correct answer, not only on whether to grant an eviction order or not, but also ... the actual date in the future from which it is to take effect. It is unsurprising that there seems to be so much confusion when dealing with eviction matters. This confusion may explain the inordinate postponements of such applications.” [Paragraph 37]

“Intrinsic to the rule of law are predictability, reliability and certainty. ... Is South Africa's great constitutional experiment, after 1994, to be put in jeopardy because we have defenestrated the rule of law? Have we sacrificed the great principle of legal certainty, developed by the giants of constitutional law over several centuries because of a penchant to be described as 'progressive'? ...” [Paragraphs 37 – 38]

Willis J then discussed the meaning of “just and equitable”, referring to South African and Canadian case law:

“The recurring emphasis, in the case law, in other contexts, on the objectivity of the test may be an indicator that a court, in making a decision that is just and equitable in terms of PIE, is allowed the same margin of error as that set out for individual judges exercising a discretion in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. In that case it was held that the exercise of a judicial discretion entails a latitude of individual judicial freedom, but nevertheless requires that it must not be influenced by wrong principles or a misdirection of the facts ... Once a court starts to talk about ‘reasonableness’, this is, ordinarily, a pointer to the fact that it is referring to an objective test.” [Paragraph 50]

“One accordingly comes full circle. ... A decision may be reasonable ... even though one may not have made it oneself. If this test is applied, the task of the courts having to decide upon eviction matters is much easier if there is a range of decisions which may correctly be made, given a particular set of facts. The rule of law favours certainty, although this certainty need not be absolute. ...” [Paragraph 52]

“No municipality, no government, no politician, no court ... can guarantee to any person unqualified permanence in his or her place of residence. ... When the Constitutional Court and the SCA refer to 'homelessness', they must, of necessity, have had in mind some qualification as to time (or, more particularly, the happening or non-occurrence of an uncertain future event). ...” [Paragraph 84]

“Accordingly, in context, 'homelessness' must mean this (or something closely similar thereto): 'Without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property and the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property), of the occupier being able to find alternative accommodation that is (a) of a comparable or better standard to and (b) at a similar rental to and (c) within reasonable proximity to that of the property from which the eviction is sought.'

This proposed definition is my own. The occupiers, in casu, have not claimed that they will be 'homeless' within the meaning that I have proposed. Accordingly, there is no need to involve the municipality in this matter at all.” [Paragraph 85]

“Of course, my understanding of what 'homelessness' must mean may be incorrect. ... It is therefore necessary to provide further reasons why I see no point in involving the City in this matter. further than has already been the case. The City is subject to severe financial constraints. This is a matter that is quite

regularly discussed freely in open court. ... [W]hen it comes to the provision of housing in South Africa, the Constitutional Court has made, and is likely to continue to make, orders which may impact, to a major degree, on questions of funding for projects of national development which, in classical constitutional theory and upon an ordinary reading of the Constitution, it is the national government's prerogative to decide, subject to approval by Parliament." [Paragraphs 86, 88]

"In view of the unanimity of these Constitutional Court decisions and the fact that judges of the Constitutional Court are appointed by the President ... from a list submitted to him by the Judicial Service Commission ... it must be accepted that successive South African Presidents as well as the JSC have, since 2000 (when the *Grootboom* case was decided), been content that these constitutional anomalies with regard to state funding of national objectives should continue. The puisne judges in the high courts will have to do their best in a trying situation." [Paragraph 91]

"... [C]ourts lower in the hierarchy may disagree with decisions of those that are higher, and may even say so. They are, however, bound to follow the decisions in higher courts. My respectful but nevertheless fundamental difficulty with the Constitutional Court's decision in the *Blue Moonlight Properties* case is that I have no doubt that its notions of 'rationality' and 'reasonableness' in this particular context are not universally shared." [Paragraph 94]

"In emphasising that '(t)he concepts of rationality and reasonableness are thus central', the Constitutional Court has steered its course towards the application of an objective test as to when a court can or cannot make an order for eviction. Ordinarily, the adjective 'objective' denotes a large degree of freedom from controversy of the noun which it qualifies. It is indubitably desirable that an aura of intellectual incontestability should be distinctive of the Constitutional Court's determinations. Unfortunately, controversy has dogged its judgments on eviction matters since the *Grootboom* case." [Paragraph 95]

"I hope my analysis of the meaning of 'just and equitable' will have shown that it is intellectually and morally impossible to insist that there can be only one correct date in the determination of (a) the date upon which an occupier is to vacate the property and (b) failing which the occupier is to be evicted therefrom. ... I am satisfied in the present matter that the only correct decision that the court can make is to order the eviction of the occupiers in the event that they do not voluntarily vacate the premises on a date to be determined. ..." [Paragraphs 127 – 128]

EMFULENI LOCAL MUNICIPALITY V BUILDERS ADVANCEMENT SERVICES CC AND OTHERS 2010 (4) SA 133 (GSJ)

Case heard 1 April 2010, Judgment delivered 28 April 2010

The applicant municipality sought to evict people alleged to be unlawfully occupying State-owned property.

Willis J held:

"My experience of the case of *Machele and Others v Mailula and Others and Philani-Ma-Afrika and Others v Mailula and Others* may perhaps bear some repeating. Applying the well-known principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* to determine factual foundation in motion proceedings, I had to consider a situation in which there had been a transfer of a dilapidated block of

flats in central Johannesburg to a bona fide purchaser. ... In order to renovate and restore the property, it was necessary to evict the tenants. To this end, he brought an application in this court.” [Paragraph 5]

“... I took the trouble to review, as far as it was reasonably possible to do so, the law concerning transactions that failed to comply with the provisions of s 228 of the Companies Act, as well as the common law, with regard to our system of property registration, including transfers thereof. I also referred to s 28(2) of the Alienation of Land Act ... which provides that an alienation in terms of an invalid deed of alienation will in all respects be valid ab initio if both parties had performed in full and the land in question had been transferred to the transferee. There was no case law directly in point... I came to the conclusion that, in our law, where the transferee had not been party to any of the alleged irregularities, the finality of transfer was of utterly critical importance: the entire system of property transfer would be chronically undermined with the most dreadful consequences, if this were not so. ... I dismissed the application to set aside the transfer and granted the eviction order, but allowed the tenants a month in which to vacate the premises.” [Paragraph 10]

“The tenants then approached the Constitutional Court ... The Constitutional Court came to their relief. ... In the unanimous judgment ... it said that the fact that 'the High Court authorised the eviction without having regard to the provisions of PIE is inexcusable'. Quite how the Constitutional Court could have come to this conclusion is one of the great unfathomable mysteries of my life” [Paragraph 12]

“The appeal was heard by the Supreme Court of Appeal (the SCA). The SCA found that one Mr Mkhumbuzi, who signed the deed of sale in respect of which Mr Mailula was the buyer, was not authorised 'to sell the building or to sign the conveyancing documents for the property to be transferred to Mr Mailula'. Accordingly the orders I had made had to be set aside and replaced with orders which set aside the sale and the transfer of the property. The SCA did not refer to any of the statutory or common-law authorities or any of the academic literature with which I had engaged when delivering my judgment. Although it did not say so explicitly, the SCA seems to have applied the principle that 'fraud unravels all'. This principle is one of English law, although it has been adopted in *Phillips and Another v Standard Bank of South Africa Ltd and Others*. Nevertheless, in English law the applicability of the principle exists so as to prevent, on public policy grounds, a party from relying on 'his own fraud' ... That was not the position of Mr Mailula in the case before either me or the SCA. ...” [Paragraph 13]

“It seems that South African judges are expected to have views on socioeconomic rights. I shall therefore, briefly, put my colours to the mast. To my mind, the experience of Britain in the nineteenth century, America in the twentieth century and contemporary China provide clear and convincing evidence that there is a linkage between economic freedom, with its incentives for innovation and risk-taking, and rapidly rising economic prosperity for all social classes. In other words, the correlation between economic freedom and general prosperity is not coincidental, but causal: ... Money follows opportunity, impervious to race, class or gender. Ironically, if anyone doubts the transformative power of this economic model, he or she should read (or reread) *The Communist Manifesto*, written by Karl Marx and Friedrich Engels. It has high praise for economic freedom's ability to smash repressive social structures.” [Paragraph 18]

“As it is with employment, so it is with housing: one does not, in my view, 'save' jobs by making it more and more difficult to dismiss employees, and one does not make housing more widely available by rendering the ownership of property which is let to tenants a serious economic hazard. ... Obviously, economic freedom is not to be confused with economic chaos: economic freedom must function within a

legal matrix. Nevertheless, matrices, in order to be nurturing, must allow room for growth and development. ..." [Paragraph 19]

"... In my view, if the courts reliably, predictably and consistently act to preserve, protect and defend the institutional framework that allows human imagination, creativity, innovation, risk-taking and freedom to soar, that will best promote the attainment of socioeconomic rights. After all, what better socioeconomic right can there be than to escape from the bonds of poverty? ... Above all, the courts must always protect those who strive to promote the achievement of our constitutionally enshrined socioeconomic rights. ..." [Paragraph 26]

"...[I]n my view, unless the courts are well attuned to economic realities, and are firm, clear and consistent in applying the principles that provide the foundation for economic prosperity for all, we shall all rue our acquiescence in what may perhaps be a misplaced moral superiority being paraded in high places." [Paragraph 27]

"As far as I am aware, there is effectively only one legal remedy for the unlawful occupation of such property: an eviction order. Obviously, the making of any such order must be exercised with compassion, grace and an awareness of the right of every human being to be treated with dignity. It hardly need be said that any such order must take into account the provisions of the Bill of Rights in the Constitution. Nevertheless, although it may be postponed, the making of the order cannot, it seems to me, be avoided." [Paragraph 28]

"I am bewildered and confused as to how a court is expected to deal appropriately with applications for eviction. ..." [Paragraph 31]

Willis J postponed the application, allowing for further papers to be filed and requesting the Deputy Judge President to appoint a full court to hear the matter [see paragraph 1].

ADMINISTRATIVE JUSTICE

THEBE YA BOPHELO HEALTHCARE ADMINISTRATORS (PTY) LTD AND OTHERS V NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY AND ANOTHER 2009 (3) SA 187 (W)

Case heard 18 February 2009, Judgment delivered 25 February 2009

Applicants sought to set aside the first respondent's award of a tender for a contract to manage first respondent's HIV-Aids Wellness Programme to the second respondent. Applicants argued that the decisions fell foul of the rationality provisions and the requirement of procedural unfairness in PAJA. Applicant had initiated a first tender process, and followed this with a second tender process which head-hunting possible tenderers. The second respondent, who had not been involved in the first tender process, was one of the tenderers targeted. Applicant was not invited to participate in the second tender process. First respondent justified excluding the applicants on the basis that first applicant was factually insolvent, and the third applicant's primary service provider was subject to a restraint of trade agreement which prohibited her from performing the required services. Applicants had been given an opportunity to respond to these concerns, but failed to ally them.

Willis J held:

“... [I]nsofar as the substantive (as opposed to the procedural) merits of the tender process are concerned, Mr Leech relied on the 'rationality' approach apparent in several cases decided in the Constitutional Court (CC) and the Supreme Court of Appeal (SCA). In *Pharmaceutical Manufacturers of SA and Another: In re Ex parte President of the Republic of South Africa and Others* and *Merafong Demarcation Forum and Others v President of Republic of South Africa and Others* it was affirmed that rationality is considered a principle of the rule of law and all exercises of public power are required to comply with this principle. That which does not, falls short of the standards demanded by our Constitution for such action.” [Paragraph 22]

“Sight must not, however, be lost of the important case decided in the Constitutional Court, *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* in which that court held that the basic test for administrative review was whether the decision reached is one that no reasonable decision-maker could reach. The standard, the court reaffirmed, 'is the one in *Bato Star*'. In the *Bato Star* case the principle of deference to an administrative decision-maker's decision received some prominence. In the *Sidumo* case Navsa AJ, delivering the majority judgment, remarked that the definition of administrative action in PAJA is 'intended to cover the field'. ... It seems it may be gleaned from the *Sidumo* case that, in regard to administrative action, PAJA is a codification of administrative law that supersedes all other earlier law which may be in conflict with it (except, of course, the Constitution itself). In view of the fact-complex of *Sidumo*, this seems to entail that, in the absence of procedural unfairness, or a failure by the administrative decision-maker to comply with an applicable statutory provision, extraneous to PAJA, a person aggrieved at administrative action can only succeed if he or she can persuade a court that the administrative decision-maker's decision was one that no reasonable decision-maker could reach. It is not clear what the impact of *Sidumo* on the 'rationality' or 'rational connectivity' test has been. ... The silence of the Constitutional Court in the *Sidumo* case on the rationality test seems to have been both deliberate and significant in more ways than one. The first is: why did they not apply it when it appears so clearly in s 6(2)(f)(ii) of PAJA? The second is that Cameron JA, as he then was, writing the judgment for a unanimous SCA, specifically based his decision in that very case - which the Constitutional Court reversed - on the 'rationality' principle. It seems that, in regard to administrative action, at least, the Constitutional Court may have taken the decision to suffuse 'rationality' into 'reasonableness'. ... Nevertheless, if all that a person aggrieved at the substantive aspects of administrative action may hang his or her case on is whether the decision was one that no reasonable decision-maker could reach, this may be rather chilling. ...” [Paragraph 23]

“... If the test in a challenge to an administrative decision is whether the decision was one that no reasonable decision-maker could reach, it will, in practice, be very difficult to succeed. ... [I]f one has regard to the totality of facts and circumstances as set out by the first respondent, it cannot be concluded that the decision of the first respondent not to continue with the first tender process and not to invite the applicants to participate in the second tender process was so unreasonable that no reasonable person could have come thereto. Moreover, even if the 'rationality' or 'rational connectivity' test still prevails, it cannot be found that the decisions of the first respondent in this regard were devoid of rationality or not sufficiently rationally connected with all that the first respondent had to consider so as to justify interference by this court. ...” [Paragraph 24]

Willis J then found that the failure to invite the applicants to participate in the second tender process was not unfair, and whilst the first respondent had “fallen short of the optimum standard” of procedural fairness before taking the decisions:

“It must be borne in mind that the persons making the decisions on behalf of the first respondent are not trained lawyers, they were acting in stressful circumstances; the record shows that they attempted to act with appropriate fairness and they did invite the applicants to make representations on ... the two issues that led to the decisions of which the applicants now complain. Against the background of all the relevant circumstances of this case, it cannot, in my view, be concluded that the court should interfere with the decision of the first respondent to award the tender to the second respondent.” [Paragraph 31]

The application was dismissed.

SASOL OIL (PTY) LTD AND ANOTHER V METCALFE NO 2004 (5) SA 161 (W)

Case heard 18 March 2004, Judgment delivered 19 March 2004

Applicants sought to declare certain departmental guidelines ultra vires and to review and set aside a decision to deny authorisation for the applicants to construct a filling station under the Environmental Conservation act (ECA).

Willis J first dealt with an argument that the review application fell outside the 30-day period specified in the ECA, and held:

“Mr Freund, however, has submitted that ... PAJA [providing for a limit of 180 days] is general legislation and cannot derogate from the provisions contained in the ECA, which relates specifically to environmental matters. In my view, PAJA cannot be regarded as ordinary legislation. The preamble ... refers to the fact that ss 33(1) and (2) of the Constitution ... provide that everyone has the right to administrative action that is 'lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given reasons'. ... The purpose of PAJA is plainly to give effect to the rights, constitutionally enshrined in the Bill of Rights of the Constitution, to just administrative action. It is constitutional legislation. ... PAJA is not general legislation in the sense that it is some generally useful tool. It is, rather, 'universal' legislation: it confers rights upon all who live in South Africa insofar as their dealings with organs of State are concerned. ... Section 7(1) of PAJA very sensibly provides that reasonableness is the primary yardstick in determining whether a review application has been timeously brought. ... The application for review was issued ... less than three months after the respondent's decision. This particular matter is complex. There is much that is at stake. The legal principles with which the parties have had to grapple are, in many respects, new and rapidly evolving. The applicants clearly needed to consider their position carefully. I do not think it can be said that the applicants came to Court after unreasonable delay. Furthermore, the provisions of the ECA are obviously dated. They are of an era, or in the broad sense of the term, a regime in which reasons for administrative action seemed less important than they do in our new constitutional order. It seems to me that it would be quite inappropriate to hold the applicants to the provisions of s 36 of the ECA.” [Paragraph 7]

Willis J then turned to deal with the guidelines:

“There is much that is good, indeed commendable, in these guidelines. ... It may well be so that, in regard to certain aspects thereof, opinions amongst reasonable men and women may differ. That is no business of the courts. What is clear from these guidelines, however, is that the respondent believed that she had the power to authorise or refuse to authorise the erection or construction of filling stations per se. ... I

understood [counsel for the respondent] to submit that the respondent necessarily and impliedly had these powers. I do not agree ... ” [Paragraph 12]

“These guidelines are clearly, on the papers, guidelines as they ordinarily understood. ... [T]he respondent herself has said ... in her answering affidavit that these guidelines were applied as guidelines in the sense that we ordinarily understand them to be. As these are motion proceedings, it would be quite wrong for me to peer behind the ipse dixit of the respondent. There are no special circumstances which would justify the inference that she is not telling the truth in this regard. ...” [Paragraph 13]

“Therefore, I do not consider that the applicants can succeed in their first prayer to have the guidelines declared to be ultra vires. I wish, however, to emphasise that the guidelines, while not ultra vires, are for the most part totally irrelevant and inappropriate, not because they purport to take into account irrelevant environmental considerations but they are based upon a clearly wrong premise, that the respondent has the power to regulate the construction and erection of filling stations per se.” [Paragraph 14]

“The proposed activity here clearly relates to the storage and handling of petroleum products and cannot go wider than that. It is the storage and handling of petroleum products within the filling station to which the respondent had to apply her mind. Any other considerations, however laudable they may be, are, as a matter of law, irrelevant. Respondent clearly believes that she had the power to regulate the erection and construction of filling stations generally and per se. She did not. In my view, the decisions taken by the respondent and her department were taken 'for a reason not authorised by the empowering provision' in terms of the provisions of s 6(2)(e)(i) of PAJA and also stands to be set aside 'because irrelevant considerations were taken into account' as provided for in s 6(2)(e)(iii) of PAJA. ” [Paragraph 15]

The decisions to deny authorisation were thus reviewed and set aside. The judgement was set aside on appeal: MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another 2006 (5) SA 483 (SCA).

PRIVATE LAW

FIRSTRAND BANK T/A FIRST NATIONAL BANK V SEYFFERT AND ANOTHER AND THREE SIMILAR CASES 2010 (6) SA 429 (GSJ)

Case heard 21 September 2010, Judgment delivered 11 October 2010

This case dealt with the application of provisions of the National Credit Act (specifically the interpretation of section 86(10)) in summary judgement applications.

Willis J held:

“In respect of the affidavits resisting summary judgment filed by each of the respondents, counsel for the applicants levelled a number of criticisms. With varying degrees of intensity, these criticisms are justified. The affidavits of the respondents have been cryptic to the extent of coyness. These affidavits are laconic, if not supine, with regard to the real possibility of extrication from financial difficulties which the respondents face. Even where the respondents presented some acceptable evidence as to the fact that they had referred the matter to a debt counsellor, and in some instances annexed that person's

recommendations, in no such instance does the proposal make any economic sense at all. Indeed, the proposals are devoid of economic rationality. In making this observation as to economic rationality I have in mind no ideological commitment but consistency with mathematical laws. ..." [Paragraph 3]

"The conundrum that arises from s 86(10) is this: may a debtor, who has made an application for debt review in terms of s 86(1) of the NCA, by the simple expedient of making such an application, indefinitely frustrate the enforcement of a debt to which he or she has no real defence and where no serious effort is being made to enter into some sensible arrangement for the rescheduling or rearrangement of his or her debt (as is provided for in the NCA)?" [Paragraph 4]

"... [I]t is clear from reading s 3 of the NCA, which sets out the purposes of the Act, that it pursues varied objectives which must be held in balance. Certainly, the NCA is designed to protect consumers, but it was not intended to make of South Africa a 'debtors' paradise'. ... Sight must not be lost of the fact that among the purposes of the Act is the 'development of a credit market that is accessible to all South Africans'. It should be remembered that access to responsibly granted credit, on fair and reasonable terms, is an important means of social upliftment for ordinary citizens. It also needs to be borne in mind that responsibly granted credit has a 'multiplier effect' in an economy. ..." [Paragraph 10]

"A plain reading of s 86(10), especially when read together with s 86(11), makes it clear that the giving of notice by a credit provider to a consumer to terminate a process of debt review does not necessarily terminate that process of debt review, but may have this consequence. ... [T]he defence must not be 'flimsy'. Where a debtor wishes to avoid summary judgment after proper notice has been given in terms of s 86(10), the court would want to see active, serious, sensible and reasonable proposals having been mooted by the consumer; and not an opportunistically supine attitude. Conversely, a credit provider who appears to be adopting a recalcitrant attitude may expect to be deprived of the expeditious and inexpensive remedy of summary judgment. It follows that, in my respectful view, to the extent that Kathree-Setiloane AJ over- emphasised the protection of the consumer as a purpose of the NCA in justifying her conclusions in the cases of *Standard Bank of South Africa Ltd v Kruger*; *Standard Bank of South Africa Ltd v Pretorius*; and *SA Securitisation (Pty) Ltd v Matlala*, she was clearly wrong. In particular I disagree with her that by reason of the provisions of s 129(2) of the NCA, a notice to terminate in terms of s 86(10) of the NCA is incompetent once a debt review has been referred by a debt counsellor to a magistrates' court for determination. ..." [Paragraphs 12 - 13]

"It seems to me that in context the words 'pending' in s 130(3)(b) (and also in s 130(4)(c)) and 'before' in s 130(3)(c) denote a certain immediacy to the events rather than merely a formal referral having been made. ... The word 'before', in plain English, means 'in front of'. In other words, it is not good enough for a consumer, being pursued for a debt for which he or she has no substantive defence, to adopt, as so often happens in this division, a 'catch-me-if-you-can' attitude." [Paragraph 15]

"I am fortified in this view by reference to two considerations. The first is that it is trite that, even where a defendant fails to satisfy a court that he or she has a bona fide defence to an application for summary judgment, the court has a discretion not to grant summary judgment. ... Summary judgment need therefore not be granted where a consumer deserves a fair opportunity to reorganise his or her financial affairs on a sensible basis. Respect for an important purpose of the NCA - consumer protection - is therefore not necessarily undermined by an application for summary judgment ... The second consideration ... is that, in terms of s 130(4)(c) of the NCA, the court has a discretion to adjourn proceedings where there is a pending debt review ... A prospective debt review is not, ipso facto, a bar to

obtaining summary judgment. ... Active endeavours to exchange serious, sensible and reasonable proposals to resolve a consumer's debt problems will be among the factors which will weigh heavily with a court in deciding which order to make." [Paragraph 16]

"The respondents are all 'clutching at straws'. In each case, summary judgment is appropriate. Mindful of the provisions of s 26(1) of the Constitution, which enshrine the right of access to adequate housing, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ... and the decisions in the cases of Jaftha v Schoeman and Standard Bank v Saunderson, I consider that, although it would be right to grant the applicants summary judgment for the debts due to them, it would be an appropriate exercise of a discretion not to make orders that the immovable property in question be declared to be specially executable. After all, among the clear purposes of the NCA is to afford a debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case. ..." [Paragraph 17]

The summary judgement applications were granted. The decision was confirmed on appeal: Seyffert and Another v Firststrand Bank Ltd t/a First National Bank 2012 (6) SA 581 (SCA).

CRIMINAL JUSTICE

MKHIZE V S [2000] 1 ALL SA 572 (W)

The Appellant was convicted of a number of crimes, including murder, and sentenced to thirty years' imprisonment on the murder charge, the other sentences to run concurrently. The Appellant's locker had been searched without a warrant, and a gun was found as a result of that search. The Appellant did not consent to the search, and submitted that the searching of his locker without a warrant constituted an invasion of his right to privacy and that the admission of such evidence would render the trial unfair and be detrimental to the administration of justice.

Willis J (Cloete and Van Oosten JJ concurring) held:

"I agree with the finding of Nugent J [in the court a quo] that Superintendent Lang would, in the circumstances, have obtained the necessary warrant and that in the circumstances prevailing at the time (some suspects had just been arrested) he believed, on reasonable grounds, that the delay in obtaining a warrant would have defeated the object of the search. But the learned Judge went further and held that even if he was wrong in this regard, he would have admitted the evidence. ..." [Page 576]

"It is clear however that he [Lang] did not, subjectively, intend to violate the appellant's constitutional right to privacy unlawfully. ..." [Pages 576 – 577]

"Even if steps had been taken properly to obtain a search warrant, nothing that the appellant could lawfully have done would have prevented the discovery of the pistol. The "no difference" principle then becomes relevant ... In my view, the admission of this evidence would not render the trial of the appellant unfair or otherwise be detrimental to the administration of justice."

"I am satisfied that Nugent J correctly decided that even if the discovery of the pistol was made and the evidence in respect thereof obtained in circumstances which were not covered by section 22(b) of the Act, the evidence should be admitted. It is real evidence. Furthermore, Superintendent Lang acted in

good faith, in that if it be accepted that he failed to comply with the provisions of the Act relating to a search, such failure was inadvertent and technical in nature. In my view, the administration of justice would be brought into disrepute if this evidence were to be excluded.” [Page 577]

The appeal was dismissed.

SELECTED ARTICLES

'THE TIMES THEY ARE A-CHANGING, AND THE JUDICIARY MUST KEEP UP', Mail & Guardian, 1 July 2011, available at <http://mg.co.za/article/2011-07-01-the-times-they-are-achanging-and-judiciary-must-keep-up>

"The extension of the term of office of the chief justice has been controversial. It is unfortunate that the deliberation of lawyers is required. The manner of appointment to such an important office and the term thereof should be easily understood and generally accepted by all."

"The problem arose because it was generally accepted that, in the early years of the existence of the Constitutional Court, its appointments would have to be made from outside the ranks of existing judges, who were pale, male and conservative."

"There was a series of legally convoluted measures trying to straddle two unruly horses at the same time: first, the need to be fair to those on the Constitutional Court bench who had been appointed from outside the ranks of judges, and, second, the "new blood" principle that no one should have undue influence on the court by serving for too long."

"... The problem currently focused on the chief justice can easily go away by making the appointment and the terms of office of Constitutional Court judges, in future, the same as those applying in the Supreme Court of Appeal."

"In recent years, the Judicial Service Commission has often found itself in a pickle. Its role in terms of the Constitution should be clear enough: to ensure an independent, highly qualified judiciary that is not packed with the usual suspects, white males. The simplicity of the mandate has become confused because the commission has displayed little actuarial sense—an awareness of the mathematics of time."

"The experience in the Commonwealth is that if one wants good, independent judges, it is best to start looking from among the ranks of those who have been successful practitioners for about 20 years. Once this requirement has been met, one can start to look for other attributes. As a rule of thumb, judges should rarely be appointed much under 45 years of age. Judges have security of tenure and are well looked after in their old age. The state is entitled to expect that it will get its "pound of flesh" from the years of service of those on the bench. It does not make actuarial sense to appoint those who are much over 55 years old...."

"The risk of bad appointments to apex ... would be decreased by the insistence that, to be eligible, one should have had a distinguished career as a high-court judge for at least eight but preferably 10 years. This also avoids the risk of anyone serving for too long in these apex courts. No one should be appointed as a head of court without having at least 13 and preferably 15 years of service on the bench."

SELECTED JUDGMENTS**SASOL OIL (PTY) LTD V NATIONWIDE POLES CC 2006 (3) SA 400 (CAC)****Case heard 13 December 2005, Judgment delivered 13 December 2005**

Appellant had been found guilty by the Competition Tribunal of breaching section 9(1) of the Competition Act. The Tribunal found that appellant was a dominant firm in the creosote market, and had sold creosote to its customers at prices that differed according to the amount purchased and constituted a prohibited practice in terms of s 65(6)(v) of the Act.

Davis JP (Selikowitz and Mhlantla JJA concurring) held:

“The question ... arises: does a test of ‘competitive relevance’ [proposed by appellant’s counsel] do justice to the wording of the section? [s 9(1)(a)] The Tribunal sought to bolster its interpretation by reference to comparative law, as well as to the purpose of the Act contained in s 2 thereof. In this regard, the Tribunal sought to adopt an approach to price discrimination which was not entirely dissimilar to that of the United States. ... ” [Page 409]

“There are notable differences between this formulation [in the U.S. Robinson-Patman Act of 1936] and that of s 9 of the Act for the wording employed in the Robinson-Patman Act clearly is different from that used in s 9. In addition, the Robinson-Patman Act is not restricted to dominant firms. The Robinson-Patman Act contains a number of express or implied exceptions to the prohibitions contained in s 2(a). Here, there are similarities to the defences contained in s 9(2) of the Act. Section 9(2)(a) of the Act is similar to a provision to s 2(a) of Robinson-Patman Act and contains a cost justification defence whereby it is permissible to employ price differentials that ‘make only due allowance for differences in the cost of manufacture, sale and delivery resulting from the differing methods or quantities’ in which the commodities are sold or delivered. Thus, a seller may charge different prices for different purchases if this is justified by savings in the seller’s cost relating to manufacture, sale or delivery.” [Page 410]

Davis JP noted that the Tribunal, in interpreting s 9 (1)(a), had looked to the preamble and to s 2(e) of the Act to find that a purpose of the Act was the promotion of small business. After considering European Union jurisprudence on abuse of dominance, and continued:

“... [T]he Tribunal was correct to emphasise the importance placed by the Legislature on the prohibition of price discrimination as set out in s 9 of the Act. This legislative purpose supports an interpretation which prevents the erosion of the competitive structure of the South African market. This approach, as seen above, also finds comparative support. Further, the fact that price discrimination was afforded a specific treatment and not placed in s 8 under the broad doctrine of abuse of dominance is significant. Manifestly, the Act is concerned with actions by a dominant firm, as defined, which charges discriminatory prices to purchasers of its goods and services, where the effect of such practice is likely to substantially prevent or lessen competition in the market under consideration. ...” [Pages 414 - 415]

“These policy considerations notwithstanding, s 9(1)(a) must be interpreted in terms of the words employed by the Legislature to give effect to this purpose. The wording ... may be open-textured, but a Court is still required to engage with the text and justify the meaning. ... [T]he majority judgement [in the Morton Salt case] applies a test which ... is sensitive to the purpose of the Act in general and s 9 in

particular. Once a supplier has been proved to be dominant in the market and engages in discriminatory pricing practice, the test is whether there is a 'reasonable possibility' that competition may be adversely affected by a practice under which the dominant firm sells its goods at a cheaper price to some customers at the expense of others. By adopting this interpretation of s 9(1)(a), an integrity can be accorded to the words employed by the Legislature and the result is to give a tangible effect to the objectives of s 2 of the Act; in particular, the protection of small and medium-sized enterprises ..." [Pages 415 - 416]

"Given the interpretation which this Court has placed upon s 9(1)(a), subject to one important qualification, the question is whether there is a reasonable possibility that appellant's pricing structure is likely to have a substantial effect on competition in the downstream market where respondent is located. The qualification concerns the evidence required to answer the question. The majority judgment in Morton Salt ... appeared to dispense with the need for independent evidence to show that 'which was self evident' ... This conclusion may well have been reached on the basis of the facts of the case. ..."

"The determination of a reasonable possibility that appellant's pricing structures are likely to affect substantially the competition in the downstream market cannot rest on an inherent effect of appellant's pricing policy without any recourse to evidence which could demonstrate that the impugned is capable of having, or likely to have, an anti-competitive effect in the relevant market." [Page 420]

"The evidence supports the conclusion that the respondent is able to compete and continue to operate in the relevant market. ... It was also clearly shown that the relevant market was one where small firms can effectively compete against their large rivals. There is, however, insufficient evidence as to the nature of the cost structures of these small firms which presently compete in the market, evidence which would indicate the impact, if any, of the discount structure upon their ability to continue to operate as effective competitors. ..." [Pages 420 - 421]

"In summary, the only clear evidence made available to the Court reveals that there is an increased cost burden imposed upon respondent ... as a result of the discount policy employed by appellant. Were this Court to have been provided with evidence as to the operations of the remaining small competitors in the market, the nature and scope of the Suprachem operation, it may have been able, on a balance of probabilities, to conclude that there is a reasonable possibility that appellant's pricing structure is preventing or lessening competition from taking place within the market in which respondent operates. ... On the evidence, this Court is not able to conclude that there is a reasonable possibility that competition has been significantly prevented or lessened. ..."

"It is to be regretted that this case was litigated without the benefit of the Competition Commission and its investigative powers. In the result, the only evidence placed before the Tribunal was that of the respondent, which clearly had limited access to the industry. The evidence produced does not justify the conclusion reached by the Tribunal." [Page 421]

The appeal was upheld.

COMMUNITY HEALTHCARE HOLDINGS (PTY) LTD AND ANOTHER V COMPETITION TRIBUNAL AND OTHERS 2005 (5) SA 175 (CAC)

Case heard 23 March 2005, Judgment delivered 26 April 2005

Appellants had sought to be recognised as participants in a merger between third and fourth respondents. The Competition Tribunal dismissed the applications. Appellants noted an appeal, and “made strenuous efforts for an expedited hearing” before the Competition Appeal Court on the basis of urgency [paragraphs 1 – 4]. The court registrar sent a letter to the parties giving instructions regarding the hearing of the appeal and two review applications. It was common cause that these instructions had not been complied with. The court was unable to hear the review applications, and continued to hear the appeal only.

Davis JP (Jali JA and Malan AJA concurring) held:

“... [I]n both the Anglo SA case ... as well as the decision of the Tribunal in Healthbridge (Pty) Ltd v Digital Health Care Solutions (Pty) Ltd: A In re Digital Health Care Solutions (Pty) Ltd v Competition Commission and Another ..., the applicants for intervention set out in their founding affidavits the matters upon which they sought to make representations. They identified their interests and specified the scope and nature of their proposed participation. ...” [Paragraph 29]

“By contrast, in the present case, appellants failed to provide the Tribunal or this Court with any details as to the contribution it might make to proceedings before the Tribunal, were they to have been admitted as intervenors. ...” [Paragraph 30]

“Although invited to specify what contribution appellants could make to the proceedings, Mr Dempers' [the C.E.O of the first appellant] testimony before the Tribunal provided no indication as to how appellants sought to assist the Tribunal in discharging its statutory duties. Mr Dempers was also not able to provide evidence of any substantial and material interest which the appellants might have had in the proceedings, which were designed with the objective of assessing whether the merger would substantially prevent or lessen competition. Rather, Mr Dempers conceded that the entire motivation for appellants' application to intervene was to protect their own commercial interests. ...” [Paragraph 33]

“For these reasons, the Tribunal was correct to conclude that the set of considerations presented by appellants as the basis for their application were not concerns which represented a genuine interest in terms of the objectives of the Competition Act. Assertions about the first appellant's own commercial interest were insufficient to bring the application within the scope of s 53(1)(c)(v) of the Act. Nowhere in the papers did appellants provide any indication of evidence it could or would lead before the Tribunal.” [Paragraph 34]

“In my view, given the skeletal nature of their justification for intervention, the Tribunal was more than justified in refusing the application. In coming to this conclusion, it carefully evaluated the evidence set out above and exercised its discretion in a judicial manner.” [Paragraph 36]

"... [F]ive days after the hearing, a replying affidavit ... was received. It is a prolix document and whether it deserves consideration, having been filed in so extraordinary circumstances, is doubtful. Suffice to say it seeks to justify appellants' conduct in persisting with the consolidation application. The short response is that nowhere is a satisfactory reason given for why the appellants acted in a manner clearly contrary to the Registrar's letter ... The dispute about whether the Registrar's letter was of 10 or 11 March 2005 is plainly irrelevant. Much of [the] affidavit turns on allegations that third to seventh respondents were unco-operative. The point, however, is that directions were given to the parties by the Registrar on behalf of the Judge President. There is an unacceptable practice among some who appear in this Court to treat these directions in a rather cavalier fashion. Private dealings which seek to circumvent directions are unacceptable and cannot be countenanced." [Paragraph 38]

The application was dismissed. Having found that the application had been brought prematurely and in violation of specific instructions by the Registrar, costs were awarded against the applicant on an attorney and client scale [paragraph 39].

JD GROUP LIMITED AND ANOTHER IN RE: COMPETITION TRIBUNAL V JD GROUP LIMITED AND ANOTHER [2004] 1 CPLR 31 (CAC)

Judgment delivered 13 January 2004

The Competition Tribunal had approved a large merger between appellants and Profurn, subject to certain conditions. The conditions required that the Profurn and JD components of the merged entity were forbidden, for a period of three years, from purchasing a lower percentage of their stock from independent furniture manufacturers than they had purchased prior to the merger. The Competition Appeal Court upheld the appeal and ordered that the merger be approved without conditions.

Davis JP (Jali JA and Malan AJA concurring) held:

"The Tribunal had dealt previously with a merger in the furniture market between the JD Group Limited and Ellerines Holdings Limited ... It had then defined the relevant market as "The relevant market is composed of furniture shops (with a product mix of furniture and appliances) directed at credit sales of customers in the LSM3-5 category". The merging parties contended in the present dispute that the same market definition should not be adopted but that the relevant market was composed of all furniture and appliance retailers aggregated together into a national geographic market. The Tribunal did not make a definitive finding in relation to the applicable market. ... The Tribunal found that the independents did not act as a countervailing power to the market behaviour of the chains and their plurality notwithstanding, they should be excluded from any relevant market determination. On this basis and employing the relevant 3–5 LSM category the Tribunal concluded: "The merged firms have 24.2% of the post merger market. The HHI (Herfindahl–Hirschman Index of market concentration) is 2 113 pre-merger and 2 380 post merger, yielding a change in HHI of 267, suggestive of a concentrated market"." [Page 33]

"In my view, there are significant further defects in the reasoning employed by the Tribunal in addition to those set out by Appellants. Although the Tribunal engaged in some detail with the definition of the

appropriate market, it ultimately desisted from providing a clear finding, concluding that “Because we make no adverse finding against the parties in respect of the horizontal aspects of the merger, it is unnecessary for us to come to some definitive conclusion on the boundaries of the relevant market”. That may well have been a satisfactory side step if the dispute had turned exclusively on the horizontal aspects of the merger. Once the Tribunal was required to engage with the significant vertical implications of the merger, clarity in respect of the definition of the market was clearly required.” [Pages 36 - 37]

“The absence of clarity in respect of the appropriate market then leads to the further difficulty with the reasoning employed by the Tribunal. The Tribunal acted in terms of section 12A(1)(a) ... From the wording of this section it appears that the Tribunal, prior to having imposed any condition on an approved merger (or in the case of the prohibition of a merger) should have considered whether, having found a substantial lessening of competition, there were efficiencies that offset the substantial lessening of the competition. ... There is also very little in the way of justification provided by the Tribunal with regard to the specific nature of the conditions imposed by it. The manner in which the conditions were framed appears to prevent the JD Group from making buying decisions in accordance with its best commercial interests and would seem to have been imposed not to protect other retailers from undesirable consequences of the merger but to protect a group of suppliers against competition from Steinhoff.” [Page 37]

“The difficulty with the conditions imposed can be illustrated thus: If the independent manufacturers are unable to deliver sufficient products to the JD Group during the so-called “Christmas rush” ... the JD Group may well be precluded from making up the shortfall by purchasing from Steinhoff. If the JD Group does seek to increase its purchases of a Steinhoff line of products that is selling particularly well, it would be required to cut back on other Steinhoff products so as not to exceed the permitted Steinhoff ratio. If a Profurn chain closes, which the Tribunal found would have been likely to have occurred in respect of at least three of the Profurn chains but for the merger, the proportion of stock that the other chains must purchase from independent manufacturers would escalate dramatically because they would be required ... to assume the obligations of the closed stores’ purchases from the independent manufacturers. This could have the effect of reducing the purchases from Steinhoff to nothing, with serious consequences both for Steinhoff and for the remaining chains which would be obliged to buy uncompetitively priced products, thereby placing their business at risk. ” [Pages 37 - 38]

“A further concern pertains to the position of Steinhoff which was not placed in a position whereby it could respond to the possibility of conditions being imposed by the Tribunal. ...”

“The imposition of a series of conditions as occurred in the present case, requires at the very least a rational justification based on the evidence presented to the Tribunal. In the present case, the Tribunal was not able to point to any clear evidence which justified the imposition of the conditions so imposed.” [Page 38]

FEDERAL-MOGUL AFTERMARKET SOUTHERN AFRICA (PTY) LTD V COMPETITION COMMISSION [2004] 1 CPLR 25 (CAC)

Judgment delivered 3 December 2003

This was an appeal against the Competition Tribunal's finding that the appellant had contravened section 5(2) of the Competition Act, and imposing an administrative penalty of R 3 million. On appeal, it was argued that the Tribunal's finding was mistaken in law and fact; that s 59 of the Act was unconstitutional for permitting the Tribunal to impose discretionary pecuniary penalties for contraventions of the Act; and that the penalty was not appropriate.

Davis JP (Hussain JA and Patel AJA concurring) held:

"Prior to dealing with these substantive matters, the question arises as to whether the Minister of Trade and Industry, being the appropriate Minister insofar as the Act is concerned, should have been joined in these proceedings. ..." [Page 26]

Davis JP noted that in the case of *Jooste v Score Supermarket Trading*, the Constitutional Court had held that it was undesirable for a court to find an Act of Parliament unconstitutional unless the relevant organ of state had had an opportunity to intervene in proceedings:

"It appears from this dictum in Jooste's case that, where a dispute comes before a court and turns on a question of the constitutional validity of a piece of applicable legislation, the appropriate Minister should be joined. Mr Unterhalter submitted that a declaration of constitutional invalidity was not, in effect, what the Appellant sought in these proceedings. ... This argument can be rebutted on a number of grounds. ..." [Page 27]

"... If this Court decides that section 59 of the Act is unconstitutional ... the Court, on the strength of the Mkgangeli case, would be obliged to consider, in terms of its powers of section 172, whether the Act was unconstitutional and, if so, declare it to so be. This case cannot be reduced to a quasi-constitutional dispute, namely that the Court would decide that the section was unconstitutional and simply leave the relevant section hanging in the jurisprudential air. The consequences for competition law in general and the system of administrative penalties as provided for in the Act would be serious in that the law would be left in uncertainty."

"... [T]he Minister would have two very significant interests in dealing with such a constitutional attack, namely, in defending the constitutional validity of legislation which is his responsibility, and defending the very enforcement mechanism which is contained within the Act. This would be a direct consequence of the declaration this Court would be required to make were Appellant to succeed, namely a declaration that section 59 of the Act was constitutionally invalid. ..."

"Joinder is not simply a question of a provision of a set of court rules. It is part of our common law and Mr Marcus was correct to contend that, even if the parties had not raised the question of joinder, this Court would have been so required to do as is evident from the Constitutional Court's jurisprudence ... It is not a sustainable argument to say that the matter was not dealt with in the Tribunal and accordingly all the parties, including the Minister, are deemed to have waived their rights, nor is it correct to suggest that some correspondence which might have been generated between Appellant's attorney and an individual in the Department of Trade and Industry is sufficient to meet the requirement of joinder. In

short, the Minister ought to and should have been joined in these proceedings and the relevant constitutional question cannot be considered without that step having been taken.” [Page 28]

“The further question then arises as to whether ... the substantive questions relating to section 5(2) of the Act ... can be considered separately from the constitutional questions to which I have already made reference. In general the approach taken by appellate courts is not to hear an appeal in a piecemeal manner ... Are there then some exceptional circumstances which would justify hearing this matter on a piecemeal basis? In my view, there are not. The matter is not pressingly urgent. The complainant is already out of business. Appellant appeals against an order to make payment of a fine. It is not alleging that its own business is now under threat. The further question arises as to how the matter would be decided if the section 5(2) question was heard separately. For example, what would occur insofar as the issues pertaining to the penalty are concerned, absent the constitutional questions inherent therein? Must the Court divide the matter between the price maintenance question and the dispute relating to penalties? If so, issues which are of a factual nature would then have to be re-canvassed when the Court dealt with the question of the penalty. That is an inconvenient course of action.”

“There does not seem to be any reason why this case should not be heard in its totality at one sitting. For this reason, it is not appropriate to hear this matter in various parts. Appellate courts should not have to engage in litigation in the form of a chain novel. In this case no pressing argument has been put up as to why that approach should be altered.”

“It appears from the record that the only party who did raise the issue of joinder was the *amicus*. There does not appear to be any indication that the Respondents adopted the approach that the matter should not be heard today, nor is there any evidence that they approached Appellant on this basis. Therefore, there does not appear to me to be any basis on which a punitive order of costs in their favour would be justified.” [Page 29]

The case was postponed, with appellant ordered to pay the respondents’ costs.

GLAXO WELLCOME (PTY) LTD AND OTHERS V TERBLANCHE NO AND OTHERS (NO 1) 2001 (4) SA 891 (CAC)

Case heard 11 September 2000, Judgment delivered 13 October 2000

The competition tribunal had granted interim relief to the 5th to 13th respondents against the appellants. The order was to remain in force until the conclusion of a hearing into alleged prohibited practices, or until six months after the date of the issue of the order. Appellants brought an urgent application to suspend the operation and execution of the order, pending the final determination of a review application.

Davis JP held:

“An order granted by the tribunal in terms of s 59 does not represent a final order because it enures only for a limited period. Furthermore where a person complains against a prohibited practice, or where the complaint is initiated by the Commissioner in terms of s 44, an inquiry which follows an investigation in terms of s 45 and which would then proceed in terms of ss 50 or 51 will have to canvass the same issues

which were examined by the tribunal when it awarded interim relief in terms of s 59. On the basis of this legislative scheme the order granted by the tribunal does not meet with the three fundamental attributes [regarding an appealable decision] to which Howie JA in the Guardian National Insurance case ... had made reference. ” [Pages 895 - 896]

“As the s 59 order was not capable of anticipation, nor was there any guarantee either that the Competition Commissioner would refer the complaint made in terms of s 44 to the tribunal, or that the complaint would be referred on the same basis as the grounds upon which the tribunal granted the interim order in terms of s 59, it could not be contended that such an order effectively functioned in the same fashion as an interim order granted in terms of the common law.” [Page 896]

“... [T]he hearing by the tribunal will dispose of the substance of the complaint which was initially canvassed in terms of s 59. For this reason it is my view that the Zweni test is inapplicable to the order granted under s 59. The matter will be canvassed again by the tribunal, save in a case where the complainant does not want to take the matter further (in the event of non-referral). For reasons which I shall set out presently, the ambiguity, if any, should be resolved in favour of the respondents.”

“Insofar as the recourse to s 34 of the Constitution is concerned, appellants have already had a right to have the dispute resolved by an independent and impartial tribunal, the competition tribunal, which has been set up under the Act for the precise purpose of dealing with matters, such as the granting of orders in terms of s 59 of the Act. The members of the tribunal were appointed for their expertise in the field of competition law and the very purpose of the tribunal was to ensure an impartial adjudicatory process particularly regarding decisions of the applicable administrative body, being the Competition Commission.”

“To extend a constitutional right to a right of appeal in the context of the scheme of interim orders set out in the Act would do far greater violence to the architecture of the Act than to any right of the appellants to subvert the purpose of an interim order by an attempt to wrench a right of appeal from the provisions of s 34. In short, s 34 of the Constitution would trump any legislative attempt to eradicate an appeal in a dispute for which an appeal is appropriate as opposed to an interim order which does not meet the test for an appeal.” [Page 897]

“In terms of s 1(2) the Act must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in ss (2). Subsection (2) makes clear that the purpose of the Act is to promote and maintain competition in the Republic ... Were an act, which on clear evidence has been found to constitute a prohibited practice, to be allowed to continue until a final determination takes place, the very purpose of the Act itself would be undermined. Accordingly, to the extent that there may be any ambiguity in the Act, this would justify the conclusion to which I have come.” [Pages 897 - 898]

“The Constitution establishes a new regime of legality in South Africa. Consequently it is understandable that an application for a review of a decision in terms of s 59 could give rise to an appeal to this Court to suspend the s 50 order of the tribunal. Were the tribunal to have acted in a manner which would justify a review, that is a decision that could be questioned on any number of review grounds based on the principle of legality, and it would be legally proper to consider a suspension of such an order. An order which is not congruent with our newly established principle of legality should not be allowed to stand, no

matter that its purpose is to protect a clear interest recognised by the Act during an interim, defined period.” [Page 898]

Finally, Davis JP turned to deal with the effect of a review application brought by the appellants after they had appealed to the CAC:

“The Court's jurisdiction ... is dependent upon whether the initial order of the tribunal is subject to a review. When appellants came before this Court it had not launched a review. The papers were not drawn on the basis of a review; respondents were never given an opportunity to answer the case as to whether a *prima facie* case for success in an application for review had been made in that the very application for review came after the Court had reserved judgment on the initial application. ...” [Page 899]

“... [W]hen a party comes to Court without launching an application for a review and the case is then argued by both parties on the basis of an absence of an application for a review and judgment is then reserved on that basis, it would work substantial prejudice if the decision is then to be taken on the grounds of a later application for a review, the very merits of which could have a significant bearing upon the outcome of the decision regarding the application to appeal the s 59 order. ... The test is whether the Court had jurisdiction when the proceedings commenced.” [Page 900]

The application was dismissed.

SELECTED ARTICLES

'COMPETITION LAW AND GLOBALISATION: UNIFORMITY OR CONVERGENCE, NETWORKING OR STATE SOVEREIGNTY', 2009 Acta Juridica 185

This article discusses the prospects of global governance of anticompetitive (antitrust) behaviour.

"The purpose of this paper is to concentrate mainly on the central issue ... [of] whether an antitrust system can encompass a wide scope including abuse of dominance or more modestly can deal with the egregious practices of hardcore cartels and merger control. ...Beyond these questions, however, lies a more controversial conceptual problem: the different approaches and dominance of the US and Europe. Expressed in the language of legislative purpose, some developed countries, particularly those who support current US thinking insist that competition law exists only to promote efficiency and consumer welfare. Any broader focus will protect small competitors and cause economic inefficiency. By contrast, developing countries insist that this form of legislation must also address issues of distributional power." (Page 187)

The article then discusses various possible models for global regulation, before turning to discuss South African competition law specifically:

"In contrast to the narrow efficiency jurisprudence that has characterised particularly the US over the last two decades, the South African Competition Act ... is illustrative of the concerns of developing nations to create a competition law that addresses key concerns of their societies. ..." (Pages 192 - 193)

"From an examination of this section [s 2 of the Competition Act], it is clear that South African competition authorities are mandated not only to regulate against practices and structures that may artificially raise prices or depress output, but also to have regard to serious distributional considerations. ... In addition, section 12A(1)(a)(ii), read with subsection (3), provides for a set of public interest considerations which can be critical to a decision on whether or not to approve a merger. ..." (Page 193)

"In *Anglo-American Holdings Ltd and Kumba Resources Ltd/Industrial Development Corporation* (intervening), it was suggested that these provisions should be interpreted widely ... The apartheid economic system led to excessive concentration in the economy, which the Act explicitly aims to address by promoting a wider spread of ownership of economic assets by a greater number of South Africans. It was accordingly argued that a merger between Anglo American and Kumba, a strategic asset, should be prohibited or should be only allowed subject to conditions to permit these assets to come into the hands of historically disadvantaged persons. ... [T]he merger would have had an effect that was diametrically opposed to the one foreseen by the Act. The Tribunal did not decide whether section 12A(3) could be interpreted to accommodate this argument. However, it decided that the merger could not be prohibited on this basis, and that a condition obligating Anglo American to share control with historically disadvantaged persons could not be imposed as there was no evidence that an alternative transaction ... could be put together. Furthermore, it was not sufficiently shown that the interest of historically disadvantaged persons in Kumba would not be increased despite the Anglo American take-over. ..." (Pages 193 - 194)

“This approach [of the US Supreme Court in the *Trinko* case] would be less likely to find favour in the South African context where ... the authorities are mandated to curb monopolistic practices and abuse of dominance to prevent dominant firms from utilising their leverage to curb competition from less powerful firms. The development of a vibrant competitive system compels this approach. Viewed in this context, creating a comprehensive international competition law runs into significant problems as an agreement to provide for a workable framework to harmonise the interests of both the developed and developing countries appears to be a bridge too far. Simply stated, beyond cartel control, developed countries led by the US hold to the view that erroneous, enforcement may well punish entrepreneurial success, discourage a firm from striving to be dominant, and thereby negatively impact on consumer welfare. Any proposal based upon a thick consensus, being a consensus around a comprehensive legislative scheme, is faced with an additional problem: national sovereignty. ...[P]roposals for a broad-based consensus for a world competition regime run into the problem that, by its very nature, competition law is predicated on competing economic models which reflect choices made by different nations that may be reluctant to give up their policy-making autonomy in favour of a global regime. ...” (Pages 195 - 196)

“Abuse of dominant power is of great concern to developing countries. While international cartels can have a most damaging impact on the trade of developing countries, multinational corporations can, and do, dominate markets in developing countries to the detriment of small and medium-sized indigenous businesses. The negative effect on competition, and in turn on consumer welfare, of local monopolies and dominant firms spawned by the unfettered deregulation of erstwhile state enterprises and the state's promotion of national champions should not be underestimated. ...” (Page 199)

“Ultimately, the problems faced by small nations require a more ambitious model than that which can be provided by an informal network. After all, at best they are equipped with weak enforcement agencies and courts which battle to deal with a conceptual tool bag of competition law adopted from either the US or the EU. Far more important, however, they face the threat of multinationals moving to more favourable jurisdictions in the event of the establishment of an efficacious competition law regime ...” (Page 200)

“In countries where there have been experiences of closed economies, state ownership of enterprises, protected monopolies and consequent concentration of markets, there is little likelihood that markets, absent regulatory intervention, will erode the existing structure which reproduces market power. In turn, it is difficult to see how one size can fit all, or how different economic conditions produced by specific histories will all respond to the same conceptual and regulatory approach. ...” (Page 201)

SELECTED JUDGMENTS**PRIVATE LAW****LIYEMA KRAQA V THE PREMIER OF THE EASTERN CAPE PROVINCIAL GOVERNMENT N.O., UNREPORTED JUDGEMENT, CASE NO.: 862/08 (EASTERN CAPE HIGH COURT, BISHO)****Case heard 24, 25 March 2011, Judgment delivered 31 May 2011**

The plaintiff, a minor child assisted in this case by his mother, suffered from osteotitis, a paediatric infection which attacks the bone. It must be treated immediately as it progressively deadens the bones that it infects. The plaintiff's mother alleged negligence in the failure of the hospital to diagnose and treat the problem and claimed damages on this basis. The merits and quantum were formally separated by the court and this case dealt only with the merits.

Bacela AJ held:

"The standard and skill required of medical practitioners or any other employee of a hospital, public or private, is that of reasonableness. The question to be asked is, on the question of reasonableness, would the general practitioners in both hospitals have been expected to foresee a possibility that the underlying cause of the cellulites diagnosed in the minor child was osteotitis." [Page 6]

"On the question of reasonableness, it was expected of the medical practitioners to rule out Osteotitis. According to Professor Brown, an expert who testified in support of the plaintiff's case, any cellulites in children must be treated as Osteotitis and the only exclusion thereof is by surgery... According to him the failure to exclude Osteotitis was negligence on the part of the Defendant's employees in both hospitals. Diagnosis had be done within 48 hours of the first visit, after that the damage was done and the failure to progressively make the correct diagnosis worsened the condition." [Page 6]

"Medical negligence arises when a reasonable man in the position of the defendant would have foreseen a reasonable possibility of his conduct injuring the other person or causing the other person a patrimonial loss and fails to take reasonable steps to guard against..." [Page 7]

"I agree with the plaintiff that there was negligence on the part of the defendant's employees to simultaneously, expeditiously and correctly make a diagnosis and thereafter appropriately and expeditiously treat the minor child's condition at both hospitals. Instead, at no stage was this condition diagnosed at all." [Page 8]

"In my view the plaintiff has discharged the onus resting on her to prove her case on a balance of probabilities. " [Page 9]

The plaintiff's application therefore succeeded on the merits.

**ZOLEKO ATTERIA KONDLO V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO. 1295/2009
(EASTERN CAPE HIGH COURT, MTHATHA)**

Case heard: 23 September 2011, Judgment delivered: December 2011 (day not indicated)

The plaintiff's husband was involved with a head on collision with another motor vehicle, in which he died instantly. The deceased had supported the plaintiff and their three minor children entirely. The plaintiff sued the defendant for loss of support for her and her minor children as a result of her husband's death, which she alleged was the result of negligent driving on the part of the insured driver. This judgement dealt with the merits only.

Bacela AJ held:

"It would appear that the versions of the parties on the point of impact are mutually destructive of each other. It therefore becomes imperative that I should make credibility findings. The evidence of the defendant was contradictory on this aspect. Even if I accept that the insured driver made a bona fide mistake during cross examination with regard to the point of impact, this part of his evidence differs significantly with his evidence in chief on the same aspect. The fact that the court had to warn the insured driver time and again not to confuse himself... will have no further impact in the assessment of the insured driver's credibility as he failed dismally to articulate where on the surface of the tarred road the accident occurred. This being the case, I find that the plaintiff's version ought to prevail..." [Paragraph 6]

"That brings me to the next issue whether any negligence can be attributable to the insured driver. The defendant pleaded that the collision occurred due to negligent driving of the deceased... It was argued on behalf of the defendant that the manner of driving by the deceased put the insured driver in a situation of sudden emergency..." [Paragraph 7]

"In *Road Accident Fund v Grobler*... it was held that: 'When a person is confronted with a sudden emergency not of his own doing it is wrong to examine meticulously the option taken by him to avoid the accident in light of after acquired knowledge... The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances.'" [Paragraph 8]

"Expert evidence is to the effect that there is a clearance of 150 metres within which motor vehicle drivers could see each other... This issue depends solely on the reaction of the insured driver immediately he noticed irregular driving on the part of the deceased... A reconstruction of a collision scene can never be conclusive, but it is only one of the considerations that the court has to take into account when making a finding on a balance of probabilities." [Paragraph 10]

"I am of the view that a reasonable man in the position of the insured ought to have done more than apply brakes. A reasonable man in his position ought to have swerved more onto his side of the road to avoid the collision. Having accepted that the collision occurred in the centre of the road on top of the barrier line it appears that it was unnecessary for the insured driver to swerve as far as the yellow line. Had he swerved completely to his lane, he could have avoided the accident. It is clear from the evidence that the insured driver on the barrier line and as such was negligent..." [Paragraph 12]

The application thus succeeded on the merits and the defendant was ordered to be liable to pay the damages for loss of support.

CRIMINAL JUSTICE

VUYO MAQTHUKA V THE STATE, UNREPORTED JUDGMENT, CASE NO.: CA&R 18/2012, 23 AUGUST 2012 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

The appellant pleaded guilty to rape and was sentenced to 25 years' imprisonment. The Court a quo granted leave to appeal against the sentence. The complainant was raped more than once and grievous bodily harm was inflicted upon her, therefore in terms of S51 of the Criminal Law Amendment Act, the prescribed minimum sentence of life imprisonment applied unless substantial and compelling circumstance justify a deviation from the life sentence. The personal circumstances of the appellant were relayed as follows: he was a 22 two year old single father of a 2 year old child, he had completed school up to standard 7, earned R1200 per fortnight as a labourer renovating prison cells, and still lived with his parents and four older siblings

Bacela AJ (Schoeman and Griffiths JJ concurring) held:

"The appellant's grounds of appeal are; a) that the sentence is shockingly inappropriate; b) the court erred in over-emphasising the interest of society as against the appellant and as such the appellant was sacrificed at the altar of deterrence... The court a quo seemed to have focused on the appellant's personal circumstances and the fact that the appellant pleaded guilty in this regard." [Paragraph 3]

"The guidelines on what an appropriate sentence should be are set out in S v Malgas... : 'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'" [Paragraph 4]

"The court of appeal will not interfere with a sentence unless it can be shown that no reasonable man ought to have imposed such a sentence or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence invokes a feeling of shock or outrage or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his/her discretion properly, or that it was in the interests of justice to alter it – S v Malgas... There is no suggestion by the appellant that the sentence was vitiated by misdirection, except that the sentence is shockingly inappropriate." [Paragraph 5]

"In this instance, the brutal invasion of the privacy and dignity of the victim was perpetrated by someone she knew and probably trusted from the same community... Although no evidence was led as to the complainant's psychological scarring, it can be accepted that the incident must have affected her negatively..." [Paragraph 7-8]

"... The complainant was viciously attacked by someone whom she knew very well. The medico legal examination of the complainant revealed that she suffered: Bilateral periorbital haematoma (black eye);

Four stab wounds at the back; Three lacerations on the left arm; Fresh bite marks to both breasts.”
[Paragraph 10]

“I am of the view that the court a quo fully considered the appellant’s personal circumstances and subsequently found that substantial and compelling circumstances existed and thereby deviated from the minimum sentence prescribed which is life imprisonment. The appellant’s use of a condom serves as no mitigating factor. Considering the appellant’s violent manner in which he perpetrated the offence, it is unlikely that the use of the condom was intended to protect the complainant. The appellant’s use of condom is, in my view, nothing but a neutral factor, for there could be a number of reasons for doing so, inter alia, an attempt to getting away with the offence, to prevent possible HIV infection...” [Paragraph 12]

“I cannot find that the sentence imposed by the court a quo is shockingly inappropriate. Accordingly I am of the view that the appeal against the sentence should fail.”

SELECTED JUDGMENTS**PRIVATE LAW****MNQUBENI V RAF [2008] JOL 21842 (CK), CASE NO. 250/07****Case heard 21 December 2007, Judgment delivered 22 May 2008**

The plaintiff sued the Road Accident Fund after her grandson (Xolani) was injured in a collision with a motor vehicle whilst riding his bicycle. She claimed damages in her capacity as her grandson's guardian for bodily injuries incurred by him. The parties agreed to separate from merits from quantum.

Cossie AJ held:

"In this matter we are dealing with two mutually destructive versions. The defendant has conceded being liable, but contends that Xolani also contributed to the collision, he having been negligent, *inter alia*, in riding into the path of travel of the insured driver at a dangerous and inopportune time. I must determine whether the collision occurred solely as a result of negligent conduct on the part of the insured driver or whether Xolani also contributed, through negligent conduct on his part, as well. Where a court is faced with two mutually destructive versions the rule as set out in the judgment of Eksteen JA in *National Employer's General Insurance Co Ltd v Jagers...* should be followed, namely, a plaintiff can only succeed if: '...he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version... is therefore false or mistaken and falls to be rejected'" [Paragraph 10]

"I prefer the version of the plaintiff to that of the defendant. There are a lot of improbabilities in the latter version, whereas the version of the plaintiff is clear and straightforward. The witness for the plaintiff was credible despite his age. He gave straightforward evidence and was not shaken in any manner under cross-examination. However, the same cannot be said about the witness for the defendant..." [Paragraph 11]

"On the defendant's version it is evident that reasonable care was not exercised by the driver of the insured vehicle and in the circumstances there can be no degree of contributory negligence on the part of the plaintiff and there is also no scope for damages on the plaintiff's version... I am satisfied that the plaintiff has discharged the onus resting on him to prove liability and that the insured driver's negligence was the sole cause of the collision. On the facts I cannot find that Xolani was negligent either in causing the collision or by failing to avoid it." [Paragraph 12-13]

The application succeeded and the defendant was to be held liable for the plaintiff's proven damages.

ADMINISTRATIVE JUSTICE**NTSHIBA V MEC, ECONOMIC AFFAIRS, ENVIRONMENT & TOURISM, EASTERN CAPE PROVINCE & ANOTHER [2008] JOL 21481 (Ck)****Judgment delivered: 14 February 2008**

The applicant was appointed as Chairperson of the Eastern Cape Provincial Liquor Board, in which position he served for a period of about 4 years. Having not obtained any compensation, he sought compensation for rendering duties in that position. The issue in dispute was whether the applicant was entitled to be remunerated for services he rendered to the Liquor Board.

Cossie AJ first stated the material facts that were common cause in the matter:

“The applicant is employed as senior legal administration officer in the Shared Legal Services section in the office of the Premier of the Eastern Cape Province in Bisho... was appointed as Chairperson of the Eastern Cape Provincial Liquor Board ("the Liquor Board") on or about 19 June 2000 and served in that capacity continuously until August 2004...” [Paragraph 1-2]

“Before his appointment as Chairperson...the Chairperson then being one Mr Lukwango-Mugerwa ("Mugerwa") who was employed in a rank and post equivalent to his own and who had in addition been remunerated for serving as Chairperson...The applicant was not remunerated for his services as Chairperson...The applicant over an extended period of time made numerous representations to various functionaries and officials for him to be remunerated for services he rendered to the Liquor Board without success. Eventually...Mr Godongwana, the MEC then in office, approved the payment of such remuneration per memo dated 26 February 2002...” [Paragraph 4-6]

“Despite such approval and the legal opinion supporting such approval the second respondent, the Head of Department at the time these proceedings were instituted, ignored calls to pay the applicant for services rendered as Chairperson of the Board hence this application... The remuneration sought by the applicant, which in fact is "top up" payment, amounts to R799 199,27.” [Paragraph 7-8]

Cossie AJ then held:

“The applicant's contention is that his claim is based on sections 41(1)(i), 41(3)(a) and 28 of the Public Service Act ("the Act") read together with Public Service Regulations ...In terms of B5 of Part VII of the Regulations an employee is entitled to compensation for acting in a higher vacant post. This is commonly known as ‘top up’.” [Paragraph 11-13]

“In the present case a decision was made by the respondents' predecessors that applicant should be remunerated for services rendered to the Liquor Board and that decision has not been withdrawn or cancelled...The decision was made by an executing authority within the powers delegated to him both in

terms of the Public Service Act and the Public Finance Management Act read together with prescripts applicable thereto.” [Paragraph 35-36]

“ There are no allegations made that the decision was unlawful or that steps were being taken to set it aside or that the approved remuneration purportedly due to the applicant constituted an unauthorised expenditure....In the absence of such allegations the decision to pay applicant the approved remuneration remains valid and enforceable. “ [Paragraph 37- 38]

“In my view, the applicant is an employee in terms of section 8(1) of the Public Service Act ... and the prescripts that govern the public service are also applicable to him and is therefore entitled to rely on them. His appointment to the Liquor Board as a "serving office bearer" that is, a person in the employ of the State did not preclude him from such benefits.” [Paragraph 39]

“There is no doubt that the applicant had a legitimate expectation that he would be paid as per approval by both offices of the predecessors of the respondents.” [Paragraph 41]

“In reviewing the second respondent's decision not to pay the applicant the additional remuneration it is necessary to analyse her reasons for such a decision to determine whether they measure up to her powers as provided for in the statutes empowering her to do so, having regard to the fact that there is prior approval for payment of such additional remuneration by her predecessor and the then MEC responsible for Liquor Board matters. “ [Paragraph 43]

“Furthermore it would be necessary to determine whether such decision constitutes an "administrative action". The second respondent's action falls squarely within the definition of administrative action as contained in section 1 of Promotion of Administrative Justice Act ...” [Paragraph 44]

“In the present case a decision was taken by the respondents' predecessors to pay applicant "top up" remuneration and that constituted an "administrative action". The decision was based on legal framework and delegated authority applicable at the time. I am of the view that applicant is entitled to have the decision of the second respondent judicially reviewed in accordance with the provision of PAJA” [Paragraph 46]

“For the reasons set out above, I have come to the conclusion that the applicant was successful in establishing a case for judicial review of the second respondent's decision not to pay the applicant such additional remuneration as he was entitled to, in terms of the applicable prescripts in the public service for performing duties as Chairperson of the Provincial Liquor Board.” [Paragraph 49]

The decision taken not to pay the applicant such additional remuneration as he was entitled to in was reviewed and set aside and declared unlawful, unconstitutional, void and without legal force and effect. The respondents were ordered to pay to the applicant all outstanding remuneration plus interest that should have been paid to him *qua* Chairperson of the Provincial Liquor Board from 19 June 2000 to September 2004.

**CRANKSHAW & OTHERS V MEC, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE & OTHERS
[2008] JOL 22704 (Ck)**

Judgment delivered 11 November 2008

As representatives of certain independent schools, the applicants instituted proceedings against the respondents, seeking the review of the respondents' decision to reduce the applicants' subsidy (originally granted in terms of section 48(2) of the South African Schools Act ("the Schools Act")) for the years 2003, 2004 and 2005 in contravention of the provisions of the National Norms and Standard published by the third respondent in the *Government Gazette* ("the Norms and Standards"). The amount of the subsidy had to be determined each year by reference to the variables set out in the formula provided in the Norms and Standards by the Provincial Department of Education. The issues for determination were whether the decision by the respondents to pay a reduced subsidy to the applicants constituted "administrative action"; and, if so whether the respondents were obliged to give the applicants a hearing prior to the decision to reduce the subsidy and whether the respondents did give the applicants a hearing before reducing the subsidy.

Cossie AJ held:

"The first issue, that is, whether payment of subsidies in terms of section 48(2) of the Schools Act constituted administrative action was considered by Leach J in *Ed-U-College (PE) Incorporated v Permanent Secretary, Department of Education & Welfare, Eastern Cape*... The conclusion reached by the Constitutional Court in this regard in the matter of *Permanent Secretary, Department of Education, Eastern Cape & another v Ed-U-College (PE)* was consistent with that reached by the court a quo. The Constitutional Court ... observed that section 48(2) of the Schools Act empowered the MEC to grant subsidies to independent schools from monies allocated for that purpose by the Legislature. The determination which schools should be afforded subsidies and the allocation of such subsidies were primarily administrative tasks....Accordingly, this Court following both decisions of Leach J and the Constitutional Court in *Ed-U-College (PE) Inc*, holds the view that the decision of the respondents to pay less subsidy to the applicants constitutes an "administrative action" within the meaning of section 33 of the Constitution." [Paragraph 30-32]

"The second question to be determined by this Court is whether the respondents were obliged to give the applicants a hearing prior to reducing the subsidy and whether the respondents gave the applicants such a hearing...The respondents argued that it is not the case of the applicants that prior to 2003 they were receiving full subsidy in terms of Norms and Standards...there is no basis for the applicants to harbour any legitimate expectation because the granting of a subsidy to an independent school is subject to the availability of funds from the provincial Department of Education. The applicants' legitimate expectation could not be based on the legislative framework and Norms and Standards promulgated by the respondents." [Paragraph 33-34]

"In the matter of *Premier, Mpumalanga* the concept of legitimate expectation was dealt with at length. Corbett CJ in *Administrator, Transvaal & others v Traub & others* considered in detail the origins and development of the concept of legitimate expectation in English law. He ruled that a legitimate

expectation must have a reasonable basis and in considering what conduct would give rise to a legitimate expectation, he cited the speech of Lord Roshill... *Service* as follows: 'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.'" [Paragraph 35]

"Corbett CJ also recognised that a legitimate expectation might arise in at least two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing, and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made." [Paragraph 36]

"In the present matter the applicants rely on the legislative framework and Norms and Standards promulgated by the respondents. However the granting of a subsidy to an independent school depends on the availability of funds in the Provincial Education Department and furthermore it is not the case of the applicants that prior to the 2003 financial year they were receiving full subsidies. There was also no promise or undertaking by the respondents that subsidies will always be paid in full." [Paragraph 37]

"In all these circumstances the applicants have failed to establish that they had a legitimate expectation that they would receive subsidies in the amounts claimed and calculated in terms of the formula applicable under Norms and Standards. This matter must be distinguished from the *Premier, Mpumalanga & another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal*...matter. In that case the court was concerned with a retroactive termination of bursaries already granted whereas this Court is concerned with a decision to allocate subsidies in circumstances where the amount available for distribution has been reduced by the Legislature." [Paragraph 38]

"The next question that arises is whether the payment of less subsidy to the applicants was procedurally unfair because they were never given a hearing by the respondents prior to such decision being taken. In the *Premier, Mpumalanga* case it was held that:

'... if a legitimate expectation has arisen concerning the grant of subsidies then any decision to alter or vary subsidies granted must be taken with due regard to procedural fairness. Procedural fairness will not require that a right to a hearing be given to all affected persons simply because a decision is to be taken which has the effect of reducing the amount to be paid. Subsidies are paid annually and given the precarious financial circumstances of education departments at present, schools and parents cannot assume in the absence of any undertaking or promise by an education department that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the Legislature has reduced the amount allocated for distribution.'" [Paragraph 40]

"The other matter that has to be considered by this Court is the submission made by the respondents that it would not be appropriate for this Court to grant an order directing the respondents to pay to the applicants the monies set out in the notice of motion ...I ...conclude that this argument is not valid. If a court arrives at a conclusion that the government owes money to a litigant, the fact that the government has not budgeted for such payment cannot deprive the court of the power to make an appropriate

order...This conclusion is consistent with that reached by Leach J in the court of the first instance and O'Regan J in the Constitutional Court in the matter of *Ed-U-College*." [Paragraphs 41-42]

"The courts have also taken a decision in this regard, namely, that a person whose legitimate expectation has not been considered is limited to a procedural right to be heard and not a legal right to seek specific performance. ..." [Paragraph 43]

The decision taken by the first and second respondents to decrease the subsidy to the applicants was reviewed and set aside. The matter was referred back to the respondents to give applicants a hearing.

SELECTED JUDGMENTS**PRIVATE LAW****BURCHELL v ANGLIN 2010 (3) SA 48 (ECG)****Judgment delivered 30 April 2009**

The plaintiff ran a game reserve and a hunting safari business, directed at overseas visitors, outside Alicedale in the Eastern Cape. He and the defendant had been friends and business associates, however their relationship soured. The plaintiff alleged that the defendant made defamatory statements about him to his key booking agent in Sydney, Nebraska (USA), known as Calebas. Most of his safari clients originated from this agent. The plaintiff alleged that bookings suddenly and dramatically decreased, due to defamatory statements made by the defendant. Plaintiff alleged that said publications took place with the purpose of destroying the ongoing working relationship between the plaintiff and Calebas. He instituted an action for damages and loss of profit amounting to approximately R12 000 000. The key issue for determination in this judgement was the matter of which substantive law (American law or South African Law) should be applied in the determination of the plaintiff's claim for damages as a result of the alleged defamation. This judgement did not deal with whether or not the defendant was liable for damages and the quantum thereof.

Crouse AJ held:

"LAWSA states that the conflict rule to determine the *lex causae* of a dispute involving a delict remains an unsettled question in South African law. The learned author CF Forsyth echoes this sentiment. ... As far as I am aware the only South African case where the *lex causae* had to be determined in a delictual matter and where mention was made in broad terms of the double actionability rule was *Minister of Transport, Transkei v Abdul*... Forsyth criticised the handling of the subject-matter in this case, referring to it as a 'garbled version of the unreformed English rule'." [Paragraph 95- 96]

Crouse AJ traced the development of the double-actionability rule under the English common law [paragraphs 97-106]. She concluded that the rule tends to favour the wrong-doer, as they can escape liability if there is a defence available to him in either the *lex fori* or the country in which the delict occurred (*lex loci delicti*). However the rule is not inflexible and has been subject to reform. It was shown in *Red Sea Insurance Co Ltd v Bouygues* that it is possible to depart therefrom on clear and satisfying grounds in order to avoid injustice, by holding that a particular issue should be governed by the law of the country which had the most significant relationship with the occurrence and with the parties.

Crouse AJ then moved to detail development of the issue in American law. The choice of law in USA was the *lex loci delicti*. However, it was found that this doctrine can lead to injustice in certain circumstances. Thus the law was restated to provide that the rights and liabilities in respect of a delictual issue are determined by the local law of the forum which has the most significant relationship with the parties. [Paragraphs 106-109].

Crouse JA also considered jurisprudence of other countries insofar as was necessary, as South African private international law "cannot be allowed to languish in a straitjacket" [paragraph 112]. She stated,

however, that she was cautious to take into account, *inter alia*, the fact that different delicts should be approached differently by virtue of their nature and that some foreign judgments are based on policy considerations particular to their specific jurisdiction.

“The unreformed form of the [English] rule always works in favour of the defendant and to the prejudice of the plaintiff. The reformed rule, in my opinion, is but a shadow of the original rule and now merely a term used to describe the discretion that the presiding officer exercises...The question is then: how am I to decide the issue? The learned author of *LAWSA* states that the orthodox method of choosing the applicable law in a multijurisdictional situation may be summed up in three words: (a) characterisation, (b) selection and (c) application. The process being as follows: first, the forum looks at the issue before it and characterises the question in terms of its conflict rules; then it selects the appropriate connecting factor in accordance with the characterisation which it has made to determine whether its domestic law or the substantive law of a foreign country will apply; and finally it applies the rule of the selected legal system.” [Paragraph 113-114]

“The dispute between the parties is whether justification in law exists for the publication. If so characterised, the issue is substantive. Thus, I characterise the issue as the substantive law of delict: defamation. According to *LAWSA*, the connecting factor in a delictual claim is the place where the delict was committed. I will now try to determine the place where the delict was committed. Having said this, I keep in mind that all delicts should not necessarily be treated alike.” [Paragraph 116]

Crouse AJ applied the seven possibilities for where a delict can be committed, as identified by the American academic authority, to the facts and found that in each of them that the place where the delict was committed was in the USA. Significantly, when assessing “principal harm” in this case, Crouse JA stated that the principal harm in a defamation case is where the damage to the claimant’s reputation took place, not where the claimant suffered financial loss. Crouse AJ also focused on the fact that the most essential element of the delict of defamation is that the defamatory statement be published or known, as it is concerned with the protection of reputation rather than individual self-worth.

“After considering all the above, I come to the decision that the *lex loci delicti* was Nebraska, USA.” [Paragraph 118]

“Internationally, a balancing test is used to determine the jurisdiction with the most significant relationship to the parties and the delict, and then the law of that jurisdiction is applied. I will follow this route. Having decided that the *lex loci* of the delict is Nebraska, I must now decide whether this is indeed the jurisdiction with the most significant relationship to the parties and the delict. In order to come to this decision, I will endeavour to establish whether our law or Nebraskan law will weigh more heavily on the balancing scale.” [Paragraph 122]

“I will deal firstly with the relationship that each of the parties and the delict have with South Africa. The plaintiff is domiciled in South Africa and operates his business ... as sole proprietor in South Africa. The plaintiff employs staff in South Africa. No South African hunters do business with the plaintiff. In either party's version, the trigger to the defamation originated or partly originated in South Africa. Any financial loss the plaintiff suffered in his estate would ultimately have been felt in South Africa. This fact weighs

heavily on the balancing scale. The video recording of the plaintiff's alleged abuse of his employees was recorded in South Africa.... The subject of the alleged fraudulent land deal is situated in South Africa. The ultimate breakdown in relationship between the parties occurred in South Africa. The defendant had acquired an interest in land in South Africa and often visits South Africa..." [Paragraph 123]

"I will now deal with the relationship each of the parties and the delict have with Nebraska. In analysing this relationship I will also have regard to other American connections... I have found that the *lex loci delicti* is Nebraska, USA. This fact weighs heavily in the balancing scale. The plaintiff so successfully conducted business in the USA that 75 percent of his clients originate there...The plaintiff has had a relationship with the booking agent ... since 2000. According to the plaintiff, roughly 95 percent of all clients coming from the USA are booked by Cabelas. The head office of Cabelas is at ... Sydney, Nebraska. The plaintiff does Frontier Safaris' advertising through Cabelas. Cabelas makes payments to Frontier Safaris into the plaintiff's Bank of America account...The plaintiff often visits America. The plaintiff often pays for his staff to attend to business in the USA. The defendant is an American citizen who works and resides in the USA. He and his wife hold interests in two quite substantial businesses in the USA. The alleged relationship breakdown between the plaintiff and Cabelas, resulting in financial loss, took place in America." [Paragraph 124]

"After the above consideration, I must find that Nebraska's relationship to the parties and the delict is more significant than the relationship of South Africa thereto...." [Paragraph 125]

"I must...also consider whether the law of Nebraska passes constitutional muster in South Africa before deciding I can apply the same...No evidence and/or argument has been presented on this issue. It is therefore left open for decision at the end of the trial." [Paragraph 127]

"Thus, in my judgment, the factors connecting the delict and the parties with Nebraska are sufficiently strong to make it substantially more appropriate to displace the law of South Africa as the applicable law on this substantive matter. I therefore find that, for the just disposal of claim 5, the *lex causae* is the law of Nebraska, subject thereto that it passes our constitutional threshold test. This decision does not mean that the law of Nebraska is applicable in the quantification of damages. This decision is also left open for decision after argument at the subsequent trial." [Paragraph 130]

ADMINISTRATIVE JUSTICE

PORT ALFRED RIVERHOUSE PROPERTY (PTY) LTD V NDLAMBE MUNICIPALITY & ANOTHER [2009] JOL 23948 (E)

Judgment delivered 10 July 2008

The applicant owned land situated directly across a river from the leased property, brought an application for the review of the lease agreement entered into between the first respondent and the second respondent, (Van der Walt). The grounds of review were, firstly, that the lease was in contravention of a restrictive condition in the title deed of one of the erven of which a portion was leased by Van der Walt. The restrictive condition stated, *inter alia*, that the erf must be used as a "public open

space". The second ground of review was that the lease was not advertised as required by section 124(2) of the Municipal Ordinance 20 of 1974.

Crouse AJ held:

"...It is accepted by the parties that the acts complained of are administrative acts as envisaged by the Promotion of Administrative Justice Act ... ("PAJA") and that the application must be dealt with under PAJA." [Paragraph 6]

With regard to the first ground of review, the restrictive condition, Crouse AJ held:

"... [O]ne must look at the predominant feature of the contract between the municipality and Van der Walt. The effect of the lease contract was that Van Der Walt erected a temporary structure as office on the boundary of erf 460. In terms of the lease, Van der Walt must keep the beach surrounding the lagoon clean and must refurbish and maintain the ablution facilities. Van der Walt's use of the premises includes environmental education and general recreation, a safe and maintained swimming area, safe parking, prevention of littering, dumping or squatting. She also upgraded braai facilities and conducts outdoor activities and adventure tourism. She presents training in first aid, navigation and diving. In return for these obligations, Van der Walt is entitled to conduct her business which has to do with recreation and recreational tourism, all of which is compatible with the general purpose to which the property let is to be put." [Paragraph 16]

"Within the meaning and intent of the town planning scheme, "public open space" is land to which the general public has access. Objectively viewed, the business conducted by Van der Walt holds no prejudice for the general public's access to erf 460, if anything the agreement between the municipality and Van der Walt enhances this use by the general public...In the circumstances, this ground of review is dismissed." [Paragraph 21-22]

With regard to the second ground of review, the failure to advertise the lease, Crouse AJ held:

"... Mr *De la Harpe*, for the municipality, agreed that, should I find that no advertisement took place, this ground of review is proper and the lease must be set aside. He submitted however that ... [a] PPP [public-private partnership] was advertised and the lease was the means ... of performing that partnership; ...There was material and substantive compliance with section 124 of the Municipal ordinance...Thus the question to be decided is whether the failure to mention that the intended contract is one of lease in the advertisement renders this contract susceptible to review." [Paragraph 25-26]

"I have no difficulty in finding that the agreement between the municipality and Van der Walt was in fact intended as a PPP, although it is termed a lease. I have also no difficulty in finding that the agreement between Van der Walt and the municipality was entered in good faith and for public benefit. I also find that the municipality was entitled to choose either a PPP or a lease as a vehicle to contract with Van der Walt. The municipality could have termed the contract a lease or a PPP." [Paragraph 33]

“The question however remains whether the publication of the PPP is sufficient compliance with the provisions of section 124(2) of the Municipal Ordinance ... to enter into a lease agreement with Van der Walt.” [Paragraph 34]

“Section 124(2) of the Municipal Ordinance 20 of 1974 only requires publication. This section does not determine what information must be published.” [Paragraph 36]

“These cases are not directly on par with the situation at hand. In the advertisement the municipality did not presume to act under the wrong enabling legislation. The municipality referred to parallel enabling legislation in the publication.” [Paragraph 40]

“Fairness dictates that the information published must be such that it places the ratepayer who might want to object in a position to do so. In its founding papers the applicant referred to the said advertisement and also the proposals to which the advertisement refers. The applicant acknowledges correctly that the proposal refers to a lease agreement. As there are no allegations to the contrary, I can thus safely assume the applicant had knowledge of the intended PPP through the advertisement and of the intended lease agreement through perusal of the proposal. The applicant does not allege any prejudice she had suffered in relation to the advertisement not stating that the vehicle of the PPP was a lease ... As already stated, each case must be decided on its own facts. In the circumstances of this case, I cannot find any prejudice to the applicant. I therefore dismiss the second ground of review.” [Paragraph 41- 42]

The application was dismissed with costs.

CRIMINAL JUSTICE

S V JAMA [2008] JOL 21714 (E)

Judgment delivered: 6 September 2007

The accused was convicted of assault with intent to do grievous bodily harm and sentenced to 12 months imprisonment, of which 6 months were conditionally suspended for five years. The correctness of the conviction and sentence was queried on review.

Crouse AJ (Pickering J concurring) held:

“The matter came before me on automatic review. I queried whether, given the circumstances of this case, the conviction and the sentence were correct. At the time I also sent a telegram to the prison authorities to have the accused released. The accused was released on 03 August 2007... I have received the magistrate's reasons. The magistrate has put considerable effort into doing legal research and preparing extensive reasons for which I am indebted to her. In short, the magistrate submits that the accused was convicted on the basis that she had intention in the form of *dolus eventualis*.” [Paragraph 2-3]

"The evidence is that the accused and the complainant had a love relationship. The accused had given money to the complainant to keep for school shoes for her children. The money was lost. The accused confronted the complainant about the money, at a time when the accused was peeling potatoes with a knife. A struggle ensued over the knife. The complainant testified that the accused did not stab him, but that she pulled the knife back while he was holding it, and that as a result he was cut...The complainant thereafter broke the toilet window with his head and tried to leave the house through the toilet window. The accused pulled him back into the house, but he managed to exit through the window. As a result, he was cut by the broken glass." [Paragraph 4-5]

"...[T]he magistrate found that the accused *should have* foreseen the possibility that her actions could cause serious injury and reconciled herself with this possibility. The magistrate convicted the accused as charged, namely of assault with the intent to do grievous bodily harm in that she stabbed the complainant with a knife on his left finger and that she pulled him against a broken window pane causing him to be stabbed/injured by the glass with the intent of causing him grievous bodily harm." [Paragraph 7]

"... [T]he intention to do grievous bodily harm was not proven. The accused did not stab the complainant with a knife. No deduction can be made that the accused *had subjectively* foreseen the possibility that the complainant could be seriously injured when she pulled him back from the window and/or that she had reconciled herself with this possibility. The magistrate's finding that the accused "should have foreseen" denotes to *culpa* and not *dolus*. A form of *dolus* is necessary before the accused can be convicted of assault with the intention to do grievous bodily harm. *Culpa* is insufficient." [Paragraph 8]

"A sentence of direct imprisonment after a conviction of assault common is an improper sentence in the circumstances of this case. The accused had already spent 14 days in jail, before I ordered her release..." [Paragraph 10]

The conviction was set aside and substituted by a conviction of assault common and the sentence was set aside and substituted by a sentence of 14 days imprisonment or a fine of R400. It was recorded that the accused had already served the alternative sentence of 14 days imprisonment.

S V MAY [2007] JOL 20554 (E); CASE NO. 194 / 07

Judgment delivered 2 August 2007

The accused had pleaded guilty to a charge of contravening section 31(1) of the Maintenance Act. However he did not submit a written statement in terms of section 112(2) of the Criminal Procedure Act. As a result, the magistrate was required to question the accused in terms of section 112(1)(b) of the Act. Despite failing to record the questions asked and the answers given by the accused, the magistrate convicted the accused and sentenced him to four months' imprisonment wholly suspended for three years.

On an automatic review, Crouse AJ (Pillay J concurring) held:

“The purpose of section 112 (1)(b) of the Act is to ascertain whether the accused admits all the elements of the offence with which he is charged. Unrepresented accused persons who are not legally trained often plead guilty without the intention to admit each element of the offence and section 112(1)(b) of the Act was enacted to prevent this. See: *S v Mmatli...*” [Paragraph 4]

“The purpose of automatic reviews is to ascertain that the proceedings in a certain defined class of matters, as set out in section 302 of the Act, are in accordance with justice. It is not possible to ascertain from the record as it stands that the proceedings were in fact in accordance with justice as it is not possible to ascertain whether the accused understood and admitted all the elements of the offence and/or whether he had not raised a defence thereto. In the circumstances it is not possible to endorse a certificate that the proceedings were in accordance of justice upon the record presented.” [Paragraph 7]

“It follows thus that the conviction and sentence must be set aside.” [Paragraph 8]

The matter was remitted to the magistrate to comply with the provisions of section 112(1)(b) of the Act.

SELECTED ARTICLES**'A BAR FOR WOMEN?' *CONSULTUS* DECEMBER 2002 VOL 15 NO. 3 PAGES 30-31**

This article 2002, reflects on the history prior to the admission of women as attorneys and the challenges that women continue in the legal profession.

"Starting as a junior at the Bar is never easy, and it is particularly challenging if you are a woman. For some years I was the only woman at the Port Elizabeth Bar..."

"Advocacy was even more difficult for woman in the past, when it was considered a revolt against nature to allow a woman to enter the legal profession. In *Incorporated Law Society v Wookey*, Innes ACJ, Solomon J and J de Villiers JP upheld an appeal by the law society that the respondent should not be admitted as an attorney because she was a female. Innes ACJ addressed the question to counsel appearing for the respondent: "How can a married woman appear for another and not for herself?" ... In an article discussing this judgement, RPB Davies J concluded ...: "The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the world... all life- long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature and when voluntary, treason against it."

"Modern man cannot be entirely blamed for women's struggle during the past century to be admitted to an exclusively male profession. For a long time men adhered to the views of great Roman and Roman-Dutch masters of law who advised against allowing women into courts... One can only wonder if this unacceptable and unreasonable measure precluded some brilliant legal minds from making a considerable contribution to our legal history."

"The first woman to be admitted to the Bar was Irene Antoinette Geffen.... In 1969 Miss Justice Van den Heever was the first woman to be elevated to the Bench, after having joined the Bar in 1952. She was also the only woman to be appointed to the Supreme Court of Appeal. In an article in 1999 *Consultus*, Judge Van den Heever spoke out against having to take on low-paying and oh-so-deserving cases that male advocates refused. Based on my own experience and feed-back from other women at the Bar, I have concluded that not much has changed since Judge Van den Heever joined the Bar."

"Male domination in our courts has caused tension regarding the dress code for woman advocates. Some ten years ago a Cape Town judge complained about the fact that a female Cape Town advocate wore trousers in court. At the time gender equality was very much an issue and the advocate under fire contacted several female colleagues, including myself, to protest...." (Page 30)

"Thirty years ago two percent of advocates in South Africa were women. In 1997 12,7 % of advocates were women...And by 1998 14 % of junior members and 2 % of silks affiliated with the GCB were women. In January 1999 there were two female silks at the Johannesburg Bar, three at the Pretoria Bar and one at the Cape Town Bar. There were 196 female juniors in total (according to GCB statistics). Three years later there are eight female silks (2% of all silks) and 230 female junior members (16 % of all juniors) practising at the various Bars (according to GCB statistics). The increase in the percentage of female juniors at the Bar is encouraging. However, these figures still do not reflect the growing ratio of female legal graduates...Representation at the annual GCB meeting is now racially equal, but there is no gender equality, and this should be addressed by the Bar." (Page 31)

"As yet, woman advocates in South Africa are equal to male colleagues neither in numbers nor in status. We have come a long way in proving Van Leeuwen wrong in his opinion that, due to inborn weakness, nearly all women are less suited than men for matters requiring knowledge and judgement. Yet female advocates in general are still breaking free from the mould created by our past. I am of the opinion that the more female advocates join the Bar and the ranks of senior advocates, the more it will be accepted that a woman can do the job as well as the next man (as I think has happened in the Office of the Director of Public Prosecutions). On the other hand, as the bumper sticker says: "Women who want to be equal to men have no ambition ..." (Page 31)

SELECTED JUDGMENTS

CIVIL PROCEDURE

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 arrested, 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

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****THOBILE GLADSTONE NEER V MINISTER OF POLICE, UNREPORTED JUDGEMENT, CASE NO.: 62/2011
(EASTERN CAPE HIGH COURT, BHISHO)**

Plaintiff claimed damages from defendant for wrongful arrest and detention by members of the South African Police Service. The case concerned the merits only. The body of a dead woman had been found by police, and the plaintiff had been arrested after a security guard had identified a similar make and colour of car to his as having been in the area shortly before the body was found.

After setting out the facts of the case, Nomjana-Ndzondo AJ held:

“In casu, Njongo was the peace officer, rape and murder are schedule 1 offences. The issue that I am called to decide is whether on the facts outlined above Njongo formed a reasonable suspicion that the plaintiff had committed the offence of rape and murder.” [Paragraph 22]

“The term “reasonable grounds to suspect” has enjoyed considerable attention by our courts. ... [citations to case law] ... It is clear that the test of reasonableness contemplates a thorough and critical assessment and evaluation of all the relevant and available information by the arresting officer.” [Paragraphs 23, 26]

“Our new constitutional order places a high premium on individual freedom and liberty. Accordingly, it must follow that any attempt to restrict such freedom and liberty should naturally be subject to strict and exacting but not unreasonable standards. While the scourge of crime and violence represents a significant threat to our democracy, it cannot serve as a justification to depart from the norms and standards that characterize ours as a constitutional state committed to fairness and justice. What is required is a suspicion that is based on substantial grounds not arbitrary.” [Paragraph 27]

Nomjana-Ndzondo AJ then turned to consider whether the actions of the arresting officer had satisfied the criteria of reasonableness in terms of s 40(1)(b) of the Criminal Procedure Act:

“The discovery of a woman’s body ... after a yellow Toyota Corolla was observed ... raises a suspicion. However, it is difficult to contemplate that any reasonable person will just arrest the plaintiff without verifying his explanation. Njongo did not investigate the other Yellow Toyota Corolla. She arrested the driver of the first available Yellow Toyota Corolla.” [Paragraph 31]

“[After referring to the case of Mabona & Another] I therefore find that Njongo’s conduct falls short of the conduct expected of a reasonable man and her suspicion was not based on solid grounds. ...” [Paragraph 33]

The plaintiff’s action succeeded.

CUSTOMARY LAW

MGUZULWA V XULUBANA AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 1340/2012 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

Case heard 6 September 2012, Judgment delivered 31 January 2013

Applicant had successfully brought an urgent application and been granted an interim order, requiring the second respondent (a child of the deceased and the executor of his estate) to lodge a liquidation and distribution account in terms of the Administration of Estates Act with the third respondent (the Master of the High Court). The applicant had lived with the deceased at his parental home, and then at a house bought by the deceased. The deceased had sent representatives to the applicant's parental home to pay lobolo on his behalf. The deceased passed away approximately six months after lobolo had been paid. Second respondent disputed the existence of a customary marriage between the deceased and the applicant. Both the second and first respondent (the deceased's mother) took the position that the applicant was only engaged to be married to the deceased.

Nomjana-Ndzondo AJ, after identifying the issues for decision as being whether there was a customary marriage between the applicant and the deceased, and whether the second applicant should be removed as executor, held:

"To decide whether there was a customary marriage between the deceased and the applicant, one has to look at the Recognition Act [Recognition of Customary Marriages Act] which defines a customary marriage as "a marriage concluded in accordance with customary law" Customary law means customs and usages traditionally observed among the indigenous Africa [sic] peoples of South Africa which form part of their culture." [Paragraph 20]

"... [T]he only requirement of the Recognition Act which will need scrutiny ... is section 3 (b) which provides that "the marriage must be negotiated and entered into or celebrated in accordance with customary law." It is not in dispute that the marriage was negotiated by the two families. The question is whether it was "entered into". [Paragraphs 22 - 23]

"In my view the meaning [having referred to a dictionary definition of "enter into"] shows that when you enter into something you become involved in it, you come into it. I therefore do not agree with the interpretations by both counsel." [Paragraph 28]

"According to the Recognition Act this requirement [that the marriage be celebrated] is an alternative to the negotiation and entering into marriage requirement. This is evident by the word 'or' in the same provision ..." [Paragraph 30]

After discussing principles of statutory interpretation and the Constitutional Court decision in *Gumede v President of South Africa*, Nomjana-Ndzondo AJ continued:

"... I find it absurd that the validity of a marriage will depend on the rituals to be held because: (i) There was no set date after the negotiations for the rituals to be held. This means that the applicant could have waited indefinitely. (ii) For celebrations or festivities to be held there are financial implications involved,

however small. With the present economic climate it would be unfair to require that every customary marriage be celebration. [sic] (iii) The ritual of utsiki is held at the instance of the husband and his family members, the woman and her family have no role to play. I am ... of the view that it was never the intention of the legislature to give such unfair and unequal treatment to women.” [Paragraph 34]

“To find now that the applicant was not married to the deceased would be to humiliate and discriminate against her because her marriage was never celebrated in accordance with customary law. This would be contrary to the Bill of Rights.” [Paragraph 35]

Nomjana-Ndzondo AJ thus found that there had been a valid customary marriage between the applicant and the deceased.

The rule nisi was confirmed and a final order granted, declaring that the applicant had been lawfully married to the deceased, and removing the second respondent as executor of the estate.

CRIMINAL JUSTICE

MASITHEMBE GXALATHANE V THE STATE, UNREPORTED JUDGEMENT, CASE NO. CA&R 13/07 (EASTERN CAPE HIGH COURT, BHISHO)

Case heard 3 June 2011, Judgment delivered ? October 2011

Appellant and a co-accused (Thandile Saule) had been convicted in the Regional Court on three counts of robbery, one count of possession of a firearm, and one of possession of ammunition. Appellant was sentenced to an effective term of 24 years imprisonment. The appeal was against conviction and sentence.

Nomjana-Ndzondo AJ (Hartle J concurring) held:

“[Regarding the argument that the accused was wrongly convicted of robbery with aggravating circumstances, having not been charged on that basis] It is not in dispute that the appellant and his co-accused were never charged with robbery with aggravating circumstances. The charge sheet also did not allege that the State would seek a conviction on the basis that aggravating circumstances accompanied the commission of the offence. ... Although it is desirable that the State should refer t aggravating circumstances in the charge sheet, a failure to do so does not constitute a fatal irregularity.” [Paragraph 7(a)]

“The appellant contends that the failure by Thandile Saule to give evidence impacted on him detrimentally. According to him Thandile Saule would have given evidence favourable to him. Even if that was the case ... the evidence of the State was found by the Magistrate to be very strong ... Thandile Saule filed an appeal against his conviction and sentence which was upheld ... on the grounds that he did not received a fair trial. The grounds of appeal were, however, peculiar to him and have no application to the matter before me. ... ” [Paragraph 7(b)]

“[Regarding the question of whether the state witnesses had enough time to identify their robbers, after reference to the Appellate Division judgement in S v Mthethwa] In this case, the robberies took place

during the day. The robbers did not hide their faces. They came to the schools, conversed with the victims ... They left immediately thereafter and robbed the complainants. The victims had ample time to identify the robbers. There were few people at the scene. The scene was not a moving one. ” [Paragraph 7(c)]

“[Regarding the submission that the sentences were inappropriate] It is a trite proposition that an appellate court’s powers to interfere with a sentence on appeal are circumscribed. It may do so only if the sentence is vitiated by irregularity, misdirection, or is one to which no reasonable court would have come. ... [citation to S v Malgas] ... I cannot find any irregularity or misdirection in the sentence of the Regional Court.” [Paragraph 7(d)]

“[Regarding the submission that no substantial loss had been incurred, and no injuries inflicted during the robbery] I agree with ... counsel for the State that robbery is a traumatic and serious offence irrespective of the value of the items ... The injuries need not be visible ... There were no injuries because all the victims were defenceless women who did not offer any resistance to the demands of the robbers. ...” [Paragraph 7(e)]

“[Regarding the submission that the magistrate should have obtained a pre-sentence report] A pre-sentence report is peremptory only in cases where a correctional supervision type of sentence is to be imposed and where a person is to be committed to a treatment centre ... In all other cases the presiding officer has a discretion to obtain a pre- sentence report ... It is therefore clear that a pre- sentence report should be obtained whenever the presiding officer feels the need to be better informed about the character and the possible future of the offender. In this case, the Magistrate found the appellant guilty of a serious crime. Having so found, he was correct in not asking for a pre- sentence report as he was not considering the question of rehabilitation. The object of a long term sentence is not rehabilitation, but the removal of the offender from society and deterrence ... ” [Paragraph 7(f)(i)-(ii)]

“Given the current levels of violence and serious crime in this country, it seems proper that in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive” [Paragraph 7(f)(iii)]

Finally, it was held that the Magistrate had been correct not to find substantial and compelling circumstances. The appeal was dismissed.

SELECTED JUDGMENTS**ADMINISTRATIVE JUSTICE****QIBING TRANSPORT ASSOCIATION AND OTHERS V REGISTRAR OF PUBLIC TRANSPORT AND OTHERS, UNREPORTED JUDGEMENT, CASE NO.: 3108/2011 (FREE STATE HIGH COURT, BLOEMFONTEIN)****Case heard 1 March 2012, Judgment delivered 26 April 2012**

The second to 14th applicants were members of the first applicant, who operated various taxi routes under operating licenses issued by the first respondent. The fourth to fifty-ninth respondents, also taxi operators, were members of the third respondent, Mohanapuso Taxi Company Limited. Qibing and Mohanapuso are described as rival taxi associations [para 7]. Applicants sought to compel second and third respondents to withdraw the licenses authorising the fourth to fifty-ninth respondents to operate on the same routes, and interdicting and restraining them from operating on such routes.

Chesiwe AJ held:

“From the affidavits before me it is clear that there is a factual dispute and it was such that only the authorities who issued the permits would be able to shed light on whether the applicant and/or the respondents’ valid permits for the routes already mentioned.” [Paragraph 16]

“It is regrettable that the third to fifty ninth respondents did not proceed with an application for review when it was discovered that an error occurred during the verification process [by the Department of Transport, of the routes used by taxi operators]. In deciding whether an applicant has exhausted the internal remedies or it is obliged to do so prior to the institution of the review proceedings, it must be decided whether there is any internal remedy available to the applicant. In *City of Cape Town v Reader and Others* 2009 ... the Appeal Division stated that in order to decide whether there is an internal remedy available ... one has to look at the relevant statute. ...” [Paragraph 21]

Chesiwe AJ considered section 1 of the Promotion of Administrative Justice Act, and continued:

“In my view this is an administrative matter and the second respondent should have immediately resolved the issue of the error that was discovered at the verification process. If it was resolved at that stage ... this matter might not have been before this Honourable Court. Although the license permits have lapsed ... and the dispute is now only academic, however, when the application was lodged, the license permits were then still in existence.” [Paragraph 22]

“... I am of the view that the License Board should keep proper records of all the allocated routes, to prevent a situation where conflict will arise due to an administrative error. Although no evidence on the records show that any violence emptied, there is an ongoing confrontation with members of the applicants and the members of the third respondent. The current situation would be resolved if members of the applicant operate on their allocated route and members of the third respondent also operate on their allocated routes. It is common cause that the interdict is against the withdrawal of the temporary permits ... [and] that these permits have expired and the matter is moot and is non-existing. IT would therefore be academic to grant such an order” [Paragraph 25]

The application was dismissed, and each party was ordered to pay their own costs.

CIVIL PROCEDURE

MOQHAKA MUNICIPALITY V MOTSOAKI CONSOLATION MABULA, UNREPORTED JUDGMENT, CASE NO.: 2292/2008, APPEAL NO.: A 189/11 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 5 March 2012, Judgment delivered 15 March 2012

Respondent had instituted a claim for damages against the appellant municipality after her minor child fell into an open sewerage drain.

Chesiwe AJ (Claasen AJ concurring) held:

“The Court a quo had to determine whether the respondent complied with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State, Act ... The Court a quo ruled that the appellant condoned the non-compliance of the provisions of the Act by not objecting to the late delivery of the letter of demand, but instead responded with a letter referring the matter to their insurer. ...” [Paragraphs 5 – 6]

“It is common cause that the said notice has not been served on the defendant within six months period as required. ... To issue summons without first complying with the provisions of section 3(4) for condonation renders that the summons are premature.” [Paragraphs 11 – 12]

“The respondent ... has already issued summons. The respondent thus has a remedy of applying for condonation. Condonation must be applied for as soon as the party concerned realises that it is required or if the state organ makes an objection to the absence or late service of the notice.” [Paragraph 14]

“... [R]espondent should have proceeded with an application for condonation, in view of the fact that the court has a discretion to grant condonation in respect of the appellant's failure to comply with the requirements of section 3(2) of the Act.” [Paragraph 16]

“Accordingly I make the following order: 1. The appeal is upheld with costs. 2. The order of the Court a quo is set aside and substituted with the following order: “The summons are removed from the roll.”” [Paragraph 17]

SUIDWES LANDBOU (EDMS) BPK H/A SUIDWESFIN V LOOMAR BOERDERY (EDMS) BPK AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. 5129/2011 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 9 February 2012, Judgment delivered 1 March 2012

Plaintiff had entered into a contract with the defendants, and second defendant had bound himself as a co-principal debtor in solidum under a written contract. Plaintiff sought summary judgment.

Chesiwe AJ held:

“... [T]he amounts involved in this matter a [sic] quite substantial, and the plaintiff also prays that the farm that the second defendant bonded as security e made executable immediately although during oral argument both counsel could not confirm if the farm ... is the primary residence of the second defendant.” [Paragraph 13]

“... Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his combine [sic] summons are disputed or new facts are alleged constituting a defence. The court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. ...” [Paragraph 14]

“... The defendant in his affidavit claimed that the plaintiff did not comply with their agreement that monthly statements will be issued upon which the defendant will have six months to note an objection. The defendant also claimed that on receipt of all the statements he made payments.” [Paragraph 15]

“In my view, the defendant has a bona fide defence and the court should not shut the door on the defendant on his intention to have his claim tested according to the dictates of law.” [Paragraph 16]

The defendants were granted leave to defend the action.

BARRY V MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGEMENT, CASE NO.: 4805/2008, 9 FEBRUARY 2012 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Applicant sought condonation for failure to give notice of his intention to claim damages against the respondent in terms of the Institution of Legal Proceedings against Certain Organs of State Act (“the Act”). Applicant had sent a letter of demand under the repealed South African Police Services Act. Respondent had acknowledged receipt of the letter of demand, but counsel for the applicant argued that respondent only objected to the failure to give proper notice once the case reached the pleading stage.

Chesiwe AJ held:

“In my view the court may, on good cause shown, condone or any non-compliance with the rules. The circumstances or the cause must be such that a valid and justifiable reason must exits as to why there was non-compliance with the prescribed rules of statutory or also show that condonation, there was a proper reason for non-compliance.”

“Condonation may be refused in cases of flagrant breaches of the rules. In my view, although it appears that the applicant’s delay in serving the respondent with the proper notices, the respondent in their letters did not make any mention of the non-compliance. They did not further give any indication that they were not satisfied with the method of the letters. This resulted maybe that the applicant thought that the legal process ... is correct.” [Page 5]

“Given the absence of unreasonable prejudice to the SAPS ... no court exercising a discretion would have to deprive the appellant of the opportunity to have his claim tested according to the dictates of law in justice.”

“Good cause usually comprehends the prospects of success on the merits of a case, but ... that notice was served timeously ... In terms of Section 3(4)(b)(ii) [of the Act] there is a specific link created between the delay and the good cause. There are two elements in play in Section 4(b), i.e. the subject’s rights to have the merits of his case tried by a court of law and the rights of an organ of state not to be unduly prejudiced by delay beyond a statutory prescribed limit for giving of such notices. Therefore the prospects of success are relevant ...” [Page 6]

Condonation was granted.

CRIMINAL JUSTICE

S V BM 2012 (2) SACR 507 (FB)

Case heard 20 February 2012, Judgment delivered 19 April 2012

Appellant had been convicted by the regional court of the rape of a 9 year old girl. On appeal, it was argued that the complainant and an 11 year old witness had been unable to distinguish between right and wrong because of their youth, and that the investigation conducted by the presiding magistrate in terms of s 164 of the Criminal Procedure Act had fallen short of what was required when admonishing a child witness to speak the truth.

Chesiwe AJ (Ebrahim J concurring) held:

“In my view, the court a quo correctly applied s 164 ... and warned the witnesses to speak the truth. I am not persuaded ... that the witnesses were unable to distinguish between right and wrong and that the magistrate's investigation was insufficient” [Paragraph 8]

“MR's evidence was formalistic in nature ... There was no fumbling or hesitancy on the part of this witness in giving her testimony. I have no doubt that this was not due on her part to any practised art of misleading or lying to persons who were in authority over her ... The court is an intimidating place for most witnesses and, doubtless, even more so for child witnesses. In the face of such direct scrutiny, bearing in mind that MR was not testifying through the medium of an intermediary, but in person in full view of the appellant, his attorney, the prosecutor, as well as the presiding magistrate, I am convinced that, had she indeed not been telling the truth, this would have been patent to the court by virtue of her demeanour. In court the content of her evidence also speaks volumes as to her veracity in giving it. It was such a straightforward, simple story that she was called upon to tell the court, that it permitted of no fabrication. In these circumstances and for these reasons, I find that the learned presiding magistrate's enquiry in terms of s 164 of the CPA in the case of this witness, whilst it may be criticised for its marked brevity, cannot be imputed with invalidity. ” [Paragraph 8.1]

“As far as the complainant herself is concerned, it is clear to me also that the learned presiding magistrate did, in fact, satisfy himself as to this witness's ability to give a full, proper and truthful account of the relevant incident. ... The content of the complainant's evidence also bears out the correctness of the learned magistrate's ruling that she was a competent witness.” [Paragraph 8.2]

“In my view, the complainant, despite her young age, was a truthful and reliable witness. She was cross-examined at length, but did not change her version at all. The appellant could not refute her version,

except through his bare denial. ... The complainant was consistent in her version, and explained in detail what the appellant did to her. Quite correctly, the trial court came to the inescapable conclusion that the appellant was the only person who had had the opportunity to rape the complainant. It follows that there is no room for interference with the conviction.” [Paragraph 12]

Chesiwe AJ then turned to deal with the appeal against sentence:

“It was submitted on behalf of the appellant that the rape was not of such a serious nature, but the fact that the child was 9-years old at the time of the crime, in itself, is very serious. Rape of a child violates the child's dignity. The record shows that the impact of the crime on the complainant is such that her performance in class has been affected. She is no longer an active participant and she lacks concentration in class.” [Paragraph 17]

“In my view the trial court did not accord due weight to the personal circumstances of the appellant: the fact that he was 19 years of age and a scholar when the offence was committed; that he is a first offender with good prospects of rehabilitation, and that he had spent three years and three months in custody while awaiting his trial. The trial court found that the aggravating circumstances of the case outweighed the mitigating factors, as the underlying rationale for imposing the prescribed minimum sentence of life imprisonment.” [Paragraph 19]

“That approach, in my view, constituted a misdirection entitling this court to interfere. A comprehensive pre-sentence report was compiled in respect of the appellant and admitted in evidence. It indicates that there is room for the rehabilitation of the appellant. The learned magistrate had regard to the fact that the appellant had connived and planned to rape the complainant and had lured her with money and death threats into having sexual intercourse with him against her will.” [Paragraph 20]

“I am in agreement with the sentiments expressed by the learned magistrate in his judgment, where he emphasises the seriousness of the crime of rape and that it be punished severely. ... [D]espite his lack of remorse ... I am not persuaded that the sentence of life imprisonment ... is warranted in the appellant's case. I say so in light of the fact that the appellant is a youthful first offender who has been assessed by expert evidence to be capable of being rehabilitated, given the opportunity. These are weighty factors, which cumulatively must redound to his benefit as substantial and compelling circumstances justifying the imposition of a sentence less than the minimum prescribed (*S v Malgas* supra). In my view to allow the appellant to be imprisoned for the rape of the complainant, despite the seriousness thereof, for the rest of his life would amount to endorsing punishment which is disproportionate to his offence, which would be unjust.” [Paragraph 21]

“In *S v Phulwane and Others* ... the court held that, when a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of the judicial officer, invested with the task of sentencing such a youth, to obtain all the relevant information, in order to structure a sentence that will best suit the needs of and interests of the particular youth. I am of the view that every judicial officer who has to sentence a youthful offender must ensure that, whatsoever sentence he or she decides to impose, will promote the rehabilitation of the particular youth. See also *S v Nkosi* ...” [Paragraph 22]

“A fine balance needs to be struck between society's needs to punish crime, whilst not overlooking the right and interest of a juvenile offender to be accorded an opportunity to be rehabilitated in suitable and

appropriate cases. Taking into account all the relevant factors ... leaves me with the conviction that a sentence of 15 years' imprisonment would be an appropriate sentence ..." [Paragraph 23]

FELIZ KHUMALO V THE STATE, UNREPORTED JUDGEMENT, APPEAL NO. A175/2010 (FREE STATE HIGH COURT, BLOEMFONTEIN).

Case heard 13 February 2012, Judgement delivered 8 March 2012.

Appellant, who was HIV-positive, had been convicted in the Regional Court of the rape of a fifteen year old girl who was classified as "mentally retarded" in terms of s 1(1) of the Sexual Offences and Related Matters Amendment Act [footnote 1 of the judgment reads "Although the Act refers to "retarded" I will throughout the judgment use the term "impaired" as it is the most appropriate]. Appellant was sentenced to 18 years imprisonment, and appealed against sentence only.

Chesiwe AJ (Mocumie J concurring) held:

"... [Appellant is HIV positive and the possibility exists that he might have infected the complainant although no such medical evidence was led. It is quiet [sic] a concern that the HIV status of the appellant was disclosed at such a late stage, before sentencing, and not during his evidence-in-chief as the State would have had the opportunity to interrogate and establish whether he knew of his HIV status or not before he raped the complainant. This situation also leaves me wondering whether the complainant has been through any counselling or treatment to check on whether she was infected with HIV/AIDS ... and whether the complainant's whole family went through to any family counselling after the rape ..." [Paragraph 3]

"I am of the view that the trial court came to an informed and processed decision on whether compelling and substantial circumstances ... were indeed such that he should deviate from the prescribed. The appellant could not point to any misdirection in that regard. Neither could I." [Paragraph 7]

"As the trial court correctly found s51 of the Act has limited but no eliminated the court's discretion in imposing sentence in respect of offences ... such as in this case. The legislature deliberately left it to the courts to decide whether circumstances of any particular case call for a departure from the prescribed sentence. [Citation to *S v Malgas*] ..." [Paragraph 8]

"Rape is a very serious offence and the punishment ... must be proportionate to such seriousness. Rape is a violation of a person's constitutionally entrenched rights. It is an invasion of a woman's most valuable of all rights, namely dignity. The courts cannot ignore the frequency at which rape takes place in the country especially perpetrated against children and worse in this case a mentally impaired child. The interest of the public must be protected against people of the appellant's calibre. ..." [Paragraph 9]

The appeal was dismissed.

SELECTED JUDGMENTS

We were unable to locate any judgements for this candidate

SELECTED ARTICLES**‘CULTURE, TRADITION, CUSTOM, LAW AND GENDER EQUALITY’, Potchefstroom Electronic Law Journal 2012 (15) 1**

This article discusses “traditional cultural practices”, and identifies harmful practices of “early and forced marriages (ukuthwala as practised currently), widow’s rituals, ‘u ku ngena’ (levirate and sororate unions), female genital mutilation (FGM), breast sweeping/ironing, the primogeniture rule, practices such as ‘cleansing’ after male circumcision, and witch-hunting.” The article argues that, where the courts had the opportunity to develop customary legal systems, they reinforced archaic customary laws or imposed western ideology. [Page 3]

“African culture has experienced rapid change since the colonial invasion. Contemporary African culture is a mix of traditional elements and alien features. Local African culture was oppressed for many years by white South Africans, who find their cultural roots in western countries. Western cultures tend to be more individualistic and focused on individual achievements and personal interests, whereas African cultures are collectivistic, group-orientated and concerned with the welfare of their community.” (Page 4)

The article then considered international treaties ratified by South Africa relating to gender rights, as well as relevant provisions of the Constitution and legislation:

“... the Constitution also provides for and protects the right to culture ... and recognises traditional leadership ... which recognition could be interpreted as protecting polygamy as well as related practices such as ‘spouse inheritance’, *Ukuthwala* and other customary practices which have the impact of undermining the constitutional guarantee of gender equality. However, the provisions protecting the right to culture explicitly include a qualification stipulating that ‘no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights’ ...” (Page 6)

“Customary practices such as *Ukuthwala*, virginity testing, widow’s rituals, and others are entrenched, and in practice take precedence over equality in the villages where they are carried out. It is therefore questionable whether the constitutional protection of gender equality is making a difference to women living in communities with a strong commitment to traditional norms and practices. These compromises on women’s right to equality can thus be interpreted to mean that women, as opposed to men, do not have inherent rights.” (Page 7)

“The revival of traditions, culture and customs, and the practices derived from them, after the demise of colonialism, imperialism and apartheid will definitely require us to enter into a dialogue on the character of our ancestors and what is really indigenous. However, the process should take the context into consideration. Some of the cultural practices that were necessary then are unnecessary now due to development, globalisation and other factors. ...” (Pages 9 - 10)

The article then discusses some specific practices which it argues are harmful to women, including virginity testing, *ukuthwala*, *ukungena*, male circumcision rituals affecting women, widow's rituals, witch-hunting, female genital mutilation and the primogeniture rule. Regarding *ukuthwala*, it argued that the practice retards childhood development:

"It burdens the girl child with the responsibility of being a wife with a husband and in most instances children and in-laws to serve or look after. ... The social development of the child is stunted as the early marriage and fast-tracking into the adult world skips organic developmental phases. ... Early marriage is a symptom of and exacerbates gender inequality. ... There is a proven link between a lack of education, underdevelopment and poverty. *Ukuthwala* deprives girl children of opportunities to educate and develop themselves. Furthermore, research indicates that the majority of the ... victims of *Ukuthwala* are from poor families. Their lack of education and underdevelopment, due to *Ukuthwala*, deepens their poverty and perpetuates the cycle of poverty. ..." (Pages 11 - 12)

"The primogeniture rule, which has just been abolished by the Constitutional Court in the case of *Bhe*, was not a customary law principle but a colonial and imperial construct imposed on Africans. The irony of it is that African males embraced it ... because it benefitted them; therefore they are the ones who were fighting against its being declared unconstitutional. .. It was imposed on Africans in order for the state to be able to litigate against one person rather than to have to join the whole family when the head of the house died." (Page 16)

"The African traditional culture has an almost infinite capacity for the pursuit of consensus and reconciliation, as opposed to being individualistic and competitive. Further, in terms of African culture, there are no orphans because a child is a child of a community in which the child lived. ..." (Pages 16 – 17)

"The writer argues that the previous generations were wise and innovative and evolved with the times, and that customary law also evolved in line with the way of life and enlightenment at that time. ... The writer agrees with McClendon when he argues that the *Mazibuko* case [*Mazibuko v Mazibuko* Natal Archives, 1 EST 2/1/2/1, Case 60/1929] shows that most of the African participants in 1929 had a very different conception of custom and customary law from that of colonial officials. Rather than something fixed and immutable, they were satisfied that although one practice had been followed 'in the old days', another might be followed now, depending on the context and circumstances." (Pages 17 – 18)

"The revival of tradition, culture and customs is part of the new national and international identity; however, this revival must be rooted in a way of life based on human rights, democracy and equality for all, and understood from a point of view of *Ubuntu*. Thus, culture, tradition and customs have to be balanced within the social and legal context of the constitution and provisions of the Bill of Rights." (Page 18)

SELECTED JUDGMENTS**COMMERCIAL LAW****S N T (PTY) LTD V COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE, AND OTHERS 2007 BIP 189 (T)****Case heard 3 April 2007, Judgment delivered 3 April 2007**

This was an application to set aside a notice of detention issued by the first and third respondents under the Customs and Excise Act in respect of a container of soccer balls bearing the trademark “PELE”. The soccer balls were suspected of being counterfeited goods under the Counterfeit Goods Act. Second respondent was the registered proprietor of the trademark “PELE”. Applicant had previously applied to registrar of trademarks to register the “pele” trademark, but a dispute concerning applicant’s use of the mark on soccer balls had arisen between applicant and second respondent. Second respondent successfully brought several applications to the registrar to protect the “PELE” trademark.

Ledwaba J held:

“... [T]he soccer balls imported by the applicant bearing the mark pele are an infringement in terms of the provisions of s 35 of the Trade Marks Act in that the trademark 'PELE' is a well-known trademark and, in addition, it is an infringement on the second respondent's registered trademark No 81/4409. 'PELE' in class 25 on the basis of s 34(1)(b) of the Trade Mark Act ...” [Paragraph 19]

“Despite the fact that the 'PELE' trademark is used in respect of other goods which are not related to soccer, eg credit cards, in my view, it cannot be disputed that in soccer, which is one of the major sports in this country, the majority of soccer fans in seeing equipments, especially soccer balls, with the mark 'PELE' embossed thereon would think that the mark is related or refers to Pele, the soccer legend.” [Paragraph 21]

“... [A]pplicant submitted that originally it imported and distributed the soccer balls bearing the 'PELE' mark from Siam Ball Sport Factory Co Ltd, a company in Thailand. ... [A]n invoice from Siam ... and ... a letter from Siam have a mark 'PELE' as part of their letterhead with the internationally recognised symbol '®' next to the 'pele' mark which indicates that the trademark has been registered. It is significant to state that applicant's case is not based on the fact that Siam authorised it to use its registered trademark 'pele'. Applicant alleges that 'PELE' is its trademark and it has been using it since 1994. Siam too, in its letter ... does not allege that it authorised applicant the use of its trademark. The applicant was, originally, importing and selling its soccer balls with the signature of Pele himself and the caption 'Signature of Pele' ... The mark 'PELE' and the Pele signature, in my view, is a clear indication that they suggested an endorsement by Pele, the soccer legend.” [Paragraph 24]

“The soccer balls detained which were to be sold by the applicant has a mark '®', which is an indication that the trademark 'PELE' has been registered at the office of the registrar. Despite the fact that the applicant knew very well that it was not the registered owner of the trademark it allowed and/or instructed and/or in collaboration with Siam put the mark '®' to cause confusion and deception. Furthermore, concerning the use of the mark '®', in terms of s 62 of the Trade Marks Act, it is an offence to indicate that a trademark is registered when it is not. ...” [Paragraph 26]

“On the submission ... that the s 15 application should be detailed and should contain all the relevant details, in my view, such application should not be required to be of a standard of court documents. The officials of the first and third respondents should not be expected to scrutinise and deal with the parties as if the application is brought in court. [Citation to the Constitutional Court judgement in Bato Star] ...” [Paragraph 27]

“It is important to emphasise that the goods were only detained and not seized. In my view, the application was made prematurely and there were no exceptional circumstances warranting bringing this application at this stage. ... In evaluating the reasonableness of the decision of the first and/or third respondents, I am not to determine whether the decision is in all respects correct or not. If the court is satisfied that the decision is justifiable and there are facts or prima facie facts for the decision, I need not interfere with the decision.” [Paragraphs 35 - 36]

“It is clear from the papers that there is a dispute regarding ownership of the trademark 'PELE' between applicant and second respondent, particularly on soccer balls, which is to be adjudicated by the registrar. ...The dispute cannot, in my view, affect the statutory power of first and third respondents to make an order of detention if there is prima facie evidence to make such an order. ” [Paragraph 38 - 39]

“Now since there is no specific registration of the trademark 'PELE' specifically on soccer balls, as alleged by the applicant, and there is an existing dispute, this implies that it would be easy for anybody to import or manufacture and sell soccer balls bearing the mark 'PELE'. Undoubtedly, the channels of commerce would be flooded with soccer balls bearing the 'pele' mark because no one would claim ownership to the work unless the dispute which may take more than one year has been finalised. This can also have a negative impact on our country which is to host the world soccer cup in 2010. In my view, there are enough prima facie facts justifying the decision of the first and third respondents to detain the applicant's goods.” [Paragraph 40]

The application was dismissed.

PRIVATE LAW

BREAU INVESTMENTS (PTY) LTD V MAVERICK TRADING 326 CC 2010 (1) SA 367

Case heard 7 August 2009, Judgment delivered 14 August 2009

Applicant sought to evict respondent from premises in a shopping centre. Applicant and respondent had entered into a three-year lease agreement, which allowed the respondent to renew the lease for a further three years on the same terms and conditions, except regarding rental and renewal. The agreement provided that the rental for the renewal period would be negotiated between the parties, and failing agreement a binding determination would be made by the applicant's auditors. Respondent exercised its right to renew the lease, but the parties were unable to agree on the rental amount or escalation percentage. Respondent disputed the amount determined by the auditors, and instituted action proceedings to have a reasonable rental determined by a court.

Ledwaba J held:

"It is clear that there was no agreement on the rental amount. The legal position in such a situation states that the lease agreement is in existence. ..." [Paragraph 14]

"Applicant's counsel, in the alternative, argued that if the lease agreement is in existence, same was cancelled ... On the contrary, the respondent's counsel submitted, and argued, that the applicant could not, in law, cancel the agreement because the respondent had already issued summons." [Paragraphs 16 - 17]

"The court in Van Heerden's case never said that after litigation commenced the contract cannot be cancelled." [Paragraph 19]

"Despite the fact that the applicant did not clearly state that the lease is cancelled on the basis of avoiding litigious proceedings, the applicant made it clear to the respondent that it wanted the respondent to be evicted. In my view, that is an indication that the applicant did not want to be involved in litigation regarding the reasonableness of the rent." [Paragraph 21]

"... [S]ince there is a pending action, I think in eviction proceedings, I cannot ignore the contents of the particulars of claim, read with the contents of the affidavit before me. Without binding the court that may adjudicate in the action proceedings, in my view, the respondent does not have a strong case." [Paragraph 23]

"Should I be wrong in considering the respondent's prospects of success in the action proceedings, I still think the applicant's cancellation of the lease is valid." [Paragraph 24]

The application for eviction was granted.

CIVIL PROCEDURE

MOLEFE V MOLEFE & ANOTHER [2010] JOL 25742 (GNP)

Case heard 15 March 2010, Judgment delivered 24 March 2010

Applicant sought the late filing of a notice under section 3(4) of the Institution of Legal Proceedings against Certain Organs of State Act. Second respondent, an organ of state, opposed the application. Applicant had been arrested on a charge of conspiracy to murder the first respondent (his divorced wife). He subsequently gave notice of institution of legal proceedings for unlawful arrest, detention and malicious prosecution. Pre-trial, applicant denied the allegation that he had not complied with section 3, and set the matter down for trial without applying for condonation. The trial was subsequently postponed, and condonation sought.

Ledwaba J held:

"The Act does not specify within which period an application for condonation must be brought if the notice was served before the debt is extinguished by prescription. I do agree that such application is to be brought within a reasonable period depending on the circumstances of each case. Advocate Malowa submitted that applicant intended bringing the application before the trial commenced on the date of hearing. I cannot find, on the circumstances of this case, that the delay in filing a proper application for condonation after the plea was filed, justifies just (sic) the dismissal of the application." [Paragraph 8]

“The purpose of the Act was clearly explained in the Minister of Safety & Security v De Witt ... that its aim is to bring consistency to procedural requirements for litigating against organs of State and to respect compliance with the Constitution.” [Paragraph 9]

“The applicant in his reasons for not serving the notice timeously, he mentioned the lack of funds and his misunderstanding that if the criminal proceedings were still in progress, prescription was delayed or suspended. He further alleged that the debt only became due from 19 January 2006 when the case was withdrawn ... It is important to distinguish that on a claim for wrongful arrest the debt becomes due on the date of arrest and/or a claim for malicious proceedings the debt becomes due on the finalisation of the criminal proceedings ...” [Paragraphs 10 - 11]

“Of importance, is also that the fact that the State may recharge the applicant, after the case has been withdrawn does not bar the applicant to institute the malicious prosecution case otherwise the constitutional right to claim may be frustrated by the State in not proceeding with prosecution after the matter has been withdrawn.” [Paragraph 19]

“If the second respondent submits that the criminal proceedings are still continuing then the action for malicious prosecution has not yet arisen. This submission cannot, in my view, be correct.” [Paragraph 20]

“Regarding the defamation claim ... it is trite that the notice is silent on the said claim and the alleged claim for defamation has now prescribed. I can therefore not entertain condonation ... because it was not mentioned in the notice. Since there was no notice for such a claim the debt in respect of the said claim has now prescribed.” [Paragraph 21]

“On careful analysis of the facts which are common cause the notice in respect of a claim for malicious prosecution was served timeously because the case was only withdrawn on 19 January 2006 and the claim was served within six months after the withdrawal. The application for the condonation of the late filing of the notice is therefore in respect of claim C, the claim of wrongful arrest and detention. ... [T]he State will not be unreasonably prejudiced by the late filing of the notice because even before the notice was served the witness(es) was(were) not available and if the witness(es) was(were) available I think, the applicant could have been recharged ” [Paragraph 23]

“The applicant has, in my view, shown good cause why the late service of the notice in respect of the wrongful arrest and detention claim should be condoned.” [Paragraph 24]

The late service of the notice was condoned, and applicant was granted leave to pursue claims A and C.

CRIMINAL JUSTICE

S V BAGADI 2008 (2) SACR 400 (T)

Case heard 29 April 2008, Judgment delivered 29 April 2008

The accused had been convicted of driving a motor vehicle with an alcohol level above the legal limit in violation of section 65(5)(a) of the National Road Traffic Act. Accused was given a suspended sentence of a R6 000 fine or 18 months' imprisonment, wholly suspended on condition that the accused was not

convicted of contravening ss 65(1), (2) or (3) during the period of suspension. The court a quo then conducted an inquiry and found that the accused was not unfit to possess a firearm. The magistrate and the Office of the Director of Public Prosecutions were asked to comment on the appropriateness of including a contravention of s 65(1) as a condition of the suspension of sentence, and on holding the enquiry under the Firearms Control Act after the accused was convicted.

Ledwaba J (Botha J concurring) held:

“This matter raises the perennial issue encountered by judicial officers as to how to properly and precisely formulate conditions when a sentence is suspended.” [Paragraph 4]

“Regarding the enquiry in terms of s 103(1) and 103(2) of [the Firearms Control Act] the Office of the Director of Public Prosecutions conceded, correctly in my view, that such an enquiry should not have been conducted. Having regard to the provisions of s 103(1) and 103(2) ..., it is clear that when a person is convicted of contravening s 65(2) of the Act the enquiry is not necessary. It is indeed so that the accused has not been prejudiced because no adverse finding was made against him. However, the enquiry still remained irregular” [Paragraph 9]

“It is trite that conditions of suspension of a sentence have a crucial role to play in the administration of justice. Inter alia, conditions serve to deter and dissuade an accused from committing similar offences in future because the breach of such conditions could trigger the operation of the suspended sentence ...” [Paragraph 11]

“It is desirable and in the interests of justice that a condition or conditions upon which a sentence is suspended should be just and have a deterrent and a reformatory effect on the accused. Importantly, in my view, such conditions should be related to the offence upon which the accused is convicted. The failure to properly have the conditions of suspension tailored or linked to the offence for which an accused is convicted, may widen up the net of potential offences which an accused may commit unreasonably, thus creating a trap for the unwary.” [Paragraph 12]

“Driving under the influence of alcohol (contravention of s 65(1) of the Act) and driving a motor vehicle whilst the concentration of alcohol in an accused's blood exceeds the legally permissible limit are distinct offences (contravention of s 65(2) of the Act). This is underscored by the vastly different sentences which the courts impose upon conviction on each of the two different offences. It is a trite proposition that driving a motor vehicle on a public road whilst under the influence of alcohol is a more serious offence than driving a motor vehicle on a public road whilst one's blood alcohol content exceeds the legally permissible limit. It is well known that in a case of contravention of s 65(1) of the Act, the driving ability of such a person must be proved to have been impaired by the consumption of alcohol whereas there is no such requirement for a contravention of s 65(2) of the Act. Manifestly s 65(2) is merely technical and has no reference to the driving ability of an accused.” [Paragraph 13]

“In casu the accused was not convicted of drunken driving which is an offence which has an element of the driving capacity being impaired or influenced by intoxicating liquor. The accused was convicted of the technical offence of driving a motor vehicle on a public road whilst his blood alcohol content exceeded the legally permissible limit. ... [A]lthough in both offences one of the elements is that the accused should 'occupy the driver's seat of a motor vehicle the engine of which is running', it is a requirement that in one

instance the alcohol must have influenced the driving ability of the driver whilst in the other instance the alcohol does not have to influence the person's driving abilities." [Paragraph 15]

"I have already expressed the view that any condition(s) should be reasonable, just and constitutional. As the accused who is convicted of contravening s 65(2) of the Act is not necessarily guilty of contravening s 65(1) of the Act, I am of the view that it is not fair or proper to add contravention of s 65(1) of the Act. That would in fact be seriously prejudicial to an accused. I therefore find that including s 65(1) of the Act as a condition of suspension by the magistrate is unnecessarily over-broad." [Paragraph 16]

The conviction was confirmed, and the sentence amended so that reference to s 65(1) in the conditions was removed.

ADMINISTRATION OF JUSTICE

STANDER V ERASMUS AND OTHERS 2011 (2) SA 320 (GNP)

Case heard 15 December 2010, Judgment delivered 5 November 2010 [These are the dates given on the reported judgement and clearly appear to be the wrong way round]

Applicant had been appointed as an administrator of a large number of estates in terms of section 74 of the Magistrates' Court Act. Applicant and one Haarhof formed a close corporation (the second respondent) to manage the estates, and subsequently entered into a sale agreement with respondent, whereby their rights, title and interest in the administration applications were ceded. First respondent was appointed as administrator, and in respect of applications already granted, applicant warranted that the required emolument attachment orders had already been granted and served. First respondent became sole member of the second respondent. Applicant continued to be an employee of the second respondent, but personal problems developed between the applicant and first respondent.

Ledwaba J held:

"The issue between the first respondent and the applicant culminated in the first respondent issuing summons against the applicant ... seeking an order to compel the applicant to sign the required documents to effect the substitution of the first respondent as the administrator in the files under administration where the applicant was appointed as administrator, failing which the sheriff be authorised to sign the said document." [Paragraph 7]

"Against the aforesaid background I must now determine if the applicant is entitled to the relief sought. I pause to mention that during the proceeding, because my roll was heavy — I had about 65 matters on the roll for that day — I instructed counsel for the parties to take further instruction from their instructing attorneys to see if the matter could not be settled, because the interest of the debtors and creditors had to be protected. Unfortunately, the parties could not reach an agreement." [Paragraph 14]

"In my view, the matter is urgent because there is an amount of about R5 million in the trust account of the second respondent, which is at risk, and the administrator appointed by the magistrate has no control over the said moneys." [Paragraph 15]

"In terms of the Act, a person who has been appointed administrator has a duty to render services set out in the Act; if he fails to perform accordingly, the court may order the administrator to pay the costs of

the creditor(s) de bonis propriis. ... In terms of the provisions of s 74 of the Act, the appointment of an administrator is done by the court. If such a person is to be relieved of his/her appointment it is the court that must sanction same, and the new appointment or substitution should be done by the court.” [Paragraphs 18, 20]

“I have serious doubts about the legitimacy of the practice of appointed administrators in using close corporations and companies to do administration, without the approval of the court. The interests of debtors and creditors are of paramount importance, hence in s 74 (1) of the Act the debtors and creditors have the right to inspect the list of all payments and other funds received by the administrator. Now, if the payments are going to be received by a person not appointed by the court, the rights and interests of debtors and creditors are going to be compromised.” [Paragraphs 21 - 22]

“On the facts of this case, the applicant and the first respondent dealt with the files of the debtors under administration matter, as if they were their personal assets, without the approval of the court. Their personal interest and the interest of the second respondent were given preference over the interests of the debtors and the creditors. It is also clear that there was misappropriation of moneys in trust, hence a shortfall of R511 589,60 before membership in the second respondent was transferred to the first respondent. There is now a credit balance of about R5 million in the trust account, and distribution to the creditors has not taken place since J September 2010. This matter needs urgent attention.” [Paragraphs 24 - 26]

“It is the applicant who has been appointed as administrator, and who bears the responsibility of complying with the Act. One of the duties of an administrator is to take expeditious steps to distribute the moneys. The applicant as an administrator has no control of the trust moneys. ... The applicant, in allowing the trust account to be conducted and controlled by another person, acted contrary to her duties and responsibilities as administrator.” [Paragraphs 28, 30]

“It is abundantly clear that the first respondent has not been appointed as an administrator, and he is the one who has the signing powers to the trust account held at the bank of the third respondent. The applicant contributed to and caused this unhealthy situation. The trust moneys need protection. The order to be made herein is done with the purpose of protecting the moneys in the trust and the interests of the debtors and the creditors.” [Paragraph 33]

“The applicant and respondent were the authors of the situation they presently find themselves in, and, in exercising my discretion on the costs, I think the costs should be reserved.” [Paragraph 34]

Applicant’s appointment as administrator of the relevant estates was set aside. The trust monies were frozen, pending the appointment of “an independent and competent administrator”, and the trust account held by third respondent was ordered to be administered by a new administrator appointed by the court.

SELECTED JUDGMENTS

PRIVATE LAW

MLENGA V RAF [2011] JOL 26735 (GNP)

Judgment delivered 31 January 2011

Plaintiff sued defendant for damages arising out of a motor vehicle collision. A separation of liability and damages was ordered and the judgement dealt only with the merits of the case.

Molopa-Sethosa J held:

“It is trite that the plaintiff bears the onus to prove his case on a balance of probabilities; in this case that the collision was caused by the negligence of either the first insured driver or the second insured driver or both insured drivers as alleged in ... his particulars of claim.”

“On the evidence of the plaintiff, the gist of his case is that the collision occurred because the second insured driver accelerated and closed the space/gap into which the plaintiff was supposed to go in when the plaintiff attempted to overtake him, thus necessitating that the plaintiff move over/swerve to the gravel portion of the road on the opposite side/lane of travel. In fact, the defendant did not lead any evidence whatsoever to rebut the plaintiff's evidence that there was a kombi, the second insured vehicle, which accelerated and blocked his way to get back into his lane of travel when he tried to overtake it, causing him to eventually swerve to the gravel side of the opposite lane of travel, thus leading to the collision ...” [Page 4]

“From the evidence before this Court, the plaintiff maintains that when he did not see his way in getting back into his lane of travel after the kombi/second insured vehicle (and the vehicles following it) had blocked his way from getting back into his lane of travel, he moved/swerved over to his right to point X2 of exhibit A, onto the gravel portion of the road on the opposite side, where he applied his brakes, thus causing a lot of dust, and that his vehicle then came to a standstill at point X3 of exhibit A, which is about 4 metres from point X2 aforesaid. ... The plaintiff disputes that at he at any stage lost control of his vehicle.”

“Looking at all the evidence before this Court, in my view, the plaintiff gave a full account of what transpired, most of which stands undisputed, especially in so far as the presence of the second insured vehicle and the conduct of the second insured driver, and also how he swerved to the gravel side of his opposite lane of travel and applied his brakes to stop his vehicle to try to avert the collision, hence a lot of dust as testified to above. ... I am of a considered view that the plaintiff honestly gave an account of what really transpired on the day of the collision, and that he tried his best to try to avoid and/or avert the collision ... However, looking at the damages to the respective motor vehicles herein, and on a balance of probabilities, I do not believe that the plaintiff's vehicle managed to come to a complete standstill just before the collision when he applied his brakes. ... On the other hand, looking at the first insured driver's evidence ... I do not think that the first insured driver saw the plaintiff at all prior to the collision coming towards them amidst the dust on his left side as he testified ...”

"If one looks at the point of impact as indicated by the plaintiff ... it is almost on the verge of the gravel road, not far from the point where the first insured driver placed the BMW [plaintiff's car] on his sketch ... This to me indicates that on the one hand, the plaintiff himself may, on a balance of probabilities, not have managed to bring his vehicle to a complete standstill when he applied his brakes, and his vehicle probably veered more to the verge of the gravel. On the other hand the first insured driver also, probably in the confusion, veered to his left, hence the collision more or less on the verge of the gravel portion of the road." [Page 5]

"I am not persuaded that the first insured driver tried at all to move to his right towards the centre line. On the contrary, and on a balance of probabilities, as already stated here above, he veered more to his left, more towards the verge of the gravel portion of the road where his and the plaintiff's vehicles collided." [Pages 5 - 6]

"On the facts before this Court I find that on a balance of probabilities the point of impact is more or less on the verge of the gravel portion of the road, somewhere nearer point X3, and that the first insured driver had probably veered to his left in the confusion and the plaintiff himself may also, on a balance of probabilities, not have managed to bring his vehicle to a complete standstill when he applied his brakes, and his vehicle probably veered more to the verge of the gravel and in the process it met/collided with the first insured driver's vehicle ..."

"... [I]n the circumstances the two parties above (the plaintiff and the first insured driver) found themselves, no fault can be attributed to either of them. The source of all the mishap herein is, in my view, none other than the second insured driver. I have no doubt in my mind that this collision happened as a result of the second insured driver's conduct, who, in my view was grossly negligent."

"On the undisputed evidence of the plaintiff the second insured driver drove slowly in front of him ... and when the plaintiff attempted to overtake him he accelerated and blocked him out so that he could not get back into his lane of travel in front of the second insured vehicle; further, the other vehicles behind the second insured vehicle had also closed up the space/gap behind the second insured vehicle and the plaintiff thus could not go back behind the second insured vehicle. Since he was in his wrong lane he thus had to swerve over to the gravel side of his opposite lane of travel where in the panic and the circumstance prevailing, he and the first insured driver collided."

"On the evidence before this Court and on a balance of probabilities I find that the second insured driver was negligent in one or more or all of the respects set out by the plaintiff in paragraph 4.2 of the plaintiff's particulars of claim and was solely to blame for the collision herein." [Page 6]

The plaintiff's claim was thus upheld.

CHILDREN'S RIGHTS**CENTRAL AUTHORITY OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER V LG 2011 (20 SA 386 (GNP))**

Case heard 14 – 16 October 2010, Judgment delivered 22 April 2010 [these dates appear in the reported judgement and clearly seem to be an error]

This was an application under the Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into South African law by the Hague Convention on the Civil Aspects of Child Abduction Act, for the return of a minor child, O, to the jurisdiction of the Central authority for England and Wales. Applicants contended that O had been wrongfully removed from O's place of habitual residence, the United Kingdom, and was retained by his mother (the respondent) in South Africa. This was denied by respondent. Second applicant (O's biological father) contended that he and the respondent had agreed that O would travel to South Africa to attend a family wedding, and thereafter return to the UK.

Molopa-Sethosa J held:

"It is trite that in order to succeed with an application under the Convention the applicants need to convince the court, on a balance of probabilities, that the Convention was contravened, in that the respondent 'wrongfully removed' the minor child from the State where the minor child was 'habitually resident' immediately before the removal there-from.... [T]he respondent is denying that she contravened art 3 of the Convention in any way whatsoever, and avers that the removal of the minor child was indeed with the consent, and with the support of, the second applicant. The second applicant concedes that O was removed from England to South Africa with his consent. ... It is significant to state further that the relief claimed by the applicants can only be granted if the applicants can show that the relief sought in terms of art 12 of the Convention, as is required in art 3 of the Convention, has the effect that the minor child is being withheld, in contrast with the 'rights the second applicant had, by way of legislation, alternatively rights actually exercised'. ..." [Page 388]

Molopa-Sethosa J then considered the arguments of the parties, and continued:

"It is important to note that the second applicant contradicts his own evidence, in denying that he ever agreed to separate and divorce ... while in para 8.1, p 128 he concedes that he did agree. It is also important to note a significant factor, that the second applicant has denied the respondent and the minor child, whom he professedly so deeply cares for, and has such a strong bond with, any funds whatsoever for subsistence. The second applicant avers that he has been advised by 'a solicitor' in England not to send the respondent any maintenance for the minor child. The respondent contends that such advice can in no terms be regarded as being in the best interest of the minor child, that it is indicative of the lack of bona fides and commitment by the second applicant, and should be considered with suspicion. Having regard to the totality of the evidence before this court, and to the facts before this court, as well as to the authorities referred to by the parties, which I have duly considered, I am satisfied that the minor child's habitual residence, before coming to South Africa with his mother on 3 February 2009, was in the United Kingdom (UK), where he resided with both his parents. Further, I am prepared to

accept that, the parties having been married and having lived together with O in the UK, as at 3 February 2009 aforesaid, the second applicant, if one adopts the English concept of custody in Convention matters, viz parental responsibility towards the child, enjoyed custody in terms of the provisions of the Convention, in that there is no evidence that he did not contribute to the maintenance of O while the respondent and O were still in the UK. ..." [Page 393]

"However, from the facts it is clear ... that prior to the respondent and the minor child leaving the UK for SA, there was an agreement to separate, followed by an agreement to divorce; further, I am satisfied ... that the second applicant had consented to O living permanently in South Africa with his mother." [Pages 393 - 394]

"It is appalling that these proceedings were initiated by the second applicant merely a day after he had spoken to the respondent's then attorney of record, confirming the terms of the divorce, which he had agreed with the respondent, including that the respondent would take custody of O. The fact that the second applicant also contradicts himself on this aspect ... is indicative of the fact that he is not playing open cards with the court. ... [T]hey had agreed on the terms of the divorce, and he had confirmed these ... Nowhere during these discussions did the second applicant raise the issue of 'abduction' and/or his objection to the minor child being in South Africa with his mother. The second applicant is in my view not genuine in these proceedings"

"I find it disturbing that the first applicant states in her replying affidavit that 'the second applicant is under extreme stress and anxiety as a direct result of the retention of the minor child in South Africa'. ... How can this be so, since the second applicant, on his own version was prepared to stay for at least six months without seeing his young child! I think that it is imperative that the Central Authority represented by the first applicant herein should strive to stay as objective as possible in these matters, and not create an impression that he/she is subjective. Basically, the fight in these matters is between the parties concerned, and the first applicant is merely a facilitator in terms of the convention. The other worrying factor raised in the papers was that the first applicant contends ... that, during mediation proceedings, the respondent agreed to voluntarily return O to the UK, which aspect is vehemently denied by the respondent and her former attorney. There is mention by the respondent of a social worker who was present during the mediation process. The first applicant is silent on this aspect. Despite having had the opportunity to deal with this aspect in her RA, she simply did not deal with it, and no confirmatory affidavit/reports from the social worker, to whom the first applicant had access, were annexed to the papers. This makes the court wonder if the first applicant was being candid to the court." [Page 394]

"I am also satisfied that the minor will be exposed to grave risk of harm if he were to be returned to the second applicant. The second applicant does not have the best interests of this child at heart. Also, there is undisputed evidence that, since the child has been in South Africa, his health has improved tremendously; this is of utmost importance and cannot be ignored." [Pages 394 – 395]

The application was dismissed.

SELECTED JUDGMENTS**PRIVATE LAW****LAAS V ROAD ACCIDENT FUND 2012 (1) SA 610 (GNP)****Case heard 14 September 2011, Judgment delivered 29 September 2011**

Plaintiff, a cash-in-transit security officer, claimed damages from defendant resulting from injuries sustained while driving his employer's vehicle at high speed over speed bumps while trying to escape from an attempted robbery. As a result, plaintiff sustained injuries to his cervical spine.

Pretorius J held:

"The court has to decide whether the injuries suffered by the plaintiff were injuries caused by or arising from the driving of the motor vehicles driven by the insured drivers and were due to a wrongful act of the drivers of the motor vehicles. ... The court was referred to several decisions so as to persuade the court that the injuries the plaintiff sustained arose from the driving of a motor vehicle and a wrongful act as provided in s 17(1)(b) [of the Road Accident Fund Act]." [Pages 611 - 612]

"Only conduct as provided for in s 17(1) will render the defendant liable. According to Diemont J in *Kemp v Santam Insurance* ... with whom I agree, the primary conduct required is the negligent driving of a motor vehicle by the insured driver. The plaintiff was chased by the driver of the Honda at high speed whilst he was continuously under fire from the occupants of the Honda. The way the plaintiff drove caused his injuries as a result of the car following him and the occupants shooting at his vehicle. The plaintiff's evidence was that he was driving more recklessly and faster as he proceeded to evade the Honda and to reach the police station as soon as possible, as the occupants of the Honda were continually shooting at him." [Page 613]

"There is no evidence that the driver of the Honda was shooting at the plaintiff's vehicle, but his driving and chasing the plaintiff's vehicle with the Honda enabled the occupants of the Honda to keep on shooting at the plaintiff's vehicle. If the driver of the Honda had not driven in the manner he had, enabling the occupants to shoot at the plaintiff's vehicle, the plaintiff would not have sustained injuries." [Pages 613 - 614]

"The court finds that the causal relationship between the driving of the Honda, enabling the occupants to shoot at the vehicle of the plaintiff, and the injuries sustained by the plaintiff was so real and close that it was caused by an unlawful act as contemplated by the provisions of s 17(1). The defendant did not present any evidence at all. In the circumstances the court cannot find that the plaintiff was negligent and contributed to his injuries. The consequence is that the court finds that the defendant is liable to compensate the plaintiff for such damages as he may prove." [Page 614]

ADMINISTRATIVE JUSTICE**SUPERSONIC TOURS (PTY) LTD V THE STATE TENDER BOARD NO AND ANOTHER 2007 (11) BCLR 1271 (T)**

Applicant sought to review and set aside the decision of the first respondent to cancel a contract between the Department of Defence and the applicant, and to restrict the applicant and its directors from obtaining business from any organ of state for ten years. The issue of cancellation fell away, leaving the court to decide whether the ten year restriction should be set aside. Applicant had been awarded a tender to provide travel and accommodation services to the Department. The Department subsequently alleged possible misrepresentations or incorrect information had been given by the applicant regarding the tax clearance certificate and equity ownership. An investigation found that the shares in the applicant were owned by a company that “is not a black empowerment company”. [page 1273].

Pretorius J held:

“It is not for this Court to decide whether the information submitted by the applicant was a misrepresentation or fraud. This Court has to decide whether the process followed in deciding on the restriction for ten years was correct and according to the provisions of the Constitution and the Promotion of Administrative Justice Act ...”

“Mr Tokota, for the respondent argued that this was a contract between two parties and should be treated as such. It should not be any different where one party terminates the contract due to misrepresentation by the other party. He referred the court to *Transnet Ltd and Others v Chirwa* ... which deals with labour law and where it was found the termination of a contract of employment did not involve the exercise of any public power or performance of a public function. Therefore it was found that section 33 of the Constitution and the provisions of the Promotion of Administration Justice Act did not apply. This contention cannot be faulted, but the complaint by the applicant is that the decision to restrict the applicant and it’s directors of obtaining any contracts from any state organ for 10 years is unfair in the present circumstances. This decision by the respondents was not reached in a proper way, according to the applicant, as *audi alteram partem* was never applied and no reasons for the decision were given.” [Page 1274]

After setting out the administrative justice provisions of the Constitution and regulations of the State Tender Board, Pretorius J continued:

“The difference between the two regulations is very clear, as well as the reason for the distinction in the two regulations. The first respondent acted according to regulation 3(5)(a)(iv) which provides for the restriction. This action cannot be reconciled with the first respondent’s own version where the first respondent is relying on misrepresentation or incorrect information rather than fraud. ... It is ... important that the request by the applicant to discuss the problems with the first respondent, was never taken up and never replied to. It was never decided by the first respondent whether the misrepresentation, if it existed, was innocent, negligent or fraudulent. This despite Mr Botha and the State Attorney warning the respondents to proceed carefully. It seems as if a finding of misrepresentation that was innocent or negligent will not attract the same sanction as a finding that the misrepresentation was fraudulent. I am of the opinion that it is of the utmost importance to know on which facts and findings the respondents decided to impose the maximum penalty and how the board

came to the decision. This is even more so, where the first respondent refer to misrepresentations and its consultants warned that different interpretations of the representation by the applicant must be allowed and that it may have been nothing more than “an oversight”. In these circumstances the applicant could have expected to be informed of the possible consequences which was not done.” [Page 1276]

“The applicant was not informed that the State Tender Board was contemplating to restrict the applicant and its directors of obtaining tenders from any state organ for ten years. The letters called upon the applicant to defend himself on an allegation ... of supplying incorrect information, alternatively “possible misrepresentations”. The applicant was never given the opportunity to give oral evidence although requesting the first respondent for such opportunity. The first respondent relies on the statement of Ms Dawood that she was only used as a front to secure the contract and that she was not compensated therefore. She further states that although the applicant alleges that she was both a beneficiary and trustee, she was only used as a “front”. Unfortunately for the first respondent the applicant was never accused of “fronting” and the hearing ... did not deal with the question of “fronting” at all.” [Page 1277]

“The first respondent relies on Ms Dawood’s affidavit, which was not part of the record at the hearing ... when alleging misrepresentation. The decision to restrict the applicant could not have been made at the time due to “fronting”, as it was never alleged before the opposing affidavit was filed. The board could not have considered the so-called “fronting” at all. ... There is no mention of fraud in any of these letters [from the Department and National Treasury], and it is only reasonable for the applicant not to expect to receive the harshest sanction that can be imposed. Although the applicant requested the Department of Defence to discuss the matter, no such discussion took place. The rule of *audi alteram partem* was not complied with as the applicant was never called upon to defend itself on allegations of bribery, bad faith, fraud or improper conduct, neither was the applicant awarded the opportunity to address the board on a possible sanction and to give evidence in mitigation.” [Page 1279]

“There is no indication which facts the board considered and which facts weighed so heavily that the board decided to impose the maximum sanction without making a finding regarding fraud and without granting the applicant an opportunity to address the board in any way to mitigate the sanction. It is not set out what findings the board made regarding the so-called misrepresentations – did it find negligence, oversight, or fraud when deciding on the matter? This is even more important in this instance where the applicant is restricted for 10 years regarding all state organs, knowing that the gross annual value of the formal contracts is ± R218 million and all the employees of the applicant will be affected and the applicant may be ruined as a result of the board’s decision.” [Page 1279]

“Taking decisions of this prejudicial nature without applying procedurally fair administrative action can never be condoned. The applicant could never have contemplated that such a drastic action would be taken due to “possible misrepresentations”. I cannot but find that the hearing of 22 September 2005 and the restriction of the applicant for 10 years were unreasonable and procedurally unfair. The *audi alteram partem* rule was not applied and the respondents did not adhere to the provisions of the Constitution and Promotion of Administrative Justice Act to ensure that procedurally fair administrative action took place.” [Pages 1280 - 1281]

The restriction relating to the applicant and its directors was therefore set aside. The judgement was upheld on appeal: *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* (389/07) [2008] ZASCA 56 (27 May 2008)

**BOHLER UDDERHOLM AFRICA (PTY) LTD V MANUFACTURING DEVELOPMENT BOARD & ANOTHER
[2006] JOL 17611 (T)**

Case heard 8 March 2006, Judgment delivered 5 June 2006

Applicant sought to review the first respondent's decision not to grant it Small and Medium Development Programme Incentives (SMEDP).

Pretorius J held:

"The SMEDP came into existence during 1999 in terms of the Manufacturing Development Act ... Only certain legal entities could participate in the SMEDP namely, companies, close corporations, partnerships, sole proprietorship and co-operations. Divisions were excluded from participating." [Page 1]

"The first respondent regards a company which has branches in different parts of the country as a company which has "divisions" which do not qualify for incentives in terms of the SMEDP. The applicant operates from various locations in South Africa as set out in their SMEDP application, but contends that it is operating as one entity with one accounting system and therefore do not operate as divisions." [Page 2]

Pretorius J set out the process followed by the first respondent when receiving an application for incentives, and continued:

"The applicant acted in accordance with the guidelines set out in the information brochure of the Department of Trade and Industry relating to applications for SMEDP incentives. The information brochure does not have any definitions to define either "divisions" or "branches", nor does it define any of the entities which do qualify." [Page 4]

"There is no definition in the guidelines setting out what is regarded as divisions or branches. There is no definition for the legal entities which do qualify to participate in the SMEDP incentives. The applicant could not guess from the information brochure that it was not entitled to participate, as the guidelines filed by the first respondent was not available to applicants, but is a document for use by the first and second respondents. The respondents admit that the applicant qualified in all aspects for the SMEDP incentives, except for the divisions and/or branches aspect. ... In this instance there is no rational basis to exclude the applicant as a qualifying entity as it is a company with audited accounts which has been drawn up for a single entity, although trading from various locations. It had applied as a company and not as a division for the SMEDP incentives. It is also an important role player in the South African automobile industry." [Pages 6 - 7]

"The recommendation to the Management Committee and the Board was not reasonable having regard to the facts at their disposal at the time or making the decision, and having regard to the lack of definitions in the Information Brochure." [Page 7]

Pretorius J considered provisions of the Constitution, PAJA, and SCA case law on the standard for review of administrative action, and concluded:

“In this instance where the applicant applied as a single entity, for SMEDP incentives, had financial audited statements no guidelines available to applicant as to how applicant's internal make-up had to be determined, the Management Committee and the Board erred in finding the applicant included divisions and/ or branches.” [Page 9]

The application succeeded.

CIVIL PROCEDURE

WRAYPEX (PTY) LTD V BARNES [2008] JOL 21368 (T)

Case heard 7 December 2007, Judgment delivered 18 January 2008

This case dealt with “a combination of applications”, one under rule 30A read with rule 37(4) of the Uniform Rules of Court (to compel a response to a list of admissions and enquiries sought), and three applications under rule 35(7) to compel compliance with notices in terms of rule 35(3).

Pretorius J held:

“These applications stem from summons which was issued by the plaintiff ... The plaintiff, a private company, is suing the defendant for damages due to the alleged publication of defamatory remarks made by the defendant. The first claim relates to the alleged publishing of false and malicious statements concerning the plaintiff in regards to the development of the Blair Atholl township. The amount claimed is R5 million. ” [Pages 4 - 5]

“The second claim relates to further alleged publication of false and malicious statements for which R10 million is claimed. A claim for R20 million is made for damages suffered as a result of delays caused by the defendant in respect of finance and contractual penalties. A further R5 million is claimed in terms of section 38 of the Constitution of the Republic of South Africa, 1996 as punitive constitutional damages. ...” [Page 5]

“... [A] request for further particulars in terms of rule 21(2) was served on the plaintiff. No reply was received. ... At the pre-trial meeting plaintiff's counsel indicated that the plaintiff was not going to respond to the request for further particulars as it had been served late. It must be noted that the remedy for non-compliance with rule 20(2) is set out in rule 20(4). On 19 April 2007 the plaintiff's attorney in writing informed the defendant's attorney that the plaintiff did not intend replying to the rule 20(2) notice as it was served out of time....” [Pages 5 - 6]

“While there may be good reasons given why the plaintiff should be compelled to give further particulars, the defendant fails to explain why the defendant failed to go through the proper process to obtain them. On 19 April 2007 the defendant's attorney requested the plaintiff's response to the request in terms of rule 37(4). On 20 April 2007 the plaintiff's attorney informed the defendant's attorney, that no response would be forthcoming. ...” [Page 6]

“The trial was set down for 27 April 2007. The rule 30A application only afforded the plaintiff one day to respond. The defendant applied for condonation for its failure to give plaintiff 10 days within which to

comply with the rule 37(4) request. The remedy for the non-compliance with the request in terms of rule 21(2) is set out in rule 21(4). The defendant chose not to approach the court with an application to compel delivery, or to have the action dismissed or struck out. Mr Campbell now argues that after the trial was postponed on 27 April 2007, the plaintiff has had more than enough time to comply. I cannot agree as this Court has to decide the issue on the fact that the rule 20(2) notice was served out of time. It is clear that rule 30A is not applicable in this instance.” [Page 7]

“The defendant chose to invoke the provisions of rule 37(4) to obtain the requested further particulars. Rule 37(8) should have been used if the defendant was not satisfied and an appropriate costs order in terms of rule 37(9) provides a further remedy. Both these rules provide for a process in the event of non-compliance with rule 37(4). The defendant chose not to invoke the provisions of these rules. Therefore the argument by the plaintiff, that rule 30A is not applicable, must be accepted. As the defendant could not succeed in obtaining the further particulars due to its own neglect in serving the notice late, the defendant tried to slip in through the back door by way of rule 37(4) at the pre-trial conference. This cannot be entertained as the provisions of rule 37(4) is peremptory and the request should not be made during the pre-trial conference, but shall be made prior to the holding of the pre-trial conference and not at the conference as happened in this particular instance. Mr Campbell, for the defendant, argued that these particulars are required, as the particulars of claim are vague and embarrassing. The correct remedy to that would have been to except to the pleadings ...” [Pages 7 -8]

“The defendant argues that it is not required to lay a basis for the relief sought in the founding affidavit and has reluctantly dealt with it in the replying affidavit. There is also no explanation for the lack of a proper basis for further discovery and inspection in the founding affidavit. The plaintiff is correct when stating that the replying affidavit cannot and should not be used to lay such a basis and to amplify the shortcomings in the founding affidavit. The defendant's argument that the court should grant some form of relief and specially in the instance of Mr Hampson, as a possible witness, for the plaintiff cannot be granted as no case for such relief was set out in the founding affidavit. The defendant cannot come to court and rely on the replying affidavit for the requested relief and argue that the basis for the applications is set out and amplified in the replying affidavits.” [Page 9]

“The defendant could not rely on the replying affidavits to discharge the onus of setting out sufficient facts upon which a court can find in his favour in the two applications. Plaintiff is thus correct when arguing that no proper case was made out in the founding affidavit.” [Page 11]

Both applications were dismissed. Costs of two counsel were not allowed as “it is neither such a complex or lengthy matter to require two counsel.” [Page 11]

SELECTED JUDGMENTS**SOCIO-ECONOMIC RIGHTS****MILLS V SHAW & 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 Veldthuisen [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.

**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

COMMERCIAL LAW

FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK V NAIDOO [2010] JOL 26575 (KZD); CASE NO.: 3869/2010

Case heard 7 December 2010, Judgment delivered 28 October 2010

The applicant sought an order for the respondent to be sequestered. The issue before the court was whether, on the facts before the court, there was *prima facie* reason to believe that it would be to the advantage of the creditors that the respondent's estate be sequestered. The court had to be satisfied that there is a reasonable prospect - not necessarily likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors.

Hughes-Madondo AJ held:

"The salient background facts which are relevant to the adjudication of the application are briefly outlined ... On 13 August 2008 the respondent bound himself in favour of the applicant, as surety for and co-principal debtor jointly and severally with Tiger Steel and Trading (Pty) Limited ("Tiger Steel"). Tiger Steel failed to make payment in respect of its indebtedness to the applicant and judgment was granted on 2 December 2008 in the amount of R3 706 908,31. Subsequent to judgment a payment of R2 595 091,30 was received and the indebtedness of Tiger Steel was reduced to R1 111 817,09. On 8 April 2009 Tiger Steel was liquidated and on 29 May 2009 Russell Hockley, a co-surety with the respondent, was sequestered." [Page 3]

"A warrant of execution was issued and served on the respondent...The applicant makes out a case that the respondent informed the sheriff that "it was impossible to pay the amount claimed or any sum". Further, that the respondent informed the sheriff that all the assets of the address reflected for service belonged to his wife, to whom he was married out of community of property. No further payments have been made. [Page 3]

"The approach in *Meskin* was adopted in *London Estates (Pty) Ltd v Nair*..."the mere fact that sequestration enables investigation of the insolvent's affairs is not sufficient: *there must be additional facts establishing not too remote possibility*." [My emphasis in italics] On examination of the facts set out above it is evident that there are prospects, which are not remote, indicating that some pecuniary benefit will result for the applicant and creditors, if the respondent is sequestered. It's evident that the respondent is still a 40% benefactor of the property at 112 Lynhurst Estate. He still owns shares that he purchased from Syd Naidoo NO. He is sole director of Ted Naidoo Incorporated who have debtors whom owe the company an amount of R239 476,60. He also draws an amount of R50 000 from Ted Naidoo Incorporated. This indicates that the company is still viable and is an asset." [Page 7-8]

“The facts on a whole show that there is not a too remote prospect, that as a result of investigation, assets other those mentioned above may be found or recovered to the pecuniary benefit of the applicant and other creditors.”[Page 8]

“*Prime facie* the facts there is reason to believe that the sequestration of the respondent will be to the advantage of the creditors.” [Page 8]

It was ordered that the estate of the respondent was to be placed under provisional sequestration.

ADMINISTRATIVE JUSTICE

VAN DEN HEEVER V MINISTER OF MINERALS AND ENERGY, CASE NO.: 1252/2010

Case heard 28 November 2011, Judgment delivered 4 May 2012

Applicant sought a declaration that the third respondent, Trans Hex Mynbou Beperk, had on 26 January 2001 abandoned its right to mine for minerals, more particularly, diamonds on two contiguous portions of land in respect of which the applicant had applied for permits to mine diamonds.

Hughes-Madondo AJ held:

“The applicant decided to access the mining industry. To this end on 15 October 2008 he applied to the Regional Manager: Mining Regulation of the Northern Cape Region in terms of Section 27(2) of the Mineral and Petroleum Resources Development Act ... (“MPRDA”). The applicant sought two permits to mine diamonds on two adjoining pieces of land situated on a portion of the farm Richtersveld No.11, in the district of Namaqualand, Northern Cape. Having received written rejections to both permits from the Regional Manager on 29 October 2008, the applicant lodged appeals in respect of both matters on 24 November 2008 to the Department of Mineral Resources, the second respondent. Both appeals were dismissed on 16 March 2010. In a nutshell the refusal to grant the applicant’s applications for mining permits and the dismissal of the applicant’s appeals were based on the fact that the mining permits sought by the applicant had already been issued in favour of the third and fourth respondents, being Trans Hex Mynbou Beperk and Trans Hex Operations (PTY) LTD, respectively.” [Paragraphs 2-4]

“The applicant maintained that the third respondent had abandoned its mining and mineral rights as at 26 January 2001 more specifically those mineral and mining rights in relation to diamond son the two adjoining portions of land on the Farm Richterveld No. 11. It is contended that due to the aforesaid abandonment, the applicant’s mining permit applications in respect of the two adjoining portions should not have been rejected.” [Paragraph 6]

“In terms of section 2 of the Precious Stones Act ..., the right to mining for and disposal of precious stones was vested in the State. By virtue of section 21 ... the state was entitled to lease its right to mining and disposal of precious minerals. Such a mining lease existed between Mynbou and the state. In terms of this mining lease Mynbou had the sole right to mine precious stones and could only exercise mining

activities on the leased portions to the satisfaction of the Minister of Mineral, Energy and Public Enterprise, who represented the state..." [Paragraphs 8-9]

"On 1 January 1992 the Minerals Act 50 of 1991 came into effect. It repealed the Precious Minerals Act. The crucial aspect that arose as a result of the repeal was that the state was no longer vested with the right to mining. In accordance with section 5 of the Minerals Act the holder of the right to any minerals in respect of land, in order to mine for such minerals, had to attain the necessary authorisation to do so. Thus the mineral rights holder could exercise this right subject to section 9 of the Minerals Act which sets out the terms for issuing the necessary mining authorisation....in terms of section 9 subsections (1) (a) and (1) (b) the mineral rights holder can only mine the minerals if he had the necessary authorisation to do so from the Director-Mineral Development." [Paragraphs 10-12]

"A reading of section 9(3) (d) and (e) reflects that there are two types of mining authorisation: (1) a mining permit; and, (2) a mining licence... What is distinct between the two is that the permit cannot be granted for a period of more than two years whilst the licence may be granted for a period longer than two years..." [Paragraph 14]

"Section 11 of the Minerals Act deals with the duration and termination of a prospecting permit or mining authorisation. Section 11(2) specifically provides that a holder of any prospecting permit or mining authorisation can by written notification to the Director-Mineral Development, at any time, abandon the prospecting permit or mining authorisation or any portion of land pertaining to it ... Further, section 11(3) stipulates that the aforesaid notification of abandonment should be accompanied by a sketch plan indicating the portion so abandoned." [Paragraph 19]

"The parties are in agreement that the central issue is whether the third respondent abandoned its mining rights by way of the memorandum of 26 January 2001." [Paragraph 22]

"On examination of the memorandum I fail to observe the words abandon translated in Afrikaans to afstanddoen or any similar wording appearing therein. In fact what does emerge is a request for an amendment ..." [Paragraph 23]

"Adv G L Grobler SC, for Mynbou and Trans Hex Operations...makes the following submission: 'The request could not be affected unilaterally. The requested amendment would have had to be acceded to by the Minister, because the notarial mining lease is a bilateral agreement between Trans Hex on the one hand and the State on the other hand. Although the mining lease was a statutory grant, it was a bilateral agreement. **See ONDOMBOBELEGGINGS V MINISTER OF MINERAL AND ENERGY AFFAIRS 1991...** A notarial mining lease could not be amended unilaterally...agreement on the amendment would only have been the first step. Once agreement has been reached to amend the lease, such agreement would have had to be notarially executed and registered...' I fully endorse what counsel propounds." [Paragraph 24]

"...I cannot agree with the applicant's contention that the letter together with the sketch was sufficient to constitute abandonment. On a careful examination of section 11(3) it is evident that there would have to be *approval* from the Director: Mining Development on whether the sketch attached complied with the statutory requirements and therefore acceptable. The approval was lacking." [Paragraphs 32-33]

“As regards an inferred waiver Nienaber JA said in **ROAD ACCIDENT FUND v MOTHUPI 2000** that the test to determine waiver is objective. The intention is thus firstly, adjudged by its outward manifestations; secondly, mental reservations not communicated are of non-legal consequence; thirdly, the outward manifestations are adjudged from the perspective of the reasonable other party concerned. ... [T]he onus rests with the applicant to prove that abandonment took place. The applicant’s reliance on section 11 fails to demonstrate that abandonment in fact occurred. How can it be said that there was compliance with the requirements of abandonment when the reciprocal duty on the part of the Director: Mining Development to accept the sketch plan was still outstanding? This was not an instance in which one party was at liberty to act unilaterally. I cannot therefore agree that abandonment was indeed effected...” [Paragraph 36-37]

“In the result I am satisfied that the letter of 26 January 2001 does not constitute abandonment.” [Paragraph 39]

The application was dismissed with costs.

CRIMINAL JUSTICE

S V JOBO [2011] ZANCHC 24 CASE NO.: CA&R44/2011

Case heard 26 September 2011, Judgment delivered 21 October 2011

The appellant had been charged with assault, kidnapping, assault with the intent to do grievous bodily harm and rape. He was convicted on all counts in the Regional Court and was subsequently sentenced to twenty five years imprisonment. This case was an appeal against both his conviction and sentence. The appellant had forced the complainant; MM (aged 16), to walk to his home by slapping her and threatening to stab her with a broken bottle if she did not comply. During the course of the incident, the complainant’s left side of her face was sliced by the broken bottle. The appellant forced her to undress and raped her in his room. The complainant’s friend had seen the appellant forcing her to walk with him to his house and had gone to call the complainant’s mother for help. Immediately after the rape, the complainant’s mother and friend forced open the door to the appellant’s room and found the complainant and the appellant lying on the bed.

Hughes-Madondo AJ (William J concurring) held:

“The issue in this appeal is whether on the day in question the appellant had sexual intercourse with the complainant without her consent.” [Paragraph 22]

“A court of Appeal is very reluctant to upset the findings of the trial court, as the trial judge has the advantage of seeing and hearing the witnesses and observing their personalities and demeanour. The trial court is in a better position to draw inferences than the appeal court... See **R v DHLUMAYO AND ANOTHER...**” [Paragraph 23]

"Ironically in this case the appellant's version corroborates the complainant's version as regards material aspects. To illustrate but a few: the appellant confirms having been in the company of the complainant on the day in question; he admitted that the complainant's mother accompanied by Grace came to his room; that they found him and the complainant lying on his bed in his room; he admits that the complainant was slapped and reprimanded by her mother in his presence;...he confirmed that the complainant, her mother and Grace left his room together." [Paragraph 24]

"On examination of the evidence in its totality I find that the evidence of the appellant which corroborates that of the complainant is further corroborated by her mother and Grace's testimony. The complainant in this case was a single witness and as such this court is mindful of the danger inherent in relying on the evidence of a single witness..." [Paragraph 25-26]

"In *casu* the evidence of the complainant is corroborated in several material respects. Her version that she was forcefully taken to the appellant's home is corroborated by the evidence of Grace ... Her evidence that the appellant subdued her by injuring her with the broken bottle is corroborated by the evidence of her mother and Grace that she had been bleeding in the vicinity of the left ear when they found her at the appellant's home. This injury is confirmed by the registered nurse who examined the complainant the following day. The nurses finding of signs of intercourse within seventy two hours of the examination further corroborates the complainant's version." [Paragraph 27- 28]

"In light of the above and having regard to the totality of the evidence, the appellant's version that the complainant had of her own free will visited him that night, that all they did was kiss, that the last time he had sexual intercourse with the complainant was at least a week before the relevant time and that she must have inflicted the injury to her face herself in order to implicate him can safely be rejected as false." [Paragraph 29]

"Certain minor contradictions existed in the evidence of the state witnesses but these in my opinion were not material and damning to the states [*sic*] evidence in totality. It is expected that with the passage of time, witnesses will not have a perfect memory of every detail pertaining to the incident concerned. In fact alarm bells should ring if indeed they have a perfect memory of events or their memories of the events are exactly the same ..." [Paragraph 30]

"In light of the evidence, only one conclusion can be drawn and that is, that the appellant had sexual intercourse with the complainant on the day in question without her consent. This court accepts the evidence of the complainant as being reliable of what indeed transpired on that day. The appellant's evidence is therefore rejected as being improbable and false." [Paragraphs 31- 32]

"It was correctly conceded by the state that by setting out four different charges as was done in this case there appears to have occurred a splitting of charges. The other charges preferred against the appellant and his actions related thereto were all part and parcel of achieving this objective of raping the complainant." [Paragraph 33]

"The appellant committed the act of rape and in doing so he took the complainant threatened her, took her against her will and had sexual intercourse with her without her consent. These entire acts were

entwined within his quest to commit the act of rape... The appellant was correctly convicted of the charge of rape in the court below and the convictions relating to the other charges should be set aside.” [Paragraphs 34-35]

“The appellant was a second offender and therefore the minimum sentence applicable in terms of section 51 Part II of Schedule 2 (ii) of the Criminal Procedure Act 105 of 1997 is that of twenty years...Mr Hollander representing the state argued that if one considered the circumstances as to how the rape occurred, these had to be considered as aggravating and as such the court is entitled to impose more than the minimum sentence...Further that the sentence of twenty five years imposed by the presiding officer in the court below was appropriate in the circumstances.” [Paragraph 37-39]

“Taking the above into consideration I am not of the view that the circumstances of this rape warrant deviating from the minimum sentence. In saying so I am not convinced that the circumstances fall within the category of *“the worst category of rape”* - See **S V ABRAHAMS** ... Having concluded that the circumstance surrounding the rape does not warrant a deviation from the minimum, the sentence that I then impose would be antedated to 15 April 2008 being the date upon which the appellant was sentenced.” [Paragraph 41- 42]

The convictions on counts one, two and three were set aside, and the appeal against the rape conviction was dismissed. The sentence of twenty five years imprisonment stood.

SELECTED JUDGMENTS**PRIVATE LAW****MMEKWA V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO.: 33275/09 (NORTH GAUTENG HIGH COURT, PRETORIA)****Judgment delivered 13 June 2012**

The Plaintiff instituted an action against the defendant, claiming damages for personal injuries sustained from a motor collision allegedly caused by the sole negligence of Van Vuuren (the "insured driver"). The merits of the case were separated from the issue of quantum therefore this case dealt only with the issue of liability.

Khumalo AJ held:

"In its Plea filed on 15 August 2009, save for admitting to the name of the plaintiff and its own locus standi, the Defendant denied any knowledge of the accident, placing all the allegations in the plaintiffs particulars of claim in issue by either denying any knowledge thereof or putting the plaintiff to the proof thereof. ...In the pre-trial minute ..., the Defendant conceded that a collision occurred on 31 August 2008 as in accordance with the accident report in which the insured driver confirmed that he was driving on Moloto Road in Roodeplaat when he hit an object that he later discovered to be a person. The Defendant also agreed that Plaintiff was the pedestrian but still put all the other issues in dispute." [Paragraphs 3-4]

"The main issue that was in contention after the Plaintiff has testified and at the beginning of the insured driver's evidence was the locus in quo. According to Plaintiffs evidence he was hit by the insured car on the gravel side (shoulder) of the road and near the gate of plot 37, which was denied by the insured driver in his evidence in chief. The contention was however resolved by the insured driver's evidence under cross examination when he conceded that the collision must have happened on the gravel ... His concession makes sense and gives credence to his allegation that he was travelling at a speed of approximately between 70 to 80 km/h when he collided with the Plaintiff and explicable that Plaintiff would then be thrown and be found 2 and a half metres into the grass away from the gravel shoulder. The alternative that the insured driver was driving on the tarred road at the time would have meant that the insured driver's speed was way in excess of 80 km/h, for Plaintiff to land at a distance of 4 to 5 metres from the edge of the road. Insured driver's surprise and struggle to accept the turnout of events is understandable if like he testified he did not see the Plaintiff. Although his evidence might have seemed to be a little wobbly under cross examination, I do find him to be a credible witness and his evidence reliable." [Paragraph 12]

"The insured driver's concession that the collision occurred on the gravel side of the road establishes a prima facie inference of negligence on his side... Although the onus of proving negligence still remains with the Plaintiff, the establishment of prima facie inference of negligence on the part of the insured driver places the evidential burden on the defendant to adduce and tender rebuttal evidence which negates the prima-facie negligence..." [Paragraph 14]

"The burden of disproof applies to the defendant until the end of the case, placing his (the insured driver's) whole conduct under scrutiny. Therefore it would not be discharged by proof that Plaintiff as the

pedestrian was negligent. Such proof can only be significant in determining the extent of liability to be attributed to the defendant.” [Paragraph 15]

“In establishing the negligence required to determine liability in civil actions a simple test that involves the standard of care and skill that would be observed by a reasonable man applies, which also depends on the atypical circumstances of each individual case. See *Flanders v Trans Zambezi Express*... In carrying out this judicial analysis the following factors will be decisive in this matter: [16.1] If the insured driver adhered to his on-going obligation to keep a proper lookout in all the circumstances. [16.2] If the insured driver kept a reasonable speed (within the range of his vision) immediately before the collision. [16.3] the visibility of the pedestrian Plaintiff, was he in plain view of the operators of motor vehicles proceeding on the road thus wearing light coloured clothing? [16.4] if the insured driver or Plaintiff each met the duty to anticipate a reasonable apparent risk and take appropriate precautions? [16.5] The time of day at which the accident occurred, the location of the collision, the speed involved? [16.6] Did alcohol, drugs or other types of impairment maybe play a role to deprive either driver or pedestrian of the ability to avoid the collision.” [Paragraph 16]

Khumalo AJ then applied the above factors and held:

“... [T]he insured driver's conduct and explanation of the occurrence is inconsistent with the exercise of due care, he evidently failed to appreciate the potential risk and to take the necessary precautions required of a reasonable person under the circumstances. My conclusion is that, had he slowed down and in anticipation of the apparent risk and kept a proper look out, the collision would not have happened. See *Manderson v Century Insurance Co Ltd*....” [Paragraph 25]

“The Defendant has consequently not discharged the onus of rebuttal as per the established prima facie case of negligence. I am in converse satisfied that the plaintiff has established on a preponderance of probability that the collision in question was caused by the sole negligence of the insured driver.” [Paragraph 26]

“The Defendant's counsel submitted that it was probable the Plaintiff was drunk at the time since the insured has alleged that he smelt of alcohol. No conduct that is outside his nature that could be attributable to him possibly being drunk at the time has been alleged by the defendant as could have been the cause or contribution to the causation of the accident. He was jogging on the side of the road where he was supposed to be and therefore carried the paramount right and entitled to preference of its usage. The principle was clearly enunciated in *Solomon and Another v Musset and Bright* ... “The general rule under such circumstances is that persons using the road upon their proper side have the paramount right and are entitled to preference, so that, in case of danger of a collision, it is the duty of those on their wrong side to give way first”. [Paragraph 27]

“I accordingly find that the insured driver was the sole cause of the collision and make the following order...The Defendant is ordered to compensate Plaintiff for 100% of his proven or agreed damages...” [Paragraph 28]

CRIMINAL JUSTICE**VILIKAZI V S [2012] ZAGPPHC 135; CASE NO.: A868/2011****Judgment delivered 28 June 2012**

The Appellant was charged with the rape of a nine year old girl, and was convicted on an alternative charge of attempted rape and sentenced to twelve years imprisonment, of which five years was suspended subject to conditions. Appellant appealed against both the conviction and sentence, alleging that there were procedural deficiencies in the trial, and placing in issue the admissibility of certain witness statements, their probative value and the reliance placed upon such statements by the court in arriving to its factual findings.

Khumalo AJ (Raulinga J concurring) held:

“When the court commenced to consider the evidence that was before it, the magistrate mentioned all the witnesses that gave testimony for the state and then announced that “formally admitted as evidence during the course of the trial were Exhibits “A”, which was Paulina Mokeretla’s witness statement, “B\ Samuel Nkosi’s witness statement, “C,” Constable Mkabela’s witness statement, “D” and “E”, Complainant’s witness statements and “F”\ the J88 report presented and read out Dr Mabotja who examined the Complainant...” [Paragraph 15]

“Appellant’s contention stems from this announcement. Therefore a careful scrutiny of the record, concentrating more on the statements of Samuel, Paulina and more especially that of Complainant, becomes not only necessary but crucial to understand and appreciate the reasons for the announcement and also to establish if it was warranted, since it is the admissibility of these statements that forms the nub of Appellant’s disenchantment.” [Paragraph 16]

“The assessment of her [the complainant’s] evidence was made difficult by the fact that neither of the sides enquired from the child about the make up or structure of her home, which information is clearly crucial in order to understand or to can make out if indeed her evidence is discrepant or not. ...My view as concluded from perusing the record is also that she did not get a satisfactory assistance from the intermediary and interpreter. I would however not dwell on that. Nevertheless, for these reasons and the other factors pointed out by the court, complainant seemed to exhibit a poor recollection of the sequence of events. Accordingly, if one has regard to the prosecution’s closing argument, it is evident that the purpose of introducing the statements was to prove the consistency between the witness statements made not long after the incident took place...” [Paragraph 22]

“ A witness statement of a complainant is generally inadmissible as hearsay evidence unless it can be received under the principled exceptional analysis ... At the end of the prosecutor’s cross examination of Complainant, the prosecutor then requested to hand in both statements as evidence and again there was no objection or contest from the defence ... Since there was no disagreement or contest to the admission of the statements and the Complainant, being the person upon whom the probative value of the statement depended, herself testified, and was available to be cross examined in accordance with Section 3 (1) (b) of the Act, removing the hurdle created by hearsay evidence, the evidence itself became admissible, so a formal ruling was not necessary, (as it would have been the case under 3 (1) (c)). This dispels the crux of Appellant’s challenge on the admissibility of this evidence.” [Paragraph 24-26]

"I therefore cannot find any irregularity in the introduction of these witness statements and their admission into evidence later. Appellant did not suffer any prejudice through their admission ..."
[Paragraph 30]

"The Appellant's heads of argument also allege that the contradictions that were in complainant's evidence were in relation to material aspect ... [The] court a quo dealt with the contradictions and confirmed that due to the time lapse and the age of the complainant at the time when the incident took place it would be inevitable that she would not remember every minor detail about the incident ... Therefore the court a quo correctly found that the perceived contradictions, when looked upon against the totality of the evidence did not alter the adequacy of her evidence or affect its credibility...."
[Paragraph 37]

"Now, the Appellant's bare denial lacks sufficient materiality to exclude any reasonable possibility that his denial may have been true ... Accordingly, the court correctly found the Appellant's guilt to have been proven beyond reasonable doubt." [Paragraph 40]

"However, even though there was proof of a possibility of a sexual assault having taken place because of the evidence of a scarring on the vagina and a white discharge found in the vagina which can only originate from a sexual activity, for the reason that the hymen was found to be intact and there was doubt that penetration was successful ... I confirm that the court was correct in acquitting the Appellant on a charge of rape and finding him guilty on the alternative charge of attempted rape." [Paragraph 41-42]

"...The conclusion of the [correctional supervision] report was that the Appellant was not a suitable candidate for correctional supervision sentence in that, whilst taking note of his youthfulness and the fact that he is a first offender, he was convicted of a very serious offence involving a young child that was vulnerable and defenceless..." [Paragraph 44]

"The report clearly dealt with all the factors that are raised in the Appellant's reasons for appeal against sentence ... Relying on this report, the trial court ... then imposed the sentence ... I cannot find any reason for interference with the imprisonment sentence." [Paragraph 47]

"The only time that the court of appeal can interfere with sentence is when the sentencing court has seriously misdirected itself or when there is such disproportion between the sentence that the appeal court considers appropriate and the one imposed by the sentencing court that it invokes a sense of shock, as restated in S v Malgas..." [Paragraph 48]

"I however find that there is a disproportion between the sentence that would have been imposed by this court and the sentence imposed by the court a quo that obviously resulted from the court a quo's failure to take into consideration that Appellant had at the time of sentencing spent a period of 18 months in custody already ... A sentence of 10 years imprisonment of which 5 years is suspended on condition Appellant is not convicted of rape, attempted murder or indecent assault committed during the period of suspension would be appropriate and fair under the circumstances." [Paragraph 55]

The Appeal against conviction was dismissed. The Appeal against sentence was upheld, the sentence in the court a quo was substituted.

SELECTED JUDGMENTS**CIVIL PROCEDURE****FIRSTRAND BANK LIMITED T/A WESBANK V MANHATTAN OPERATIONS (PTY) LIMITED AND OTHERS, CASE NO:37793/2012 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)**

The case concerned an application brought in terms of Rule 35(12) of the Uniform Rules of Court. The Applicants required the Respondent to make certain documents available for inspection and to allow them to make copies thereof. The required documents were referred to in various certificates of balance and were described as a series of account numbers.

Mashile AJ held:

“For purposed of consistency and purely to avoid confusion, I shall refer to the parties in this application as in the main case. ... It is clear from the contents of the rule that once a party makes reference to a documents or a tape recording in a pleading or an affidavit such a document or tape recording may become vulnerable to inspection, copying and transcription at the instance of the other party” [Paragraphs 1 - 4]

“The argument of the Defendants it would appear is that once reference is made in a pleading or an affidavit that document or tape recording becomes exposed to inspection and copying. In this regard Counsel for the Defendants correctly referred me to the case of Machingwata and Others v Mogale Alloys (Pty) Ltd ... where my brother, Ntoshe AJ stated that the grammatical meaning of the words in Rule 35(12) is clear. Once reference is made to a document in a pleading or affidavit, it must be produced. Counsel for the Defendants is correct but the case of Machingwata dealt with a different scenario. In the Machingwata case, there was a direct reference to certain documents and the court, correctly in my view, arrived at the conclusion that the Plaintiff ought to give the Defendant permission to inspect and to make copies.” [Paragraphs 5 - 6]

“It must be borne in mind that the situation in the present case is that the Plaintiff makes a direct reference to a certificate of balance and therein it mentions account numbers. The defendant refers to these account numbers mentioned on the certificate of balance as documents the assertion being that the signatory to the certificate must have had reference to statements of account for him to have arrived at the amount cited as due and owing. The above is what my brother, Bozalek J, in Penta Communication services (Pty) Ltd v King and Another ... rejected when he said ... ‘...It does not follow, however that a reference to that bank account, without more, constitutes a reference for the purpose of Rule 35(12), to documentation relating to such bank account.’ [Paragraph 9]

The application was dismissed with costs.

NEDBANK LIMITED v LORAIN P GOSSAYN, UNREPORTED JUDGEMENT, CASE NO:33795/2012 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

This case concerned an application for a summary judgment against the defendant for monies alleged were owed to it in terms of a loan agreement that it concluded which was subsequently secured by a mortgage bond. The loan agreement was in essence a consolidation of four loan agreements that were previously concluded by the parties. Each of these loan agreements had been secured by a mortgage bond.

Mashile AJ held:

“It is common cause and evident from the statement of the Plaintiff annexed to the pleadings that the Defendant has since the conclusion of the last loan agreement in 2008 been financially stressed. The Defendant believes that it has bona fide defences to the Plaintiff’s claim and that it is not defending the case solely to delay... [I]t raises four defences and these are: the deponent to the summary judgement application of the plaintiff identifies the cause of action as an instalment sale agreement instead of a mortgage bond; a misplaced loan agreement, interest rate discrepancy and reckless credit.”[Paragraphs 3-4]

“The Defendant seems to make a big meal out of the fact that the person who signed the loan agreement is E Drotsky while the affidavit in support of the summary application was signed by a different person, Marius Kruger. The fact that the loan agreement was signed by E Drotsky who was manager of the Home Loans Department of the Plaintiff does not necessarily mean that he should have been the person to sign the affidavit in support of summary judgement. In this regard, Satchwell J held in the case of *FirstRand bank Ltd v Carl beck Estates and Another* ... that : ‘the deponent to the affidavit accompanying the application for summary judgement is employed by the applicant as operations manager area legal. Accordingly, it was argued that deponent to the affidavit has no personal knowledge of the facts surrounding the dispute and his affidavit could not comply with the requirements of the provisions of rule 32. This submission is without merit ... [T]he deponent to the founding affidavit is the operations manager arrears legal which title clearly indicates knowledge of arrears in moneys owing to plaintiff and legal responsibility therefor.’ The fact that the affidavit in support of summary judgement was no signed by the Homeloans Department manager does not therefore take the matter further. The defence must therefore fail.”[Paragraphs 7-11]

“... By signing the mortgage bond and allowing it to be registered she [defendant] acknowledged that the mortgage bond became the primary document by which the Plaintiff protected the loan that it advanced to the Defendant. Accordingly it is my view that a mortgage bond being a document that constitutes proof of the existence of a real right should take precedence over other agreements that might have been concluded between the two parties. The attachment of the loan agreement would neither strengthen nor weaken the plaintiff’s action or application for summary judgement. The alleged defence must also be rejected as it is without merit.” [Paragraphs 12-13]

“The Defendant claims to have been promised a lower interest than the one currently been charged by the Plaintiff. Assuming that this is correct, how does one deal with the fact that she has despite this promise signed the loan agreement dated the 13th of July 2011? The interest rate negotiations clearly took place prior to the signature of the loan agreement. In this regard ... the Defendant cannot attempt

to bring extrinsic evidence because she is barred by the 'no variation except in writing clause' in the loan agreement ... I find that this allegation is not bona fide and must as of necessity crumble." [Paragraph 14]

"It is common cause that the NCA is applicable to this transaction. It is obvious that the Defendant's financial woes began shortly after the Plaintiff had secured the fourth loan agreement of 2008 with the registration of the fourth mortgage bond. This situation persisted right through to 13 July 2011 when the present loan agreement was signed and subsequently a mortgage bond securing that loan was registered." [Paragraphs 15-16]

"An examination of the statement issued by the Plaintiff reveals that the Defendant continued to struggle financially even after the conclusion of the loan agreement on 13 July 2011. In fact at the time when the Plaintiff and the defendant agreed to consolidate the debt, it was in consequence of the realization that the Defendant was not coping with her then current debts. What is inexplicable to me is why the parties proceeded to consolidate the debts when it was apparent that the outcome of such consolidation would land the defendant even in greater financial embarrassment. Faced with these facts, it becomes inevitable that the conclusion of the loan agreement on 13 July 2011 was a flagrant disregard of the provisions of Section 80 of the NCA in particulars (1)(A) and (B)(i) and (ii). In this premises I am satisfied that reckless credit as envisaged in Section 80 of the NCA for purposed of avoiding summary judgement application is sufficient..." [Paragraphs 17-20]

The summary application was dismissed and the defendant was given leave to defend the action.

MOTISE AND ANOTHER V HLANO FINAICAL SERVICES (PTY) LTD, UNREPORTED JUDGMENT, CASE NO: 11/13799, (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

This case concerned a claim by the Plaintiff for the debatement of an account rendered to them by the Defendant following an agreement concluded by the parties which placed the Plaintiff and Defendant in a mortgagor-mortgagee relationship.

Mashile AJ held:

"The Defendant excepts to the Plaintiff's particulars of claim on the basis that it does not disclose a cause of action and/or that it is vague and embarrassing. In substantiation of this assertion the Defendant list three ways in which it believes the declaration is vague and embarrassing or does not disclose a cause of action and these are; there is no contractual obligation on the Excipient to account to the Respondents, there is no statutory obligation on the Excipient to account to the Respondents and that Respondents reliance upon section 103 of the National credit Act (NCA) render the declaration vague and embarrassing." [Paragraph 4]

"It is apparent that the parties are agreed that the Defendant must render some form of account. The Plaintiffs contend that the Defendant is under the circumstances of this present case obliged to render not only an ordinary statement of account but must render a debatement thereof. The Defendant on the other hand argues that its obligation under any statue or contract between the two parties cannot be extended beyond the rendering of an ordinary statement of account of parties who stand in a creditor-debtor relationship. For the Plaintiffs to establish a right to receive statement, they must allege: such right, the basis thereof and whether it arises contractually or on account of a fiduciary relationship that

they have with the defendant; any contractual terms or circumstances having a bearing on the account sought; the defendant's failure to render and account. These requirements were laid down in the case of *Doyle and Another v Fleet Motors (Pty) Ltd 1971 (3) SA 760 (A)* and has since been confirmed in subsequent cases." [Paragraphs 5-8]

"The Plaintiffs find the Defendant contractual obligation to render a statement of account in Clause 3.6 of the agreement between the parties which reads: 'KHL will furnish its clients with revised and updates statements of accounts, on a regular basis. This is averred in Paragraph 6.4 of the declaration.' In so far as the statutory obligation of the Defendant to render a statement of account to the Plaintiffs paragraph 9 and 10 of the declaration read: 'The agreement is pre-existing credit agreement as contemplated in the National Credit Act 34 of 2005 (the NCA) and is subject, inter alia to the provisions of Part D of chapter 5 of the NCA. The Defendant bears a contractual and/or statutory duty in terms of the agreement and/or Part D of Chapter 5 of the NCA to render an account to the Plaintiffs'." [Paragraphs 9-10]

"On the inapplicability of Section 103 of the NCA the Plaintiffs refer to Paragraphs 12,13 and 14 of the declaration which together read : '...the Excipient rendered to the Respondents an account that indicates an outstanding balance in terms of agreement, as at 1 August 2012, of R167 476.00..A true copy of the account .. is attached hereto marked annexure POC 3... The account is defective in that an outstanding balance of R167 476.00 on the agreed new capital amount of R24 643.40 includes usurious interest and /or contravenes the provisions of section 103 of the NCA and/or has been incorrectly calculated'.

I am satisfied that the Plaintiffs have made the necessary averments to meet the requirements laid down in the Doyle case to which I referred above...the Defendant does not accept that its duty is more than to render an ordinary statement of account. The Plaintiffs on the other hand maintain that where a party renders an account which is inadequate the other party in the relationship is entitled to demand a debatement of the inadequate account. [Paragraphs 11-12]

"In *ABSA Bank Bpk v Janse van Rensburg 2002 (3) SA 701 (SCA)* the court upheld the exception because the Plaintiff did not allege inadequacy of the account that was rendered. It is reasonable to infer that had such an allegation been made the exception would not have succeeded. The inadequacy principle was enunciated in the Doyle case that set out the allegation that a Plaintiff must make in order to establish a right to receive a debated account. .. *Nusca v Nusca ...* echoed the same principle. It would appear from the cases above that a party is obliged to render a statement of account that arises as a result of a statutory or contractual obligation such a statement must be adequate and proper. Failure by the party rendering such an account entitles the other party to sue for a debatement of the account. In the present case the Plaintiffs received a statement of account, which the Defendant is contractually and/or is statutorily bound to render and such an account is apparently inadequate making it prone to debatement." [Paragraphs 13-16]

"The Defendant in the present case would not be obliged to render a debatement of the account that it submitted to the Plaintiffs if the account was adequate and proper. It would be unconscionable to expect a person who has been servicing a debt albeit intermittently in 1997 knew himself to have owed a little more than R24 000.00 and 15 years later he is told to be in excess of R167 000.00 to graciously accept his indebtedness. I must point out that the rendering of a debatement of an account cannot be abused by unscrupulous debtors because any party with a right to receive a debated account must allege that the need to debate an account arises as a result of the other party having rendered an inadequate account.

The Plaintiffs having made these allegation in the Declaration I am satisfied that there is no basis on which the declaration can be said to disclose no cause of action and/or that it is vague and embarrassing." [Paragraphs 17,19-20]

The exception was dismissed with costs.

SELECTED JUDGMENTS**CIVIL PROCEDURE****TLALE NO AND ANOTHER V MOMENTUM GROUP LTD AND OTHER [2012] ZAFSHC 179, CASE NO.: (3471/2007)****Case heard 23 August 2012, Judgment delivered 20 September 2012**

This case was an application for an order that the attachment of the first and second applicants movable goods by the second respondent.

Molefe AJ held:

“The first respondent taxed their bill of costs as per... [the] court orders ... in the sum of R65 721, 61 ... and issued a Writ of Execution against the applicants’ movables. On the 20 January 2012, the Sheriff attached the following movables from the applicant’s home: A ladder; Lounge suite and coffee table; Wall unit and television set; 2 x microwaves; Dining-room suite and sideboard; Deep freezer; 2 x double bed headboards and dressing table; 2 x single bed head boards and dressing table; Refrigerator. The Sheriff put the valuation of the attached movables at R15 500.” [Paragraph 10]

“The issue to be determined by the court was whether the attached movable goods constitute “necessary furniture and household utensils” and do not exceed in value the amount determined by the Minister from time to time by notice in the gazette. In the event that it was found that the movable goods indeed fell within the definition of “necessary furniture and household utensils” but that they exceeded in value the amount determined by the Minister from time to time by notice in the gazette, that there were exceptional circumstances that existed and the amount of each item be increased to double the amount therein stated.” [Paragraph 12]

“The applicants’ counsel also raised the issue that apart from the provisions of section 39, it is contrary to “*ubuntu*” and that it is cruel that “a large corporation is hounding a poor widow for a paltry sum relative to its wealth, and seeks to deprive the applicant of basic furniture and utensils thereby also threatening her dignity as enshrined by the constitution.” [Paragraph 13]

“It is a well established principle in law that the successful party is entitled to have costs order made in its favour against the unsuccessful party. The applicant’s papers in respect of the Third Party Notice showed no cause of action against the first respondent and despite the fundamental defects of the joinder application, the applicants persisted with her attempts to persuade the two courts that the first respondent should be joined as a party. However her attempts were unsuccessful and cost orders were made against her.” [Paragraph 14]

“Section 39 of the Supreme Court Act ... is meant to protect certain assets belonging to a debtor from execution because it was recognised that such assets constituted necessities without which it would be unduly difficult to survive. The section provides judicial supervision of execution against movables.” [Paragraph 15]

“It was submissions [*sic*] of the counsel for the applicants that the court should follow the case of *Japhtha* above. In the case of *Gundwana v Steko Development* ... it was decided that where the value of the goods attached is modest and the deprivation of the debtor of those goods will achieve more humiliation and deprivation of a dignified life of the judgment debtor than the satisfaction of the judgment debt. In this instance it can’t be said that the amount of R15 500 is so insignificant to the first respondent that it would only be serve to humiliate the applicants.” [Paragraph 17]

“In *casu*, I do not believe that the applicant’s attached movables as listed in the inventory are “the necessary furniture other than beds and household utensils” and that they are needed for the survival of the applicants. Furthermore, it is clear from the sheriff’s inventory that the attached movables exceeded in value the amount of R2 000,00 as determined by the Minister. (Section 39(b) of the Supreme Court Act 59 of 1959). I do not agree that the attached movables are exempted from execution.” [Paragraph 18]

“‘*Ubuntu*’ is an African ethic or humanist philosophy focusing on people’s allegiances and relations with one another. The word “*Ubuntu*” has its origins in the indigenous languages of Southern Africa. ...This concept is that you cannot be human all by yourself, there should be inter connectedness. When you have the “*Ubuntu*” quality, you are known for your generosity.” [Paragraph 19]

“I commend and agree with the concept of “*Ubuntu*” but the interest of creditors to recover debts owed to them have also to be taken into consideration and not be overlooked. One cannot disregard the interest of creditors because the applicants perceive them to be contrary to the concept of “*Ubuntu*”. The procedure put in place for execution in order to recover money owed is reasonable and without it, the administration of justice would be severely hampered.” [Paragraph 21]

“In *Stiff v Q Data Distribution*...Mthiyane JA said that: “Costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be....” [Paragraph 22]

“There are other factors which militate against a finding that the execution is unjustifiable. In *casu*, it is as a result of the applicants’ actions and persistence (on the advise [*sic*] of her attorneys) to continuously and recklessly pursue and involve the first respondent in litigation, and consequently incurring unnecessary legal costs.” [Paragraph 24]

“It would appear to me that the poor widow was ill advised by her attorneys to pursue a dead-end cause. They should have abided by the decision of the court *a quo* and not proceeded with litigation, causing her to incur unnecessary legal costs.” [Paragraph 25]

It was ordered that the attachment in execution was not in contravention of section 39 of the Supreme Court Act and the application was dismissed with costs.

CRIMINAL JUSTICE

THE STATE V BORAKI DANIEL MOSIA, CASE NO.: 63/2012, UNREPORTED JUDGMENT (FREE STATE HIGH COURT, BLOEMFONTEIN)

The accused was convicted of murder, possession of a firearm without a licence and possession of ammunition without a permit on 2 August 2012. This judgement considered the imposition of sentence.

Molefe AJ held:

"I have to consider a spectrum various factors in search for a balanced, befitting and appropriate punishment for you today. I have to consider the usual triad consisting of your personal circumstances as an individuals, [*sic*] the nature of the crime upon you have committed and the interests of the society in which we live and the interest of the society in which we live. As far as is practically possible, the sentence must be blended with a measure of mercy." [Paragraph 5]

"... You were 18 years and 10 Months when you committed the offence... At the time of the offence, you were a student ... repeating Grade 11 and you had intentions to become a police officer. ... You are a first time offender with no previous convictions. You acknowledged responsibility of shooting and killing your childhood friend. You have been in custody for almost a year." [Paragraph 6]

"I have also read the family impact report. The deceased's grandmother has suffered some psycho physiological impact consequently to the shooting incident..."

"With regard to the offences you have been convicted of, murder is without a doubt, the most serious of offences as it involves a loss of life... The deceased's grandmother was visibly distraught when she gave evidence in this court. She testified that the deceased's death has left her deeply hurt and alone. The effects of murder are in [*sic*] irreversible. We can do whatever we can but we cannot bring back to life, Martins Lehlomolo Matlokotsi. Life is the most important gift of nature to everyone. Everyone values his or life. The victim valued his life dearly. He still wanted to live just like you, and you brought misery and unhappiness to his family." [Paragraph 8]

"In *S v GN*... it was decided that 'Even where imprisonment for life is prescribed as a minimum sentence, a court must bear in mind that it is the ultimate penalty that the courts in this country can impose. As such, in [*sic*] must not be imposed lightly." [Paragraph 11]

"Youth will always be an important factor in the determination of whether, with respect to the cumulative effect of all the circumstances, substantial and compelling circumstances are present. In *S v Tshisa*, the court found that the appellants had not yet been 'caught up in a spiral of wickedness' and their young age was considered sufficient grounds for a departure." [Paragraph 12]

"The question which now arises is whether there are substantial and compelling circumstances to justify the imposition of a lesser sentence than life imprisonment for the murder conviction." [Paragraph 13]

“The following are mitigating circumstances in your favour: youth (you were 8 [sic] years 10 months when the shooting incident occurred); you have a clean criminal record; you have been in custody for a year; you still had ambitions to study further before you committed these offences.” [Paragraph 14]

“The following are aggravating factors: you killed your childhood friend, unprovoked and in cold blood; the family of the deceased trusted you and treated you like their own son; you were knowingly in possession of an unlawful firearm and ammunition which you kept with you for month without handing it over to the police.” [Paragraph 15]

“I have come to the conclusion that you deserve a second chance in life. I regard your age, your clean record and will take it in your favour (though there was no evidence to this effect) that your power of self-control and restraint was reduced by your drinking alcohol on that night.” [Paragraph 16]

The accused was sentenced to fifteen years imprisonment in respect of the charge of murder, five years imprisonment in respect of the unlawful possession of a firearm and one year imprisonment in respect of unlawful possession of a firearm. It was directed that all three sentences were to run concurrently.

S V TSOTETSI [2012] ZAGPPHC 303 CASE NO: (A196/12)

Case heard 1 October 2012, Judgment delivered 19 November 2012

The appellant was one of two accused convicted of murder and attempted robbery with aggravating circumstances. The appellant was sentenced to life imprisonment for the murder charge and to 15 years' imprisonment for the attempted robbery.

Molefe Aj held:

“The submission by the appellant’s counsel was that the State had failed to prove the identity of the stabber and the trial court relied on the doctrine of common purpose to convict the appellant although the facts and evidence pointed to accused one acting solo, without common purpose and not following the plan that had been agreed upon... The appellant’s counsel was adamant that there was no prior agreement among the accused persons to stab the deceased as the plan was to tie him up and rob him. He also submitted that the evidence was that the appellant was only holding the deceased down when the deceased was being stabbed, that the appellant ran away in fear after the stabbing and that he was petrified and visibly shaken when approached by the police. Therefore he submitted that no active association on the part of the appellant was established by the State.” [Paragraph 7]

“It was counsel’s submission that the appellant only held the deceased down and fled after the stabbing and that this lessened his moral blameworthiness and ought to reflect in the sentence to be imposed.” [Paragraph 9]

“I agree with the respondent’s counsel that the appellant and accused 1 had a common purpose to kill the deceased as was inferred from the facts and implications. The appellant was holding the deceased down and was watching accused 1 stabbing the deceased seven (7) times. He failed to stop or attempt to stop the stabbing or complain about it and did not even run away when the stabbing was being executed. He therefore performed some act of association with the conduct of accused 1.” [Paragraph 20]

"In *Sefatsa*... the then Appellate Division confirmed the conviction of the six accused who had been convicted of murder...on the doctrine of common purpose...The court rejected the argument advanced on behalf of the accused that they could be convicted of murder only if a causal connection were proved between the individual conduct of each of the accused and deceased's death. The court in fact assumed that it had not been proved that the individual conduct of any of the six accused contributed causally to deceased's death. It is sufficient that the individual participant actively associated himself with the execution of the common purpose." [Paragraph 21]

"In *Thebus* the Constitutional Court held that the common purpose doctrine is compatible with the Constitution of the Republic of South [sic]. The doctrine does not infringe an individual's right to dignity and freedom. It is according to the court rationally linked to a lawful aim, namely the combating of criminal activities by a number of people acting together. If the doctrine did not exist there would have been the unacceptable situation that only the person who had committed the principal act (in other words, who actually stabbed the deceased with a knife in his chest) would have been guilty, whereas those who have intentionally contributed to the commission of the principal act would not have been guilty of the crime committed by the principal perpetrator." [Paragraph 22]

"Regarding the attempted robbery with aggravating circumstances, I am satisfied that there was a completed attempt to rob the deceased of money, and evidence showed that the accused persons had a knife and a rope to execute their attempted robbery. The deceased was tied with a rope and stabbed seven times. Although nothing was taken from the deceased, the appellant, accused ... engaged in conduct that was not merely preparatory but had reached the commencement of the execution of the intended crime of robbery with aggravating circumstances. As a general rule if the accused persons had done everything they set out to do in order to commit the crime but the crime was not completed, they are guilty of attempt." [Paragraph 23]

"Considering the evidence on both counts the appellant have been convicted on I am satisfied that the State proved the case against the appellant beyond reasonable doubt and the convictions must stand." [Paragraph 24]

"It is trite law that the appeal court's powers to interfere with the trial court's sentence are circumscribed. The appeal court may interfere only when misdirection is found on the part of the trial court or where the sentence imposed induces the sense of shock." [Paragraph 25]

"The charges put to the appellant are, as set out in the indictment, not read with the provision of section 51 (1) of Criminal Law Amendment Act ... (CLAA). The application of the provisions of the CLAA are first mentioned by the trial judge only at sentence stage ..." [Paragraph 26]

"In *S v Makatu*...the court found a misdirection to have been committed by the trial court when sentencing a convict to life imprisonment relying on the provisions of section 51(1) of the CLAA while the indictment referred to section 51(2) of CLAA respectively. The principle was applied and followed most recently in *S v Mashini*..." [Paragraph 27]

"Considering the principles set out in the above mentioned cases, I am of the view that there was misdirection on the part of the trial court by sentencing the appellant to life imprisonment relying on the provisions of the CLAA. On this leg alone, the appeal on sentence stands to be upheld. Considering the appellant's personal circumstances placed on record in mitigation which I am not going to repeat save to emphasise that the appellant is a first offender. The appellant's youthfulness at the time of the

commission of the offence coupled with the period he spent in custody while awaiting trial should have been considered. In that light, I am of the view that life imprisonment is indeed disproportionate with the offence committed. The sentence stands to be set aside.” [Paragraph 28]

The appeal against the convictions of murder and robbery with aggravating circumstances was dismissed. The sentence of life imprisonment for the murder count was reduced to eighteen years imprisonment and the accused was sentenced to fifteen years imprisonment for the housebreaking with aggravating circumstances. The sentences were ordered to run concurrently.

S V TSINYANE [2012] ZAFSHC 174, CASE NO.: 1/2012

Judgment delivered 20 September 2012

The accused was found guilty of housebreaking with intent to steal and theft by the Magistrate Court and sentenced to three years imprisonment. He was not assisted by a legal adviser. Three different legal representatives withdrew as his attorneys prior to the commencement of the trial. When the trial commenced, the accused was uncooperative and refused to participate in the proceedings. The presiding officer eventually instructed that the accused be escorted to the cells and the judgment was handed down in his absence. The question for determination in this case was whether, given these circumstances, the conviction and sentence should stand.

Molefe AJ (Moloi J concurring) held:

“Section 159(1) of the CPA states as follows: ‘If an accused at a criminal proceedings conducts himself in a manner which makes the continuation of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.’” [Paragraph 9]

“In *R v Pauline... Tindall*, decided that it is also desirable to cause the accused to be brought back at a suitable time for the court to see whether they should realise that they should change their attitude.” [Paragraph 11]

“In *S v Moko*a...Smuts J decided that it may even be desirable, if at all possible, to allow the case to stand down or, to postpone it in order to allow the accused time to come to his or her senses. The accused should also be informed pertinently that the case can proceed in his or her absence. Given that real prejudice can follow such removal, it is submitted that the presiding officer should also inform the accused of such possible prejudice. The events in the *Moko*a case underlines [*sic*] the fact that patience is an indispensable component of judicial conduct.” [Paragraph 12]

“To remove an accused during a trial and to proceed in his absence must be exercised by the presiding officer with circumspection. The provisions of section 159(1) of the CPA are made not merely in the interest of the complainant or the accused, but in the interests of the public and for the administration of justice.” [Paragraph 13]

“In this case, it is clear that the accused was very unco-operative and refused to participate in the proceedings. He interrupted the witness and refused to take a seat. He conducted himself as to render the continuance of the proceedings in his presence impracticable. It is my view that the presiding officer

had very good reasons to remove the accused. It is also clear from the record that the presiding officer failed to warn the accused that his behaviour might result in his removal and in the trial proceedings in his absence. In this regard, it is my view that the proceedings were not in accordance with justice and that the accused's right to fair trial was denied." [Paragraph 14]

"In the circumstances the following order is made: The conviction and sentence of the trial court as on the 23 July 2012 are set aside." [Paragraph 15]

SELECTED JUDGMENTS**PRIVATE LAW****CACOURIS V LEMMETJIES AND ANOTHER, UNREPORTED JUDGMENT, CASE NO.: 41135/09, 4 APRIL 2012 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)**

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. Pritchard 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, UNREPORTED JUDGMENT, CASE NO.: 08125/2012 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)**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 (l)(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(l) (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.

SELECTED JUDGMENTS**PRIVATE LAW****SIFISO V MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGMENT, CASE NO.: 35019/2010
(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)**

The plaintiff instituted an action against the Minister of Safety and security claiming R700 000.00 for unlawful arrest, detention and assault and torture by members of the SAPS acting within the course and scope of their employment by the defendant. The plaintiff was arrested without a warrant of arrest, detained on 14 November 2009 and released on bail of R1000.00 on 10 February 2010. The charges against him were subsequently withdrawn.

Nkosi AJ held:

“The defendant’s defence to these allegations was that the arrest was lawful in terms of section 40(1) of the Criminal Procedure Act ... is that the arresting officer was a peace officer as defined in the Act and reasonably suspected the Plaintiff of having committed murder an offence referred to in Schedule 1 of the Act. The Defendant further pleaded that subsequent to his arrest, the Plaintiff was lawfully detained in terms of section 50 of the Criminal Procedure Act.” [Paragraph 4]

“It is common cause that no warrant for the arrest of the Plaintiff had been authorised. The crucial issue to be decided is whether the Defendant’s employees suspicion that the Plaintiff committed as [sic] Schedule 1 offence was reasonable or not. The onus was on the Defendant to establish that reasonable grounds existed for such suspicion was objectively reasonable.” [Paragraph 5]

Nkosi AJ relayed the facts that were found to have been proven:

“a) That the plaintiff was arrested without a warrant and for an offence he did not commit; b) That he was subjected to assault, torture shock as alluded in the evidence by the medical experts [sic]... whose testimony remains unchallenged; c) That the doctors comments that the marks on the body are consistent with assault, kicking sjamboking and cuffing; d) That the Plaintiff was unlawfully arrested and detained for 90 days on an offence he did not commit thereby depriving him of his freedom without just cause in violation of the police standing order; e) Before his detention in Moroka Police Station he was assaulted, tortured, shocked by an electrical device, his genitals pulled and a tyre tube was covered over his head in an attempt to pressurise him to tell them where Shimane [murder suspect] was though he denied knowledge of his whereabouts; f) The assault and torture stopped after Shimane was found and apparently died in the hands of the police on their attempt to arrest him. The defence count [sic] not tell us to where the marks on the Plaintiff’s body came from; ... h) That the Plaintiff’s body marks were a result of assault and torture by the policemen who were acting within the course of their employment with the defendant; and i) There was no proof of a reasonable suspicion of committing an offence, by the Plaintiff, which could be proven by any thread of evidence.” [Paragraph 13]

Nkosi J continued:

“Having heard both parties in this matter it became clear that the Plaintiff was indeed arrested and incarcerated after he was subjected to all sorts of assault and torture. The Plaintiff’s witnesses

corroborated each other on the sequence of evidence and the expert witnesses assisted the court clarifying all the medical findings after examining the Plaintiff... The first defence witness was not assisting the court and only denied all allegations... His testimony is not acceptable as it was far from the truth... His witness could not take the manner any further as he exonerated *[sic]* the plaintiff from any wrongdoing by failing to point him out at the identity parade.” [Paragraph 14 (a) - (b)]

“The Plaintiff’s case is accepted as reasonably correct and it is my view that the encroachment on the Plaintiff’s physical freedom was not carried out in procedurally fair manner and was unlawful... The Defendant is henceforth held vicariously liable to the actions of the policeman who unlawfully arrested and detained Plaintiff with the resultant assault and torture.” [Paragraph 14 (d)-(e)]

“I have been referred to various cases to consider for a reasonable amount as compensation in case my finding is in favour of the Plaintiff. The Plaintiff was detained for 90 days as a result of police officers abusing their rights. The Plaintiff was subjected to severe assaults and interference with his liberty by being humiliated by the police.... The conduct of the police was the grossest abuse of their powers and grossest invasion of the right of helpless citizen *[sic]*. It is clear that it is appropriate that the rights of citizens be protected by court by including punitive element *[sic]* in the damages to be awarded. I am therefore of the view that a reasonable award will suffice after a clear assessment and thorough consideration. [Paragraph 14(h)]

The defendant is ordered to pay the Plaintiff the sum of R250 000.00.

**MAFIKENG LOCAL MUNICIPALITY V FIRE RAIDERS PTY (LTD) AND OTHERS, UNREPORTED JUDGMENT
CASE NUMBER 2011/28639 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)**

Case heard 24 November 2011.

The applicant claimed delivery of two vehicles. The vehicles were, at the time that the case was heard, in possession of the first Respondent on the basis of it being a bona fide and lawful possessor thereof. The vehicles were purchased by the applicant in terms of a Lease Agreement with the 4th Respondent (Finance House) from Mafikeng Toyota (the 3rd Respondent) following an open tender to fix the vehicles to be used for fire-fighting for the municipality was awarded to the 2nd Respondent. The vehicles were delivered to the 2nd respondent for this purpose by Mafikeng Toyota. Certain amounts were paid to the 2nd Respondent for the purpose of converting the two vehicles into fire-fighting vehicles for the municipality. The 2nd Respondent then subcontracted the 1st Respondent to carry out the necessary work on the vehicles. The 1st Respondent completed the work, but was not paid by the 2nd Respondent, therefore refused to give up possession of the vehicles. The Applicant brought an application claiming delivery of the two vehicles to it. The 1st respondent argued that it was exercising its lien over the vehicles and would release them on payment of its fees for fixing the vehicle by the 2nd Respondent. The Applicant argued that the 1st Respondent did not have a lien over the vehicles as the necessary costs of improvement of the vehicles were paid by the Applicant to the 2nd Respondent and that all of the requirements for an enrichment lien could not be established by the 1st respondent.

Nkosi J held:

“The Applicant further submitted that a right of retention being a right that a possessor of another’s property, on which he expended money and labour, obtains to keep the property in his possession until he has been paid for his actual expenditure: 1) It was submitted that the 1st Respondent had to prove that the Applicant was enriched 2) That the 1st Respondent has been impoverished by the Applicant 3) that the Applicant’s enrichment must have been at the expense of the 1st Respondent; and 4) That it was unjustified... It further submitted even though the first two requirements for enrichment lien may be found present, the 4th i.e. unjustified enrichment could not be established.” [Paragraphs 5-6]

“It was further submitted that 1st Respondent has already obtained judgment against 2nd Respondent who is the one owing him in reality...this was not disputed by the 1st Respondent. If this stand [*sic*] to be correct or true the 1st Respondent cannot have a second bite on the same cherrie [*sic*].” [Paragraph 8]

“1st Respondent drew the court’s attention to the fact that Applicant is not the owner of the vehicle but a mere leaseholder.” [Paragraph 9]

“Different cases have been referred to, to show that a lessee is not the owner – these cases ... might be very important but they refer to the lease of property (immovable)... In this case the property is movable and the Applicant purchased the vehicle for a specific purpose... the issue of ownership vis-a-vis the lease agreement of the vehicles with 4th Respondent begs the question as to who bears the risk or who have [*sic*] legal possession of the vehicle. The answer is the Applicant: if the vehicles are involved in an accident, for an example, who bears the risk to fix it? Who is supposed to insure the vehicles against any mishap? In whose names are the vehicles registered?” [Paragraphs 11-13]

“The issue of locus standi cannot lead to saying that 4th Respondent have [*sic*] to be called in a case of unforeseen circumstances happening to the vehicles. Applicant bears the risk and does not need permission from the 4th Respondent to handle the situation... The case of Reddy v Delro Investment talks about locus standi – where the lessee of premises not yet in possession- that such lessee in ordinary sense having no real right to property and not having locus standi to eject other occupiers. Yes this case talks about a lessee not yet in possession.” [Paragraph 14-15]

“Possession is defined as control over the property but not strictly meaning physical control or possession. Applicant had technical possession because it had the control required to have the vehicles to be modified according to its own specification. I am persuaded by the fact that Applicant has the right to sue in this regard and therefore has the necessary locus standi.” [Paragraph 16]

“In the case of Buzzard Electrical v 158 Jan Smuts Avenue Investment... specifically dealt with a similar case where, like in this one, a contractor subcontracted his work to a third party without the knowledge of the owner or risk bearer. A sub-contractor cannot succeed against the (legal possessor/lessee) where the main contractor is unable to pay the sub-contractor.” [Paragraph 17]

“I therefore agree with the reasoning set out in the Buzzard case and that the 1st Respondent cannot succeed on the defence of lien... against the applicant. This also serves to strengthen that as a sub-contractor, who already has a judgment against the main contractor (2nd Respondent) must pursue that line... He cannot hold judgment against 2nd Respondent but also wants to hold a lien against the Applicant.” [Paragraph 18]

“Consequent upon these and having heard both parties with submission supported by case law it can be concluded that the Applicant has made out a proper case for the order sought ... and therefore succeeds.”

CRIMINAL JUSTICE

NAKEDI V THE STATE, UNREPORTED JUDGMENT, CASE NO. A528/2011 (NORTH GAUTENG HIGH COURT, PRETORIA)

Case heard 29 November 2012.

This was an appeal against the conviction of the Appellant for robbery with aggravating circumstances (count 1), kidnapping (count 2) and attempted murder (count 4). He was also charged on three other counts, namely reckless driving, possession of an unlicensed firearm and possession of ammunition however he was acquitted on these counts (counts 3, 5 and 6). The grounds of the appeal were that the magistrate failed to consider the evidence *in toto* and that the evidence of the complainant was not satisfactory in material respects in that he could not give a detailed description of the person who robbed him.

Nkosi AJ held:

“The Learned Regional Magistrate clearly failed to consider the evidence *in toto* and simply preferred that version which seemed to support a conviction. ... She thus failed to follow the law as set out in *S v Trainer*... where Navsa pointed out that the correct position in regard to evaluating the versions that: “A court does not base its conclusion, whether it to be [sic] convict or acquit on only part of the evidence. The conclusion which it arrives at must account for all of the evidence...” ... In *S v Chabalala Heher* AJA stated that position as follows: “The correct approach is to weight up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking prop account [sic] for inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.” [Paragraph 19]

“Having heard the parties to the arguments and after the respondent’s counsel conceded that though appellant was acquitted on counts 3, 5 and 6 there is no direct link of the commission of the offences against the appellant as far as 1,2 and 4. There was no evidence of doubtless identification or an identification parade to positively identifying the suspect, except that the complainant only identified the suspect who was already in police custody following an arrest of the Appellant. Complainant only confirmed what he saw as a suspect wearing a blue-striped shirt and could not give features of the person who hijacked him. Further to that the first two counts were unjustifiably divided leading to two convictions without proof beyond reasonable doubt as it was expected of the state...On the acquittal of the Appellant on the count of possession of firearm and such firearm could not be found to have been used in any shooting, it naturally follows that there is a doubt as to who shot the constable.” [Paragraph 31.1]

“It is therefore my finding that the trial court failed to properly weigh the evidence before it and it follows that the conviction of the Appellant on counts 1,2 and 4 was bad in law and ought to be set aside and therefore propose that the appeal must succeed.” [Paragraph 31.2]

The conviction and sentence were set aside.

SELECTED JUDGMENTS**PRIVATE LAW****MAHLASELA CALVIN MOSIPIDI V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO.: 4595/2008 (SOUTH GAUTENG HIGH COURT)****Case heard 24 August 2011, Judgment delivered October 2011 (Day not indicated)**

The case concerned an action for damages arising from bodily injuries sustained by the plaintiff in a car accident. At the commencement of the trial, defendant conceded liability for 70% of the proven damages. At the time of the accident, the plaintiff was 17 years old and in grade 11. He suffered severe head injury that resulted in brain damage. This case concerned the issues in respect of the plaintiff's estimated future loss of earnings and loss of income earning capacity.

Windell AJ utilised expert evidence to assess the plaintiff's capabilities pre-accident and post-accident in determining these issues.

Pre-Accident:

"In paragraph 4.2 of the particulars of claim it was alleged that the plaintiff's estimated future loss of earnings is R3 500 000." [Paragraph 7]

"In the joint minute of Ms Nhtle and Mr Khumalo, both educational psychologists... They ...agreed based on his cognitive functioning that the plaintiff was of average to high average functioning with the ability to complete Grade 12 and tertiary qualifications." [Paragraph 8]

"Dr Coetzer is an industrial psychologist and gave oral evidence on behalf of the plaintiff... With reference to her report, she set out three possible pre-accident scenarios. The third pre-accident scenario is that of an unskilled worker. I am satisfied that this is the least probable. The first re [sic] accident scenario is where the plaintiff only has a grade 12 diploma. It is common cause that he was and still is interested in an IT Diploma and even enrolled for the diploma at Unisa. From the experts report it is also clear that he had the intellectual capacity to obtain at least some diploma. ... Dr Coetzer explained the second [pre] accident scenario and testified that as the plaintiff was interested in an IT career he would have been able to obtain an IT diploma...In light of the above facts the second pre accident scenario seems to be the most probable scenario.... " [Paragraph 11]

"The court finds that pre-accident that plaintiff would have been able to obtain a diploma, and enter the market on a B3 Patterson level." [Paragraph 12]

"The two experts [for the plaintiff and the defendant respectively] do not agree on the career ceiling... Dr Coetzer explained that she used tables that is [sic] widely accepted by numerous large organisations ... and is widely recognised. Dr Malaka could not explain why he differs from Dr Coetzer who applied the standard norms. His only answer is that it "does not reflect the real world out there." I find the manner in which Dr Malaka approached this question very unscientific. I find that he [sic] plaintiff would most probably, reached a career ceiling of C4 on the Patterson level.' [Paragraph 14]

Post Accident:

“It is undisputed that the plaintiff suffered a severe head injury arising from the collision...” [Paragraph 16]

“In the joint opinion of Ms [sic] Khumalo and Ms Nthle, ... they agree that the plaintiff [sic] tests on cognitive functioning revealed a below average global IQ with a below average VIQ...” [Paragraph 19]

“Dr Fine gave oral evidence on behalf of the plaintiff. He is a psychiatrist. He diagnosed the plaintiff with organic brain syndrome, which is damage to the actual brain and their [sic] connections. This is coupled with symptoms of depression, the main cause being the awareness of his cognitive impairment and the changes that has taken place in him... He further contended that the plaintiff might be able to pass his examinations but has lost the ability to be flexible and that will influence his work situation...” [Paragraph 21-22]

“I am satisfied based on all the evidence before me, that the plaintiff post-accident would only be able to work in an unskilled environment.” [Paragraph 27]

“Having considered the evidence and other factors I gave the following directions for actuarial calculation for future loss of earnings which were sent to the respective legal representatives of the parties. The directions for actuarial calculations were as follows: Post accident [sic]: The plaintiff would have obtained an IT Diploma... He would enter the labour market at the B3 level and reach the ceiling of C3/C4 by age 45. He would have retired at age 65. Pre accident [sic]: If he is successful in securing work he will be able to earn at the median earnings of an unskilled labourer in the informal sector... He will commence employment at R14000 p.a which will increase with future inflation by 6% p.a... He would have retired at the age of 65 years.” [Paragraph 29]

[Note: numbering from here on is recorded as per transcript – possible error]

“The actuary provided for a general contingency of 20% on prospective value of income but for the accident and a 40% general contingency having regard to the accident. I agree with that.” [Paragraph 22-page 11]

“To sum up, the full award to be made to the plaintiff is therefore calculated as follows: General damages R500 000. Future loss of income: R3 778 137. Total: R4 278 137. Defendant is liable for 70% of plaintiff’s proven damages. Total: R2 994 694.90.”

The defendant was thus ordered to pay the plaintiff the aforementioned sum taking into account both general damages and future loss of income as a result of the accident.

PHILLIP MUTHEVHULI V MEC FOR HEALTH, GAUTENG PROVINCE, UNREPORTED JUDGMENT, CASE NO.: 18826/2003 (SOUTH GAUTENG HIGH COURT)

Case heard 8 September 2011, Judgment delivered October 2011 (No day indicated)

The plaintiff issued summons against the defendants for pain and suffering as a result of a laparotomy operation. The operation was a success, but plaintiff testified that the defendants operated on him without him having given his informed consent to the procedure. The hospital file had since been lost and the doctor who performed the operation could not recall whether there had been consent or not.

Windell AJ held:

“A delict has five requirements of which all five must be present before the conduct complained of can be classified as a delict. The requirements or elements are an act, wrongfulness, fault, harm and causation.” [Paragraph 3]

“It is trite law that to operate on a person is a violation of his bodily integrity and is *prima facie* unlawful. This is also embodied in our Constitution in section 12(2) ...” [Paragraph 4]

“Once the conduct (operating on a person) is proven it is *prima facie* unlawful and the onus then shifts to the defendant to prove a ground of justification. In this instance the justification ground would be consent... The question of whether consent was present in *casu* is one of fact which has to be proved. If the defendant thought that consent had been while in fact it was absent, no ground of justification existed and he acted wrongfully. In such cases the actor may possibly evade liability through lack of fault.” [Paragraph 5]

“Dr Cubasch... explained that to obtain consent is standard procedure and he must be mad or *mala fide* to operate on a patient without consent. He remembered the plaintiff vaguely and recalled that the plaintiff was a difficult patient who had many complaints... The only document that could be found was a theatre list. From this list it was ascertained that the plaintiff had an obstruction in his bowel and the obstruction was removed by way of a laparotomy. The operation was a success in that the obstruction was removed...” [Paragraph 6]

“The onus is on the defendants to prove a justification ground of consent. Consent is not only the giving of permission but it also must be informed consent. The defendants cannot remember whether consent was given but testify that it must have been given and the specifics of the operation must have been explained to the plaintiff. Even if the court is able to find on a balance of probabilities that consent was given by the plaintiff, the court will not be able to find out whether it was informed consent.” [Paragraph 7]

“In the absence of any evidence from the defendants recalling this specific operation, I find the defendants could not prove that there was informed consent and so proving the existence of a justification ground. Their conduct (the operation) is therefore unlawful... Although this court found that the conduct of the second defendant was unlawful... it doesn't automatically follow that the defendants are liable.” [Paragraph 10]

“Plaintiff originally instituted action against defendants based on medical negligence. Plaintiff however amended his particulars of claim and no longer relies on medical negligence. It is plaintiff [*sic*] cause of action that the defendants wrongfully and intentionally operated on plaintiff without his consent...” [Paragraph 11]

“The plaintiff's action is not based on negligent conduct of the second defendant but on the intentional conduct of the doctor. The plaintiff must prove that the doctor had the necessary *dolus*. The plaintiff must prove that the second defendant acting in the course and scope of the first defendant employment, well knowing that there was no consent, intentionally proceeded with the operation.... A person acts intentionally if his will is directed at a result which he causes while conscious of wrongfulness of his conduct. See *Dantex Investments Holdings Pty Ltd v Brenner...*” [Paragraph 14]

“Fault is described as the subjective element of a delict because it is to a large extent concerned with a person’s attitude or disposition. Fault can only be present if a person has acted wrongfully. Knowledge of wrongfulness as a requirement of intent indicates that it is insufficient for the wrongdoer merely to direct his will at causing a particular result; he must also know or at least foresee that his conduct is wrongful. The court cannot find that Dr Cubasch knew that there were [sic] no consent, and consciously knowing that he was acting unlawfully, decided to operate on the plaintiff. Specifically looking at the plaintiff’s particulars of claim, I find that the plaintiff failed to prove the element of fault.” [Paragraph 15]

The plaintiff’s action was dismissed with costs.

CRIMINAL JUSTICE

HENRY BEMOMOTIMI OKAH V MINISTER OF CORRECTIONAL SERVICES, UNREPORTED JUDGMENT, CASE NO.: 16538/2011 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 13 September 2011, Judgment delivered 21 September 2011

The applicant was awaiting trial on charges of contravening various provisions of The Protection of Constitutional Democracy against Terrorist and Related Activities Act. Applicant sought to have his continued detention in what amounted to solitary confinement declared unlawful, and for the respondents to be directed to return him to the single cells facility of the awaiting trial section. The applicant had been moved to the Maximum Security Section after prison warders searched his cell and found a number of cellular phones and a sketch which they believed to be a map to be used to plot his escape.

Windell AJ held:

“Two questions now need to be determined: ... What procedure did the respondents follow when the applicant was removed from his single cell at the awaiting trial section to the Maximum Security Section? ... Does the removal of the applicant constitute an infringement of the applicant’s rights” [Paragraph 14]

“It is respondent’s contention that the applicant was classified as a security risk having been found in possession of the cell phones and sketch. This entitled the respondent’s to remove him to another section of the prison without providing reasons. They were entitled to do so in absence of a prescribed procedure in the Correctional Services Act ... concerning an enquiry of hearing. This off [sic] course provided deprived the applicant of an opportunity to furnish any reasons why he is not a security risk and why he should not be moved” [Paragraph 19]

“Numerous facts were placed before this court and these facts, supported by documents emanating from the respondent, indicate that section 30 of the Act was indeed applied. The respondent’s denial is at odds with its own documents. The respondent’s version in light of the overwhelming facts is untenable ...” [Paragraph 20]

“Segregation in general is permissible only under certain circumstances, and imposes a number of obligations on the prison authorities. The first and second respondent clearly did not comply with any of the obligations. This in itself is sufficient to grant the relief the applicant is seeking.” [Paragraph 21]

““It is however not necessary for the determination of this application to find whether the decision taken by the respondents was in terms of s30 or s29 of the Act, in view of the fact that the rules of natural justice had clearly not been followed. In *Nortje en ‘n ander v Minister van Korrektiewe Dienste en andere* it was found that the *audi alteram partem* rule must be followed in a decision to transfer prisoners to a closed maximum security unit, and that a failure therefor results in an infringement of the right to fair administrative action and therefore renders the decision unfair. It was held that section 33 of the Constitution guarantees the right to procedurally fair administrative action. The *audi alteram partem* rule finds application where an administrative decision may negatively affect a person’s rights.” [Paragraph 22]

“I turn now to the question whether any of the applicant’s rights had been infringed by the respondents [sic] conduct” [Paragraph 25]

Windell AJ considered case law and academic authority regarding the rights of prisoners, and continued:

“Common law, and the law pertaining to prisoners, is now supplemented by the values and rights enshrined in the Bill of Rights which forms part of the Constitution. Section 10 of the Constitution recognizes that ‘everyone has inherent dignity and the right to have their dignity respected and protected.’ This is an affirmation of the residuum principle. Section 12 provides that ‘everyone has the right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman or degrading way.’” [Paragraph 34]

“The applicant is being held in isolation without contact with other inmates and is being treated differently from other awaiting trial prisoners. This impacts on his human dignity, and is inhuman and degrading to the applicant. The conditions under which he is held amounts [sic] to solitary confinement.” [Paragraph 38]

“In conclusion I find that: ... The decision to remove the applicant to another part of prison taken unilaterally by the first and second respondent, did not comply with the natural rules of justice and more specifically the *audi alteram partem* rule. ... The applicant’s right to fair administration was infringed, and the decision taken by the first and second respondent was accordingly unfair. ... The decision impacted on the applicant’s human rights and infringed on his constitutional rights.” [Paragraph 39]

The application succeeded.

JOSEPH VILIKAZI V MINISTER OF CORRECTIONAL SERVICES AND OTHERS, UNREPORTED JUDGMENT, CASE NO.: 18768/2010 (SOUTH GAUTENG HIGH COURT)

Case heard 14 September 2011, Judgment delivered 7 October 2011

The applicant was detained at Leeuwkop Medium C Correctional Centre in Johannesburg. Applicant sought a declaration that he was entitled to retain the standard remission of 13 years of his sentence of

35 years 3 months pursuant to the Correctional Services Act ("Prisons Act") and an order that his date of expiry of sentence to be revised to be in the year 2004. The applicant was sentenced to 39 years of imprisonment in July 1982.

Windell AJ began by quoting Section 63(1) of the Prisons Act and Regulation 131(1) promulgated under the Prisons Act. She went on to hold:

"From the section and regulation quoted ... the following is clear: The remission of sentence is not automatic. Remission of a sentence cannot be claimed as a right." [Paragraph 9]

"On admission to prison the applicant's Warrant of Committal was endorsed with a note which indicated the period of remission that was granted with a date of discharge. The date of discharge was noted as 2004-07-27... A copy of the policy document: CHAPTER VI RELEASE: Service Order 2: Remission of Sentence; was handed up to court. This is guidelines *[sic]* to the authorities on how section 63 and regulation 131 should be applied. It is noted that the remission of sentence is calculated as soon as a prisoner is admitted to a prison, but may only be granted when it becomes effective, that is on the date on with the sentence with remission expires." [Paragraph 11]

"Chapter VI of the Prison Act, that included Section 63, was substituted in 1994 with the coming into operation of the Correctional Services Amendment Act ... This Act came into operation on 1 August 1993. This Act also brought with it the insertion of Section 22A that introduced the credit system." [Paragraph 12]

"A system of credits which had to be earned by the prisoner on merit was introduced in March 1994 with the 1993 Correctional Services Amendment Act. These credits would in theory be applied in the advancement of the Prisoner's release... Remission was applicable until the introduction of the credits system by way of the insertion of section 22A in the Prisons Act." [Paragraph 15]

"It is common cause that the Prisons Act of 1959 is applicable to the applicant. The applicant seeks a remission of his sentence and contended that section 63(1) of the Prisons Act is still applicable. The applicant relied on the unreported judgment of *Ambrose Ross and Another v The Minister of Correctional Services* ... A Copy of the judgment was not made available to me and I cannot comment as to whether it is applicable to the facts before me." [Paragraph 17]

"I find that in 1994 when the applicant still had about 10 years before remission could even be considered, the Prisons Act was amended and the remission of sentence was no longer a possibility. I find that the remission system is no longer applicable and available to the applicant. It is the credit system under section 22A of the Prison Act that is applicable to the applicant." [Paragraph 18]

"The applicant further contended that it is a violation of section 12(2) of the Interpretation Act 33 of 1957. I find that it is not. The applicant had no automatic right of remission to his sentence and remission was never granted. When the law relating to remission of sentence was repealed in 1994, the applicant had not accrued any right to such remission of sentence." [Paragraph 19]

The application was dismissed with costs.

SELECTED JUDGMENTS**PRIVATE LAW****METTEL ARCHITECHS CC V LASON TRADING 12 (PTY) LIMITED, UNREPORTED JUDGEMENT, CASE NO: 2008/30703, 19 MARCH 2012 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)**

This case concerned a disagreement regarding a partly oral and partly written contract. Plaintiff was to render architectural services to the defendant. The written portions of the consultancy contract included a fixed fee of R8m for the architectural service and listing 11 terms, an email from the plaintiff's representative containing 5 terms and a lengthy standard form client/architect agreement which amongst other clauses stated (in clause 11.4) that the agreement, including annexures, was the whole contract between the parties, and that no variation would have any effect unless reduced to writing and signed by both parties. It was alleged that a failure to pay for variations outside the R8m fee had resulted in a breach of contract. Defendant excepted to plaintiff's particulars of claim.

Wright AJ held:

"The particulars of claim contain the allegation that for the agreed fee of r8m, the plaintiff would be obliged to provide only standard services as detailed in stages 1 to 4 of the client/architect agreement. The plaintiff has pleaded that in so far as the contract was concluded tacitly, the conduct relied upon consists in: - The defendant a having requested the plaintiff to participate in negotiations for the purposes of agreeing a way forward: - The defendant having agreed to remunerate the plaintiff for its further and ongoing participation in the said development - The plaintiff having committed with the defendant's encouragement and knowledge to continue with the supply of professional services in relation to the development. The particulars of claim do not suggest that the consultancy contract was varied as required by clause 11.4 nor do they suggest that the plaintiff has a claim in unjust enrichment, for quantum merit, for a reduced contract price, where incomplete performance is being utilised or that equitable circumstances exist for the court to use its discretion." [Paragraphs 8 -9]

"The 1st exception is that the conduct pleaded giving rise to the tacit conclusion of the contract is insufficient to establish unequivocal conduct alternatively exception is taken on the ground that the pleaded conduct supports the conclusion of an express agreement. In my view the facts alleged in paragraph 9 can reasonably be read as giving rise to the tacit conclusion of the consultancy contract." [Paragraphs 14 - 15]

"In the 2nd and 5th exceptions, the defendant's point is that the plaintiff cannot waive its right under the agreement to be remunerated on a percentage of cost of project basis, that the method of calculations was expressly agreed and a deviation constitutes a variation as prohibited by 11.4 of the client/architect agreement of which no allegations has been made. In Van As v Du Preez ... it was held that the lessor's acceptance of reduced rentals despite the reduction not having been reduced to writing amounted to a waiver. In the present case, I am faced with the phenomenon of a creditor alleging that it has waived its own right. In my view, the plaintiff is attempting to substitute its own terms relating to remuneration for that expressly provided for in the consultancy contract" [Paragraphs 16 - 19]

“Both the 2nd and 5th exceptions contain the allegations that the rights allegedly waived by the plaintiff are not capable of waiver and the method used to calculate the claims amounts to a variation of the terms of the consultancy contract. In *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 AD at 972A Hoexter JA stated in passing that ‘even in the absence of communication to the party released waiver may, in an appropriate case, be established by proof of an overt act or acts clearly evidencing the creditor’s intention to surrender his right against the debtor.’ In my view, the right allegedly waived by the plaintiff is capable of being waived. The 2nd and 5th exceptions, insofar as they rely on the allegation that the right is incapable of waiver are misconceived. They are better motivated by their reliance on the allegation that the plaintiff seems to vary the terms of the contracts other than by the mechanism of clause 11.4” Clearly the defendant has an interest in knowing how the fees it will pay will be calculated.” [Paragraph 35 - 36]

“The 3rd and 6th exceptions allege a failure by the plaintiff to comply with Uniform Rule 18(4) if the plaintiff is entitled to waive its agreement. No allegations as to what percentage based fee would have been, when the plaintiff elected to waive, when the election was conveyed and when the defendant accepted the waiver. The missing facts are not in my view material facts upon which the pleader relies for claims as envisaged in Rule 18(4). On the grounds alleged in the 3rd and 6th exceptions, the particulars of claims are in my view neither excipiable at common law nor do they fall short of the requirements of Rule 18 (4). Under Rule 18(6) a party who relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded. The failure to plead the missing allegation of fact complained of would render the particulars of claim in breach of Rule 18 (6) but the exceptions do not invoke Rule 18 (6).” [Paragraph 39]

The 2nd, 3rd and 6th exceptions were dismissed and the 2nd and 5th exceptions were allowed. Plaintiff was order to pay all the costs of the exceptions and granted leave to amend its particulars of claim within one month of delivery of the judgement.

ELLIS V SOUTHDOWNS COUNTRY CLUB, CITY OF JOHANNESBURG, UNREPORTED JUDGEMENT, CASE NO: 2009/4865, 12 FEBRUARY 2013 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

While playing golf at the club, plaintiff tripped over a wire suspended between two wooden poles after walking off the green. He suffered various injuries, and claimed for damages.

Wright AJ held:

“Crisply put, the particulars of claim allege that the Club erected a row of wooden poles at the side of the green on the 12th hole and ran a cable along the top of each pole. Having created a danger to Mr Ellis the Club owed him a duty of care to warn him of the cable. It failed to so and therefore the club was negligent. Apart from denials of duty of care and negligence the Club pleaded in the alternative that any damages suffered should be reduced as he had not been looking where he was going. In addition, the Club pleaded ... A tacit agreement between Mr Ellis and the Club to the effect that Mr Ellis would not claim from the Club in the event of his sustaining injuries in the manner which he did shortly before the incident. That Mr Ellis had represented to the Club that he had accepted to be bound by the disclaimers and that Mr Ellis was aware of the risk of tripping over the cable appreciated the risk but nevertheless persisted in playing.” [Paragraphs 4-5.3]

“Mr Ellis had played about five times on the course prior to having joined the Club some 12 days before the incident. Mr Ellis played with three friends. On arrival at the green 12th hole, Mr Ellis has been let off the golf cart by Mr Fitchett near the front of the green. After he had completed the hole, he walked towards Mr Fitchett’s golf car which has been parked to the side of the green 20 meters from its edge. ... The round, dark brown wooden poles supporting the wire were of varying heights, ranging from about 20cm to 30cm above the ground. A silver metal wire, about 5mm in diameter ran from the top of each pole to the top of the next pole. It sagged to approximately ankle height halfway between any two poles. The distance from the point at which Mr Ellis tripped, back to the edge of the green along the line walked by Mr Ellis is about 15 meters. The purpose of the poles and the wire was to prevent golf carts from being driven on to the green and damaging it.” [Paragraphs 7-9]

“On entering the Club the driver of each car was given cards stating ‘You enter the premises at your own risk’. Near the entrance to the Club, on a fence at the edge of the parking area was a sign clearly visible to all who used the parking lot, which contained the words, in capital letters ‘Parking at your own risk.’ These words had a double underlining and were above words reading ‘Southdown Country Club is not responsible for loss by fire, theft, damage or any other cause whatsoever’. These words also appeared in capital letters. The Club was unable to refute Mr Ellis’s evidence ... that he was never handed a card nor did he read such a card. He had never driven to the Club himself, on each visit to the club he was given a lift... [T]he card was given to drivers only.” [Paragraph 10]

“In my view the sign at the parking area relates only to vehicles and not to injury to person. The sign was next to the parking area. It was intended by the Club and understood by the reasonable person in the position of Mr Ellis as covering only loss of vehicle, theft from it or damage to it. Under the Constitution of the Club, one of the objectives is ‘To provide a golf course ,to lay out, maintain and improve such course and to erect, construct, carry out ,maintain, improve, manage and to control all infrastructures.’ Mr Smit who appeared for the Club argued that a contract between Mr Ellis and the Club had come into existence on Mr Elli’s joining the Club which contained the quoted objective as a term. Mr Ellis therefore had a contractual remedy against the Club and I should consider this a relevant factor when deciding whether or not to find that the club acted wrongfully in the first place. This argument is disposed of by Mr Ali, who appeared for Mr Ellis, to authority that our law recognises, in cases of personal injury and damage to property simultaneous causes of action in both contract and delict. ...” [Paragraphs 12-13]

“In my view, this disposes of two of the specific pleaded defences namely the tacit agreement defence and the representation defence and it is accordingly unnecessary for me to decide whether or not this latter defence is recognised in our law. Subject to what I say below concerning the defence of consent to the risk, in my view Mr Ellis has established wrongful conduct on the part of the Club. By erecting the poles with wire sagging low to approximately ankle height without any flag or sign or other warning device it created a danger. This conduct was negligent. To establish the defence of consent to the risk the Club must prove that Mr Ellis knew of, appreciated and consented to the risk. ... In my view *Santam* is not authority for the proposition that the evidence of a claimant such as Mr Ellis, on the question of consent to the risk is inadmissible. In *Santam* the defence of consent to the risk failed as it was held that by agreeing to be a passenger in a car participating in an illegal race the plaintiff did not thereby consent to the risk of injury where the real cause of the injuries was negligent driving at a particular point during the race rather than participation in the race itself.[Paragraphs 14-16, 18-19].

“In my view the club has failed to show either that Mr Ellis knew of the risk, appreciated it or consented to it. The evidence fails to show that any of the greens, other than the 5th hole had been protected on the day in question by the rows of poles with wire. Mr Ellis, Mr Fitchett and Mr Stevens were clear in their testimony that at the 12th hole, the green had no row of poles with or without wire running at 90 degrees to the row to the side of the green which was the row that tripped Mr Ellis. There was no row of poles with wire guarding the front of the green which could have served as a reminder to Mr Ellis when he walked off the green at the 12th hole. On the question of apportionment I find that Mr Elis could and should have looked where he was going. The other three walked immediately ahead of him. Given that they stepped over the wire or went around it or through a gap Mr Ellis could and should have been able to do the same. In my view, considering all the evidence, the damages suffered by Mr Ellis fall to be reduced in terms of s1 (1) (a) of the Apportionment of Damages Act .. .by 40%.”[Paragraphs 20-22]

CRIMINAL JUSTICE

GEBEYENU A. ADISSY V THE STATE, UNREPORTED JUDGEMENT, CASE NO: 528/2011, 27 FEBRUARY 2012, (NORTH GAUTENG HIGH COURT, PRETORIA).

Appellant who had pleaded guilty contravening Section 65(5) (a) of the National Road traffic Act. He had been driving while intoxicated and was over the limit by one –third. He was a first offender and was not involved in a motor collision, and was the self-employed bread-winner of his family. He was sentenced to a fine of R6 000.00, a further suspended fine of R6 000.00 or six months imprisonment. Pursuant to Section 319(1) of the National Road Traffic Act, the appellant’s license was suspended for a period of 12 months.

Wright AJ (De Klerk AJ concurring) held:

“The Appellant is a person from Ethiopia who resides and works in South Africa with the necessary permission. During sentencing the learned Magistrate said amongst other things: ‘We find more and more foreigners living on the hospitality of South Africa committing offences in this country, offences that they most probably would not even dare to commit in their own countries. ... And maybe the Court should be less sympathetic and say “hey shame this poor guy is a foreigner let us give him a less severe sentence that I would have given a citizen of South Africa on a similar charge”, maybe we should change that mindset and actually sentence foreigners more severely than our own people .So that foreigners realise this country is not here to be ignored as per legal rules and regulations’.” [Paragraph 4]

“Under section 9(1) of our Constitution everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) proscribes unfair discrimination. Under Section 10, everyone has inherent dignity and the right to have their dignity respected protected. In my view the Appellant was rightly convicted of a serious offence. That does not justify the unfortunate remarks made by the learned Magistrate. The remarks about the fact that is a foreigner infringed unlawfully on his inherent dignity and the right to have that dignity respected and protected. The State led no evidence suggesting why foreigners should be sentenced more heavily than South Africans. ...In our view the remarks by the learned Magistrate were unconstitutional, constitute a misdirection and allow us to impose sentence afresh.” [Paragraphs 5-6]

“In *S v Rooi* ... the accused person was convicted of having driven on a motor vehicle on a public road ... he had a previous conviction for a similar offence ... the accused in that case earned R4 000.00 per month. The court on review imposed ... a fine of R6 000 or 12 months imprisonment suspended for five years, periodical imprisonment for 240 hours to be served over five consecutive weekends. In *Rooi* the learned Judges did not suspend the accused driver's licence. The Appellant in the present case has been without his driver's license for one year and has paid his fine of R6 000 to remain a free man. ...In our view a fine of R2 000.00 which is approximately half a month's disposable income for a man and wife and child meets the justice of the case. We would not have suspended his driver's licence. [Paragraphs7-9]

The appeal succeeded, the sentence imposed by the magistrate was set aside and replaced with a fine of R2 000.00 or three months imprisonment and suspended imprisonment of six months.