SUBMISSION AND RESEARCH
REPORT ON THE JUDICIAL RECORDS
OF NOMINEES FOR APPOINTMENT
TO THE CONSTITUTIONAL COURT
FEBRUARY 2013

INDEX TO THE REPORT

INTRODUCTION

1. The Democratic Governance and Rights Unit (DGRU) is an applied research unit based in the Department of Public Law at the University of Cape Town. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research *inter alia* on the judicial appointments process and on the future institutional modality of the judicial branch of government.
2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, monitoring and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for JSC interviews in September 2009, October 2010, April and October 2011, and April, June and October 2012.
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, as well as the website of the Supreme Court of Appeal. We have naturally focused on judgments with a focus on aspects of constitutional law.
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.

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

We will deal further with the qualities which we think should inform the selection of the judges of the Constitutional Court later in this submission.

8. We have introduced one structural change from previous reports, by attempting 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 Constitutional Court judges. We recognise that this process of categorisation is a work in progress, and that it does not necessarily cover all the themes that may be relevant. 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.
10. There will also often be a significant overlap between different themes. With these caveats in mind, we hope that the new structure of the report will be helpful.
11. The themes under which judgements are grouped are the following:
    11.1. Civil and political rights;
    11.2. Socio-economic rights;
    11.3. Gender;
    11.4. Criminal justice;
    11.5. Customary law; and
    11.6. 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.
12. We hope that together, these themes will bring out a pattern that might be called a philosophy or theory of adjudication. As we have 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.
13. As was done in our report for the 2009 and 2012 Constitutional Court interviews, we have compiled a statistical breakdown of the number of cases heard, and judgments written, by candidates who have served on the Supreme Court of Appeal (being Justice Bosielo and Advocate Madlanga SC). This information was obtained by perusing the judgments listed on the SCA's website. A small number of these judgments did not open on the website, and therefore there may be some small inaccuracy in the figures presented. As equivalent data is not as readily accessible for other courts, we were not able to undertake the same exercise for the other candidates.

SUBMISSION REGARDING THE INTERVIEW PROCESS

14. In our submissions prior to the June 2012 Constitutional Court interviews, we expressed concern that only four candidates had been shortlisted for the interviews. We pointed out that this significantly and undesirably limited the JSC's role in the appointment process.
15. Interviewing five candidates means that the JSC does have a slightly more expansive role to play this time round, in that the commission will have to apply itself to the question of which one of the candidates ought to be excluded from the list to be sent to the President in terms of section 174(4) of the Constitution.

16. This still falls some way short, in our view, of the process that the Constitutional drafters had in mind when they created the process for the appointment of Constitutional Court judges. Interviewing a larger number of judges will, we submit, allow for a more rigorous selection process that enables the best possible candidates to be put before the President for possible appointment. It does not appear to us that interviewing five candidates, however well qualified, for the purposes of submitting four names to the President, is a healthy sign for the process of judicial appointments.
17. This is particularly so as one would expect that the Constitutional Court, as the highest court in the country and an internationally renowned institution, would have a large number of applicants striving for promotion to that court.
18. Of course, one response to this criticism is that the JSC can only consider the applications it receives, and can do little if only five candidates make themselves available. This may be so, but the dearth of applications for the last two vacancies is a worrying state of affairs. Whilst the JSC is not the only stakeholder involved, we would urge the commission to undertake some serious introspection to analyse why so few candidates are putting themselves forward for vacancies on the country's highest court.
19. This is particularly important, we submit, in light of the lack of any women among the candidates. We have raised concerns regarding the issue of gender transformation elsewhere, and will not repeat those in detail here. But suffice it to say that the issue is one that requires urgent and meaningful attention. The Constitution expressly requires that the need for the judiciary to reflect the gender composition of the country must be considered when judicial appointments are made (section 174(2)). Plainly this cannot be done if no female candidates are before the appointing authorities.
20. 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.
21. However, the outcome of these interviews will mean that, regardless of which candidate is appointed, the court will continue to have only two women represented on its bench. Whilst we appreciate that implementing transformation is a complex and nuanced task, this state of affairs is plainly inadequate and falls well short of what section 174(2) contemplates.
22. We therefore again urge 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.
23. We turn now to consider some of the qualities which, we submit, should inform the selection of judges for the Constitutional Court.
24. The appointment of any judge must be informed primarily by the provisions of section 174(1) and (2) of the Constitution, which require that a judge be an "appropriately qualified" person, who is "fit and proper"; and that the "need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered" in making appointments.

25. We take this opportunity to repeat the attributes that we think are required by these provisions.[2] The criteria that a candidate be "fit and proper" for appointment might be distilled into five categories:
    25.1. A commitment to constitutional values and to apply the underlying values of the Constitution (human dignity, freedom and equality), with empathy and compassion, and with due regard to the separation of powers and the vision of social transformation articulated by the Constitution.
    25.2. Independence of mind: judges must have the courage and disposition to act independently and free from partisan political influence and private interests alike.[3]
    25.3. A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice.
    25.4. High standards of ethics and honesty. For the rule of law to be respected, the reputation and probity of the bench should be a non-negotiable pre-requisite.
    25.5. Judicial temperament. This may encompass qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.
26. The requirement that candidates be "appropriately qualified" might be understood as referring to a candidate's formal qualifications, experience and potential. Constitutional Court judges must be qualified not only in respect of the general body of law, but they must also have expertise in constitutional law and be equipped to give meaning to constitutional values.

ACKNOWLEDGEMENTS

27. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was carried out by Chris Oxtoby and Emma Taya Darch, researcher and research associate of the DGRU respectively.
28. We are grateful for the financial support of the Open Society Foundation and the Royal Danish Embassy for making this project possible.

DGRU

15 February 2013

[2] Our work on the criteria for the ideal South African judge is based on the research of Advocate Susannah Cowen, available at http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf

[3] While individuals may well hold, or have held, political or ideological affiliations, and while a judge's values will influence their approach to adjudication, "independence of mind" refers to the capacity to put the Constitution first, and not to slavishly follow "the line" of any one political or private party or interest.

A STATISTICAL ANALYSIS OF NOMINEES FOR THE CONSTITUTIONAL COURT FROM THE SUPREME COURT OF APPEAL

The abbreviations used in the tables below are as follows:

C- number of cases heard by the Judge of Appeal

J – number of unanimous leading judgments written by the Judge of Appeal

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

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

S – number of separate but concurring judgments written by the Judge of Appeal

D – number of dissenting judgments written by the Judge of Appeal.

Judgments written by "the Court" have not been attributed to any individual judge. However, co-written judgments have been credited to the relevant Judge of Appeal.

JUDGE	C	J	s	d	S	D
2012 (up to December 3rd)						
Bosielo JA	32	4	1	-	-	-
2011						
Bosielo JA	49	10	2	-	-	1
2010						
Bosielo JA	29	8	2	1	-	-
2009						
Bosielo JA/AJA[4]	40	6	-	-	-	1
1999						
Madlanga AJA	15	1	-	-	1	-

[4] Judge Bosielo served as a Judge of Appeal for 8 of the cases he heard during 2009, and as an Acting Judge of Appeal for the remainder.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

RISK AND ANOTHER V THE OMBUD FOR FINANCIAL SERVICES PROVIDERS AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 38791/2011, 7 SEPTEMBER 2012 (NORTH GAUTENG HIGH COURT)

Applicants, financial services providers (FSP's) under the Financial Advisory and Intermediary Services (FAIS) Act, challenged the steps taken by the first respondent in dealing with complaints against the applicants. A central issue was the interpretation of provisions of the FAIS Act in terms of which the Ombud could decline to deal with complaints, and refer the complaints to a court. Applicants further argued that provisions of the FAIS Act allowing the first respondent to apply "equity as opposed to law" constituted an unjustifiable limitation of their constitutional right of access to courts (section 34).

Baqwa J held:

"The applicants conceded that it is a trite feature of statutory interpretation that the use of the word "may" tends to imply a permissive conferral of power. They however submit that there are cases in which the context in which the word is used may require to be interpreted to be obligatory as "shall". …" [Paragraph 26]

"… [A]pplicants suggest that the Ombud does not apply the principle of "audi alteram partem", that she does not allow legal representation and by implication no cross-examination and that her whole process is accordingly unfair and not in accordance with the provisions of section 34. " [Paragraph 29]

"… I'm not persuaded that this application is well founded. It is quite clear from a reading of section 34 … that the section does not entitle the applicants to be sued in a court. On the other hand the section specifically makes provision for matters to be dealt with by an independent tribunal or forum such as the first respondent. …" [Paragraph 33]

Baqwa J noted that section 39 of the FAIS Act provided for internal appeals, and held that the applicants had failed to exhaust their internal remedies, as required by section 7(2) of PAJA. Baqwa J referred to SCA authority on the exhaustion of internal remedies under s 7(2), and continued:

"The applicants in their amended Notice of Motion included a prayer for exemption under section 7(2)(c) of PAJA without pleading any special or exceptional circumstances to support the application for exemption. … " [Paragraph 37]

Baqwa J thus found no basis on which to condone the failure to exhaust local remedies.

"The effect of section 27(3)(c) [of the FAIS Act] … is that first respondent retains jurisdiction over a complaint unless she, on reasonable grounds makes a determination that it should be dealt with by a court or any alternative dispute resolution process. … I accept that first respondent administers an institution which in terms of the FAIS demands efficiency and economy and that this may indeed justify the lack of a public hearing in circumstances which may be resolved quickly and with minimal formality. [Citation to England and Wales Court of Appeal authority] … The section … clearly confers a discretion on the first respondent. Any other interpretation would be tantamount to stripping her of her statutory powers in terms of FAIS Act. Absent a decision by the first respondent to refer the matter to a court, she retains jurisdiction. It is not the task, therefore, of the reviewing court to consider whether or not the

decision by the first respondent is correct in law. That is a matter for the appeal board to decide." [Paragraph 38]

"Section 27 is written in a language that clearly demonstrates the intention of the legislature. … Upon submission, the Ombud "must" determine whether there has been compliance with the rules and if so, officially receive the complaint … The provision is peremptory. … Section 27(3)(a) provides the Ombud "must" decline a prescribed complaint. This subsection is equally peremptory. … Equally section 27(3)(b) states that the Ombud "must" decline a complaint pending before a court. … [T]he Ombud "may" follow any procedure she considers appropriate including allowing representation. She is not obliged to do so. … The Ombud "may" delegate some of her investigative and adjudicative functions. … Similarly she "may" consider it appropriate on reasonable grounds to refer a complaint to a court or other dispute resolution forum. … The applicants contend that the word "may" must in this context be interpreted to mean "shall". This would be clearly an extraordinary interpretation which … cannot but distort the intention of the legislature and lead to an absurdity. " [Paragraph 39]

Applicants argued that the section27(3)(c) of the FAIS Act imposed a duty on the Ombud to decline to deal with the complaints against them, and that if the court found no such duty, it should interpret section 29(5)(a) as imposing a duty on the Ombud to convene a trial before determining the complaints. If the application of s 27(5)(a) did not result in the convening of a trial, they argued that the section was constitutionally invalid.

Baqwa J found that the applicants "cannot pedal two canoes at once", and cited the Constitutional Court judgement in *Brummer v Minister for Social Development and Others*, finding that a litigant could not ask a court to apply the provisions of a statute and, if that yielded adverse results, then ask for the statute to be declared unconstitutional. [Paragraph 41]

"I am of the view that the applicants have failed to identify a constitutional issue that would require to be dealt with as a priority as enunciated by Chaskalson P (as he then was) in the Zantsi decision (supra). The intention of the legislature in framing section 27(5)(a) … is clear. It was to permit the Ombud institution a measure of flexibility when dealing with complaints. This means that depending on the circumstances and facts of each complaint, the Ombud may adopt procedures which are akin to that of a court hearing." [Paragraph 43]

The constitutional challenge was rejected, and the application dismissed.

FLETCHER-MORGAN AND OTHERS V COST AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 53948/2008, 25 JUNE 2012 (NORTH GAUNTENG HIGH COURT)

Plaintiffs sued for inter alia malicious prosecution and unlawful arrest, claiming that first defendant and wrongfully and maliciously laid charges of attempted murder, robbery and theft of a motor vehicle against them.

After setting out the factual background, and the requirements to prove a claim of malicious prosecution, Baqwa J found that the plaintiffs had proved that the first defendant had instigated the prosecution against them. Baqwa J then turned to deal with the claim for unlawful arrest and detention:

"Regarding the first plaintiff it is common cause that the arrest was on the 7th of January 2008. The liability for that arrest, if any, would lie against the Metro Council concerned and not the second defendant [the Minister of Safety and Security]. The Metro Council was not cited as a party in these proceedings and therefore I say no more in that regard." [Paragraph 11]

"… It would indeed seem that the police … did not apply their minds when detaining the plaintiffs on the different days on which they were charged and detained. … In my view, the police ought to have paid a closer look at the statement especially as it was recorded elsewhere by a person who was not a member of the police force. … [E]ven a cursory reading of the statement would have indicated that this was a domestic or civil dispute which did not merit a criminal sanction. …" [Paragraphs 13 – 14]

"What we have to do with here is the so-called Wednesbury Principles…" [Paragraph 15]

After citing an SCA judgement dealing with those principles, Baqwa J found:

"… I am of the view that the police officers concerned acted in a robot like fashion. They allowed the mere statement of schedule 1 offences in a statement written by a civilian to dictate the course of action they had to take. In other words, they did not apply their minds to the matter and totally and negligently failed to exercise a discretion." [Paragraph 17]

Baqwa J found that the arrest and detention was wrongful and unlawful:

"If the situation was viewed differently, it would imply that police officers should act in a robot-like fashion. Any person would simply bring a statement to a police station alleging robbery or a similar schedule 1 offence and a police officer, purely on the strength thereof would proceed to arrest and/ or detain whomever would be fingered in that statement. That would, in my view, lead to gross injustice." [Paragraph 22]

"… The unreasonable nature of the actions of members of the South African Police is not being alleged in general terms. It hinges squarely on the manner in which they dealt with the plaintiffs … They completely failed to apply their minds. … [E]ven though the initial arrest of the first plaintiff was not effected by members of the South African police the subsequent charging of the plaintiffs at Douglasdale Police Station and detention was unlawful." [Paragraphs 24, 26]

"First plaintiff had upon being admitted to detention, fingerprinted, had her personal effects removed, undressed and body searched. The search included search of her clothing, bags and cavities. According to the psychologist … plaintiffs had been humiliated and traumatised by their experiences, to varying extents according to their treatment and duration of the period of detention." [Paragraphs 37 – 38]

Judgement was given in favour of the plaintiffs. Regarding the claim for malicious prosecution, first defendant was ordered to pay the first plaintiff R100 000 plus costs. Second defendant was ordered to pay the first defendant R200 000 plus costs for unlawful detention. Second defendant was also ordered to pay second and third plaintiffs R25 000 each for wrongful arrest and unlawful detention. First defendant was also ordered to pay monies found to be owing by him to first plaintiff.

CRIMINAL JUSTICE

BOIKIE NDUMA V THE STATE, UNREPORTED JUDGEMENT, CASE NO: A187/2010, 14 AUGUST 2012

This was an appeal against sentence and conviction, the accused having been convicted by the Regional Court on four counts, of theft, robbery, unlawful possession of a firearm and unlawful possession of ammunition.

Baqwa J (Khumalo AJ concurring) held:

"… [I]t can hardly be argued that the appellant had no intention to steal when participated in the removal of goods from a place that did not belong to him without the owner's permission. The fact that the goods were removed from the concealment of the theft of a firearm that had been removed earlier can hardly come to the rescue of the appellant." [Paragraph 6]

"Concerning the robbery count, complainant states that it was at night and the only source of light was an Apollo light some distance away and this was to some extent obscured ... Complainant was seeing appellant for the first time. The incident lasted for a few minutes. He does not identify the appellant in his police statement." [Paragraph 7]

"In this poorly lit environment, the evidence of Selibalo and Lekonjani does not lend much corroboration if any to the evidence of complainant. … One fact is clear however and that is that there was a person (possibly the robber) who made a clean get away by jumping over a fence. If appellant was a participant in the robbery, it is most unlikely that he would not also have jumped the wall and got away." [Paragraph 8]

"The appellant [sic] is a single witness with regard to the robbery incident and with regard to the identity of the perpetrator or perpetrators. There was no identity parade held and that state tried to prove its case on the basis of dock identification." [Paragraph 9]

"The law with regard to the Identification of an alleged perpetrator, is summarised in the case of **S v Charzan and another** [citing a passage holding that the honesty and sincerity of the identifying witness is not sufficient, and that there must be certainty beyond a reasonable doubt as to the reliability of the evidence] … Add to this, the fact that not a single item robbed from the complainant was recovered from or found in the possession of the appellant and the fact that he was detained minutes after the incident, the result cannot but be a weak case for the state." [Paragraph 10]

"There were not many people during the commission of the crimes that gave rise to this case yet the uncertainties and contradictions in the evidence of complainant, and state witnesses … leave one in the state of discomfort regarding their credibility. …" [Paragraph 11]

"If appellant was at the scene and in possession of a firearm, what is the likelihood that a knife would be used and not a firearm. … [T]here are significant material contradictions and inconsistencies in the state case that cannot but create a reasonable doubt regarding identity of the perpetrator regarding count 2. Regarding ... the unlawful possession of a firearm and ammunition, the evidence is equally unsatisfactory. No ballistic or forensic reports were tendered by the state and the firearm was not presented at the trial." [Paragraph 12]

The appeal on the count of theft was dismissed, but the appeal on the remaining counts was upheld.

PETRUS FANIE SIBIYA AND ANOTHER V THE STATE, UNREPORTED JUDGMENT, CASE NUMBER: A217/2009, 15 SEPTEMBER 2011 (NORTH GAUTENG HIGH COURT)

This was an appeal to a full bench against the sentence imposed by the Circuit Local Division. Baqwa AJ (Kruger AJ and Tuchten J concurring) held:

"The appellants were convicted on assault with intent to do grievous bodily harm in relation to Themba Eric Mngomezulu and in relation to Sizwe Dlamini during an attack on these victims by members of the community ... The appellant [sic] are members of this community. They and a number of other community members reacted to allegations of criminal activities allegedly committed by the two men and severly [sic] assaulted the two men. Mngomezulu later died of the wounds he sustained ..." [Paragraph 2]

"The appellants were treated equally for purpose of sentence and they were each sentenced to eight (8) years imprisonment of which half was suspended for five (5) years on condition that they are not found guilty of a violent crime without the option of a fine during the period of suspension." [Paragraph 3]

"In mitigation the circumstances of both appellants were placed before the court: (a) The first appellant was 44 years old with three children below 15 years old. He also maintains his wife and parents. He is in regular employment ... (b) The second appellant was 30 years old with two children aged 5 and 8 years and also supports his mother. He is also in regular employment ..." [Paragraph 7]

"The court *a quo* took into account not only the personal circumstances of the appellants but also the seriousness of the offence. ... The learned judge *a quo* was not invited to consider a sentence of correctional supervision or periodical imprisonment ... In my view, if the learned judge's intention [sic] had been drawn to these sentencing options, he would have at the very least given them serious consideration. It is trite that the imposition of an appropriate sentence is a matter within the discretion of the trial court and that an appeal court will be slow to interfere with the sentence of the court below unless there has been a misdirection (See *S v Holder 1979 (2) SA 70 (A)*). The failure of the court *a quo* to consider alternative sentencing options to which I have alluded is, in my view, such misdirection. Accordingly, this court is at large to determine an appropriate sentence, having regard to all the relevant circumstances." [Paragraphs 8, 10]

"An effective sentence of four years in prison would not only impact upon the appellants ... but also cause them to lose their employment and leave their wives, children and parents without support. The families might not just be left destitute, but could be destroyed. Upon release from prison, the prison terms served would leave an indelible mark on the appellants' employment prospects." [Paragraph 11]

"It is my considered opinion that it is precisely for such circumstances that the retributive aspect of the law has sought to be mitigated through the sentences such as correctional supervision. Such mechanisms ensure that justice is seen to be done whilst at the same time ensuring that negative and unintended consequences are avoided. ... The appellants were found to be guilty of a serious crime. They took the law into their own hands and sought to punish the two men for the crimes they had allegedly committed. ... Every person, no matter what he or she is alleged to have done, is entitled to a fair trial. The imposition of punishment for criminal conduct is a matter for the courts to decide." [Paragraphs 12,15]

Baqwa AJ quoted from the judgment of Schreiner JA in *R v Karg* regarding the approach to sentencing, and continued:

"In my view, the appellants … are suitable candidates for correctional supervision and the relevant detail in this regard is set out in the Correctional Services reports handed into court." [Paragraph 16]

The appeals were upheld, and the sentences substituted for sentences of eight years imprisonment, wholly suspended on condition of no further convictions, with the accused being placed under correctional supervision for a period of eighteen months.

ADMINISTRATION OF JUSTICE

YONDA INVESTMENTS CC V ROHR AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 29235/2009, 25 JUNE 2012 (NORTH GAUTENG HIGH COURT)

This was an action based on a written deed of sale. At the conclusion of the judgement, Baqwa J dealt with the question of costs:

"… [T]he plaintiff knew or ought to have known that when it purported to sell immovable property to the defendant without the said property having been registered in its name was not lawful. It is also quite significant that the sole member of the plaintiff did not find it necessary to testify in court in this regard. I therefore find that an appropriate costs order has to be made into [sic] this regard." [Paragraph 28]

The plaintiff's claim was dismissed, and the plaintiff ordered to pay costs on an attorney and own client scale.

MANGANYE V NGOBENI AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: A546/11, 9 FEBRUARY 2012 (NORTH GAUTENG HIGH COURT)

This was an appeal from a judgement in the Magistrates' Court in a case arising from a collision between two motor vehicles.

Baqwa AJ (Prinsloo J concurring) held:

"According to the finding of the Magistrate "the evidence of the Plaintiff's driver and that of the defendant is mutually destructive in that each blames the other as to what happened on the day of the collision"." [Paragraph 7]

"It is at the time of reaching this conclusion that the magistrate ought to have been guided by the law as clearly enunciated in the case of *National Employers General Insurance Co. Ltd v Jagers* … [T]he Magistrate did not find the Appellant's version false in which event he would then have been justified to prefer the Respondents version. He states as follows "the difficulty the court faces is that there is no reason to disbelieve either version of the plaintiff's driver and that of the defendant's because of the manner in which the collision occurred which seems to be consistent with the damages on both vehicles"." [Paragraphs 8 – 9]

"After making this very clear and correct summation of the facts the magistrate appears to take what can only be described as an inexplicable leap of faith and apportions liability between the two drivers on a fifty percent basis." [Paragraph 10]

"In my view the magistrate clearly misdirected himself in coming to this conclusion … He misdirected himself because after finding that the two versions were evenly balanced there is no basis in [sic] which he could prefer one of the two versions." [Paragraph 12]

"The magistrate further misdirected himself by purporting to apply the maxim '*res ipsa loquitur*' which clearly could not be applied in *casu*. [Citation to *Hoffman and Zeffert* explain the meaning of the maxim]." [Paragraph 13]

"In this case, with two mutually destructive versions, and no finding of fact *prima facie* pointing to negligence on the part of either driver, such an inference could clearly not be made." [Paragraph 14]

The appeal was upheld, and plaintiff's claims dismissed.

MABUNDA AND OTHERS V DALSON, UNREPORTED JUDGEMENT, CASE NUMBER: A 1000/10, 23 FEBRUARY 2012 (NORTH GAUTENG HIGH COURT)

Case heard 23 February 2012, Judgement delivered 23 February 2012.

This was an appeal against a decision by the Magistrates' Court in which a rule nisi had been discharged, and the respondents (appellants) ordered to desist from removing passengers from the applicant's (respondent's) motor vehicle. Respondent operated the vehicle as a taxi, and argued that he was being victimised for not supporting first appellant for a leadership position in a taxi association.

Baqwa AJ (Fabricius J concurring) held:

"The court a quo took the view that it had the power to impose the terms … of its order interdicting the Appellants … In my view the court misdirected itself …" [Paragraph 11]

"The correct position is that any terms imposed against granting or refusal of an order have to be reasonable. … The rule nisi was discharged as a result of the fact that the court a quo found the Respondent did not possess a right that stood to be protected with regard to his taxi operation. If this was so, it follows that the Respondent could not therefore lawfully continue to operate his taxi. In the absence of such an operation the order … was academic and could therefore not be a reasonable order … The court a quo further misdirected itself in ordering each party to pay its own costs. The Respondent had brought an application … well knowing that he did not possess the requisite documents to operate his taxi. The costs order should accordingly have been awarded against him." [Paragraph 12]

NCONGWANE V TARCIA N.O. AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: A737/2010, 16 FEBRUARY 2012 (NORTH GAUTENG HIGH COURT)

Appellant, an attorney, had been charged with unprofessional or dishonourable or unworthy conduct, and found guilty on one charge.

Baqwa AJ (Fabricius J concurring) held:

"… [A]s the record shows he [appellant] did not even disclose to the Magistrate that he had omitted to serve his colleague (opponent) with papers despite his most recent communication with him. It is quite

clear that he would have been hard pressed to furnish cogent reasons to the court for such an omission." [Paragraph 12]

"… [W]hat I find regrettable is the attitude of the Appellant who even at the end of the proceedings fail to show any remorse regarding his actions. He instead attacks the Fourth Respondent. … Appellant makes other disparaging remarks of and concerning the Fourth Respondent which do not bear repeating … Appellant goes on to cite the Minister of Justice and Constitutional Development, Black Lawyers Association and he Law Society of South Africa … There is absolutely no justification for citing these parties who were not parties in the disciplinary action. …" [Paragraph 16]

"The Appellant argues that having been found guilty of the least of five charges, he should have been treated with more leniency. … [T]he profession of an attorney is an honourable and respected one and to be held in the utmost esteem. It is an indispensable adjunct to every one, not only in law suits, but in many other private affairs and his office is deemed both necessary and praiseworthy. … Any deviation therefore from conduct considered appropriate for this high calling ought to be visited with the necessary opprobrium. Any sanction, therefore below the effective fine of R7 500 would be seen by all concerned as a slap on the wrist and not expressing sufficiently the disapproval which should accompany such conduct." [Paragraph 20]

"I am of the view that the Respondents took into account the Appellants circumstances when they suspended half of the R15 000 fine. I accept that the Respondents blended the sanction with an element of mercy by taking into account that Appellant had only been in practice for one year at the time of the commission of the offence." [Paragraph 20.5]

The appeal was dismissed.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

RADEMAN v MOQHAKA MUNICIPALITY AND OTHERS 2012 (2) SA 387 (SCA)

Case heard 16 November 2011, Judgment delivered 1 December 2011.

First respondent was a municipality incorporated in terms of the Local Government: Municipal Structures Act (the Municipal Structures Act), and second to fifth respondents were officials of the municipality. The appellant had failed to pay her taxes and levies, with the result that the municipality disconnected her electricity supply. This was done without any court order. The appellant successfully launched an urgent application for the restoration of her electricity supply in the Magistrates' Court, but respondents' appeal against this order to the High Court was successful.

Bosielo JA (for a unanimous court: Lewis JA and Petse AJA concurring) held:

"The appellant, together with other residents of the municipality, are members of the Moqhaka Ratepayers and Residents Association. This is an organisation which comprised residents who claimed to be unhappy with the municipal services rendered by the municipality. As a means of getting the respondent to attend to their various complaints, which included alleged poor service delivery, they decided to withhold payments of their rates and taxes. They continued to pay for their other municipal services like water and sanitation, electricity and refuse removal. Notwithstanding various demands for payment, the appellant persisted in her refusal to pay taxes and levies. Inevitably, this impasse culminated in the first respondent discontinuing any further supply of electricity. ... [T]he municipality admitted having disconnected the supply of electricity ... [but] denied that such disconnection was unlawful. The municipality cited as legal justification ... the fact that, notwithstanding lawful demand, the appellant refused to pay her rates and taxes in arrears ... The municipality admitted that the appellant's accounts relating to other municipal services like electricity, water, and sanitation and refuse removal were up to date. Counsel for the appellant contended that it is unlawful for a municipality to discontinue the supply of electricity without a court order. The argument was that this amounts to self-help which is not permissible in our law." [Paragraphs 2-4]

"In a comprehensive and well-reasoned judgment, the court below held that the appellant had failed to prove that the disconnection of her electricity supply was unlawful. It found expressly that the disconnection was statutorily authorised. ... In terms of the Constitution municipalities play a pivotal role in facilitating and ensuring efficient public administration at local government level. It follows that for a municipality to be able properly and efficiently to execute its constitutional and statutory obligations to deliver municipal services to its residents it requires sufficient resources and revenue. In order to put the municipality in a position to render the required municipal services, the ratepayers must make regular payments of taxes and levies and consumption charges. There is in fact a duty on ratepayers that, inasmuch as they are entitled to demand that the municipality should deliver municipal services to them, they must also make corresponding payment for such municipal services. ... This is part of their civic and contractual responsibilities. ..." [Paragraph 6-10]

"Municipalities are obliged to levy and collect rates and taxes from their residents as authorised by s 229 of the Constitution. Appreciating the difficulties experienced by municipalities when ratepayers protest

and refuse to pay for municipal services, the legislature has provided in s 96 for every municipality to have a credit-control and debt-collection policy. Furthermore municipalities are mandated by s 96(1)(a) to collect all money that is due and payable. Section 97(1)(g) of the Systems Act in turn decrees that provision should be made for termination of municipal services or restriction of the provision of municipal services when payments of ratepayers are in arrears. In addition, s 25 of the Credit Control and Debt Collection Bylaws ... gives a municipality the power to restrict and disconnect supply of municipal services. ..” [Paragraphs 11-14]

“For a proper understanding of the legal issue facing us in this appeal, one should ask: what is a municipality expected to do when faced with a number of its residents who steadfastly refuse to pay their taxes and levies? Is a municipality expected to approach the court each time a ratepayer defaults to seek a court order authorising discontinuation of services? Such a proposition is both unrealistic and untenable. Given the rate of the protests and demonstrations for delivery across the country concomitant with the refusal by ratepayers to pay their rates and taxes and fees for municipal services, I am of the view that it would not be practical for municipalities to pursue these matters in court. I have no doubt these powers were given to municipalities to enable them to collect all moneys that are due and payable to them in the most cost-effective manner. Commenting on the power of a municipality to discontinue municipal service as a means of getting the ratepayers to pay their accounts, Yacoob J remarked as follows in Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; ‘It is emphasised that municipalities are obliged to provide water and electricity and that it is therefore important for unpaid municipal debt to be reduced by all legitimate means. It bears repeating that the purpose is laudable, has the potential to encourage regular payments of consumption charges, contributes to the effective discharge by municipalities of their obligations and encourages owners of property to fulfil their civic responsibility.'” [Paragraphs 15-17]

“Section 102 of the Systems Act makes it clear that in pursuit of its obligation to charge and receive payments for municipal services, a municipality has the option to consolidate the accounts for various services it provides. This is intended to circumvent the very problem confronting us in this appeal that is, allowing residents to choose which account they wish to pay and which they will not pay. Such tactics should not be allowed as they have the potential to frustrate a municipality in governing its area and, importantly, meeting its constitutional obligations. Thus a failure to pay rates and taxes is likely to have very serious consequences. I say this conscious of ratepayers' rights to protest and demonstrate whenever they have valid complaints against the municipality. However, we live in a democracy where there are various lawful methods that ratepayers can use to ensure proper municipal services. As the Constitutional Court aptly held in Pretoria City Council v Walker ...: 'Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it, however, cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered.' Having considered all the relevant legislation, it is clear to me that there is no statutory instrument which requires a municipality to obtain a court order authorising the discontinuation of a municipal service. In the circumstances the appeal is dismissed with costs.” [Paragraphs 18-22]

RADIO PRETORIA v CHAIRMAN, INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA, AND ANOTHER 2003 (5) SA 451 (T)

Case heard 21 February 2003, Judgment delivered 21 February 2003.

The applicant applied in terms of Rule 53 of the Uniform Rules of Court for the review and setting aside of the second respondent's decision to refuse the applicant's application for a temporary community broadcasting licence and a signal distribution licence, and for an order directing the second respondent to reconsider the application.

Bosielo J held:

“The applicant's main argument on this aspect is that s 32(3) [of the Broadcasting Act] does not apply to the applicant. Mr Van Rooyen for the applicant argued forcefully that s 32(3) expressly limits its application to licensees whose licences are based on geographical boundaries. He submitted that the applicant is based on community interests as opposed to a geographical area. ... [H]e drew my attention to the distinction drawn between the two concepts as appears from the definition of 'community' ... in s 1 of the Broadcasting Act where community is defined as '''community'' includes a geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest'. As an alternative point, Mr Van Rooyen argued that the second respondent erred by giving the expression 'democratically elected' a very narrow and restrictive meaning. His submission on this point, if I understood him correctly, is that the second respondent erred in failing to appreciate and acknowledge that democracy is a nuanced concept which can mean different things to different people depending on the context within which it is used. The applicant admitted that its membership is not open to all people in its target community. Membership can only be acquired by invitation from members of the board. It is this select group of members who enjoy the privilege to appoint directors and also to be nominated for appointment as directors. Clearly such an election cannot be described as being democratic, even in the most liberal and extended meaning of the word.” [Paragraph 24.1]

“It is common cause that clause 42 of the Broadcasting license was incorporated as a special condition into the applicant's previous licence. It is clear from a reading of clause 42 that the ideal is to ensure and promote community involvement in the election and nomination of the directors of the applicant. I understood the applicant's submissions on this point to be that second respondent had no right or powers to impose such a condition. Quite interestingly, applicant never applied to have the conditions either amended or cancelled. With respect, I found the applicant's complaint to be without merit. Suffice to say that reg 11 of the regulations made by Independent Broadcasting Authority ... grants the second respondent the authority, in granting any application, to impose conditions and obligations which it may find to be appropriate to such licence. To my mind, second respondent acted correctly in considering the applicant's non-compliance with clause 42 which was an express condition of its previous licence. To do otherwise would, in my view, be a serious abdication of its responsibilities by second respondent.” [Paragraph 24.2]

“Section 2 provides primarily that every licensee must take steps to encourage equal opportunity employment practices within its broadcasting service. It is common cause that, even at the hearing of the application, the applicant unashamedly admitted that it is only employing people from the Boere-Afrikaner community. According to the applicant's own definition ... it is a small and exclusive community comprising of the core conservative Afrikaners. Amongst others, the applicant submitted at the hearing that as their Afrikaner community is a minority group which is being marginalised in all spheres of life,

they have an obligation to reserve for the Boere-Afrikaners all the jobs which they are able to create. Mr Van Rooyen sought reliance for his submission on this point on s 31(1)(a) and (b) of the Constitution which seeks to promote and protect the rights of cultural, religious or linguistic communities to enjoy their freedom of association, religion and the right to their culture and language. However, as Mr Unterhalter for the respondents correctly pointed out, the Constitution demands that these rights be exercised in a manner consistent with the Bill of Rights. ... [T]he applicant's employment policy and practices discriminate against members of other races on either race, ethnic or social origin, colour, religion, culture and language. I am constrained to agree that the justification proffered by the applicant for its discriminatory practices is clearly spurious and cannot be justified on any basis other than racial exclusivity which is in conflict with both the IBA Act and the Constitution." [Paragraph 24.3]

"Mr Van Rooyen argued that second respondent, as a creature of statute, must operate in terms of and within the confines of the statutes relevant to it. He submitted, if I understood him correctly, that it was improper for the second respondent to invoke the provisions of s 9(4) of the Constitution. With respect I have found this submission to be rather startling. Section 2 of the Constitution provides in clear language that '(t)his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled'. It was submitted ... that second respondent exceeded its powers and in fact usurped the functions of the Broadcasting Monitoring Complaints Committee ... by requesting the applicant to furnish particulars with regard to its appointment of directors and its employment policies and practices. Second respondent was of the view that justice and fairness required that applicant be afforded an opportunity to respond to them before any decision could be taken which was likely to be prejudicial to the applicant. I have found the second respondent's conduct in this regard to be eminently fair, reasonable and in consonance with the fundamental principles of natural justice. To my mind, there is no merit in this ground for review. It is simply unthinkable that second respondent could be expected to close its eyes to conduct by applicant which second respondent found to be in conflict with the IBA Act." [Paragraph 24.5]

"It is significant to note that applicant never objected to the request to make written submissions, neither did it request a rehearing of the application where it could make oral submissions. In fact applicant commenced its response by saying 'with reference to your letter of 6 February 2001 we are pleased to have been afforded the opportunity to make further written submissions you have called for before taking a final decision on our application'. ... [T]he principle of audi alteram partem can be satisfied in different ways. It is trite that the law does not demand an oral hearing at all times. ... In casu, it is clear that applicant had submitted a well-prepared and researched application. Applicant was given ample and sufficient opportunity to address second respondent at the hearing. It was argued on behalf of the applicant that there were a number of events and circumstances which, together, created a perception on the part of applicant that everything was in order and that therefore applicant was entitled to a temporary community broadcasting licence for which it had applied. It was also argued that the fact that in the past ... applicant had applied for and had been granted temporary community broadcasting licences without any objections being raised about the election of its directors, the extent of community involvement and participation and its discriminatory employment policies and practices, had created a perception on the applicant that second respondent accepted and/or condoned these practices. ... Mr Van Rooyen argued that ... applicant had a justifiable and legitimate expectation that these issues would not be raised against the applicant." [Paragraphs 24.6-24.7]

"With respect, I have found these submissions less appealing and unpersuasive. What is common cause is that applicant knew about these conditions as they were incorporated in its licence. The applicant knew

that it was incumbent on it to comply with its licence conditions. For reasons best known to applicant, it knowingly and brazenly decided to ignore these conditions. In my view, a perfect answer to applicant's complaint is to be found in the dictum by Corbett CJ in Administrator, Transvaal, and Others v Traub ..: 'As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing.'" [Paragraph 24.7]

"With respect, I have found the submissions made on behalf of applicant in this regard not only unmeritorious but startling and frightening. Perhaps, applicant needs to be reminded of the lofty and fundamental ideals and aspirations of the people of South Africa which is captured dramatically in the preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act ... I am satisfied that ICASA acted lawfully, reasonably and in a procedurally fair manner. The allegations that ICASA acted arbitrarily, capriciously or that its decision has no rational basis are, with respect, without merit. Finally I find that ICASA applied its mind properly and fairly to all the issues which were relevant to this application by applicant." [Paragraphs 24.7 25]

An appeal to the Supreme Court of Appeal was dismissed because the judgement or order sought served to have no practical result: **Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another 2005 (1) SA 47 (SCA)**. Leave to appeal to Constitutional Court was refused: **2005 (4) SA 319 (CC)**.

SOCIO-ECONOMIC RIGHTS

THEART AND ANOTHER V MINNAAR NO; SENEKAL V WINSKOR 174 (PTY) LTD 2010 (3) SA 327 (SCA)

Case heard 5 November 2009, Judgment delivered 3 December 2009

Both appeals dealt with the proper interpretation and application of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) in the magistrates' courts. The provision requires that written and effective notice of proceedings for the eviction of an unlawful occupier be served on the unlawful occupier and the municipality with jurisdiction, at least 14 days before the hearing.

Bosielo JA (Mpati P, Brand, Snyders and Malan JJA concurring) held:

"… [T]he appellants in both appeals did not dispute the merits of their respective cases. They confined themselves to an attack on the procedures which had been adopted ... In Theart the objection was that although two notices had been issued separately, they were served simultaneously. In Senekal ... the objection was that there was only one hybrid notice issued, which embodied the information required by s 4. Both appellants contended that the failure to have two notices served separately on them infringed their rights to procedural and substantive justice expressly provided for in s 4(2), read with s 4(5) of PIE. Reliance was placed on Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others … (SCA) ... It is useful to quote the relevant part of the judgment in Cape Killarney ...: 'Section 4(2) further provides that this notice must be effective notice; that it must contain the information stipulated in ss (5) and that it must be served by the court. Although s 4(2) could have been more clearly worded, it is obvious in my view that the Legislature did not intend physical service of the notice by the court in the person of a

Judge or magistrate. On the other hand, mere issue of the notice by the Registrar or clerk of the court would not suffice. Accordingly, for purposes of an application in the High Court, such as the one under consideration, s 4(3) requires that a notice of motion as prescribed by Rule 6 be served on the alleged unlawful occupier in the manner prescribed by Rule 4 of the Rules of Court. It is clear, in my view, that this notice in terms of the Rules of Court is required in addition to the s 4(2) notice. Any other construction will render the requirement of s 4(3) meaningless" [Paragraphs 6 - 7]

"... [I]t is not I dispute that, although the notices were not contained in separate and distinct documents and not served separately, the appellants were served with notices duly authorised by the respective magistrates that, read together, complied with ss 4(2) and (5). It is important not to lose sight of the central role played by the courts during the issuing of the notice contemplated in s 4. Before a court authorises a s 4(2) notice, the notice must contain all the essential information prescribed by s 4(5). This is consonant with one of the primary ideals of PIE ... which is to regulate the eviction of unlawful occupiers from land in a fair manner and … to ensure that no one is evicted from his or her home or has his or her home demolished without an order of court made after considering all the relevant circumstances as contemplated by s 4(8). In the present appeals both applications were properly served by the sheriff on the two appellants in a manner approved by the court concerned. Both appellants understood what the applications were all about and duly instructed legal representatives to represent them. In opposing the applications both appellants filed affidavits setting out their defences to the applications. Significantly both appellants were represented by legal representatives when their applications were heard. There is no doubt that the object of s 4(2) to give the occupiers sufficient and effective notice of the intended eviction was achieved." [Paragraphs 10 -11]

"Notwithstanding this the appellants contend that both applications should have been dismissed on the simple basis that there was no additional notice served on them. However, counsel for the appellants … was unable to point to any section in PIE which requires an additional notice. … I find this argument untenable. During argument counsel for the appellants was unable to indicate any prejudice suffered by the appellants due to the failure by the respondents to serve separate notices on separate occasions on them. This is so because the applications served on the appellants complied substantially with s 4(2) and, quite importantly, contained all the necessary information prescribed by s 4(5)." [Paragraphs 12 - 13]

"Viewed against the main purpose of PIE, the real issue is not so much whether or not there are two separate notices. The real and proper enquiry should be whether there has been effective notice of the proceedings on the occupier in the sense that a court is satisfied that the occupier has been fully informed of the impending eviction, the grounds therefor, the date and place of hearing, and the right to appear in court and be represented. This is exactly what happened ... Accordingly I am satisfied that effective notice was given to the appellants. To hold otherwise would promote slavish adherence to form above substance. The appeal is dismissed with costs." [Paragraph 14]

CRIMINAL JUSTICE

BAILEY V THE STATE (454/11) [2012] ZASCA 154 (01 OCTOBER 2012)

Case heard on 18 September 2012, Judgment delivered on 1 October 2012

Appellant appealed against a sentence of life imprisonment on a charge of raping his minor daughter. The question was whether substantial and compelling circumstances existed justifying a deviation from the prescribed minimum sentence of life imprisonment.

Bosielo JA held:

"… Ms Packery referred us to the Victim Impact Report which was handed in by consent, which depicts a sad and painful picture of the complainant after the rape. Amongst the most severe of the after-effects of the rape are that: she suffers from (a) anxiety, fear and sleeping disorder; (b) misplaced feelings of guilt and shame; (c) mood swings. She has also lost her trust in mankind and harbours a great sense of anger and hostility towards her father, whom she feels has abused her trust. In addition she has developed hatred for her brother as he reminds her of her father and sadly, she no longer trusts her own mother." [Paragraph 10]

"She argued further that, as a result of the rape, the complainant left school prematurely when she discovered that she was pregnant. She furthermore suffered two miscarriages. The rape left the complainant with a distorted understanding of love and she confuses sexual intercourse with love." [Paragraph 11]

"It is clear to me that the rape has had a very serious and deleterious effect on the complainant. One gets the picture of her whole life in tatters. Although the social worker did not indicate whether the complainant could through counselling be cured of these after-effects, it cannot be gainsaid that the impact is both devastating and far-reaching. Undoubtedly, this makes this case heinous and different from those referred to. To my mind, any comparison of this case with the three referred to is misguided if the intention is to use them as precedent binding any court not to impose life imprisonment as a sentence, particularly where the offence falls within the purview of s 51(1) of the Act." [Paragraph 12]

"It can hardly be disputed that rape of young girls by their fathers is not only scandalous; it has become prevalent as well. To all right-thinking people it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer seriously threatening the well-being and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric." [Paragraph 13]

"It is true that *Abrahams*, *Sikhipha* and *Nkomo* all involved rapes that fall under s 51(1) of the Act. Yet the court after having considered all the relevant facts came to the conclusion that, in those cases, a sentence of life imprisonment was disturbingly disproportionate to the offence to a point where it could be described as unjust. The court then imposed various terms of imprisonment in respect of each of the cases in the place of the ordained life imprisonment." [Paragraph 15]

"What then is the value of such a comparative analysis of previous cases. Can this trend, if it can be called that, qualify to be elevated to the status of a precedent which is intended to bind all the courts which have to consider sentence whilst sentencing an accused who has been convicted of rape read with s 51(1) of the Act? Is a court expected, without proper consideration of the peculiar facts of this case, to

slavishly follow the so-called trend not to impose life imprisonment for rape? By doing so, a court would be acting improperly and abdicating its duty and discretion to consider sentence untrammelled by sentences imposed by another court albeit in a similar case. It follows in my view that such a sentence would be appealable on the basis that the sentencing court either failed to exercise its sentencing discretion properly or at all." [Paragraph 16]

"Van den Heever JA put it more succinctly in S v D 1995 (1) SACR 259 (A) at 260e when she stated that: 'I agree that decided cases on sentence provide guidelines not straightjackets.' I also agree with this correct approach." [Paragraph 17]

"The minority judgment in the court below appears to reflect the misunderstanding that the refusal by this court to endorse the life imprisonment imposed in the three cases of Abrahams, Sephika and Nkomo constitutes a benchmark or a precedent binding other courts. That is a misconception. Such an approach or trend can never be elevated to a benchmark or binding precedent. Those cases remain guidelines." [Paragraph 19]

"What then is the correct approach by an appellate court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court after exercising its discretion properly simply because it is not the sentence which it would have imposed or that it finds it shocking? The approach to an appeal on sentence imposed in terms of the Act, should in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This in my view is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not." [Paragraph 20]

"The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part the sentencing court. …" [Paragraph 21]

The appeal was dismissed.

DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG v THABETHE 2011(2) SACR 567 (SCA)

Case heard 15 September 2011, Judgment delivered 30 September 2011

The respondent was convicted pursuant to a plea of guilty of rape read with the provisions of s 51(2) of the Criminal Law Amendment Act in the Regional Court. The complainant was a girl below the age of 16 years. The respondent was committed to the North Gauteng High Court for sentencing. The High Court found that in light of the extraordinary circumstances, the accused be sentenced to ten years' imprisonment, suspended for five years, on condition (amongst others) that the accused was not convicted, during the period of suspension, of a crime involving violence or a sexual element or both and that at least 80% of his income must be devoted to the support of the victim and her family. Boseilo JA (for a unanimous court: Mthiyane and Shongwe JJA concurring) held

"The appeal turns on whether the sentence imposed on the respondent is appropriate. The appellant argues that, given the nature and gravity of the offence, and the fact that the legislature has prescribed

life imprisonment as the minimum sentence for this offence, the sentence imposed by the court below is startlingly or disturbingly inappropriate. The respondent was a live-in lover of the complainant's mother.

At the time of the incident the complainant was 15 years and 10 months old. On the fateful day, the complainant had apparently left home without her mother's or the respondent's knowledge or consent.

Both the respondent and the complainant's mother launched a frantic but unsuccessful search for her.

Later in the day the respondent found her at a home suspected to be that of her boyfriend. On their way back home, the complainant expressed the fear that her mother might punish her for her misdemeanour.

She then implored the respondent not to tell her mother where she had been. Presumably sensing her vulnerability and desperation, the respondent inveigled her to have sexual intercourse with him in return for an undertaking not to tell her mother where the complainant had been. The next day there was some unexplained altercation between the respondent and the complainant which culminated in the respondent going to report the sexual intercourse to the police and voluntarily handing himself over." [Paragraphs 4 – 5]

"The complainant and her mother testified on sentence. In an attempt to obtain more evidence regarding the appropriate sentence to be imposed, the court below heard the evidence of a probation officer, Ms Nyundu. At the time she testified the complainant was already 17 years old and in grade 9. The essence of her evidence was that the complainant had outgrown this incident. She has forgiven and reconciled with the respondent. She is no longer angry with or even afraid of him. She and the respondent have in fact repaired and mended their relationship. Importantly, she stated unequivocally that she does not wish the respondent to be sent to jail. According to her, the respondent is playing a useful role in maintaining her and her family and she would like him to continue to support them.

Nyundu, interviewed the complainant, her mother and the respondent. Furthermore, she arranged a victim-offender conference to afford the complainant and the respondent an opportunity to engage each other. The respondent has also re-joined the family, urging it to stay together as before the incident. She testified that the respondent expressed remorse for what had happened. She described the complainant's mother as being ambivalent. Nyundu recommended that the respondent be sentenced to correctional supervision ..." [Paragraphs 6,8]

"The court below also had the benefit of a psycho-social report on the impact of the offence on the complainant. It is clear from the report that this incident has had serious adverse effects on the psychoemotional wellbeing of the complainant. Her academic performance at school deteriorated to such an extent that she did not even write her final examination for grade 8. She emphasised the fact that the complainant was hurt by the fact that the respondent had betrayed her trust in him as a father figure. In the light of these facts, the court was of the view that this case was the one rape case — certainly the first this court has dealt with — in which restorative justice could be applied in full measure in order to ensure that the offender continued to acknowledge his responsibility and guilt; that he apologised to the victim and cooperated in establishing conditions through which she may find closure; that he recompensed the victim and society by further supporting the former and rendering community service to the latter; and that he continued to maintain his family." [Paragraphs 9-10]

"What is even more disturbing is the emergence of a trend of rapes involving young children which is becoming endemic. A day hardly passes without a report of such egregious incidents. Public demonstrations by concerned members of society condemning such acts have become a common

feature of our everyday news through the media. In many instances such young, defenceless and vulnerable girls are raped by close relatives, like in this case, a person whom she looked upon as a father. ... There are disturbing features in this case. It is common cause that, although the respondent was not the complainant's biological father, he had assumed the role of her father and she regarded him as such. That he exercised parental authority over her is shown by the fact that on the ill-fated day of the rape he had gone looking for her. The respondent took undue advantage of her and had unlawful sexual intercourse with her." [Paragraph 17-18]

"Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness to lead them to impose restorative justice even in cases where it is patently unsuitable. A controversial if not intractable question remains: do the views of the victim of a crime have a role to play in the determination of an appropriate sentence? If so, what weight is to be attached thereto? After all, it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be heard on, amongst other things, how the crime has affected him/her. This does not mean, however, that his/her views are decisive." [Paragraphs 20-21)

"I agree that this case presents panoply of facts which qualify as substantial and compelling to justify a departure from the prescribed minimum sentence. However, I am not persuaded that such facts justified a wholly suspended sentence, or one based on restorative justice. It is trite that, in addition to deterring an accused person from committing the same offence in the future, a sentence must also have the effect of deterring like-minded people. Having weighed all the circumstances of this case against the legislative benchmark explicitly set by the Act and endorsed in *S v Malgas* ... I am of the view that the appropriate sentence for the respondent is a term of imprisonment of 10 years." [Paragraphs 22,30]

DIRECTOR OF PUBLIC PROSECUTIONS v MNGOMA 2010 (1) SACR 427 (SCA)

Case heard 23 November 2009, Judgment delivered 1 December 2009

The accused had been convicted of murder by the High Court, and was sentenced to five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. The appellant was granted leave to appeal against the sentence.

Bosielo JA (Mthiyane, Lewis and Malan JJA and Griesel AJA concurring), held:

"The question to be answered ... is whether a sentence of five years' imprisonment ... for the murder of the accused's live-in lover by strangling her is appropriate. Section 276(1)(i) provides for 'imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner . . .'. The State contends that, given the circumstances under which the deceased was killed, the sentence is startlingly inappropriate and induces a sense of shock. On the other hand, the accused contends that the sentence is appropriate and should be left undisturbed." [Paragraph 2]

"... The accused was involved in a love relationship with the deceased, spanning a period of some six years. From this relationship one child was born. On 8 August 2006, whilst on his way home the accused

saw a man emerging from his home. Upon arrival at home, the accused confronted the deceased and asked who had been sleeping on his bed which was untidy. Instead of responding the deceased hid her face. The accused concluded that the deceased was unfaithful to him. Angered by this discovery, he then assaulted the deceased and chased her away from his home. Four days later, the accused and the deceased were walking together ... The deceased was leading the way when all of a sudden the accused, who apparently had been seething with anger at the deceased for cheating on him, threw a stone at her head causing her to fall to the ground. He then strangled her with a lace from his soccer boot until she stopped breathing. He then tied her to a tree and left the scene. He later wrote a note and left it with her to create the impression that she had committed suicide. In his plea explanation, the accused admitted that, when he was choking her, he realised she might die. Notwithstanding this, he continued to strangle her until she stopped breathing. The accused further admitted that he knew that his actions were unlawful." [Paragraphs 3 - 5]

"The main contention advanced on the State's behalf on appeal was that, given the nature of the offence and the circumstances under which the murder was committed, a sentence of five years' imprisonment ... is shocking and startlingly inappropriate. It was submitted that the judge a quo failed to have regard to the gravity of the offence committed by the accused and that the sentence imposed was too lenient in the circumstances. On the other hand, counsel for the accused, relying on the judgment of this court in S v Mvamvu 2005 (1) SACR 54 (SCA) ... contended that his personal circumstances and the peculiar circumstances under which the offence was committed called for the imposition of a sentence which would give recognition to the individualisation of punishment. We were urged to take cognisance of the accused's lack of skills in anger management. On the evidence his anger was 'bottled' up for four days before it exploded into the commission of the murder" [Paragraphs 6 - 7]

"In considering an appropriate sentence, the court below acknowledged the fact that violence is prevalent in our society, particularly violence committed by men against women. It described the accused's conduct as deplorable. However, the court found that a combination of the accused's personal circumstances and in particular the circumstances which led to this tragic event are sufficiently weighty and cogent to qualify as substantial and compelling circumstances justifying a lesser sentence than the prescribed one. However, the State contended that even with the presence of substantial and compelling circumstances the sentence imposed by the trial court on the accused is shockingly inappropriate. The powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. As to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in S v Malgas ...: 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as shocking, startling or disturbingly inappropriate" [Paragraphs 10 -11]

"Viewed against the grim facts of this case, I agree with the State's contention that the sentence imposed on the accused is shocking and startlingly disproportionate to the gravity of the crime that he committed. The sentence imposed on the accused is in my view inappropriate and distorted in favour of the accused without giving sufficient weight to the gravity of the offence and the interests of society. A failure by our courts to impose appropriate sentences, in particular for violent crimes by men against women, will lead

to society losing its confidence in the criminal justice system. This is so because domestic violence has become pervasive and endemic. Having given proper and due consideration to all the circumstances, I am of the view that the aggravating features of this case far outweigh the mitigating circumstances. A sentence of imprisonment for 12 years appears to me to be appropriate. However, the accused has already served some 10 months in prison. He was sentenced on 27 August 2007 and released into correctional supervision by the commissioner ... on 28 June 2008. It is fair and appropriate that this period as well as that served while under correctional supervision be taken into account in considering an appropriate sentence." [Paragraphs 13 - 16]

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

MINISTER OF LABOUR AND EMPLOYMENT AND OTHERS V TS'EUOA [2008] 3 ALL SA 602 (LESCA)

The court *a quo* had found provisions of the Lesotho Labour Code to be unconstitutional.

Gauntlett JA (Steyn P, Grosskopf, Smalberger and Melunsky JJA concurring) held:

"In Lesotho, a two-stream labour law dispensation has evolved. Employees who are not public officers … are regulated by the Labour Code … Their disputes … must progress through the Directorate, Labour Court and Labour Appeal Court. Public Officers – a substantial part of the Lesotho workforce in formal employment – are however in significant respects exempted by the Labour Code Exemption Order … The net effect is that public officers aggrieved by decisions of their employer or tribunals within the public sector may resort to the High Court and thereafter … this Court. … Thus … non-public officers have access to a labour court, as opposed to the High Court, and thence to the Labour Appeal Court, comprising only one judge and two lay assessors. … On legal matters, only the mind of one judge is brought to bear – despite the fact that it has final and exclusive jurisdiction. …" [Paragraph 8]

After contrasting the composition of the High Court and Court of Appeal with the Labour Courts, Gauntlett JA continued:

"Equality in constitutional law, this Court has noted before, is to be tested on a substantive and not a formal basis … Merely because one legal regime differs from another is not to say that it is unequal. Here the substantive enquiry. Here the substantive inquiry is directed at the narrower question: does the different regime … constitute equal protection of the law for those employees who are not public officers? In my view, manifestly and materially not, given the features I have contrasted above." [Paragraph 10]

Gauntlett JA then turned to consider whether there were any grounds of justification, finding that the Minister had not offered any factual justification, but had argued that the legislature intended to expedite and simplify the finalisation of labour disputes:

"It is doubtful whether the evidence of the Minister is admissible as to Parliament's intention … But if it is assumed … that such an intent is to be inferred from the statutory provisions themselves, it is not apparent why that consideration should set private sector employees apart from public sector employees, or for that matter, labour litigants from other classes of litigants. All, surely, wish to achieve access to the best available resources, and as simply, swiftly and cheaply as may reasonably be achieved." [Paragraph 13]

"… [I]t is not apparent … that the regime … meets the broad test for justification: it has not been shown to be reasonably and demonstrably justified in a free and democratic society … There is nothing *ex facie* section 38 and section 38A which indicates that, and the Minister's affidavit is wholly silent as regards proportionality and the less invasive means available to attain such an end." [Paragraph 14]

Gauntlett JA then turned to address the question of whether Parliament had the power to create the Labour Appeal Court through the relevant statute:

"It is apparent … that the term "courts" [in the Constitution] … is used in two senses. In the first place, it is used as a generic term for all five adjudicative categories listed in section 118(1)(a)-(d): collectively these constitute "the courts of Lesotho" … "courts" is however simultaneously used in a narrower sense, to denote those bodies which include this Court, the High Court and subordinate courts, in contradistinction to courts-martial and tribunals. …" [Paragraph 22]

"… To have been validly constituted by Parliament … [the Labour Appeal Court] must thus be capable of being categorised as either a "court subordinate to the High Court" or a "tribunal". …" [Paragraph 23]

"Is the Labour Appeal Court "subordinate" to the High Court? In the ordinary meaning of the phrase, one court is subordinate to another if it occupies an inferior position in a hierarchy of courts – more particularly … that its decisions are in principle subject to appeal to that other court, and that it is in turn bound by the decision of that other court. … [T]he Labour Appeal Court is not subordinate in either respect. …" [Paragraph 24]

"What however of the possible power of review which the High Court may have over the Labour Appeal Court? Suffice it to say … because a functionary or public body or tribunal may be subject to judicial review does not make it "subordinate" in the usual sense. …" [Paragraph 25]

"Parliament, then, only had the power to create the Labour Appeal Court if it is a tribunal … I have already set out the composition and essential functioning of the Labour Appeal Court … It is a court in the widest sense … not the narrow sense … It is, in my view, a tribunal discharging a judicial function … It follows that Parliament did have the power to establish it …" [Paragraphs 26 – 27]

Gauntlett JA then considered whether the court *a quo* had been correct to grant a declaration allowing private sector employees an unrestricted right of appeal to the Court of Appeal:

"… In my view, it erred in this regard … [T]he respondent has succeeded on the basis of his claim to the equal protection of the law. Public sector employees do not have an unrestricted right of appeal in all matters from the High Court to this Court. … [I]t is not immediately apparent that this Court itself has the power to create a right of appeal to itself. … How exactly the problem we have identified should be remedied is, it seems to me, properly a matter to be left in the first instance to Parliament. …" [Paragraphs 30 - 31]

The appeal was dismissed and the order of the court *a quo* amended.

KHATHANG-TEMA-BAITŠŌKŌLI AND ANOTHER V MASERU CITY COUNCIL AND OTHERS, LAC (2005 – 2006), LESOTHO COURT OF APPEAL, CIVIL APPEAL NO. 4 OF 2005.

Appellants, a registered association of traders and an individual member of the association, brought a constitutional challenge to the removal of traders from the main thoroughfare in Maseru to a market, which respondents claimed was situated 200 metres away. The challenge was based on the right to life, the traders claiming that they were no longer able to sell due to being out of reach of the public. As a result of the resultant loss of income, they claimed to be unable to purchase clothing and food for their dependants.

Gauntlett JA (Grosskopf and Smalberger JJA concurring) held:

"The traders appear in the main to be people whom economic need has drawn from rural areas to the capital, seeking to eke out an existence through informal trading. The phenomenon is familiar in many societies, particularly in Africa, and the plight of those concerned (like that of others who struggle as farmers or workers) is apparent." [Paragraph 7]

"The affidavits however do not … establish a threat to actual survival arising from the relocation of the stalls, imminent or gradual, as the appellants assert. … [T]he case for the appellants instead rests most centrally on the proposition that the traders' rights to a livelihood were imperilled, and that the right to life under Lesotho's Constitution encompasses these rights. … [T]he essential question is whether the right to life in Lesotho encompasses the right to a livelihood. If that proposition fails, so does the claim made by the traders. …" [Paragraphs 8 – 9]

"The attack on the actions of the respondents in obliging the applicants to trade at the new market accordingly must assume the constitutional validity of the statutory powers invoked [the validity of the provisions not having been challenged – see paragraph 11]. The argument then must be understood to be that, while these powers authorize the respondents to effect the relocation of traders … the exercise of these powers in the present case infringes the Constitution. This, I reiterate, is on the sole basis that the right to life subsumes the right to a livelihood and that he latter is infringed by the compulsory move to the new market." [Paragraph 12]

"It is well-established now as a principle of constitutional interpretation that a fundamental right entrenched in this way in a justiciable Bill of Rights should be given a generous interpretation … [citation to *S v Zuma* 1995 for the proposition that a constitution remains a legal document, the language of which must be respected] Apart from the words used, their context too will be of great importance in determining the ambit of the provision. … In interpreting a particular constitutional provision … while similar exercises in other jurisdictions will frequently be of value and sometimes of importance, reference to them must be undertaken with care. …" [Paragraph 14]

"The … provisions of s. 5 [the right to life] to my mind make it clear that the protection accorded by the right relates to life in the ordinary sense of human existence … The limitations … specified in s. 5(2) are hardly consistent with an interpretation of the right to life as encompassing the right to a livelihood. These limitations are both exclusive and specific, and nowhere authorise curtailment in any circumstances, however pressing, of a right to livelihood. Thus if the right to life includes that right to a livelihood, the appellants' argument would have the effect of recognising an absolute right to livelihood in Lesotho. … This, moreover, in a context where the core right – the entitlement to exist as a human being – is itself derogable. The proposition is clearly not tenable. …" [Paragraphs 16 -17]

"The wider context too is further destructive of the argument. The position is not that there is no provision elsewhere in the Constitution … relating to the right to livelihood. … Lesotho has dealt with what are generally described as socio-economic rights … in a way which is distinct from the treatment of fundamental rights … In Lesotho's case this is to provide separately for a chapter in the Constitution … entitled "Principles of State Policy". … The inspirational language is significant. That is not to say that the provisions … may not in appropriate circumstances and in appropriate ways find implementation … But that is not a matter that falls to be determined in this case. It is, however, to say that the opportunity to gain a living by work – in other words, to secure a livelihood – is expressly dealt with outside the ambit of s. 5 …" [Paragraphs 18 – 19]

"The argument for the appellant means that the securing of a livelihood is dealt with twice under the Constitution: once implicitly as part of the right to life … and again under chapter III with none of those features. The contradiction is evident. Such a construction (entailing tautology, inconsistency and anomaly) is inimical to any sound approach to construction.

These difficulties in my view are fatal to the argument. …" [Paragraphs 20 – 21]

Gauntlett JA then distinguished the Indian Supreme Court's decision in *Tellis v Bombay Municipal Corporation*, and the Supreme Court of Bangladesh in *Bangladesh Society for the Enforcement of Human Rights v Government of Bangladesh*, holding regarding the latter that:

"The factual premise for the present challenge is hardly comparable. The constitutional provisions differ materially. The extract available to is indicates that the court followed *Tellis* … It does not appear to have considered the further matters which constrain me respectfully to come to a different conclusion in relation to the claim made in this case." [Paragraph 27]

The appeal was dismissed.

GENDER

TŠĒPĒ V INDEPENDENT ELECTORAL COMMISSION AND OTHERS LAC (2005 - 2006), CIVIL APPEAL NO. 11 OF 2005 [LESOTHO COURT OF APPEAL]

This case was a constitutional challenge to legislative provisions relating to the conduct of local government elections in Lesotho. Appellant's candidacy was not registered as the electoral division for which he wished to stand had been reserved for women candidates only. Respondents conceded that the legislative measures in question discriminated against men, but argued that this was justified. The court a quo rejected the challenge.

Gauntlett JA (Steyn P, Grosskopf, Melunsky and Smalberger JJA concurring) held:

"[Appellant's] departure point … [is] that "while there is nothing wrong in increasing the participation of women in public bodies / affairs" … "this should not be done to his detriment and in a discriminatory manner"." [Paragraph 13]

"This evokes an approach to equality provisions which subordinates substantive to formal equality. It is inimical to any form of handicap (positive or negative) and to quotas. If s 18(3) of the Constitution [defining "discriminatory" for the general provision prohibiting discrimination] stood alone, it would be a valid point of departure … But the Constitution … does not prohibit outright measures which confer advantage on some over others. In the careful language of s 18(4)(e), the inquiry in relation to any such preference is whether "having regard to its nature and to special circumstances pertaining to those persons or to persons of any such description, [it] is reasonably justifiable in a democratic society"." [Paragraph 14]

"It is well-established that in general principle, provisions in a Bill of Rights are to be purposively and generously interpreted … But, contends the appellant, Lesotho's international treaty obligations suggest a different answer … The true position appears in fact to be that where there is uncertainty as regards the terms of domestic legislation, a treaty becomes relevant, because there is a prima facie presumption that the legislature does not intend to act in breach of international law, including treating obligations.

[Citation to English and South African case law] … There is no uncertainty … that the Constitution authorises (on the conditions laid down by it) the advantaging of some over others. … " [Paragraphs 15 - 16]

"In any event, Lesotho's treaty commitments do not support the appellant. … " [Paragraph 17]

"Measures must … be taken under the ICCPR to ensure the attainment of restitutionary equality, which are temporary and aimed at eliminating inequality in a specified segment of society." [Paragraph 18]

"CEDAW is the definitive international legal instrument requiring respect for and observance of the human rights of women. … In order to achieve this obligation [to guarantee women the exercise and enjoyment of human rights and freedoms on a basis of equality with men, in terms of Article 3], article 4 provides for a limited form of positive discrimination or affirmative action. … It thus allows State Parties the right to adopt "temporary special measures" aimed at accelerating de facto equality between men and women. While positive discrimination is thus allowed, the Convention is very clear that this does not sanction the maintenance of unequal and separate treatment; once equality of opportunity and treatment has been achieved the measures adopted must be discontinued…." [Paragraph 19]

Gauntlett JA further considered provisions of the African Charter on Human and People's Rights, and a SADC Declaration on Gender and Development, before continuing:

"It is accordingly evident that if regard is had to Lesotho's international law obligations, these, if anything … require equality which is substantive, not merely formal, and restitutionary in its reach." [Paragraph 22]

Gauntlett JA then considered the appellant's argument that there were less intrusive measures available:

"… [A]n inquiry into what is reasonably justified is not resolved by presenting a possibly preferable model. A legislative measure is not unconstitutional because arguably, either as a matter of conception in policy or execution in drafting, a better one might conceivably be devised." [Paragraph 37]

"This leads to … the contention that the court a quo was unduly deferential in accepting the justification proffered by the respondents. The constitutional function f courts prevents them from being deferential to the Legislature or Executive, in the general sense of that word, with "its overtones of servility, or perhaps gracious concession" … But the proper balance to be struck was recently expressed by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* …" Paragraph 38]

"The court *a quo* adopted just such an approach. It did not act on any bland assertion of constitutional compliance by executive or legislative agencies. It subjected the justification … to appropriate scrutiny. The fact that it found it persuasive in the result is not a reason to characterise the process as unduly deferential." [Paragraph 39]

"In my view, accordingly, the court *a quo's* reasoning was sound. … The impugned measures were … "*carefully designed to achieve the objective in question*". They were equally not "*arbitrary, unfair or based on irrational considerations*". They were indeed "*rationally connected to the objective*". And as regards the means, the court *a quo* correctly considered that those employed to advance greater electoral representation of women indeed impaired "*as little as possible*" the rights in question. …" [Paragraph 40]

The appeal was thus dismissed.

CRIMINAL JUSTICE

MONYAU V R [2005] 3 ALL SA 90 (LESCA)

Appellant had been convicted of sedition and conspiracy to commit murder, and sentenced to fifteen and five years' imprisonment respectively, the sentences to run concurrently. The appellant had been acquitted on a charge of high treason.

Gauntlett JA (Steyn P and Smalberger JA concurring) rejected an argument that the proven facts did not support the conviction for sedition, and turned to consider arguments regarding the *actus reus* for sedition:

"Professor Milton argues that the principal Roman-Dutch common-law authorities do not … support the conclusion in *S v Twala* … that two persons can constitute the requisite concourse or gathering of persons. … Nor do the earlier leading decisions … appear to do so. But this point does not require determination in the present case because of the plethora of meetings at which a significant number of persons were present …" [Paragraph 12]

"This leaves the inquiry whether those meetings had the requisite features of an unlawful gathering for the purposes of sedition …" [Paragraph 13]

Gauntlett JA then dealt with the argument that a gathering had to have attributes of unruliness or restiveness, having regard to seditions' roots in public violence at common law:

"… [T]he old writers in fact dealt with what they knew as *oproer*, meaning tumult or public disturbance. A requirement of violence in some manifestation is to be seen in that context. Sedition in the modern law of Lesotho is an offence distinct from either high treason or public violence. … It has its own requirements … which may in part be derived from and overlap with the two parent offences but are not for that reason to be equated with the requirements of either." [Paragraph 15]

"The reliance by counsel for the appellant on an attribute of violence as a requirement for sedition … overlooks the nature of present-day society in general and the functioning today of the State. A modern State may be subverted … by stratagems which involve no violence. Hacking into computer systems or interference with telecommunications are just two examples …" [Paragraph 17]

"It may in future be necessary for this court to reconsider the definition of sedition … This is because the common law must comply with the Constitution … Among the fundamental rights entrenched in Lesotho's Bill of Rights … are the rights to freedom of peaceful assembly, association, equal protection of the law, conscience and expression. Provisions that trench upon these rights have to be justified …So assessed, the common law *actus reus* for sedition as it applies in Lesotho since the adoption of the Constitution must be approached with care. … It seems to me that a concern is righty raised regarding the almost feudal sweep of the common-law offence, in constitutional democracies … The concern may have to be addressed in a way which holds in balance the existence of sedition as a separate modern-day offence with its compliance with the Constitution and the fundamental rights the latter entrenches. …" [Paragraphs 19 – 20]

"A definition of the offence in these of similar terms would permit gatherings taking place which may indeed challenge government but which will be legitimate forms of expression so long as they do not seek to subvert or defy the State (or, of course, are otherwise in conflict with the law)." [Paragraph 21]

"This issues was, however, not raised before us by either the appellant or the State. …" [Paragraph 22]

Gauntlett JA then turned to the conviction for conspiracy to commit murder:

"… This in my view is based on substantially the same set of facts as those alleged … in relation to sedition … Charges cannot be split or convictions duplicated where conduct could properly have been encompassed by one offence, to the prejudice of the accused … The conviction on count two accordingly cannot stand." [Paragraph 27]

Gauntlett JA found that the court *a quo* had misdirected itself on sentence, and imposed a sentence of ten years' imprisonment:

"The sentence … needs also to make it clear that sedition in Lesotho with actual and potential consequences such as these here present will be treated with severity. … [T]he fact that Lesotho is a constitutional democracy may mean that the common-law offence of sedition cannot be used as a blunt instrument against socio-political challenges to government. But that same fact has as a consequence that those who do commit sedition strike at the very basis of that legal order …" [Paragraph 34]

ADMINISTRATION OF JUSTICE

SOLE V CULLINAN AND OTHERS [2004] 1 LRC. COURT OF APPEAL, LESOTHO

Appellant had been convicted of fraud and bribery following a trial before the first respondent, an acting judge who was the retired Chief Justice of Lesotho. An appeal was unsuccessful. Appellant subsequently brought a "notice of constitutional motion" in the High Court, arguing that the first respondent was disqualified from presiding over the trial.

Gauntlett JA (Grosskopf, Plewman, Smalberger and Melunsky JJA concurring) dealt first with argument regarding a postponement application and subsequent costs order when the motion had been argued in the High Court:

"This court has repeatedly warned that gross breaches of the rules and of this court's circulars issuing further procedural directions may, in appropriate circumstances, give rise to a costs order de bonis propris. … The multiple failures by the appellant's attorney were, for the reasons given by the court a quo, reprehensible. The court a quo had a discretion regarding costs, and it has not been shown that it exercised it in a way which would warrant our intervention. In my view the appeal against the costs order relating to the application for postponement is without merit, and should be dismissed." [Paragraph 13]

Gauntlett JA then dealt with the issue of an unsuccessful application for recusal brought against two members of the court *a quo*, which had been moved only after the postponement application had failed, and after the main application had been argued.

"When an adjudicator should be recused, 'it means that the trial … should never have taken place at all. What occurred was a nullity. …' …. Nullity in criminal justice has serious consequences. – for those involved, and for the administration of justice itself. … [S]ince the objection is, in its effect, to jurisdiction, in principle it should be raised in initio litis. … The conscious decision by the appellant … not to object to the composition of the court a quo … when the court commenced proceedings, prior to the application

for a postponement being moved, and against when that application had been dismissed and the court indicated that it wished to hear argument on the principal application – in my view supports the objection … to the late making of the application for the recusal …" [Paragraph 19]

Gauntlett JA then found that, on the facts, the application was devoid of merit. After adopting the test for recusal developed by the Constitutional Court in *President of the RSA v SARFU*, Gauntlett JA held:

"… The first ground … is the contention that two members of the court a quo exhibited, in what they said during the hearing …, 'no semblance of detachment and were totally biased …' This attack relates primarily to what are described as 'stinging' observations … in the aftermath of the postponement application … But this account is, in material respects, refuted in the detailed answering affidavit filed on behalf of the respondents. … " [Paragraphs 23 – 24]

"It was also contended that the Chief Justice fell to be recused because he had, in a related criminal trial … relied on decisions and rulings by the same judge … to whose position the principal application related. The objection is in my view untenable: it could as well be applied to any court of appeal which, at times, has upheld judgments of a particular puisne judge. …" [Paragraph 25]

"A third basis … involved the contention that Ramodibedi J, having been appointed on a permanent basis as a member of the Court of Appeal, was prevented from sitting as a judge of the High Court. … There is no room for the 'perception' raised by the appellant, if the Constitution … itself provides in the clearest terms for that very state of affairs. That it does so is doubtless for the reasons suggested by Guni J in her judgment: the fact that Lesotho is a poor country, drawing on a small pool of skilled lawyers. …" [Paragraphs 26, 28]

Gauntlett JA then considered remarks made by the judges *a quo* in dismissing the application for recusal of two of its members:

"… [T]he court's remarks came at the end of a protracted process in which the conduct of the appellant as well as his attorney had been extremely provocative. Certainly this conduct fosters the impression of resort to procedural ploys. In the circumstances, the court's rhetorical excess would not in my judgment give rise to 'reasonable grounds on the part of the litigant for apprehending that the judicial officer for whatever reasons, was not or [would] not be impartial' …" [Paragraph 32]

Gauntlett JA then dealt with the main application, seeking to declare the first respondent's appointment as an acting judge a nullity:

"The complaints by the appellant … were essentially that the first respondent was appointed specifically to try a particular case, and not generally; that he was appointed while he held the office of Judge Advocate; and that the constitutional requirement that the Chief Justice advise the King … was not satisfied." [Paragraph 41]

"The undisputed evidence … is that the Chief Justice formed the opinion that 'a judge of stature from outside the country should be appointed to preside solely in this matter'. It is clear that this opinion was prompted by the anticipated scale, duration and complexity of the trial … There is, in my view, clearly no limitation in s 120 (5) on the appointment of a suitably qualified person to act as a judge only for the purposes of particular litigation. …" [Paragraph 42]

Gauntlett JA rejected the challenges relating to the office of Judge Advocate and advising the King, and continued:

"A further major area of attack … [was] that Cullinan Ag J received remuneration which was specially agreed. …" [Paragraph 47]

"… On the 'double-reasonableness' test … the relevant perception … is a perception based on a balanced view of all material information. The inquiry relates to how a well-informed, thoughtful and objective observer rather than a hyper-sensitive, cynical and suspicious person would view the facts. … [T]he position of acting judges is not narrowly to be compared with that of permanent appointments. … [A]cting judges retain in most instances certain professional ties, they expect to return to other lives, and they enjoy no tenure. …" [Paragraph 48]

"In the present case, the reasonable and informed observer … would know that Cullinan Ag J had had a distinguished judicial career … and that he had… during his own ten years as Chief Justice struck down legislation of the military government as being unconstitutional. The observer would know from the facts to which I have referred that in no sense had he been handpicked for the task, but that three other senior retired judges had also been approached. The observer would know, too, that the trial was likely – as indeed transpired – to impose great burdens on a presiding officer …" [Paragraph 49]

"… [E]ven if it were to be assumed, for the purposes of the argument, that the agreed emoluments were at variance with a statutory requirement, this fact would not – to the reasonable observer, viewing the matter without undue suspicion, in the way the authorities require – give rise to a perception of a lack of impartiality, in the full factual setting…" [Paragraph 51]

The appeal was dismissed.

SELECTED ARTICLES

'"A COCKTAIL OF IGNORANCE AND MALICE', The Sunday Independent 25 November 2012, available at http://www.iol.co.za/sundayindependent/a-cocktail-of-ignorance-and-malice-1.1430084

This article was a response to article by Professor Ziyad Motala, written in the aftermath of Advocate Gauntlett's non-appointment to the Cape High Court.

"[Motala] says selecting judges is "a deep intersection (how is an intersection ever "deep"?) between law and politics". Section 174 of the constitution (which regulates choosing judges) says nothing of the kind. Its primary stipulation is that a judge be appropriately qualified and fit for that office. No "intersecting" of "law" and "politics" there."

"Its secondary requirement is the need for the judiciary to reflect "broadly" (my emphasis) race and gender in South Africa. Not representivity measured by quota, national or provincial. Or does Motala think the Judicial Service Commission went wrong when it recently chose two Indian males as judge president and deputy judge president of KwaZulu-Natal? Did one have to be African? Were their undoubted qualifications for those two high offices trumped by the notion that their appointment would somehow fail "to reflect broadly" race and gender? From his silence on that particular topic, seemingly not in his view. Rightly so. "

"If there be any doubt about what section 174 requires, then simple reference to section 165(2) confirms that judges the JSC selects have to be "independent… [applying the law] impartially and without fear, favour or prejudice".

"Second, for Motala "our democracy has created a mechanism… the JSC". No it has not. The constitution has done so. The JSC does not operate by virtue of democracy alone, but of constitutional democracy. That is what the rule of law is all about: all power is now under the law. Head-counting is not enough. Fidelity to the constitution is what matters. Sometimes the outcome will be majoritarian, sometimes not. The death penalty was undoubtedly popularly supported. Parliamentarians by majority supported the continuation in office of Chief Justice Sandile Ngcobo, by presidential extension of his term. Both were unconstitutional."

"… Motala does not specify what my "conservatism" might entail. He does not explain what it is in my 35 years of representing ANC, Swapo and PAC insurgents, UDF detainees and other activists, the End Conscription Campaign, MDC and other human rights activists across the region, that justifies this. Nor my role for a decade on the Law Reform Commission, leading or supporting programmes ranging from combating domestic and child violence to facilitating Islamic choice-of-law and enabling a properly determined personal right for each of us to choose when to die. Nor does he so much as refer to the judgments I have delivered over a period of 14 years as a judge of appeal of Lesotho. If he has occasion to visit a law library he will find them. These uphold the electoral promotion of women, the exclusion of lawyers from labour inquiries (to promote the equality of arms for ordinary people), address the consequences of a coup d'état, a mutiny and an invasion, and engage with the difference between right to life and the right to a livelihood in comparative constitutional law. They are not by any stripe "conservative"."

"…[H]e absurdly says I have "praised the rule of law under apartheid". I have done no such thing. I have publicly written and spoken about the assault on the rule of law since my student days.

I co-authored the three-volume General Council of the Bar submission to the Truth and Reconciliation Commission. It detailed Bar failures, but also documented brave stands. One would have expected any lawyer in this country to have read it. If he had done so, he would not have been able to say that I "ignore[d] the legal profession's complicity in supporting apartheid" – where that existed. I was and am unrepentant about celebrating the principled commitments to law of James Rose Innes, Oliver Schreiner, Duma Nokwe, Oliver Tambo, Nelson Mandela, Victoria Mxenge, Godfrey Pitje, Sydney Kentridge, Arthur Chaskalson, John Didcott and many others. The truth is that there were lackeys as lawyers under apartheid and there are lackeys now. …"

'THE SOUNDS OF SILENCE', TSAR 2011 2 PAGES 226 - 233

Originally delivered as a plenary address at the Conference of the Society of Law Teachers of Southern Africa.

"… [W]hat I want to talk about today is a common malaise: a lack of critical faculty not merely in the faculty, but across the face of legal life in South Africa. My thesis is that, for all lawyers, there are disturbing developments about which we are insufficiently articulate and active. I have often thought that the trouble with political revolution … is that it gives rise to the same illusions as university graduation. There is the sense of attainment and finality, of a status achieved and no more to be learnt or done. I believe the converse is true. It is just a beginning. That is true of the commencement of constitutionalism in 1994…." (Page 226)

"… [I]t is time to end an approach which is insufficiently rigorous in its scrutiny of the judgments of courts, and how they function. I do not mean … that there should be anything less than professional respect for judges, and least of all that there should be the kind of attacks on courts, chiefly by political figures, which from time to time have been manifested. But … what probing critique has there been in the last five years of the work of the constitutional court? … Do you have nothing to say when the constitutional court, in the New Clicks case, produced 446 pages of judgments … Why have you not criticised the refusal by Sachs J in the Sidumo case to join Ngcobo J and others in determining whether the right in issue was a labour right or an administrative justice right, he urging a 'move away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability'? Do you share my inability to understand language like that, and the concern that it is inexact because the reasoning is not rigorous? … [A]s Lord Bingham has recently written …one of the first requisites for the rule of law is clarity in the law. The consequence, we have seen too often in recent years, has been decisions in which one battles to find a ratio, when there is a self-indulgent multiplicity of voices, and when, as Nugent JA stated in Makambi v MEC for Education, Eastern Cape, various constitutional court decisions on the same issue require the courts to go 'in diametrically opposed directions'." (Page 227)

The article then discusses disparities in funding between the Constitutional Court and the Supreme Court of Appeal and the High Courts, before dealing with judicial appointments:

"Another continuing concern is how we choose our judges. It is probably unnecessary for me in this regard to disclose the interest I have: that in the past my own nominations … have … been rejected. I do not speak with rancour … but equally I cannot avoid speaking. … I would hope that all of us are committed to the fundamental transformation of our legal system. By that I mean the betterment of the

system, in all its attributes, so that it is both closely congruent with and an effective vehicle for the new constitutional dispensation … I am not a believer that addressing the makeup of the bench could await the slow evolution of passing years. But that does not prevent us from asking questions … fully six of the eleven members of the constitutional court had no judicial experience before joining the court, with the remaining five averaging four year's judicial experience each. Can it be said that certain of last year's appointments reflect a continuing disregard for discernible judicial excellence? ..." (Page 228)

"… [I]t seems set that the constitutional court is to become the apex court … for all matters. I have never understood how eleven judges, sitting en banc, could perform this task physically. … And if they cease to sit en banc, one faces the prospect of inconsistent precedents, already a serious concern in the supreme court of appeal in recent years as its numbers have grown. Nor do I understand the rationale. A very deliberate policy choice was made in 1993 not to have complete integration of the courts, placing the constitutional court at the top but exclusively concerned with constitutional law. Some of us at the time believed … that this was a wrong turn … But the turn was taken in the road, and consequences follow. These include selection of judges over the past seventeen years on the basis that they would only adjudicate constitutional matters, and therefore their lack of involvement in prior professional life in wide areas of private law until now mattered less than it otherwise might. Now all must change for the highest court …"(Pages 228 - 229)

The article then discussed the suspension of the SADC tribunal, briefly mentioned the Legal Practice Bill, before concluding with remarks on legal education:

"… I do believe, strongly, that the predicament of those who train young legal practitioners as regards their educational deficiencies is not to be addressed by expecting universities to remedy basic educational deficiencies. The deficiencies … which haunt and cripple young practitioners, are the responsibility not of tertiary institutions but of basic education … The function of universities is the introduction of the intellectually qualified in the rigours of rational discourse. It is not to remedy the deficiencies of primary and then secondary education. It is also the duty of the organised legal profession, not universities, to teach professional skills and the adjectival law relevant to these." (Page 232)

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

ZAIR V MINISTER OF HOME AFFAIRS AND ANOTHER; MATIWOS V MINISTER OF HOME AFFAIRS AND ANOTHER 2012 (3) SA 90 (ECP)

Case heard 12 March 2010, Judgment delivered 27 October 2010

The applicants were seeking their release from detention. They were detained pending their deportation to their countries of origin.

Madlanga AJ held:

"[The applicants] allege that their arrest and detention are unlawful. It is trite that the onus of proving the lawfulness of an arrest and detention is on the arresting authority." [Page 90]

"…[T]he first respondent then seems to justify the arrest and detention on the basis that once the applications had been refused deportation followed as a matter of course, and it was on that basis that the arrests were then effected. The affidavits do not seem to deal with what I consider to be a crucial question in a matter where there is the deprivation of the liberty of an individual, which is this: does it or must it always follow as a matter of course that somebody who has been refused asylum must be arrested and detained prior to deportation?"

"… [T]he respondent seems to take a stance that an arrest and detention must, just must, follow as a matter of course once an application for asylum has been refused. Surely, that cannot be. There must still be a proper exercise of discretion on the question whether or not one should be arrested and detained prior to deportation." [Page 91]

"The law … plainly seems to admit of the possibility of a person who has been refused asylum not being arrested prior to deportation. In this regard I refer to regulation 26(4) of the Regulations issued in terms of the Immigration Act ... It is quite plain, or at least according to my reading, that the person here would then depart of their own and not be deported, and they would not be in detention pending such "voluntary" departure.

One understands the difficulties that the State would encounter if illegal foreigners were to disappear upon refusal of their applications. … [B]ut the point of the matter is this, somebody has been arrested and detained. The arresting authority must justify the lawfulness of that arrest by demonstrating by means of acceptable evidence that there was a proper exercise of discretion, and I take the view that that has not been done on these facts.

Therefore I reach the conclusion that each of the two applicants is entitled to release, but that is release pending the finalisation of each of the two applications. … Realising the difficulties that government faces, and that government refers to in paragraph 13 of the affidavit, as also the fact that this is interim relief that is being granted without the full facts having been ventilated, it seems proper that certain conditions should be set, and I have as a result set certain conditions, one of those being that the applicants should only be released upon payment of bail." [Pages 92 - 93]

The application was postponed sine die, and it was ordered that the applicants be released on bail of R3000, subject to several conditions

PREMIER, EASTERN CAPE, AND OTHERS v CEKESHE AND OTHERS 1999 (3) SA 56 (TK)

Case heard 3 April 1998, Judgement delivered 23 September 1998

This was an appeal against decision setting aside a proclamation issued by first appellant, and setting aside the termination of the respondents' employment. It was argued that the court *a quo* had erred in considering the passing of the proclamation to be administrative action, and in holding that the proclamation was an administrative act which had to comply with s33 of the Interim Constitution. It was also argued that as original legislation, the proclamation was not subject to judicial review.

Locke J wrote a judgement, and Madlanga J a separate concurring judgement. Somyalo JP concurred with both, but found "more consonance" with the reasoning of Madlanga J.

Madlanga J found that the classification of administrative acts as "quasi judicial" and "purely administrative" had been "dealt a final blow" in the decision of *Administrator, Transvaal and others v Traub*, and held:

"In my view, Botha JA's reliance, in the *Modimola* case, on the classification formed an integral part of the reasoning that led him to the conclusion that the*audi alteram partem* rule was not applicable. Therefore, the change in the law must of necessity affect the binding nature of his pronouncement." [Page 99]

"Therefore, even besides the dictum which … has been overtaken by recent developments … the conclusion reached by Botha JA was, on the facts of the case before him, clearly wrong. Indeed, the correctness of the judgment on the facts seems to be doubted by Milne JA in the South African Roads Board case... Botha JA's approach has been strongly criticised by academic writers …" [Page 102]

"I do not find myself facing any difficulties in not following Botha JA's judgment insofar as it relates to the applicability of the *audi alteram partem* rule in them quasi judicial/purely administrative act dichotomy. The difficulty that faces me squarely relates to the pronouncement by Botha JA that where an administrative action was taken in the interest of a community as a whole, the *audi alteram partem* rule does not find application even if such administrative action adversely impacts on the rights of an individual. This difficulty lies in the fact that this pronouncement emanates from the then Appellate Division and I am sitting in a High Court. The question thus may arise as to why I have gone into this rather long discourse on the issue if Botha JA's pronouncement is in any event binding on me. This difficulty is exacerbated by the apparent acceptance of Botha JA's formulation by Milne JA in the South African Roads Board case ..." [Page 102]

"On a close reading of Milne JA's judgment it is clear that the learned judge's acceptance of this formulation is not unqualified. The judgment unequivocally makes the point that even where the administrative action involves prejudice to a whole community and the public authority is acting in accordance with what he believes to be best for such community, if the administrative action impacts on an individual or a group of individuals within that community in a manner not experienced by other members of the community as a whole the *audi alteram partem* rule may find application ... Milne JA did

not accept Botha JA's formulation in cases of the nature of *Pretoria City Council v Modimola* as somebody in the position of Modimola, when his property is being expropriated, could not appropriately be said not to be at the receiving end of "a particular impact not experienced by members of the community as a whole" ... The point I am making here is that the authority which I say presents me with a difficulty is indeed questionable." [Page 102]

"In my view the Constitution has had a positive impact on the essential content of the common law right to a hearing… Surely, the right to property as entrenched in section 25 must have a bearing on the exercise of administrative functions by government functionaries in a context where the property rights of an individual are likely to be adversely affected. In my view, this section calls for more careful consideration of all relevant factors before the relevant administrative functionary takes a decision adversely affecting the property rights of an individual as a failure to do so may result, not only in a violation of the *audi alteram partem* rule, but also in the violation of the right entrenched in section 25. In the circumstances, there can no longer be a place in our law for an administrative law rule that does not only overemphasise the interests of the community at large but also virtually disregards proprietary prejudice experienced by an individual and not by the rest of the members of his/her community. ... In sum, the Modimola formulation, insofar as it purports to apply even to a situation where an individual can demonstrate prejudice experienced by him/herself only and not by other members of the community, is at variance with the present stage of the development of our law and does not accord with the spirit of the Bill of Fundamental Rights enshrined in our Constitution. Therefore, although I would ordinarily be bound by the decision in Modimola, I am entitled … not to follow Botha JA's judgment. His judgment pre-dates the Constitution and thus did not consider the possible impact of a Bill of Rights on the right to be heard where there is certain prejudice to one's right to property. In instances where something must turn on the content of the Bill of Rights, I am thus bound more by the Constitution than by pre-Constitution Appellate Division judgments which obviously did not take into account the "democratic values of human dignity, equality and freedom" that underlie our Constitution (see section 7(1) of the Constitution)." [Page 103-104]

"That is the extent of the importance and omnipotence of our Bill of Fundamental Rights. The Bill of Rights is always lurking in the background and, for our Constitution to be the panacea of the ills of the past and the meaningful and living document that it should be, practitioners and those involved in legal adjudication in one form or another (insofar as they have jurisdiction to do so) are enjoined to bring it to the foreground. The Bill of Rights is so pervasive that it permeates virtually every facet of our lives and gives added content and substance to legal rights ... In so saying, I am not suggesting that practitioners and courts should be busybodies bent on invalidating any and every form of government action in the name of the Bill of Rights. What I am saying is that practitioners and courts should forever be alive to the potency of the Bill of Rights and, wherever applicable, invoke it and come to the rescue of an individual who is at the receiving end of unconstitutional government action. This approach, however, should be undertaken guardedly lest, in invalidating law (including pre–27 April 1997 Appellate Division precedent) in the quest for upholding the Bill of Rights, the courts throw the baby out with the bath water. Such cautious approach finds support in the provisions of section 39(3) of the Constitution. This section seems to suggest that one should proceed from the premise that rights which derive their existence from common law (whether as enunciated by courts or not) are valid." [Page 104]

Madlanga J then considered the applicability of the *audi alteram partem* rule to the case, and discussed the meaning of administrative action in s33:

"What I want to concern myself more with is the suggestion that the choice of "administrative" in section 33 read with item 23 of Schedule 6 means that one cannot rely on the *audi alteram partem* rule if the act in issue is legislative or, for that matter, amorphous in nature." [Page 106]

"In my view, it would be a retrograde step in the development of our administrative law to insist … that before reliance can be placed on section 33 of the Constitution there must be a finding that the action in issue … is an administrative action. ... Surely, once the framers of our Constitution saw it fit to entrench procedural fairness in the context of administrative law … they must have intended not to bring about inequitable results. In my view, it would be inequitable and at variance with the spirit of the Constitution to say, even though administrative law has, in accordance with the *South African Roads Board v Johannesburg City Council* case, come to insist on procedural fairness even in respect of legislative (subordinate) action falling under category (b) of Milne JA's formulation, that section 33 does not likewise require such procedural fairness in respect of legislative acts. In my view, such an approach would be absurd in the extreme." [Page 107]

"Moving away from labels commends itself because that way courts would concern themselves more with whether or not the circumstances of a given case, and not the form in which the act in issue in the case has presented itself, warrants compliance with fair procedures as envisaged in section 33. … The insistence on labels would require a clear definition and demarcation of the two types of acts. Such an exercise has been attempted before… and not much joy was found. Why would the Constitution require courts to go back to such a venture as that, in my view, would in all probability be an exercise in futility?" [Page 108]

The appeal was dismissed.

CRIMINAL JUSTICE

S v STEYN 2001 (1) SA 1146 (CC)

Case heard 22 August 2000, Judgement delivered 29 November 2000

The applicant and an amicus *curiae* were convicted of serious offences and sentenced to substantial terms of imprisonment in separate proceedings in the Regional Court sitting in Pretoria. They challenged the constitutionality of sections 309B and 309C of the Criminal Procedure Act (the Act), on the grounds of inconsistency with section 35(3)(o) of the Constitution ("[e]very accused person has a right to a fair trial, which includes the right ... of appeal to, or review by, a higher court"). The impugned provisions required that an appellant first seek leave to appeal before lodging and appeal against conviction or sentence in a Magistrate's Court. Previously, there had been an unconditional right of appeal on the full trial record with full oral argument.

Madlanga AJ (for a unanimous court – Chaskalson P, Langa DP, Ackermann, Goldstone, Kriegler, Mokgoro, Ngcobo, O'Regan, Sachs and Yacoob JJ concurring) discussed the nature of the leave to appeal procedure in the magistrates' courts:

"After the refusal of leave to appeal by a magistrate, all that the clerk of a Magistrate's Court is required to submit to the High Court for consideration, along with the petition, are copies of the refused application for leave and the magistrate's reasons ... This is a bare minimum of information that is to be

placed before the judges who consider the petition. Not even the judgment sought to be appealed against (or reasons for it) must be lodged with the High Court. ...” [Paragraph 9]

“In my view the paucity of information, which in terms of section 309C(3) must be lodged with the High Court, does not allow for an adequate reappraisal and the making of an informed decision on the application. This situation is not much improved by the provisions of section 309C(5) which make it possible for the judges considering a petition to call for further information. The language of these provisions is permissive. … [S]ome judges may insist on the production of the record. Others may not.” [Paragraph 11]

“The situation of an accused person, wanting to appeal from a magistrate’s decision, is very much less favourable than one who seeks to appeal against a conviction or sentence in a High Court. When an unrepresented accused wants to appeal, after being convicted and sentenced in the Magistrate’s Court, the task of presenting a properly formulated application … for leave under section 309B will probably prove insurmountable. Then there is the even more formidable barrier of drafting a petition to the High Court for leave to appeal... The fact that the petition may – and on the ordinary procedure envisaged by the statute will – be considered in the absence of the record exacerbates the situation. ... There is too great a risk under this procedure that a genuine miscarriage of justice will not be picked up.” [Paragraph 12]

“In its narrower sense, the object of the right to a fair trial contained in section 35(3) is “to minimise the risk of wrong convictions” and inappropriate sentences “and the consequent failure of justice”. ... In determining what is fair, the context or prevailing circumstances are of primary importance – there is no such thing as fairness in a vacuum. By “context” I am referring to such prevailing facts and circumstances as may have a bearing on the content given to a constitutional right. Examples of such facts and circumstances might be socio-economic, political, financial, as well as other resource-related considerations.” [Paragraph 13]

“In my view the High Courts and Magistrates’ Courts are not only significantly different in the two respects mentioned by Madala J [in the *Rens* decision, highlighting differences in standing and functioning] but also in terms of human and material resources, participation by legal representatives and other relevant considerations. It then follows that the context in which the fairness of the procedure must be judged is different. This in itself may be a sufficient basis for concluding that, even though the leave to appeal and petition procedure meets the test for fairness in respect of High Courts, it does not do so at the level of Magistrates’ Courts.” [Paragraph 14]

“The inclusion of paragraph (o) in section 35(3) of the Constitution is significant. The right … is directed at ensuring that there is a reasonable procedure for correcting errors that may have occurred at the trial stage. In a substantial number of criminal cases, convictions result in prison sentences. ... [I]mprisonment brings the liberty of the individual to a halt. It also impacts on the individual’s dignity. Therefore, it cannot be overemphasised that before this happens, there must be procedural checks and balances of such a nature that wrong convictions and inappropriate sentences are reduced to the barest minimum: an appropriate reassessment mechanism is an important cog ... ... Where (as in the Magistrates’ Courts) the potential for error is greater, the threshold of what accords with fairness cannot appropriately be pitched at a similar level as in the procedure for appeal from High Courts.” [Paragraph 23]

“The automatic right of appeal undeniably allows for a meaningful reappraisal and the making of an informed decision by a higher court. It best ensures the correction of errors. The intrinsic advantages of

an automatic appeal are that the court of appeal is furnished with the entire trial record and that it hears oral argument. Errors warranting correction may be apparent from the record itself. Oral argument during an appeal has the benefit of giving more content to the issues to be determined and assists in clarifying and bringing them into sharper focus... The value of oral argument is further illustrated by the experience that convictions and sentences, that were confirmed on automatic review in terms of section 302 of the Act, have subsequently, on occasion, been set aside on appeal. By and large, this occurs as a result of the crystallisation and clarification of the issues by oral argument, something which is lacking on automatic review." [Paragraph 24]

"A highly restrictive form of appeal is not appropriate where, as in the Magistrates' Courts, the margin of error is greater. ... The unsatisfactory features of the sections 309B and 309C procedure … make it unsuitable for the purpose envisaged in the Constitution, in that the procedure does not accord with an adequate reappraisal and the making of an informed decision. Obviously, the automatic right of appeal, the right recently displaced by the impugned sections, satisfies the constitutional prescripts. I want to make it clear that there is no intention to suggest that Parliament may not come up with an appeal procedure that falls short of the automatic right of appeal, but still satisfies the constitutional requirement of fairness or is justified in terms of the Constitution. ..." [Paragraph 25]

"… I conclude that the attenuated appeal procedure consisting in the leave and petition procedure contained in sections 309B and 309C, even if supplemented by an application for leave to appeal against a High Court's refusal of leave and a petition to the Chief Justice, constitutes a limitation of the right "of appeal to, or review by, a higher court" as entrenched in section 35(3)(o) of the Constitution." [Paragraph 27]

"Even though the State has seen fit not to furnish any hard data, we cannot ignore the probability that the sudden increase in the appeal rolls that will result from an immediate declaration of invalidity, will have a major impact on our court system, the full ramifications of which are not immediately imaginable." [Paragraph 46]

"During the period of suspension, and in the interests of justice and equity, it is necessary to ameliorate the adverse effects of the leave to appeal and petition procedure contained in sections 309B and 309C... Because of these practical considerations it may be necessary to limit the requirement of lodging the record and reasons for judgment. Accused persons worst affected by the absence of the record are those prosecuting appeals in person. It seems appropriate in respect of such accused persons that, in addition to the documents mentioned in section 309C(3), the clerk of the Magistrate's Court concerned must also submit the record of proceedings and the reasons for conviction, sentence or both (depending on what is sought to be appealed against). However, insisting on the preparation and lodging of the record in all appeals prosecuted in person may not adequately address the practical considerations referred to above." [Paragraph 47]

"In proceedings which are automatically reviewable in terms of section 302 of the Act the record is prepared, as a matter of course, for consideration by a judge or judges of the High Court. In such cases, even though the section 309C petition will be considered without a record, the automatic review, to a large extent, serves as a safety valve. Purely as an interim measure, and to address the highlighted difficulties, the lodging of records is not necessary in reviewable cases." [Paragraph 49]

"In my view something should also be said about the imposition of fines. We cannot ignore the reality that, because of endemic poverty, for many in our society an option of a fine would be a pie in the sky. To

them a sentence with the option of a fine means an effective term of imprisonment. In the circumstances, … even in those cases where a person has been given a sentence with the option of a fine, the lodging of the record should be insisted on if the unsuspended portion of the alternative term of imprisonment is in excess of three months." [Paragraph 50]

Madlanga AJ ordered that sections 309B and 309C, and the words "subject to section 309B" in section 309(1), of the Act were inconsistent with the Constitution and declared invalid and that these orders were suspended for six months.

THE STATE V SIPHO MSINDWANA, UNREPORTED JUDGEMENT, CASE NO.: CC18/2010, 19 JANUARY 2011 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

The accused was convicted of repeatedly raping his minor child. On sentence, Madlanga AJ held:

"… '[T]he Criminal Law Amendment Act' has decreed that in certain instances life imprisonment be imposed for rape unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence. The rape of a girl under the age of 16 and the repeated rape of the same woman are two examples…" [Page 31]

"Mr. Msindwana has been convicted of the rape of his daughter who was under the age of 16 and this he did on diverse occasions. On each score the offence becomes a candidate for the imposition of life imprisonment. The question then is whether there are substantial and compelling circumstances that justify the imposition of a lesser sentence." [Page 31]

"Mr. Xozwa submitted that from the fact that Mr. Msindwana has lived a clean life with no brushes with the law for a substantial number of years and the fact that he has dedicated his life and income to the maintenance of his family, it can be inferred that he can be rehabilitated." [Page 33]

"These factors must be weighed against the following. This rape is particularly serious because it is the rape of a very young girl, ones own daughter. A daughter, in particular a young one, would look to her father for protection and the security of her person. Being raped by the father is the most grievous and reprehensible violation of that "most private intimate zone of a woman" ... This is more so in the present case: the evidence revealed that this child and father were very close. This was thus a serious breach of trust and a grievous violation of her sense of security. Even in itself the rape of a child shows sexual depravity of the highest order. This is more so in a case where the child does not as yet show signs of sexual development." [Page 33]

"The complainant was, in a manner of speaking, a captive victim for Mr. Msindwana… She had nowhere to run to. He could do with her what he pleased and when he pleased and indeed that is exactly what he did. The act of rape itself was of the most demeaning and degrading manner in that Mr. Msindwana did not only penetrate his daughter vaginally, he also penetrated her anally." [Page 34]

"Ms.Sakasa testified that [significant changes in the complainant] were a manifestation of post traumatic stress disorder… Even if one were to be cured, in later life factors like male/female relationships might act as triggers with the result that the post traumatic stress disorder might recur. In sum, the rape has left the complainant affected psychologically." [Page 35]

"Weighing up all these aggravating factors against the mitigating factors that I have referred to earlier in this judgment, I am not convinced that there are compelling and substantial circumstances that justify the imposition of a sentence lesser than life imprisonment." [Page 35]

The accused was sentenced to life imprisonment.

CUSTOMARY LAW

BANGINDAWO AND OTHERS v HEAD OF THE NYANDA REGIONAL AUTHORITY AND ANOTHER; HLANTLALALA v HEAD OF THE WESTERN TEMBULAND REGIONAL AUTHORITY AND OTHERS 1998 (3) SA 262 (TK)

Case heard 13 February 1998, Judgement delivered 13 February 1998

The applicants in the first application had been convicted by a regional authority court and sentenced to three years' imprisonment, and the applicant in the second application was the defendant in a civil action before a regional authority court. The applicants challenged the constitutionality of various sections of the Regional Authority Courts Act 13 of 1982 (Tk) (`the Act'). The courts established in terms of the Act had concurrent jurisdiction with the magistrates' courts within the regional authority area. The applicants in the first application challenged various sections of the Act on the grounds that they (i) catered I for only `Transkei citizens', a category of persons who no longer existed; (ii) violated the requirement that the judiciary be independent and impartial; (iii) violated the right of every accused to a fair trial; and (iv) created a system of unequal justice in violation of s 8 of the Constitution. The applicant in the second application relied on the fact that the Act denied litigants in civil cases the right to legal representation.

Madlanga J held:

"It is clear from the provisions of s 242 that the rationalisation of court structures is still to take place. In my view the cumulative effect of ss 229, 96, 103, 241 and 242 and the fact that the Constitution has not directly outlawed the regional authority courts leads one to the conclusion that the framers of our Constitution intended that the regional authority courts should continue to exist. For them to continue existing meaningfully there must be persons over whom they exercise jurisdiction. The question then arises as to who such persons should be. It seems to me that a harmonious reading of ss 1 and 5 of the Constitution (on which applicants rely strongly) on the one hand and ss 229, 96, 103 and 241 on the other dictates that some meaning, albeit for the limited purpose of the jurisdiction of the regional authority courts, should be attached to the concept of `Transkei citizenship'. Such restricted interpretation is contemplated in s 232(3) of the Constitution." [Pages 269-270]

"... In my view it would be too long and unwarranted a jump to argue, as applicants are doing, that even for the limited purpose indicated above there exists nothing like `Transkei citizenship'. One would have to conclude that the words `all other courts' in s 103(1) and the words `every court of law existing immediately before the commencement of this Constitution' in s 241(1) do not include the regional authority courts. There is no basis for such a conclusion, a fortiori when one has regard to the fact that it is not as though the framers of the Constitution did not have in mind the abolition of certain courts, especially in the former Transkei. … That being so, it is highly unlikely that it escaped the framers of the Constitution to also directly and specifically outlaw the regional authority courts if they so intended.

What remains, therefore, is to read s 3(1) of the Regional Authority Courts Act in such a way that, in the light of the new constitutional order, the provisions thereof are not rendered nugatory." [Page 270]

"Section 96(2) of the Constitution enjoins the judiciary to `be independent, impartial and subject to [the] Constitution and the law'." [Page 271]

"Insofar as this approach relates to courts and tribunals which are traditionally of, for lack for a better word, `western' origin, I am in full agreement therewith. However, the position is different when it comes to the African customary law setting. There is a danger in a wholesale transplant of a concept suited to one legal system onto another legal system. For example, African customary law knows of no distinction between the executive, the judicial and the legislative arms of government." [Page 272]

"… [T]he judicial, executive and law-making powers in modern African customary law continue to vest in the chiefs and so-called paramount chiefs (the correct appellation being kings). The embodiment of all these powers in a judicial officer (which in the minds of those schooled in western legal systems, or not exposed to or sufficiently exposed to African customary law, or not believing in African customary law, would be irreconcilable with the idea of independence and impartiality of the judiciary) is not a thing of the past. It continues to thrive and is believed in and accepted by the vast majority of those subject to kings and chiefs and who continue to adhere to African customary law… This fusion of functions in one individual has, at varying times, received statutory recognition..." [Page 272]

"Surely, the views and outlook of believers in and adherents of African customary law to the question of independence and impartiality of the judiciary would not be the same as those of non-believers and non-adherents. .. [T]here seems, in my view, to be no reason whatsoever for the imposition of the western conception of the notions of judicial impartiality and independence in the African customary law setting. Any such imposition is very much akin to the abhorrent subjection of matters African to `public policy'. As our recent legal history discloses, such was the public policy of those then in power and it did not necessarily accord with the public policy of the Africans and, for that matter, the public policy of the rest of the South African people who were not in power. The believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial functions. The imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof. This would be completely at variance with the provisions of ss 31, 33(3) and 181(1) of the Constitution." [Page 273]

"Like chiefs (or heads of tribal authorities), heads of regional authorities exercise both executive and judicial functions. It is because of such duality of functions that applicants contend that the presiding officers in regional authority courts are neither independent nor impartial." [Page 273-274]

"For the reasons stated with regard to chiefs' and kings' courts, therefore, the conception of judicial independence and impartiality in respect of regional authority courts would not necessarily be the same as that in respect of courts in the western law setting. ..." [Page 274]

"The opinions of Professors Bennett and Bekker to the effect that the prohibition of legal representation in regional authority courts is justified under the Constitution is, with respect, not acceptable. The learned authors stress the fact that regional authority courts are traditional or customary law courts adjudicating on matters of African customary law in which system of legal representation is unknown. They give examples (some, or most, of which one must agree with) of the advantages brought about by the absence of legal representation in traditional or customary law courts. It is so that in dealing with the

question of judicial independence and impartiality I have indicated that regional authority courts are more akin to African customary law courts. However, that cannot be taken too far. Regional authority courts … exercise concurrent jurisdiction with magistrates' courts. This means that these courts have the power to adjudicate on complex statutory and common law matters. In criminal matters they may impose substantially robust prison terms in respect of statutory offences where the penal jurisdiction is not the limited jurisdiction in terms of the Criminal Procedure Act ... As the substantive law justiciable in such courts is not purely customary law and as the penal provisions applicable to such non-customary substantive law may be quite drastic, the `justification' relied upon for the prohibition against legal representation hardly suffices for purposes of the limitation clause contained in s 33(1) of the Constitution." [Page 276-277]

Madlanga J then dealt with the argument regarding the right to legal representation:

"I accept … that, even though there be no specific mention of the right to legal representation in civil cases, the right of access to court and of having justiciable disputes settled by courts would be rendered entirely nugatory if, in respect of civil proceedings, it were to be held that there is no constitutional right to legal representation. … [E]ven the best educated lay people need the assistance of professional legal representation to exercise their right to access to court in a meaningful way. This applies with more force in respect of the vast numbers of uneducated and illiterate people of this country. Though there be no specific mention of the right to legal representation in respect of civil matters, in my view the conclusion I have reached is not too long a jump. It accords with an interpretation that views the Constitution for what it is - a living document." [Page 277]

"In the instant case... as s 7(1) of the Regional Authority Courts Act violates ss 22 and 25(3) of chap 3 of the Constitution and as no justifiable limitation … has been proffered, the prohibition against legal representation must be struck down both in respect of civil and criminal proceedings in regional authority courts." [Page 277]

"...[T]he applicants contend that persons subject to regional authority courts are unfairly discriminated against in violation of s 8 of the Constitution. Of the examples given is the absence of legal representation in such courts, the discrimination to be found in the fact that South African citizens who are not subject to the jurisdiction of regional authority courts enjoy the right to legal representation which is denied to those persons subject to such courts. ... [I]t seems that the prohibition against legal representation falls to be struck down on the basis of s 8 of the Constitution as well. ..." [Page 278]

"I am not in agreement that s 5 of the Regional Authority Courts Act also falls to be struck down on the basis of a violation of s 8 of the Constitution. Summarised, the contention by the applicants is that the defendants in civil trials and the respondents in appeals before the regional authority courts are denied the right to choose the forum - the prerogative to make the choice rests … on the plaintiff and on the appellant... In my view the choice of forum by one litigant in situations where two or more courts enjoy concurrent jurisdiction is something that occurs daily in our legal system... [T]he litigant instituting the proceedings will naturally choose the forum that affords him/her the most benefits regardless of how inconvenient that may be to the other litigant. That … does not necessarily violate the provisions of the Constitution." [Page 278]

Madlanga J then found that presiding officers do not have to be legally trained:

"... [I]t seems that any disparities stemming from the absence of legal training on the part of the presiding officers are of the nature contemplated in the Constitution in the transitional phase … One should also not lose sight of the fact that kings apply both common and customary law. It can hardly be contended that they do not know customary law. On the other hand, it is not all presiding officers who preside in the other courts who have been trained in and/or know customary law. Must they, therefore, be excluded from adjudicating in African customary law matters?" [Page 279]

"Further, other advantages in the regional authority courts do compensate for the absence of legal training on the part of presiding officers. Litigants appear before people who are known to them. Their own language is spoken during the conduct of the proceedings and there is, therefore, no danger of a miscarriage of justice occasioned by inaccurate interpretation, something that happens with disturbing frequency in other courts... Therefore, the environment is more conducive to the important perception that justice should be seen to be done." [Page 279]

"… [A]pplicants set out a number of procedural `shortcomings' in the procedure followed by the regional authority courts. I do not propose setting out each of these `shortcomings' - they are many (long lists in respect of both criminal and civil procedure). What the lists in fact do is to state that the procedure in other courts has such and such a facility whereas the procedure in regional authority courts does not. In my view, such an approach does not assist at all. It amounts to no more than comparing apples and potatoes. The elaborate procedure that applicants emphasise can be criticised for providing fertile ground for the raising of technical points which are not infrequently upheld by the courts. On the other hand the less elaborate procedure of the regional authority courts has the advantage of leaving less room for such technicalities and of having the real substance of disputes dealt with and laid to rest. ..." [Page279]

Madlanga J held that the convictions and sentences of the first applicant could not stand, the civil proceedings against the second applicant fell to be interdicted, and s 7(1) of the Regional Authority Courts Act fell to be struck down in respect of both applications.

ADMINISTRATION OF JUSTICE

GCALI AND OTHERS V MUNICIPALITY OF BUTTERWORTH AND OTHERS [1998] JOL 2207 (TK)

At issue in this case was the question of what constitutes "sufficient cause" and a determination of the merits of a case, for recession of an order of court.

"... I am of the view that it cannot appropriately be said that a matter has been determined on the merits if the court had before it only the evidence, whether oral or on affidavit, of only one of the two disputants. Such evidence would be half, if not a fraction, of the merits." [Page 12]

"On this approach, even though, in granting the order of 11 February, I considered the oral evidence led by the respondents, it cannot appropriately be said that the determination was on the merits and it certainly was not on the full merits." [Page 13]

"… [A]ll five applicants (together with their erstwhile co-applicants) were not in attendance on the 11th. It is clear from their affidavit that they were not in attendance even on the 10th. The question is – if, as has just been demonstrated, they were aware that they had to attend, why did they not do so? Had they

been in attendance and had they learnt of their attorney's withdrawal in court, they would themselves have explained their predicament to court and in all probability the court would not have non-suited them. My experience is that the court bends over backwards to accommodate and assist litigants who appear in person after being left in the lurch at the eleventh hour by their attorneys. I must stress that this case is unlike those where the litigant himself/herself is not ordinarily expected to be in attendance (eg where the matter is to be argued on the papers) and it is, therefore, not a case where the applicants can claim to have reasonably believed that their attorney or counsel would appear and, without their attendance, protect their interest to the fullest. I should not be heard to say that in all matters where oral evidence is to be adduced the litigant is expected to be in attendance in person. If his/her case can be advanced without him/her attending, the litigant's non-attendance is of no moment. In this case, however, indications are that the applicants themselves (or some of them) were to testify ... It is not for me to speculate why the applicants did not attend court. It was incumbent upon them to fully and cogently explain their failure to attend and they have not done so." [Pages 16-17]

"If my assumption be wrong, one would at the very least expect the applicants to explain the apparent conflict. In the circumstances of this case, the appeal to sentiment... which is thinly veiled under reliance on being "laymen" flies against reason and common sense and can hardly hold, more so that we are here dealing with relatively sophisticated persons in managerial positions at first respondent's office. To sum up, the applicants have failed to show sufficient cause for the rescission of the order of the 11th." [Page 19]

"Because of the far-reaching implications of the order of the 11th one sympathises with the applicants although one is not in a position to assist them. This brings me to the concluding remarks which I wish to make. In this division the withdrawal of attorneys on the date of hearing or the day before occurs with disturbing frequency and often with disastrous consequences. I am not at all suggesting that in a proper case attorneys should not withdraw from a case at a time when they feel they must withdraw. I do want to say, however, that it must be in quite a few cases that an attorney will not have timeous notice or awareness that he/she may have to withdraw from a matter. Once an attorney is so aware, he/she owes it not only to the client but also to the court and the other side, as a matter of duty and not merely courtesy, to timeously give notification of his/her withdrawal – this would accord with his/her position as an officer of the court, and it would avert much a mishap and thus advance the cause of justice. The words of the Honourable Mr Justice RPB Davis that practitioners "are as much a part of the court in which they practise as the Judges who preside over them" are quite apposite... It can only be hoped that in future this duty and courtesy will be observed." [Pages 20-21]

SELECTED ARTICLES

'AFRICAN LANGUAGES FOR NON-AFRICAN PRACTITIONERS', Consultus October 1993, page 103.

"I have noted with grave concern the extent to which justice is miscarried as a result of incorrect and/or imperfect translation of the evidence of the evidence of African witnesses by interpreters."

"… [I]n virtually all trials that I have been involved in or in which I have been part of the audience there is bound to be some incorrect and/or imperfect translation. This is particularly disturbing when one considers that most of the witnesses that appear before our courts, especially in criminal matters, are African and give their evidence in African languages. It is pitiful to observe a witness being required to explain something that he/she is supposed to have said when he/she never said it. On saying that he/she never said such a thing, the witness will be confronted with the record which, of course, will reflect the incorrect English version of the interpreter."

"This state of affairs may have disastrous and far-reaching effects in that the incorrect and/or imperfect translation may relate to the very facts that are crucial for the determination of the case. ..."

"For justice not to be "justice in the air", it is time that all practitioners who do not speak the African languages of the areas where they practice took lessons in such languages so that they themselves may be in a position to hear and understand the evidence of witnesses. …"

"Something also needs to be done about the training of interpreters. Obviously a lot is lacking in the system presently followed in training them. In Transkei where I practice I am not aware of any formal programme of training interpreters. …"

"Considerations of inconvenience to those practitioners … who do not speak the languages of the areas where they practice or intend practising should play a very minor, if any, role … I trust that the concern of all practitioners is to strive for justice and not to sacrifice it at the altar of personal convenience."

"This issue equally affects judges and magistrates … An illustrative example is the case of *S v Mpopo* 1978 (2) SA 424 (A) where the learned presiding judge made adverse remarks on the witness's demeanour basing them on his understanding of the Xhosa language when the witness was speaking seSotho. …"

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

FIKRE v MINISTER OF HOME AFFAIRS AND OTHERS 2012 (4) SA 348 (GSJ)

Case heard 18 & 22 March, 21 April, 3 May 2011, Judgement delivered 11 May 2011

Applicant claimed an entitlement to protection as an asylum seeker under the provisions of the Refugees Act. He contended that his detention was unlawful, since he had not yet exhausted all available remedies and was entitled to protection under the Refugees Act as an asylum seeker.

Spilg J dealt with the question of onus:

"Under our law it is clear that the onus in respect of the deprivation of liberty of an individual is borne by the state… However, certain difficulties of application may arise because of our rules regarding what is to be treated as the evidence before a court in motion proceedings." [Paragraph 13]

"The restoration of the state's obligation to discharge the onus of proving facts justifying the deprivation of an individual's liberty is realised practically, by applying Plascon-Evans without distortion, but recognising that the usual grounds for refusing to hear oral evidence, ie that there are real and substantial questions in dispute that should be determined rather by trial, are not necessarily applicable." [Paragraph 21]

"In order to comply with its obligation under s 39 of the Constitution to promote the values that underlie it, including those based on dignity and freedom, when interpreting not only the Bill of Rights but in developing the common law in a manner that promotes the values contained in ch 2 of the Constitution, it appears prudent that a court give due effect to the wide discretion it enjoys under rule 6(5)(g) to allow the calling of oral evidence where a matter cannot be decided properly on affidavit so as to ensure 'a just and expeditious decision'. " [Paragraph 22]

"By transforming the proceedings to the hearing of evidence the court can then determine the facts based on whether the burden of proof in the true sense has been discharged by the state. While it is appreciated that there are practical difficulties attendant upon a prompt referral to oral evidence … this procedure may have to be accommodated in order to properly meet constitutional requirements." [Paragraph 23]

"There appears to be no reason … for a court not to refer mero motu a matter to oral evidence if it is of the view that this would ensure 'a just and expeditious decision' as contemplated in the rule. It appears that the practical means of reconciling the Plascon-Evans rules regarding the evidence which a court must accept with the court's obligation to give effect to constitutional values under ss 12(1) and 35(1)(d) – (e) is to more readily entertain the hearing of oral evidence. Once it is determined what evidence the court is entitled to receive then the second component of what makes up the onus comes into play, ie whether the applicant has demonstrated a deprivation of liberty and if so whether the state has discharged the onus of justifying the detention." [Paragraph 25]

“Even if the respondents were correct that the Immigration Act and not the Refugees Act applies to the applicant, it is difficult to appreciate how there can be any prejudice or on what basis a court would allow a technical point of this nature to delay the determination of the liberty of an individual. In my view it has no substantive-law consequences where the same minister and same director-general are responsible for administering two pieces of legislation that may impact upon the rights sought to be asserted.” [Paragraph 40]

“The question remains as to whether the applicant's continued detention is unlawful. Clearly the respondents are wrong to claim an entitlement to hold the applicant under the Immigration Act since the applicant's status after resurrecting his appeal … is governed once more by the Refugees Act ... In any event … even if the Immigration Act applied there is no warrant and the period of permissible detention has long expired.” [Paragraph 83]

“What remains unclear ... is whether the applicant is subject to the ordinary criminal procedural laws. ... [B]oth sets of papers have mentioned the applicant being detained in the ordinary police cells and that he signed a Notice of Rights ... which indicated that he was formally charged with a criminal offence and brought before a court ...” [Paragraph 84]

“... [T]he applicant can only be detained under the provisions of the Refugees Act. In terms of s 29 of that Act, once the 30-day period has expired, the detention of the applicant must be reviewed by a high court judge.” [Paragraph 89]

“The provision is unique. My research has revealed one other similar oversight provision. It is under s 37(6)(e) of the Constitution dealing with detentions under a declaration of a state of emergency.“ [Paragraph 90]

“It is evident that in discharging its functions a court seized with an application where detention has gone beyond the 30 days cannot stand idly by and await an application to be launched. The provisions of the Act, however inelegant and even though it is difficult to appreciate the nature of the proceedings envisaged ... are nonetheless couched in imperative language and require a review before a high court. ...” [Paragraph 91]

“I am satisfied that a court is obliged to give content to s 29. This is because the initial period of 30 days expired at a time when this matter was before it and, even though the 30 days had not expired when the application was brought or argued, the court must discharge its judicial functions having due regard to the express wording of s 29. In turn s 29 must be considered in light of the constitutional obligations entrusted to a court under the Constitution ... Section 29 ... provides for the considerations that must be taken into account if the individual is to be detained further.” [Paragraph 94]

Spilg J ordered that the detention of the applicant be reviewed.

CITY OF JOHANNESBURG V BERGER AND ANOTHER (16296/2011) [2011] ZAGPJHC 235 (31 AUGUST 2011)

The applicant applied for an order requiring the respondents to cease utilising their property in contravention of zoning bye-laws. The respondent clinic had relocated from a prior location due to higher demand than anticipated. The respondent had selected the new location because of its potential for re-zoning. This application came to the court before a decision had been reached on re-zoning.

Spilg J held:

"[Applicant] contends that the property is being used as a veterinary clinic, rescue, rehabilitation and re-homing centre for cats and dogs … in violation of its Residential 1 zoning status." [Paragraph 3]

"When the matter was first called I expressed concern about the consequences the order would have on the animals sheltered at the haven. In particular I wished to ascertain whether alternative shelter could be found or whether animals, generally puppies and kittens, would be euthanized if the order sought was implemented without alternative arrangements for their relocation. ..." [Paragraph 4]

"... [A]lthough the Bergers used the property as a sanctuary for young animals, an application for rezoning had been made at a very early stage and there was no reason at that stage to believe that it would not be granted." [Paragraph 25]

"The Bergers' rezoning application has lain with the City for some three years without finality. The Bergers were aware that they had to apply for rezoning and would not be entitled to use the facility as an animal shelter or veterinary facility before the necessary authorisation was obtained. They had also sought a delay in finalising the application. Nonetheless, the City is obliged to make a decision on the rezoning. The City did not come out and say unequivocally that the rezoning will not be approved. Furthermore no objection was raised prior to mid-2009 despite due notice to the public. At that time the Bergers would have believed that their rezoning application would be successful." [Paragraph 31]

"In my view the situation that has developed is of the City's own making. It is obliged to act within the provisions of Section 33 of the Constitution and provide just administrative action. This includes the duty to make decisions within a reasonable time having regard to the nature of the matter before it and to provide certainty. These requirements appear to find their counterpart in sections 56(8) to (10) of the Ordinance, which obliges the local authority to notify an applicant without delay of its decision either to approve or postpone its decision after investigating an application in the prescribed manner." [Paragraph 32]

"I accept that none of this on its own permits a court to ignore legislation that requires effective and prompt implementation of remedies for bye-law infringements. However what comes into reckoning is whether the bye-law is to be enforced humanely where life is threatened." [Paragraph 34]

"I must therefore weigh the obligation to enforce a bye-law against the City's failure to comply with its constitutional obligations, as given expression in PAJA. If the City had complied with its

obligations then there would already have been a rezoning (albeit one subject to conditions) or a notification that the rezoning application was refused." [Paragraph 36]

"In my view every attempt has been made to explore an adequate alternative solution created by the City's failure to comply with its administrative duties to secure just administrative action. There is no adequate alternative centre and the animals cannot be relocated under the auspices of the SPCA without the risk of some being destroyed." [Paragraph 37]

"The question comes down to whether we should sacrifice life, because of a failure to consider an application made to the City within a reasonable time, particularly when such a decision is due imminently." [Paragraph 38]

"Domestic animals are objects of the law, mere chattels, which are not accorded any right or specific protection under our Constitution." [Paragraph 43]

"However the enquiry is not whether animals have rights, since they do not under our common law, but what our responsibility is towards animals; and in this case, those which we treat as pets under our control and which receive protection under statute." [Paragraph 44]

"Such an enquiry may ultimately resolve itself by reference to the content of our humanity and whether it is to be regarded both as the foundational stone which lies at the heart of our Constitutional rights and also as the expression of a value system, of which the inter-relationships between humans is a manifestation but which transcends it." [Paragraph 45]

"This understanding of humanity within our constitutional framework may have been touched upon in S v Makwanyane ... by Didcott J …" [Paragraph 46]

"This broader concept of humanity as a value system underlying our legal foundation, finds expression in national legislation concerning animals."

"However for present purposes it appears adequate to confine the enquiry to national legislation such as the SPCA Act in regard to the inhumane treatment of domestic animals."

"While the entitlement of the City to enforce its bye-laws is self evident, the evidence before the court confirms that if the order is implemented with immediate effect an indeterminate number of young animals are likely to be put down. This would be contrary to the SPCA Act which has as its object … the "good treatment by man" of animals and to prevent their "ill treatment". The unnecessary killing of an animal would fall within the provisions of the sub-section."

"In the present case the likely killing of some of the 200 animals would be unnecessary and the object of the bye-law can be achieved without the inhumane killing of the young animals. This can easily be achieved by delaying the enforcement of the order. ... There is nothing in the Ordinance which precludes a court from delaying the enforcement of the bye-law in the interests of justice, particularly where a failure to do so would result in the contravention of animal protection laws, laws which in turn ought to be broadly construed and applied by reason of its foundational value based on humanity." [Paragraph 44]

The matter was postponed pending the outcome of the rezoning application.

SOCIO-ECONOMIC RIGHTS

BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD V OCCUPIERS OF SARATOGA AVENUE & ANOTHER [2010] JOL 25031 (GSJ)

Case heard 17 - 18 June 2009 and 22 July 2009, Judgement delivered 4 February 2010

Applicant, a private property owner, sought the eviction of those occupying the property. The occupants claimed protection from eviction under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE) until the city of Johannesburg provided them with suitable alternative temporary accommodation.

Spilg J held:

"… [T]he principal point taken by the City in relation to the necessity to join the provincial government as a necessary party, because the City has no greater obligation than to seek financial assistance from the provincial government and is confined to the role of a passive bystander, is wrong. … [T]he City should have fully appreciated that it is most directly involved and has the most direct and immediate control over housing and housing policy within its boundaries and in particular in relation to the attainment of the core rights under section 26 of the Constitution as read with the National Housing Act and the provisions of PIE." [Paragraph 68]

"Secondly, the constitutional challenge … is not directed at the validity of any law but to the discriminatory and arbitrary policy adopted by the City to exclude destitute occupiers who are subject to eviction from privately owned land." [Paragraph 69]

"The right to property is an essential foundational stone of a democratic state. ... [T]he arbitrary seizure of land without adequate compensation strikes at the core of democratic values. The ability to strip people of the right to own private and commercial property without adequate compensation was an essential tool of the apartheid government's ability to implement a system that undermined the fabric of African society, stunted its economic growth and undermined dignity." [Paragraph 93]

"The right not to be deprived of property, except in terms of a law of general application and subject to further limitations, which are always subject to just and equitable compensation, is a constitutionally protected right under section 25. One of the express limitations concerns the need to acquire privately owned land, subject to compensation, in order to address both the forced removal of communities and the inability to fairly access our natural resources..." [Paragraph 94]

"… [T]he State is obliged to initiate and maintain the socio-economic objectives identified in sections 26, 27 and 29 of our Constitution as well as maintaining the necessary framework to protect the security of all South Africans. It must have the ability to structure sound economic growth and stability ... Its ability to do so is dependent on the State's ability to raise revenues by way of direct and indirect taxation, by the levying of rates and charging for basic services, such as water and electricity." [Paragraph 95]

"It is evident that section 26 of the Constitution affords everyone the right to have access to adequate housing and does not impose an obligation on the private sector to give up its property for this purpose. If this consequence had been intended, then the limitation of the right to use and

occupy one's own property would have been founded in section 25. The private sector's obligation remains to provide the necessary revenues via taxation and the other means already referred to, to enable the State to achieve its duties under section 26." [Paragraph 96]

"Moreover, section 26 does not, whether directly or indirectly, permit the State to either abdicate or thrust its responsibilities to provide adequate housing onto the private sector, nor does it suggest that the private sector is obliged to itself indefinitely provide housing without compensation …" [Paragraph 97]

"In my respectful view, the fact that the court's discretion under section 4 of PIE to delay the eviction of any unlawful occupier, whatever their personal circumstances, is temporary and what the exact period is depends on the circumstances of the case save that a landowner cannot be effectively deprived of his property without adequate compensation and ought to retain the right to decide how he wishes to develop what he has paid for." [Paragraph 103]

"… [T]he case before me is an *a fortiori* one where there is no horizontal application to a private landowner of section 26 of the Constitution." [Paragraph 111]

"Constitutional Court and SCA authority … make it plain that those in desperate situations who face eviction are entitled to have access to adequate housing on a progressive basis and that all tiers of government must take reasonable legislative and other measures within available resources to achieve this end. However, desperately poor families have no right to look to private landowners for indefinite continued accommodation at no cost." [Paragraph 127]

"It is clear from the Constitutional Court and SCA judgments… that the City has a positive constitutional duty to the desperately poor not to render them homeless should they be evicted." [Paragraph 128]

"Whatever the temporary period might be to assist in the amelioration of hardships caused by an eviction order in respect of those who are unlikely to find alternate shelter, no tier of government can transfer its constitutional obligations to private citizens on what, realistically, would be an indefinite basis rendering the ownership rights nugatory." [Paragraph 135]

"The consequence of excluding persons in the position of the first respondent occupiers of private property was to exclude them from both programme formulation and budget preparation. It is not surprising therefore that there has not been a budget allocation. It is, however, difficult to appreciate that the persons responsible for this policy decision could genuinely have believed it to be justifiable. The fact that it is not is demonstrated by the failure of any meaningful argument being presented on behalf of the City in that regard." [Paragraph 141]

"In my view, the City cannot rely on its own default to explain why it has neither the budget nor the accommodation to cater for indigent occupiers of private land facing eviction." [Paragraph 142]

"Accordingly, the City's policy not to provide accommodation or plan or budget for the procurement of accommodation on an emergency or temporary basis in respect of private land occupied unlawfully under PIE is unfairly discriminatory and offends the equality provisions of section 9 of the Constitution." [Paragraph 154]

"The remedy for the breach of the occupants' constitutional and statutory rights in respect of accommodation appear extremely limited. A court cannot dictate who should go to the head of the queue. What it can concern itself with is whether the order it makes will result in an impermissible queue-jumping. By reason of the failure to have any regard to the occupants' rights over a significant period of time, this issue does not arise." [Paragraph 176]

"While it is correct that compensatory damages until accommodation is provided may result in the City changing its policy and budgeting, nonetheless it is obliged to change its position not because the court has selected another route but because it is constitutionally obliged to include indigent occupants of private land threatened with eviction in the housing programmes and to budget for it." [Paragraph 177]

"In my view, the possible resolution of the case without a court decision has been explored during the hearing. It is evident that the parties now seek finality regarding their respective positions." [Paragraph 189]

"… Blue Moonlight is entitled to an eviction order. The only question is when it is to be implemented having regard to what is just and equitable in the circumstances." [Paragraph 191]

"Blue Moonlight has been unable to realise any benefit from its investment for some five years. ... On the other hand, the occupiers live in squalid conditions with no water or other basic facilities." [Paragraphs 192 - 193]

"Resolution of what is just and equitable therefore depends on what constitutes a reasonable time within which the first respondent occupiers can find alternate accommodation. Clearly there can be no time stipulated if they do not have sufficient income to pay rental for even the most meagre of accommodation. ... [H]owever ... the rights of the landowner do not allow for an indefinite deprivation that renders their section 25 rights de facto nugatory and that the occupants are entitled to compensatory damages in the form of a subsidisation of their income that is likely to allow them a form of basic accommodation until the City remedies its breach." [Paragraph 194]

The first respondent and all persons occupying them were evicted from the property and ordered to vacate no later than 31 March 2010. The second respondent was ordered to pay the applicant monthly rental of the premises from 1 July 2009 to 31 March 2010. The second respondent's housing policy was declared unconstitutional to the extent that it discriminated against persons within their jurisdiction, and it was ordered to remedy this defect in its housing policy.

On appeal, the Supreme Court of Appeal substituted the order but substantively dismissed the appeal: **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2011 (4) SA 337 (SCA)**. An appeal to the Constitutional Court was dismissed. A cross appeal by the occupiers was upheld, ensuring that they would not be evicted until the City provided alternative accommodation. **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).**

EAGLE VALLEY PROPERTIES 250 CC V UNIDENTIFIED OCCUPANTS OF ERF 952, JOHANNESBURG SITUATED AT 124 KERK STREET, JOHANNESBURG IN RE: UNIDENTIFIED OCCUPANTS OF ERF 952, JOHANNESBURG SITUATED AT 124 KERK STREET, JOHANNESBURG V CITY OF JOHANNESBURG (0/04599) [2011] ZAGPJHC 3 (17 FEBRUARY 2011)

Applicant sought the eviction of those occupying commercial property it owned in the Johannesburg CBD. In February 2010 the Applicant sought the eviction of those occupying the buildings. The occupiers conceded that their occupation was unlawful and contended that consequently they were protected against eviction under PIE until such time as the City of Johannesburg secured adequate temporary accommodation for them. The occupiers also applied to join the City as a party.

Spilg J held:

"Within the context of housing rights, section 26 of the Constitution is not limited to redressing the degrading and impoverishing consequences of past racially discriminatory laws or practices. The right to have access to adequate housing on a progressive basis, having regard to available resources, is founded principally on the fundamental and enduring right to dignity." [Paragraph 28]

"Sections 4 (7) and 6 (3) of PIE expressly recognise the existence of unlawful indigent occupiers within South Africa and the obligation of the State (including a municipality) to provide occupation on land that it can reasonably make available. This provision ... makes no distinction between whether their status arose as a consequence of past racial or other inequalities, or simply the current socio-economic climate ... which has led to their present hardships and that of their dependants. The provision is founded most directly on the right to dignity." [Paragraph 29]

"Socio-economic rights, such as housing, are given substance by reference to a constitutional requirement that they be realised. A fortiori this presupposes that they are attainable, progressively within the limitation of available resources, but attainable nonetheless. This assumption is at the core of recognising socio-economic rights such as housing. All spheres of government and other organs of state including the courts, through our judgments, are obliged to give content to these rights. ..." [Paragraph 30]

"... [S]hould it be argued that any of these rights cannot be attained then for so long as the socio-economic right in question remains in the Constitution the courts are constitutionally obliged, particularly under sections 8(1) to (3), to investigate if the breach goes to a systemic failure within an organ of state despite its consequences to the separation of powers unless another non-invasive enquiry and effective remedy can be fashioned to secure the attainment of the right. Similarly, for so long as the right is contained in the Constitution, organs of state are similarly required to comply with their constitutional obligations to secure the attainment of the right progressively within the limitation of available resources." [Paragraph 31]

"The second, and perhaps more concerning, issue that needs to be addressed, is the apparent contention that the objective of achieving adequate housing for all is unattainable. Since the constitutional requirement is to realise that objective in the long term and alleviate the plight of those currently living in abject poverty (on my understanding of case law concerning PIE such as Joe Slovo), the need to properly address this contention is essential before a court can consider fashioning an appropriate and effective remedy. In the present case it is perhaps the single most

important factor in weighing whether the City is correct in contending that other spheres of government should also have been joined, particularly bearing in mind the early stage in these proceedings when the point arose." [Paragraph 36]

"I believe that all court decisions proceed, even if unarticulated, on the basis that the socio-economic rights are realistically attainable, albeit on a progressive realisable basis." [Paragraph 38]

"The recent concerns, as also expressed by the City in the present proceedings, suggest that this may not be the case. The question is then whether households can ever be released from the cycle of poverty created historically by apartheid or by the circumstance of birth and which effectively deny them and preclude their children from enjoying their fundamental rights and freedoms. This issue becomes more pressing as our informal settlements and genuine slums expand as they absorb increasing numbers of destitute people both from outside and as a result of the natural population growth within the area. ..." [Paragraph 39]

"It therefore appears necessary for the courts to be provided with a more holistic appreciation of the housing crisis and the resources, available and projected, to deal with it. ..." [Paragraph 40]

"If, after receipt of the reports, it is contended that the constitutional objectives are not attainable, the question would then arise whether the separation of powers would be infringed if the courts were to enquire into the rational need for other expenditure and establish from the Auditor-General whether revenues are being squandered elsewhere or budgets are being under-utilised or inefficiently appropriated in respect of the provision of housing and other socio-economic constitutionally identified priorities." [Paragraph 41]

"In the present circumstances, where many local governments including the City (and possibly even National Government) suggest that it is not possible to meet housing shortages even on the progressively realisable basis as envisaged in the Constitution, it appears necessary for a court to obtain a complete picture of what is feasible and attainable in order to decide what is just and equitable, as it is required to establish within the context of section 4(7) of PIE, and so too under section 6(3)(c) of PIE where State land is involved." [Paragraph 45]

"If regard is had to the broader nature of the issues that the court may now have to consider, especially if the City persists with its current position that even the provision of temporary shelters for the indigent homeless population within its area is unattainable, it appears eminently desirable that National Government and Provincial Government should be joined. In many other cases they are cited and they have not suggested a mis-joinder even where the issues may have been narrower." [Paragraph 46]

"Clearly neither National Government nor Provincial Government has been heard on the issue. I therefore do not consider it appropriate to direct their joinder without affording them an opportunity to be heard on the issue. ... It appears prima facie that they have a real and substantial interest in the issues before this court." [Paragraphs 52, 55]

The main application was postponed *sine die* and the City of Johannesburg was joined as a party in the proceedings as the 2nd respondent.

CRIMINAL JUSTICE

S v MANGENA AND ANOTHER 2012 (2) SACR 170 (GSJ)

Case heard 9-25 March, 1-25 November 2010; 30 May, 6 June, 17-23 June, 26 June 2011, Judgement delivered 29 June 2011

This was a trial-within-a-trial to establish the admissibility of a statement made by one accused against the other accused. Spilg J found that accused number 1 had been assaulted before being transferred between police stations:

"The next question is whether, as a consequence of the assaults, the admissions were voluntarily made as required by s 219A of the CPA [Criminal Procedure Act]." [Paragraph 28]

"The natural meaning of the word 'voluntarily' … is 'done, given, or acting of one's own free will'. Since the provision is also an exception to the common-law hearsay rule and risks impacting on protected constitutional rights ... full effect must be given to the broadness of the concept encompassed by the word. Moreover s 35(1)(c) of the Constitution provides that a suspect has the right 'not to be compelled to make any confession or admission that could be used in evidence against that person'. This provision is complemented and reinforced by s 12(1)(c), (d) and (2) (personal freedom and security), as well as s 35(1)(a) and (3)(h) and (j) (arrested and detained persons)." [Paragraph 32]

"… I am satisfied that the state has failed to establish beyond a reasonable doubt that the written statement of the accused … was voluntarily made." [Paragraph 33]

"... [T]he state intended to rely on a portion of [the statement] against accused No 2 on the basis that such evidence was admissible against him under the exception to the hearsay rule. … I expressed difficulty in appreciating the basis upon which an extracurial statement made by accused No 1, after he had been arrested for the offences with which he has been charged, could be admissible against his co-accused in relation to the same offence." [Paragraph 38]

Spilg J analysed the Constitutional Court and Supreme Court of Appeal decisions upon which the state relied:

"In my respectful view, the SCA decision was obiter and the Constitutional Court decision has no direct bearing on the issue. With the greatest respect to the high-court decisions to which reference has been made, including the decision of this court, I believe that they are clearly wrong … because the courts were not invited to consider, and therefore did not address, what I believe are the a priori questions: ... on what basis is the testimony sought to be admitted and whether, properly characterised, there is a fundamental objection to its reception which precedes an enquiry as to whether or not such evidence is hearsay, and if so, whether it may nonetheless be admitted under the statutory exceptions permitted under s 3 of the Law of Evidence Amendment Act … or any residual common-law exception. ..." [Paragraph 40]

"It is ... difficult to appreciate how evidence of an extrajudicial admission concerning a co-accused made otherwise than in furtherance of their common purpose can be allowed in when it can, as

many cases illustrate, amount to a confession of all the facts or elements necessary to convict, save for one. It certainly is not so under the common law." [Paragraph 59]

"In my view the amendment [Law of Evidence Amendment Act] was intended to do no more than codify the law regarding informal admissions, whether by conduct or by statement. The mere fact that it did not expressly exclude the admissibility of such admission against a co-accused is of no consequence ..." [Paragraph 62]

"Moreover, the potential for abuse cannot be overlooked. In Molimi the SCA accepted that the statement made by the one conspirator amounted only to an admission, thereby allowing the evidence in, whereas the Constitutional Court on an overview of the conspirator's statement, found that it amounted to a confession, thereby rendering it inadmissible against the co-accused under the express exclusion provided for in s 219." [Paragraph 68]

"The extensive utilisation of confessions and admissions, particularly during the state-of-emergency era, cautions us, unless there is an express intention to the contrary in amending legislation, against eroding those common-law principles that were responsible, in numerous cases, for securing the rule of law, despite the absence of a Bill of Rights." [Paragraph 69]

"The unreliability of a statement made by one conspirator which contains an admission against the other at the time of arrest is fraught with danger. ... Another rule that comes into contention is the auxiliary rule relating to the possible inability to cross-examine for want of 'equality of arms' in establishing precisely what occurred to induce the accused to implicate his co-accused. These factors effectively destroy the reliability of the extracurial statement. Moreover a court should not be obliged to undertake an exercise of determining whether or not the accused will receive a fair trial where it is likely that such evidence would be provisionally admitted." [Paragraph 74]

"In my view the considerations adopted by the Constitutional Court in Molimi apply in the present case. Accused No 2 was not pre-cognised that, if accused No 1's admissions were received, they would be used as evidence against him." [Paragraph 80]

The Court thus refused to admit any extracurial admission that might have been made in a statement by accused No 1 *after* his arrest against accused No 2 since on the facts it could not have been made in furtherance of their conspiracy.

ADMINISTRATION OF JUSTICE

BLUE CHIP CONSULTANTS (PTY) LTD V SHAMROCK 2002 (3) SA 231 (W)

Case heard 17 – 24 November 2000, Judgment delivered 5 December 2000

After the plaintiff had completed its evidence in an action claim based on a suretyship, the defendant sought to re-open his case to call his attorney (Z) to give testimony relating to privileged communications between himself and the plaintiff's managing director at a time when Z had represented the plaintiff in other litigation.

Spilg AJ held:

"The objection based on both privilege and relevance are good. The defendant prefaced his request to call Mr Ziman on the basis that the plaintiff's waiver of the privilege was first required. It was not forthcoming. There are sound reasons for respecting the attorney-client privilege. The desirability for skilled legal representation in litigation is axiomatic. In order for such representation to achieve its purpose, our system is predicated on the need for establishing trust between the lawyer and his client and securing freedom of communication between them without fear of disclosure. That can only be attained if communications are treated as confidential and inroads are confined to clear cases of greater competing interests" [Page 235]

"[Counsel] sought to meet this on the basis that the High Court decision which the defendant sought to introduce is not itself privileged. It is a public document that any other attorney could obtain." [Page 235 - 236]

"In my view, the possibility that such evidence existed, and that it was worthwhile to pursue by reference to content and ease of location, arose by reason of the content of the privileged communication made by the plaintiff's managing director to Mr Ziman. The knowledge that precipitates the acquisition of such evidence would be so closely linked to the communication itself that the very rationale for the privilege would be undermined if the document were allowed to be introduced. The existence of the judgment, its content and location was only known to Mr Ziman by reason of the attorney-client relationship. There is no evidence to suggest that another attorney would have embarked upon such an investigation, let alone know where to look. It was the disclosure during the privileged communication that opened up this avenue of investigation and would facilitate the expeditious location of the evidence by reference to a specific Court or case number" [Page 236]

In **City of Johannesburg Metropolitan Council v Ngobeni (314/11) [2012] ZASCA 55 (30 March 2012)**, the Supreme Court of Appeal (per Mhlantla JA, Navsa, Heher, Tshiqi and Wallis JJA concurring) unanimously upheld an appeal against a judgment by Spilg J in a claim for wrongful shooting, arrest and detention by the appellant. The SCA criticised Spilg J's conduct during the trial, finding that he had engaged in inappropriately active participation in the proceedings [para 29 ff], including descending into the arena, *mero motu* calling witnesses, and on his own initiative deciding to hold an inspection *in loco*. The SCA held that: "In the result, Spilg J breached many of the canons of judicial behaviour and was overzealous in his approach. Conduct of this nature cannot be countenanced and has the potential of bringing the judiciary into disrepute. His behaviour constitutes an irregularity which would have vitiated the proceedings but for the parties' request that we consider the merits on appeal." [Paragraph 48].

SELECTED ARTICLES

'A STATE OF DEMOCRACY', Advocate April 2008, pp. 42 - 44

"Almost immediately, court decisions post 1994 replaced the will of parliament as the supreme law with that of a people and its institutions under the rule of law. In the years immediately after the interim Constitution was adopted, judicial independence and acceptance that no person was above the law did not create tensions between the courts, parliament or the executive. ... Post-1994 decisions not only restored and protected the rights of the individual against improper state action but also asserted those rights in cases of state inaction." [The article cited the cases of *Carmichael*, *Van Duivenboden* and *Rail Commuters Action Group* to illustrate this development.]

"The Constitutional Court has also addressed the vexed whether a court directive requiring the government to take measures to meet its constitutional obligations would not infringe the separation of powers doctrine. The court did so by adopting the standard of reasonableness. ... Our common law is presently being enriched by testing reasonableness and, where it is a relevant factor, public policy in the laws of delict and contract by reference to constitutional values rather than other norms or the proverbial man on the Clapham omnibus." (Page 42)

The article then considered Bills gazetted during 2005 and their impact on judicial independence:

"The Bills were subsequently withdrawn for reconsideration. However, the fundamental failure to appreciate the need to respect the separation of powers and the independence of the judiciary remains prevalent. ... [T]he novel idea that courts are there to represent the will of the majority or even of a ruling party undermines the clear distinction drawn by democracies, whether under a written constitution or not, that the courts interpret and apply the law without fear or favour and in accordance with the accepted values of a constitutional democracy."

"The extent of respect for human rights, and the extent to which a democracy is judged to enjoy such respect, are not finally measured by court pronouncements or legislation ... One finds and judges the extent to which a society respects human rights in the conduct and morality of its citizens."

"We must be measured by the extent to which our constitutional values are respected and nurtured amongst our people. By that standard we have a long way to go. And we have faltered since the turn of the millennium. The core values that are necessary for a democratic society to exist and prosper are eroding."

"Our society, which has claimed the rights and constitutional freedoms to which we are entitled has yet to embrace the obligation to respect the rights of others. We are witnessing an upsurge in intolerance. Compassion is a rarity treated with derision." (Page 43)

'JUDICIAL INDEPENDENCE' – IMPENDING CONSTITUTIONAL CRISIS', Advocate, April 2006, pp 8 – 11.

This article discussed the Constitution 14th Amendment Bill and the Superior Courts Bill.

"Unlike the Bills dealing with judicial conduct and training that have been shelved, the Constitution Amendment Bill and the Superior Court Bill are little concerned with representivity on or transformation of the bench. They are fundamentally concerned with control of the judiciary and tethering it. This is to be achieved directly by striping the judiciary of control over its functional and procedural independence, including its rule-making powers."

"The various proposals in these two Bills will emasculate the judiciary of its functional independence. If these Bills are passed into law the consequence is that fair trial process, non-arbitrary procedures, non-interference by government in matters such as specific judge selection for a particular case, and an impartial judiciary can no longer be guaranteed."

"The 1996 Constitution was fashioned in order to ensure constitutional democracy under the rule of law and secured by an independent judiciary. Section 165 of the Constitution leaves no room for misunderstanding. ..."

"Judicial independence goes beyond the ability to deliver a judgment in open court. It ensures the judiciary has autonomy over matters which relate directly to the exercise of its judicial functions and to the public perception of a court that dispenses justice fairly, impartially and free from political pressures. Unless the courts enjoy functional autonomy, justice has no chance of being fairly dispensed. Functional independence includes administrative functions that can adversely impact on the courts' ability to perform their judicial functions. .."

"If clarity was needed as to whether our Constitution placed administrative functioning outside the control of the courts, then it was resolved by the Constitutional Court in *De Lange v Smuts NO* ... The court identified the critical features of an independent judiciary to be security of tenure, financial independence and *institutional independence*. ..."

"The ramifications of tampering with a constitution is far-reaching, particularly if they affect and limit the role of institutions that are established to act as a buttress between the executive and the individual ... They are well nigh impossible to undo at the best of times. They are impossible to undo when most needed – during times of government excess."

"The Constitution Amendment Bill and the Superior Courts Bill materially undermine judicial independence by giving the executive, through the responsible Minister, power to control all elements relating to the administration of justice and the budget of courts. ..." [Page 8]

The article then listed specific objections to various provisions in the Bills, before continuing:

"At present, we have a strong jurisprudence that identifies the reach of the judicial function. It seeks to ensure that the judiciary enjoys an independent status and immunity from political pressures. A democratic society requires that the process of adjudication is clearly separated from the processes of government and Parliament. The appointment of key staff and of Judges President by government would provide the framework for arbitrary political interference."

"In the main, the Department claims that the changes are part of the transformative process. It is difficult to fathom how, when almost all the key judicial positions are representative of the majority

of the population, it is now time to reduce their control over the judicial function, nor why this is transformational. The irony is that the converse is true."

"It is also difficult to appreciate how a rule-making function can ever be a transformational issue. The rule-making function has stood the test of time irrespective of the political dynamics at any particular stage of a country's constitutional development."

"The Department also seems to think that no constitutional challenge is possible once a constitutional amendment has been passed by 75% of the National Assembly members. That is incorrect. ..." [Page 11]