dgru Democratic Governance and Rights Unit

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

JUNE 2012

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SUBMISSION AND RESEARCH 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 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 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 applies the same basic principles as 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* and *LexusNexus* 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. The candidates have extensive judicial track records, which has made selecting judgments to include in the report a particularly challenging task. Time and capacity constraints have meant that we have not been able to include as many judgments as we would have liked. It is therefore particularly important to bear in mind that this report provides a sample (we hope a

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

fair one) of each candidate's judicial track record - not a comprehensive summary of all relevant 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. 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. As was done in our report for the 2009 Constitutional Court interviews, we have compiled a statistical breakdown of the number of cases heard, and judgments written, by candidates who are judges of the Supreme Court of Appeal. 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 Judge Zondo.

SUBMISSION REGARDING THE INTERVIEW PROCESS

9. We begin by noting our concern that only four candidates have been shortlisted for these interviews.
10. We appreciate that, having been unable to shortlist enough candidates to interview for the position in April, there must be pressure on the JSC to recommend candidates to the President without further delay. We have publically expressed our concern that a vacancy on the court has been left open for so long. The JSC's inability to gain sufficient applicants to conduct the interview when it was first advertised remains a cause for concern.
11. However, interviewing only four candidates for the position is, in our view, problematic. In terms of s 174(4)(a) of the Constitution, the JSC will have to send the names of all four candidates to the President in order enable the President to make an appointment. Should any of the candidates become unavailable, or be found to be unsuitable for any reason, the JSC will be unable to send enough names to the President and the process will have to be postponed again, and then re-started. These scenarios are clearly undesirable.
12. By interviewing only four judges, the JSC's role will effectively be limited to determining whether any of the nominees are so unsuitable that they cannot be recommended to the President for appointment. This in itself could put both the JSC and the candidate in a very uncomfortable position. It is one thing not to be chosen in the short list of four out of, say, eight candidates interviewed, but quite another to be "dropped" from a minimum list of four.
13. We submit that this is not the role of the JSC that the drafters of the Constitution envisaged. Rather, the JSC ought to be able to engage in a rigorous process of evaluating the merits of a number of candidates, before selecting the best (in this case, four) candidates to recommend to the President for his consideration.
14. The JSC was created in order to mark a decisive break from the pre-Constitutional practice of judicial appointments, where appointments were entirely within the discretion of the executive, without input from the broader legal community or from civil society. In the First Certification Judgment, the Constitutional Court identified the JSC as providing "a check and balance to the power of the Executive" to appoint judges.

15. We are concerned that, by interviewing only the bare minimum number of candidates necessary, the JSC will be limiting its Constitutional role unduly, to the point of extinguishing it. We urge the JSC to ensure that in future, it is able to sift a broader pool of candidates before it sends the required number of recommended names to the President.
16. We turn now to consider the interviews themselves, and the qualities which, we submit, should inform the selection of judges for the Constitutional Court.
17. 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.
18. 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:
    18.1. 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.
    18.2. Independence of mind: judges must have the courage and disposition to act independently and free from partisan political influence and private interests alike.[3]
    18.3. A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice.
    18.4. 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.
    18.5. Judicial temperament. This may encompass qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.
19. 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.
20. Even though there may only be four candidates being interviewed, it is still important for the JSC to interview the candidates rigorously in order to ensure that they meet these criteria. In the (hopefully unlikely) event that any of the candidates do not meet the required standard, their names ought not to be sent to the President for possible appointment.
21. Furthermore, it is to be hoped and assumed that the advice the President receives on which candidate to appoint will be informed by the interview process. This being so, the importance of a serious and in-depth interview process is clear. It is to be hoped that the JSC will not see the fact that they effectively interviewing four candidates for four vacancies, as justifying conducting perfunctory interviews.
22. Thus, we can see a clear role for the JSC in using these interviews to ensure that the section 174(1) criteria are met in respect of each candidate. It is somewhat less clear, given that there

[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.

are only four candidates, what role the JSC can play, in these particular interviews, in furthering the aims of section 174(2).

23. Furthering the requirement of section 174(2) further illustrates why it is undesirable for only four candidates to be interviewed. We submit that, with only two of the ten current justices of the Constitutional Court being women, section 174(2) requires very serious consideration to be given to appointing a woman judge. And yet only one of the four candidates is female. If the JSC were interviewing a greater number of candidates, including more women candidates, it would be in a position to send a list of names including multiple women candidates to the President. This would enable to the JSC to play its part in trying to ensure that the objective of section 174(2) requirement in respect of gender is fulfilled.
24. Finally, we turn to make some comments on the lines of questioning to be followed during the interviews.
25. It follows from what is said above that we regard it as crucial that the interviews constitute a full, meaningful engagement with issues such as candidates' judicial philosophy, independence of mind, and commitment to constitutional values. After observing the interviews for High Court and Supreme Court of Appeal vacancies in April 2012, we were concerned that many of the interviews were extremely short and did not canvas issues central to the judicial function in any great depth. Some interviews for Supreme Court of Appeal and Judge Presidency positions provided more in-depth discussions of candidates' judicial qualities, and we submit that it is this approach that should provide the template for these interviews.
26. In our submission prior to the April 2012 interviews, we commented on the trend of questioning on the issue of deference and separation of powers. We commented that:
    26.1. It cannot be denied that questions as to a candidate's understanding of principles of deference, the separation of powers and judicial independence are appropriate, and indeed fundamental, subject matter for questions to assess the suitability of a candidate for judicial office. These issues go to understanding a candidate's judicial philosophy, and are important indicators of a candidate's understanding of the constitutional dispensation within which the judiciary operates.
    26.2. Having said this, this line of questioning should not be seen as a means to overlook candidates who demonstrate independent-mindedness, any more than it should be used to appoint overly activist judges with no regard for the constitutional role of other branches of government.
    26.3. It is worth recalling certain provisions of the Constitution. Section 2 provides that the Constitution is the supreme law of the country, and that any law or conduct inconsistent with it is invalid. The obligations imposed by the Constitution must be fulfilled. Section 172(1)(a) provides that, when deciding a constitutional matter, a court must declare any law or conduct that is inconsistent with the Constitution invalid, to the extent of its inconsistency.
    26.4. The courts thus do not have a discretion as to whether or not to defer to other branches of government, if legislation or actions are found to be unconstitutional. They are mandated, by the supreme law of the country, to make a finding of constitutional invalidity.
    26.5. Of course, issues of deference do arise in determining whether a law or conduct is constitutionally invalid, and exploring candidates' understanding of how such a determination is to be made is a highly relevant and important line of questioning. But

candidates who assert the role of the courts which the Constitution demands ought not to be disadvantaged for doing so.

27. These considerations arguably apply with even greater force to interviews of prospective Constitutional Court judges, bearing in mind the unique role of that court as the final arbiter of constitutional matters in our democracy. It must be said that our observations of the April 2012 interviews did little to dispel our concerns that many of the questions being asked about deference and separation of powers do not fully take into account the role the Constitution requires the courts to play.

ACKNOWLEDGEMENTS

28. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was carried out by Chris Oxtoby and Tabeth Masengu, research officers of the DGRU.
29. We are grateful for the financial support of the Open Society Foundation for making this project possible.

DGRU

1 June 2012

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 May 28th)						
Bosielo JA	12	2	-	-	-	-
Maya JA	1	-	-	-	-	-
Nugent JA	13	4	-	-	1	-
2011						
Bosielo JA	49	10	2	-	-	1
Maya JA	51	11	-	1	-	1
Nugent	22	9	-	1	1	-
2010						
Bosielo JA	29	8	2	1	-	-
Maya JA	17	3	1	-	-	-
Nugent JA	41	13	-	-	2	-
2009						
Bosielo JA/AJA[4]	40	6	-	-	-	1
Maya JA	37	4	-	-	-	1
Nugent JA	35	10	1	1	1	-
2008						
Maya JA	41	6	1	1	-	1
Nugent JA	21	4	-	-	2	2
2007						
Maya JA	23	3	1	-	-	-
Nugent JA	40	11	1	3	-	-
2006						
Maya JA/AJA[5]	39	7	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.

[5] Judge Maya served as a Judge of Appeal for 25 of the cases she heard during 2006, and as an Acting Judge of Appeal for the remainder.

Nugent JA	43	9	-	-	2	1
2005						
Maya AJA	26	3	1	-	-	-
Nugent JA	34	12	-	1	1	-
2004						
Nugent JA	31	7	1	-	1	-
2003						
Nugent JA	15	5	-	-	-	-
2002						
Nugent JA	30	6	1	-	-	1
2001						
Nugent AJA	27	7	-	1	-	2

SELECTED JUDGMENTS

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 s 12 of the Local Government: Municipal Structures Act (the Municipal Structures Act), and second to fifth respondents were officials of the municipality. The appellant was a member the Moqhaka Ratepayers and Residents Association who 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.

On appeal to the SCA, 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 Walker1998 (2) SA 363 (CC)* ...: '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]

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

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: Mthuyane 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 psycho-emotional 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]

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 (for a unanimous court: Mpati P, Brand, Snyders and Malan JJA concurring) held:

"... In *Theart* the appellants occupied the respondent's premises on the strength of an option to buy the premises. It is common cause that the appellants defaulted in their payment in terms of the option. As a result the option expired. The respondent gave the appellants due notice of the expiry of the option and

demanded that they vacate his premises. On 24 October 2004 the respondent caused to be issued a notice in terms of s 4(2) of PIE. In addition the magistrate authorised the procedure for the service thereof. On the same day the respondent had a notice of motion issued in terms of rule 55 of the magistrates' courts rules which informed the appellants that an application for their eviction from the respondent's premises would be heard in the magistrates' court ... on 29 November 2007. The notice of motion informed the appellants, amongst other things, of the respondent's intention to evict them from his premises; the grounds for such eviction; the date and place for the hearing; their right to defend the matter and seek legal representation; their right to adduce relevant facts before a court to enable it to decide whether the eviction would be justified and their constitutional right to adequate housing in terms of s 26(3) of the Constitution. The s 4(2) notice and the notice of motion were served by the sheriff on the appellants on 26 October 2007 as authorised by the order of the magistrates' court. The appellants were duly represented by an attorney when the matter was heard in court on 6 December 2007 and when the magistrate granted an order for the eviction of the appellants. ...” [Paragraph 3]

“In Senekal the respondent had no agreement of lease with the appellant who was the new owner of the property. The respondent sought an eviction order against the appellant on the grounds that she had no right to occupy the property and that she was accordingly an unlawful occupier. The application for the eviction order was couched in the form of a notice of motion in terms of rule 55. No dedicated s 4(2) notice was issued. Yet the notice of motion contained the information as prescribed by both ss 4(2) and (5). On 10 July 2007 the magistrate made an order authorising service of the notice in terms of s 4 of PIE. This notice of motion was served on the appellant and the municipality concerned on 11 July 2007. In the notice of motion the appellant was advised to appear before the magistrates' court on 14 August 2007 if she intended to oppose the matter. The appellant in Senekal filed an affidavit opposing the order sought, alleging that she was entitled to occupy the property as part of her employment benefits with her previous employer. She was represented by an attorney. The matter was heard on 10 October 2007 and, having listened to both sides, the magistrate granted an order evicting the appellant from the premises. ...” [Paragraphs 4-5]

“I pause to observe that the 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 2001 (4) SA 1222 (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 in 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, quite importantly, 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 (the same counsel appeared for the appellants in both cases) was unable to point to any section in PIE which requires an additional notice. For the reasons I have given, 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 in the two appeals. 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]

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 (for a unanimous court: 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 to Cathcart. 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]

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 of the Boere-Afrikaner community, 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 and Others1989 (4) SA 731 (A)* ...: '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).

SELECTED JUDGMENTS

BOGAARDS V S [2012] 1 ALL SA 376 (SCA)

Case heard 24 August 2011, Judgment delivered 21 November 2011

The accused was convicted on two charges of contravening the Protection of Constitutional Democracy Against Terrorism and Related Activities Act (Terrorism Act), for having harboured and assisted two escaped accused in the "Boeremag" trial. The accused had also been charged with an alternative count of contravening the Correctional Services Act.

Maya JA (Mhlantla JA concurring) held that the appeal should be rejected, as the State had established the appellant's guilt on the alternative charge of harbouring and concealing escaped prisoners under the Correctional Services Act. Regarding the conviction on the main charges, Maya JA held:

"... The main question for determination is whether Mr Bogaards may be convicted in the circumstances of this case – where a party is charged under the Terrorism Act for harbouring and concealing persons he knows or ought reasonably to have known or suspected to have committed offences in contravention of ss 11 and 12 of the Terrorism Act alternatively s 115(e) of the Correctional Services Act. ... " [Paragraph 2]

"... We were ... urged to categorise the fugitives' offences committed under the Internal Security Act, before the promulgation of the Terrorism Act and for which they were on trial when they escaped, under the banner of 'specified offences' referred to in s 11 of the Terrorism Act as the court below seems to have done." [Paragraph 4]

"Section 27 of the Terrorism Act makes provision ... for the repeal of the Internal Security Act and ... transitional arrangements ... The sum of these provisions is that any pending criminal proceedings, investigation, prosecution or other legal proceedings instituted in terms of the Internal Security Act would continue to finality under its provisions, even after its repeal, as if the Terrorism Act had not been promulgated. Evidently, none of these transitional provisions cater for Mr Bogaard's situation as the conduct for which he was charged and the subsequent criminal proceedings against him occurred after the commencement of the Terrorism Act. The latter Act makes no express provision for a situation such as the present; where the act of terrorism or terrorist activity was committed during the operation of the Internal Security Act and the harbouring and concealment of the offenders occurred after its commencement." [Paragraphs 5 - 6]

"As Leach JA correctly points out, there is a well established rule of construction that the operation of a statute is prospective, to apply only after its enactment, unless the legislature clearly expressed a contrary intention that the operation should be retrospective ..." [Paragraph 7]

"I am mindful that the Terrorism Act did not create new offences as such in ss 11 and 12 in view of the provisions of s 54(4) of the Internal Security Act ... which also criminalised harbouring and concealing a person known or suspected to have committed acts of terrorism and failing to report such person's presence – the basis of the finding made by the court below that ... '...It is therefore fair to say that when [they]escaped from custody they were then charged with conduct equivalent to that contemplated in the definition of terrorism or terrorist activities under the [Terrorism Act]'. However, the provisions of s 27 of the Terrorism Act present an insurmountable difficulty for this view. This is so because they unequivocally provide for offences committed whilst the Internal Security Act was in force to be dealt with after its repeal as if the Terrorism Act had not been passed, thus expressly excluding such offences

from the umbrella of 'specified offences' as defined under the Terrorism Act. There is simply no room for the modification of the Terrorism Act to 'fill the gap' allegedly left by the Legislature..." [Paragraph 8]

"There is no ambiguity in the wording of ss 11 and 12 of the Terrorism Act. The sections are concerned only with conduct constituting 'a specified offence' ... committed or likely to be committed after the commencement of that Act on 20 May 2005. ... Mr Bogaards' prosecution targeted the offences committed by the fugitives before their arrest towards the end of 2002. By no stretch of the imagination can such offences be said to constitute specified offences under the Terrorism Act. The presumption against retrospectivity was not rebutted ... He should therefore not have been convicted for a contravention of these provisions." [Paragraph 9]

Seriti JA held that the appeal should be rejected, and would have upheld the convictions under the Terrorism Act. Leach JA dissented, and would have rejected the appeal. Mthiyane JA concurred with the conclusion and order of Maya JA, on a different basis.

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

Case heard 11 November 2010, Judgment delivered 22 February 2011

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

"Drawing from the established common-law principles with regard to vicarious liability ... the Constitutional Court has formulated the questions to be asked in applying the rule in deviation cases as follows in *K v Minister of Safety and Security*:

> 'The approach [adopted in *Minister of Police v Rabie*] makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is purely a factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights." [Paragraph 64]

"I must say at the outset that I do not understand our law to impose a duty on police officers to protect members of the public and prevent crime even when not on official duty. ... Neither do I attach any significance to the fact that Van Wyk was on standby duty. In my view he effectively remained off duty until summoned to resume duty or took action that placed him on duty ... Regarding the first stage of the test set out in *K*, there is no question that Van Wyk's conduct in raping F had nothing whatsoever to do with the performance of his duties as a police officer. But the enquiry goes further. It must still be considered whether, despite the fact that Van Wyk's unlawful conduct was totally self-serving, there

nevertheless was a sufficiently close link between his acts for his own personal gratification and the State's business." [Paragraph 67]

"Unlike my colleague Nugent JA, I find it quite pertinent that F was aware that Van Wyk was a police officer when she accepted Van Wyk's second bogus offer to take her home at Kaaimans, and I agree with the court below that this knowledge influenced her decision and quelled her earlier misgivings. ... As I understand the court's reasoning in *K*, it was a relevant factor that the victim there identified the policemen by their uniform and the marked police van they drove, and for that reason placed her trust in them and accepted their lift even though she did not know them. ..." [Paragraphs 70 – 71]

"... [B]y offering to rescue and take home in a police vehicle a lone, vulnerable child stranded on a dark, deserted riverside in the dead of night in those circumstances, Van Wyk subjectively placed himself on duty and acted in his capacity as a police officer. This is regardless of his intention which I find no different from that of the errant, off-duty officer in *Rabie* who, actuated purely by malice, arrested a person he very well knew was innocent. ... In my opinion he placed himself on duty as he was empowered to do by law. And once he did, he assumed the status and obligations of an on-duty police officer. For that reason, I would find the Minister vicariously liable." [Paragraph 73]

"Finally, there is another matter that, in my view, requires comment. It transpired in the trial that Van Wyk has a criminal record. ... All these convictions occurred during his career in the police force, and they do not seem to have hindered his rise within the police ranks as he became a detective vested with vast police powers and limited control by his superiors. More disconcerting was a statement made by Du Toit, when asked if he was surprised that an officer with Van Wyk's sullied track record was kept in the police force, that 'there are guys that have done worse things that have stayed on in the [police] service', and that it is only when a police officer has been declared unfit to carry a firearm that he will not be put on operational duties." [Paragraph 74]

"I do not agree with the erroneous elevation by the court below of the apparent risk of harm created by the Minister, in keeping a police officer of Van Wyk's questionable calibre in the police force, to an element of the vicarious-liability rule. But I share the sentiments ... that it should not be a matter for surprise for the Minister that Van Wyk, who had no vehicle of his own and would most probably not have committed the rape had he not been provided with a vehicle since he would have been unable to give a lift, acted as he did." [Paragraph 75]

"In *K* the Constitutional Court exhorted our courts to 'take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed'. In *Luiters* the court reiterated the Minister's responsibility 'to ensure that police officers are properly trained and carefully screened to avoid the risk that they will behave in a completely improper manner'. I find it inimical to these objectives that our police force would, seemingly as a matter of course, have within its ranks police officers who have repeatedly committed serious crimes." [Paragraph 76]

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

LEBOWA PLATINUM MINES LTD V VILJOEN (2009) 30 ILJ 1742 (SCA)

Case heard 1 December 2008, Judgment delivered 17 December 2008

This case dealt with the definition of the term "occupier" under the Extension of Security of Tenure Act (ESTA). The respondent had worked for the appellant, and been allocated a family home for a nominal monthly rent. Respondent was subsequently dismissed for dishonesty. After unsuccessfully contesting his dismissal in the CCMA, respondent's challenge to his dismissal was pending before the Labour Court at the time of the SCA decision. Appellant's housing policy allowed a dismissed employee 30 days within which to vacate the company house after dismissal. On expiration of the 30 day period, appellant launched eviction proceedings in the High Court under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). Respondent argued that he was an "occupier" in terms of ESTA. The matter was transferred to the Land Claims Court, which found that respondent qualified as an "occupier", and hence that eviction proceedings should have been instituted in the Magistrate's Court or the Land Claims Court under ESTA.

On appeal, Maya JA (for a unanimous court: Farlam, Cameron, and Jafta JJA and Mhlantla AJA concurring) held:

"The appellant's case before us turned on the contention that the respondent's right to occupy the premises arose solely from his contract of employment, was dependent and conditional upon his continued employment and terminated automatically on his dismissal. It was submitted ... that ESTA seeks to redress the unfair eviction from land of poor farmworkers resulting from past discriminatory laws and practices and ... was not intended to protect a person in the respondent's position ie an employee of an owner of land earning an income in excess of the minimum ... prescribed in the ESTA regulations, whose occupation of the land is a condition of employment and whose consent to occupy the land is subject to his continued employment ..." [Paragraph 7]

"ESTA has its origins, inter alia, in s 25(6) of the Constitution which entitles '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices ... to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. ... [T]he main purpose of ESTA is to regulate the eviction process of vulnerable occupiers of land and it generally seeks to protect a designated class of poor tenants occupying rural and peri-urban land ... with the express or tacit consent of the owner against unfair eviction from such land." [Paragraph 9]

"...I deal first with the proposition ... that only 'poor previously disenfranchised farmworkers', which the respondent undisputedly is not, may benefit from the protection offered by ESTA. I have some difficulty with this submission. ... [A]lthough there is obviously a particular class of vulnerable persons who were the legislature's primary concern ... of which the respondent may not be a member, courts are nonetheless enjoined to consider the colour-blind provisions of s 26(3) of the Constitution when interpreting ESTA. From the wide wording of such provisions, it hardly seems inconceivable that in that exercise a person falling outside the designated category, but nonetheless possessed of a land owner's consent or some other legal right, may fall within its purview. ..." [Paragraphs 12 - 13]

"... [I]n considering the meaning of the term 'occupier' under ESTA, the starting-point must be when the circumstances of the person sought to be evicted ought to be considered to ascertain whether or not he or she is such an 'occupier'. ... [A]ppellant's counsel urged on us that on a literal reading of the definition ... particularly the legislature's change in tense in the wording ' a person residing on land ... who has on 4 February 1997 or *thereafter had consent*', the date of termination of the respondent's employment contract should decide the question. He argued that to do otherwise would be unreasonable as it would

confer on the respondent a status he did not enjoy during the whole of his tenure of employment ..." [Paragraphs 14 – 15]

"... I do not find that the interpretation ... suggested on the respondent's behalf would yield absurd or unreasonable results. ... [O]n the literal approach ... all that ESTA requires for a tenant to qualify as an 'occupier' is the owner's consent or 'another right in law' to reside on the land as long as he or she does not use the land in the manner excluded ... or earn more than R5,000 a month." [Paragraph 16]

"It is so that the respondent did not qualify as an 'occupier' during the tenure of his employment. It is however a fact that ... he remained in occupation of the premises with the appellant's consent after termination of such employment; this at a time when he no longer earned an income and did not use the premises for the purposes precluded in the ESTA definition. During this period, the respondent's occupation ... undoubtedly assumed an entirely different character which, in my view, brought him squarely within the ambit of 'occupier'. I can conceive of no reason why the fact that he previously occupied the premises in a different capacity should exclude him from a definition whose requirements he clearly satisfied when his permission to remain on the premises came to an end. ..." [Paragraph 18]

The appeal was dismissed.

NTAKA V S [2008] 3 ALL SA 170 (SCA)

Judgment delivered: 28 March 2008

The appellant was convicted of rape and sentenced to 10 years' imprisonment, 4 of which were conditionally suspended. The appeal was solely against the sentence. The appellant and the complainant were both 17 years of age and friends. The complainant had previously suffered serious psychological problems, had attempted suicide and consequently received treatment for depression. At the appellant's house, he assaulted the complainant into submission and raped her in his room. The resulting trauma suffered by the complainant led to several failed suicide attempts.

Maya JA, noting the effect of the rape on the complainant, the appellant's lack of remorse, the interests of society and the nature and gravity of the offence, held that "whilst undoubtedly a robust punishment, the effective sentence of six years' imprisonment imposed by the magistrate is fitting in the circumstances of the case." [Paragraph 33].

Cameron JA (Cachalia JA concurring) noted the 'awful awryness' and impulsivity of the crime, and the appellants youth. Though a prison sentence is 'unavoidable', six years "disregards the youthfulness of the appellant when he committed the crime…and fails to individualise the sentence." [Paragraph 42] The Court replaced the sentence with five years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977; after serving a minimum of one-sixth of the time imposed (ten months), he becomes eligible for the Commissioner of Correctional Services to place him out on correctional supervision.

"Is this too soft? I cannot say 'No' with any assurance. But I am less unsure that it may be too soft than I am sure that an undifferentiated sentence of direct imprisonment is too harsh." [Paragraph 44]

ZANNER V DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG [2006] 2 ALL SA 588 (SCA)

Judgment delivered 3 April 2006

The appellant—indicted on a count of murder more ten years after a charge of culpable homicide had been withdrawn—applied for a permanent stay of prosecution, arguing that he would suffer trial-related prejudice.

Maya AJA, for the majority, held that the "…focus is solely on whether [the appellant] has suffered significant trial-related prejudice" [paragraph 16], and that "…the appellant has not contended that there are witnesses who he intended calling in his defence who, by reason of the passage of time, are no longer available" [Paragraph 17]. The Court further held that other difficulties "should work to the appellant's advantage as the prosecution's burden to prove its case beyond reasonable doubt will be all the more difficult to discharge" [Paragraph 19] or appear to be "no more than speculative" [paragraph 20].

The appeal was therefore dismissed (Scott and van Heerden JJA concurring).

Nugent JA (Cachalia AJA concurring) delivered a separate judgment:

"Whether there has been an unreasonable delay in bringing an accused person to trial … calls for a balanced decision that brings to account the length of the delay, the reason the State assigns to justify the delay, the assertion by the accused of his or her right to a speedy trial, and prejudice to the accused from the delay…Each is capable of being accorded its due weight only relative to the others." [Paragraph 25]

"I am unable to accept that even if the DPP has culpably denied to the appellant for more than ten years his right to be brought to trial promptly, which my colleague assumes to be the case, the appellant is nevertheless not entitled to an order staying any further prosecution in the absence of specific prejudice…" [Paragraph 27]

"For that reason, I have found it unavoidable to decide whether the appellant was indeed denied that right…" [Paragraph 27]

"I do not think the DPP can be faulted for not having brought the appellant to trial during that period, simply because throughout that period the appellant did not stand accused of having committed an offence, and there was thus no accusation upon which to try him. For the right to be brought to trial without reasonable delay is a right that protects the integrity of the prosecution process: it accrues to an accused person and endures for only so long as he or she stands accused." [Paragraph 29]

F v F [2006] 1 All SA 571 (SCA)

The parties were both British citizens who settled in South Africa in 1986. They were divorced in 2001. The appellant, who had custody of the child, wished to return to the country of her birth permanently and take the child with her. The respondent refused to consent to the child's removal from the country. The appellant's application to the Johannesburg High Court for leave to remove the child from South Africa was refused, as was an appeal to the Full Court. Maya AJA (Zulman, Cameron, Van Heerden and Ponnan JJA concurring) held:

"It is also important that courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts – who have no reciprocal legal obligation to maintain contact with the child and may relocate at will – may, and often does, indirectly constitute

unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses." [Paragraph 12]

"There are just too many imponderables in the appellant's plans to enable the court to assess the likely effect of the move on Sarah's physical, emotional and psychological well-being. When these imponderables are 'weighed-up' against the agreed opinion of all three experts that Sarah's interest would best be served by remaining in proximity to both parents and that a separation from either parent would be prejudicial to her well-being, the decision of both the trial court and the majority in the Full Court not to permit the appellant to relocate to the United Kingdom with her daughter cannot be faulted." [Paragraph 21]

MEC FOR ROADS AND PUBLIC WORKS, EASTERN CAPE V INTERTRADE TWO (PTY) LTD [2006] JOL 17048 (SCA) 27 MARCH 2006

The appeal concerned the right of an unsuccessful tenderer who had instituted review proceedings in terms of uniform rule 53 against the public body that had called for tenders, to obtain information relating to the adjudication process from such a body. The court *a quo* granted the relief sought. On appeal, Maya AJA (Howie P, Farlam, Heher, Van Heerden JJA concurring) held:

"… I am satisfied that Intertrade did make a 'request' in terms of section 7(1)(b) before the institution of its application." [Paragraph 13]

"The wording of section 7(1) [of the Promotion of Access to Information Act 2 of 2000] is clear and must be given effect to. Whilst the jurisdictional requirement set out in subsection (1)(a) has been established, that set out in subsection (1)(b) has not been met in the present case. Section 7 cannot, therefore, operate as a bar to Intertrade's request." [Paragraph 19]

The appeal was therefore dismissed (not appealed).

WORMALD NO V KAMBULE [2005] JOL 15547 (SCA)

Judgment delivered: 22 September 2005

The appellants sought to evict the respondents from certain residential property in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act. They also sought an order declaring a customary marriage the respondent was alleged to have contracted with a person who was now deceased, from which she claimed her right to occupy the property derived, null and void. The application was dismissed. On appeal, Maya AJA (Mpati DP, Zulman and Nugent JJA concurring; Combrinck AJA concurring in a separate opinion) held that:

"…the essential basis for the respondent's opposition to the eviction proceedings is the alleged customary marriage and the deceased's alleged intention to bind the second appellant to provide her with lifelong use of the property and that, furthermore, it would not be just and equitable to evict her." [Paragraph 12]

"…whilst it is so that in customary law a husband and, upon his death, his heir, has a duty to maintain his wife or widow…she does not, at any stage, acquire real rights in such land. The *dominium* vests in the husband's or heir's estate…The wife does not, therefore, have a right to demand to occupy any land of her choice, even to the detriment of the estate, as the respondent seeks to do in the present matter." [Paragraph 13]

"It would clearly be untenable in law to extend the right of a customary law wife or widow to maintenance to confer real rights in respect of such property, particularly against the wishes of the bondholder." [Paragraph 14]

"…there are no allegations of an intention to donate the property to her or grant her lifelong use thereof or transfer any rights whatsoever in relation to the property to her. In the absence of such evidence the court *a quo* erred, in my view, in finding that the deceased 'bound [the second appellant] to provide the respondent with a home during the subsistence of their customary marriage' and that the second appellant consequently granted her a right '*usus*' or '*habitatio*' to endure for her lifetime." [Paragraph 14]

"…the court *a quo* erred in finding that a right to occupy the property accrued as a result of the alleged customary marriage. The respondent's occupation of the property has no legal basis and is, thus, unlawful." [Paragraph 15]

"It is clear that [the respondent] is not in dire need of accommodation and does not belong to the poor and vulnerable class of persons whose protection was obviously foremost in the Legislature's mind when it enacted PIE." [Paragraph 20]

The decision of the court *a quo* was set aside and the eviction was granted (not appealed).

S V MBANGI [2002] JOL 9249 (TK)

Pursuant to the conviction of the accused on charges of murder, assault with intent and common assault, the court was required to determine sentence. The accused had assaulted his wife after she was late in arriving home. He then hit his children, one of whom was a baby who died as a result of the assault. Maya J held:

"This Court cannot, in the circumstances of this case, turn a blind eye to the ever rising scourge of violence against women and children in this country, particularly within the family units."

"It seems to me that the root problem is that spouses, particularly husbands, who are often the offenders in cases of family violence, believe that they own their spouses and children and can do with them as they please. Nothing could be further from the truth."

"I am aware that courts have traditionally treated cases of this nature differently, more often than not imposing lenient sentences on the perpetrators because of the close relationship and emotional ties they had with their victims. I do not understand the rationale underlying these decisions. I do not subscribe to that school of thought. The accused turned against and attacked the very people to whom he owed protection. It is to me an aggravating factor for a father, a grown man to vent anger against his wife on innocent children by savagely battering them."

"I have not been persuaded that there are substantial and compelling reasons as would justify a sentence less than that prescribed by the law in respect of count 1. In my view, this Court has a duty to send a

clear message to society that conduct of this nature will simply not be tolerated… State counsel, reminded this Court, the rape of a young child is punishable with life imprisonment. We are here dealing with the murder, a deliberate and brutal obliteration of a young baby's life. The analogy is, in my view, quite appropriate. I am certain that even in the absence of the provisions of section 51(2) I would still have been inclined to impose a sentence similar or even lengthier than the one set out therein."

The accused was sentenced to 15 years imprisonment.

S V QEKELE AND OTHERS [2001] JOL 8633 (TK)

The four accused persons had been convicted of two counts of murder and rape and one count of attempted murder and rape. Maya J held:

"…all the accused played an active and critical role at all stages of the incident…All the girls were repeatedly raped by all the accused."

"I have considered the accuseds' youthful ages although I had to simultaneously remind myself that the minimum sentences' application begins at age 16 and that the crime of rape, and in particular gang rape, is mostly committed by persons as young as the accused…I have considered their clean records, their pleas of guilty which I assume signify their remorse, that they had consumed liquor, that they have been in custody since their arrest."

"Having said this I must bring to the equation the clear fact, in addition to their collective admission in this regard, that their actions show that despite consuming liquor they did not lose their power of self-control and were at all material times…able to appreciate their acts and foresee the consequences…They clearly formed the intent both to rape the girls and after satisfying their lust, to kill them to cover their tracks."

"The enormity of the crimes involved herein and the public interest in suitably severe sentences when weighed against the accused's personal circumstances convince me that this is exactly the kind of case which the legislature had in mind when it enacted section 51. In my opinion, this Court would be failing in its duty if it does not send out a clear message now that cruel, perverted, cold-blooded and senseless acts of violence such as were committed in this case will not be tolerated."

"…I find that there are no substantial and compelling circumstances which would justify the imposition of lesser sentences…"

"There is, however, the question of accused 2 who was still 17 years old at the time of the commission of the offences…The sentence envisaged by the Act should be imposed on such a youth only in very special circumstances…"

"When his borderline age is viewed against the backdrop of his level of participation in the incident the scale tends to tip against him. I am persuaded that the combination of these factors does constitute the special circumstances envisaged by the legislature which would justify that he should be treated similarly to his co-accused."

The accused were therefore sentenced to life imprisonment.

SELECTED JUDGMENTS

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

Case heard 11 November 2010, Judgment delivered 22 February 2011

At issue in this case was the vicarious liability of the State for the rape of the respondent by a Mr Van Wyk, a policeman who was off duty but on "standby duty" when he committed the rape.

Writing for the majority, Nugent JA (Snyders JA and R Pillay AJA concurring) held:

"... [T]he introduction into the principle of vicarious liability of a duty owed by the employer was taken a step further in K. Adopting the 'two-stage' enquiry that was laid down in Rabie, O'Regan J said that the first question 'requires a subjective consideration of the employee's state of mind and is a purely factual question'. Needless to say, the state of mind of the policemen in that case, as it was in this case, was entirely self-directed, and the case turned rather on the second, 'objective' question, namely — 'whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer'." [Paragraph 30]

"The learned judge pointed out that the rape of K was 'clearly a deviation from their duties', but went on to observe that when committing the rape the three policemen were 'simultaneously omitting to perform their duties as policemen', which was said to be 'relevant to answering the . . . question . . .: was there a sufficiently close connection between that delict and the purposes and business of the employer?' ..." [Paragraph 31]

"The learned judge then concluded: 'In my view, these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.'" [Paragraph 31]

"I have pointed out that both the State and the policemen personally were held to be under a duty to protect K. In those circumstances it might be that the court could justifiably have found that the State, acting through its employees, was directly liable for its own delictual omission. That would have been consistent with a line of cases that have been decided in this court ... that purport to be founded upon vicarious liability, but might better be said to have been founded upon direct liability of the State, acting through the instrument of its employees." [Paragraph 34]

"... [T]he court [in *K*] found that not only the State, but also the policemen personally, were under a duty that they omitted to fulfil. In view of its express finding of vicarious liability, it must be taken that the policemen were considered to be personally liable for their omissions, thus rendering the State vicariously liable, albeit that it might equally have held the State to be directly liable for its own omission. In this case, too, we are concerned with whether the State is vicariously liable for delictual conduct on the part of Mr Van Wyk, and not with whether the State is directly liable." [Paragraph 35]

"If the State were not vicariously liable for the positive delicts of the policemen in K, then I think that, a fortiori, it is not vicariously liable for the positive delict that was committed by Mr Van Wyk. Indeed, it would seem to me to be rather extreme to find that a policeman is 'engaged in the affairs or business of

his employer' when he commits the crime of rape, or that that could 'rightly be regarded as a mode — although an improper mode' of exercising the authorisation conferred by his employment. ...” [Paragraph 37]

“Turning to the omissions that were found to exist in K: I have no doubt that the State had a duty to protect Ms F against harm, and that that duty necessarily falls upon functionaries who execute the duties of the State — which might render the State directly liable if its functionaries omit to do so. But the basis for the finding in K was that the policemen were also under an equivalent personal duty — thus rendering them personally liable (and the State vicariously liable) for omitting to fulfil that duty. It seems to me, then, that what this case comes down to is whether Mr Van Wyk was under a similar duty at the time he committed his criminal act. And that depends upon whether the duties that were held to exist in K persist when a police officer is not on duty.” [Paragraph 41]

“There is some suggestion in the judgment of the court below that a police officer is never off duty – that his or her obligations are of a ‘continuing nature’ ... Various shades of those suggestions also surfaced in argument before us. I do not think they are correct. ... In my view ‘standby duty’ ... is precisely what the language conveys – a detective is on standby to resume duty if duty calls and is off duty until that occurs.” [Paragraphs 42 – 43]

“I also see no basis for finding that the obligations of a police officer are of a 'continuing nature'. What does continue when a police officer goes off duty is his or her authority to exercise police powers. ... That police officers are entitled to exercise police powers when they are off duty does not imply that they are obliged to do so. ... I can see no grounds for finding that a police officer is obliged to perform his or her ordinary functions when not on duty. Indeed, I think that the consequences of such a finding would be far-reaching indeed. Its effect would be to make the State a guarantor of good behavior on the part of police officers at all times by virtue alone of their appointment. Without a duty to protect Ms F against harm — and thus personal liability for omitting to do so — there is no scope for secondary liability of the State for the omission to protect Ms F. ...” [Paragraphs 44 – 45]

“In my view this case fails the test for vicarious liability that was articulated in *K.* It seems to me that, upon proper analysis, the finding of liability in that case was founded upon the personal liability of the policemen concerned — and consequently the vicarious liability of the State — for omitting to fulfil their constitutional and statutory police duty, and Mr Van Wyk had no such police duty in this case. ...” [Paragraph 48]

The appeal was thus upheld. Maya JA (Bosielo JA concurring) dissented (see summary at pages 21 - 22).

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V M & G MEDIA LTD 2011 (2) SA 1 (SCA)

Case heard 22 November 2010, Judgment delivered 14 December 2010

The case concerned a report prepared by two senior judges, who had visited Zimbabwe at the request of then-President Mbeki shortly before the 2002 elections in that country. The report was in the possession of the President and had never been released to the general public. The respondent, the publisher of a newspaper, requested access to the report but was denied. The High Court ordered that the report be released to the respondent.

Nugent JA (for a unanimous court: Van Heerden, Maya, Cachalia JJA and Bertelsmann AJA concurring) held:

"Open and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the state' ... But few constitutional rights are absolute. Generally they are capable of being limited within the confines of s 36. ..." [Paragraphs 1 - 2]

"The Constitution – and consequently the legislation that it has spawned – signals a decided rejection of past odious laws, policies and practices. In Shabalala and Others v Attorney-General, Transvaal and Another Mahomed DP expressed that trenchantly in relation to the interim Constitution (it applies as much to the present Constitution) when he called it a 'radical and decisive break from that part of the past which is unacceptable'. ... Etienne Mureinik captured the essence of the Bill of Rights when he described it as a 'bridge ... from a culture of authority ... to a culture of justification ...' – what he called 'a culture in which every exercise of power is expected to be justified...'" [Paragraphs 9 - 10]

"The 'culture of justification' ... permeates the [Promotion of Access to Information] Act. No more than a request for information that is held by a public body obliges the information officer to produce it, unless her or she can justify withholding it. And if he or she refuses a request then 'adequate reasons for the refusal' must be stated. ..." [Paragraph 11]

"... At another time courts were regularly confronted with laws that precluded them from going behind conclusions and opinions formed by public officials. ... The affidavits that have been filed by the appellants are reminiscent of affidavits that were customarily filed in cases of that kind. In the main they assert conclusions that have been reached by the deponents, with no evidential basis to support them, in the apparent expectation that their conclusions put an end to the matter. That is not how things work under the Act. The Act requires a court to be satisfied that secrecy is justified and that calls for a proper evidential basis to justify the secrecy. ... What the appellants' case amounts to is little more than rote recitation of the relevant sections and bald assertions that the report falls within their terms. That is not the 'stark and dramatic contrast' with the past that was referred to by Mahomed DP. Nor does it reflect that 'culture of justification' that was referred to by Mureinik and which is embedded in the Act." [Paragraphs 18 - 20]

Nugent JA noted that the sections of the Act in issue made secrecy discretionary, and after considering the responses given by the Presidency, continued:

"I have said that a court must scrupulously examine the grounds upon which secrecy is claimed, particularly because the facts that purport to found a claim of secrecy will generally be within the peculiar knowledge of the public body concerned, if the rights of a requester are not to be thwarted. ..." [Paragraph 31]

"The case that the appellants advanced to justify the secrecy of the report rests on three legs ... First, the appellants sought to cast the judges in the role of diplomats (they called them 'envoys') who embarked upon a diplomatic mission ... Then they described the nature of diplomacy, pointing out that it is 'generally accepted' in diplomacy that information is exchanged in confidence. And finally it was asserted ... that the judges were indeed received and dealt with in Zimbabwe as diplomats." [Paragraph 43]

"... [T]he appellants do not assert that the judges received information only from the government, but say that they received information from the government 'amongst others'. Where a record contains partly information that may or must be refused and partly other information, then the public body is

obliged by s 28 (1) to provide access to the latter if the former can reasonably be severed. In this case there is no more than a bland assertion that severance of one from the other is not reasonably possible, without explanation for why that is so, and without even an indication of the source and nature of the unprotected information." [Paragraph 45]

"But more important ... there is no evidential basis at all for the purported assertions of fact that I have referred to. ... Nor has a basis been laid for establishing those purported facts upon hearsay evidence. On the face of it those assertions seem simply to have been constructed and they can be summarily discounted." [Paragraph 46]

"Diplomacy is an executive and not a judicial function. I would need clear and substantiated evidence to persuade me that judges would assume that role, or that it would be approved by the Chief Justice ... While judges might from time to time perform functions that are not strictly judicial, Chaskalson P pointed out in *South African Association of Personal Injury Lawyers v Heath and Others* that 'there are limits to what is permissible.' ..." [Paragraph 49]

"There is one further aspect of the procedures that are provided for in the Act that I ought to mention. Section 80 (1) permits a court to take ... a 'judicial peek' at the record that is in issue. ... Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal."

Nugent JA thus found that the appellants had not established an evidential basis for refusing access to the report, and dismissed the appeal. On appeal to the Constitutional Court, a majority held (per Ngcobo CJ, Froneman, Mogoeng and Yacoob JJ and Mthiyane AJ concurring) that the High Court should have invoked s 80 of PAIA to take a 'judicial peek' at the report in terms of s 80, and remitted the matter for the High Court to examine the report in terms of s 80, and thereafter to determine the merits of the exceptions claimed and the lawfulness of the refusal to disclose the report. The minority, per Cameron J (Jafta, Nkabinde and Van Der Westhuizen JJ concurring), would have dismissed the appeal.

VILAKAZI V S [2008] 4 ALL SA 396 (SCA)

Judgment delivered 2 September 2008

Convicted on one count of rape, the appellant was sentenced to life imprisonment. The victim of the crime was under the age of 16. The appeal was directed solely at the sentence imposed. Nugent JA (for a unanimous court: Streicher, Mlambo and Maya JJA and Hurt AJA concurring), held:

"What is striking about the [sentencing] regime is the absence of any gradation between 10 years' imprisonment and life imprisonment." [paragraph 13]

"It is only by approaching sentencing under the Act in the manner that was laid down by this Court in *S v Malgas* … that incongruous and disproportionate sentences are capable of being avoided … For by avoiding sentences that are disproportionate a court necessarily safeguards against the risk – and in my view it is a real risk – that sentences will be imposed that are so disproportionate as to be unconstitutional." [Paragraph 14]

"The case that is before us is characterised by superficiality from beginning to end with the result that it exhibits several disturbing features … The complainant's evidence was presented with little care for completeness and accuracy. The evidence was subjected to little analysis. And the process of sentencing was perfunctory." [Paragraph 22]

"The court was required by *Malgas* ... to apply its mind to whether the sentence was proportional to the offence (in the wide sense that I have described) and I think it is fair to conclude that the court failed altogether to do so." [Paragraph 31]

"In this case there was no extraneous violence and no physical injury was caused other than the physical injury inherent in the offence. There was also no threat of extraneous violence of any kind. The appellant at least minimised the risk of pregnancy and the transmission of disease by using a condom." [Paragraph 55]

"What we have before us in assessing the emotional impact of the crime upon the complainant is that after the event the complainant felt herself able to await the appellant's return and to be in his company once more … the complainant must indeed have been traumatised, but the evidence does not reveal anything more specific than that." [Paragraph 57]

"When viewed as a whole the only material feature that the evidence discloses as having aggravated what is inherently a serious crime was the complainant's age. Bearing in mind where the complainant's age fits in the range between infancy and 16 I do not think that her age by itself justifies what would otherwise have been a sentence of 10 years imprisonment being raised to the maximum sentence permitted by law. A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate." [Paragraph 59]

MAKAMBI V MEC, DEPARTMENT OF EDUCATION, EASTERN CAPE [2008] 8 BLLR 711 (SCA)

Judgment delivered 29 May 2008

Having been employed as an educator, the appellant's employment was terminated by the respondent. The appellant challenged the fairness thereof, arguing that the respondent had committed an unfair labour practice and that the department's conduct constituted administrative action which is 'unlawful, unreasonable and procedurally unfair'. The court *a quo* upheld two *in limine* objections—that the appellant had not exhausted the internal remedies available to her, and that the High Court did not have jurisdiction to hear the application as the administrative action of which the appellant complained amounted to an unfair labour practice in terms of the Labour Relations Act - and dismissed the application. Farlam JA (Mlambo and Maya JJA and Mhlantla AJA concurring) held that the effect of the Constitutional Court's decision in *Chirwa* was that the appellant could not pursue her claim in the High Court, and the appeal was accordingly dismissed [paragraph 18].

Nugent JA, in a separate opinion, held that on the jurisdictional question:

"We are now confronted by two decisions of the Constitutional Court—its unanimous decision in *Fredericks* and its majority decision in *Chirwa*—that seem to oblige us to go in diametrically opposed directions on that issue." [Paragraph 26]

"Notwithstanding close and repeated study of the majority judgments over a considerable period of time I regret that I have not been able to discover a legal basis for the finding that the High Court has no jurisdiction over a claim of that kind." [Paragraph 34]

"The fact that the claim arises from an employment relationship does not place it within the exclusive jurisdiction reserved to the Labour Court by section 157(1) of the LRA … And if the claim falls within the ambit of section 157(2) then the ordinary jurisdiction of the High Court is expressly preserved…" [Paragraph 34]

"Applying the decision in *Fredericks*…I think the appeal must in any event be dismissed.

Ten members of the Constitutional Court held in *Chirwa* that the dismissal that was there in issue did not constitute administrative action as contemplated by PAJA … On that issue I think I am bound to follow the decision of the Constitutional Court whatever my own view might be on the matter." [Paragraph 41]

BROWN V MBENSE [2008] 4 ALL SA 26 (SCA)

Judgment delivered 28 May 2008

The first respondent had obtained an order declaring that she was a labour tenant as contemplated by the Land Reform (Labour Tenants) Act. The owner of the land being occupied by the respondent appealed. For the majority, Van Heerden JA (Mthiyane and Maya JJA concurring) held:

"It is simplistic to approach the relationship between a farm owner and a labour tenant as necessarily one in respect of which only one member of a household or family unit has the right to be or remain on the farm as a labour tenant … metamorphosis would have led inexorably to labour tenancy relationships between the farmer and each individual member of the family unit." [Paragraph 28]

"…to deny the plaintiff the rights of a labour tenant by asserting that such labour tenancy arrangements as were made were limited to the male members (or perhaps even only the male head) of a family unit smacks of opportunism, is not supported by the facts and would render her presently liable to discrimination of a kind not countenanced by the Constitution. To gauge the existence of a labour tenancy agreement in the technical and precise manner akin to that applicable to usual residential or commercial tenancies is far too restrictive an approach and one that goes against the objective and general tenor of the Act." [Paragraph 30]

Nugent JA (Scott JA concurring) dissented:

"I think that the evidence of the respondent establishes without doubt that she is not and never has been a labour tenant as that term is defined in the Act. That her husband was a labour tenant is clear but labour tenancy is not capable of being acquired derivatively."

"The cropping and grazing rights that were enjoyed by the Mhlongo household existed before Mrs Mbhense was born. Quite evidently those rights…adhered to someone other than herself." [Paragraph 47]

"That Mrs Mbhense was not under an obligation to provide labour (and thus was not the holder of the corresponding rights) is confirmed by the fact that she service only periodically … Her services would merely be the means by which the labour tenant (her father or mother) fulfilled his or her obligations to provide labour." [Paragraph 48]

"…the fact that the rights continued to be exercised unabated notwithstanding that Mrs Mbhense provided no labour confirms that the obligation to provide labour (and the corresponding right to crop and graze) did not adhere to her." [Paragraph 49]

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER V MAHOMED [2008] 1 ALL SA 181 (SCA)

Judgment delivered 8 November 2007

Two warrants had been issued, authorising the appellants to conduct search and seizure operations at the respondent's residence and offices. The evidence being gathered related to the prosecution of a former client of the respondent, Mr Jacob Zuma. All items seized were sealed and deposited with the Registrar of the Johannesburg High Court, but the respondent claimed privilege in respect of all but three items. On application by the respondents to the High Court, the warrants were set aside, and the appellants were ordered to return all documents, files, records, notes, data and other property seized under the warrants. The appellants conceded that the warrants were invalid to the extent that no case had been made out for the search and seizure of the objects listed in certain paragraphs, but sought a preservation order be inserted in the order granted by the court *a quo*.

Nugent JA held that:

"…the appellants want the material to be available to them, if they are able to obtain lawful access to it…for the purpose of establishing whether Mr Zuma or the Thint companies have committed offences, or for proving to a court in due course that they have committed offences.

"I am not persuaded that this Court (or any court) has the power in law to make a preservation order for that purpose. The retention by the Registrar of the material, or copies of the material, even if that material is not viewed, will in my view be a continuing violation of the respondent's privacy…" [Paragraph 18]

"I am not persuaded that the power to fashion remedies to redress constitutional violations are capable of being used to deny such redress so as to serve some other purpose." [Paragraph 22]

However, representatives for Mr Zuma had put the appellants on notice that if their client is ever brought to trial he would contest the ability of the state to afford him a fair trial because, it was alleged, the prosecution had had access to that privileged material. Nugent JA therefore held that what was being sought in that regard is to:

"…preserve the material (or copies of the material) so that a court may in due course be in a position to identify with certainty what material was seized if the identity of the material becomes contentious in any future trial." [Paragraph 29]

"I have little doubt that the right to a fair hearing before a court of law includes the right to have factual disputes resolved expeditiously and justly. That seems to me to provide ample authority to a court in appropriate circumstances to order the preservation of evidence so as to achieve that end." [Paragraph 31]

Cloete JA concurred in the judgment of Nugent JA, and Farlam JA concurred in the order. Ponnan JA dissented:

"The State…thus derives for itself an advantage from acting unlawfully that it would not have secured had it not acted at all…If documents unlawfully seized can be held in the manner postulated by the State, the protection afforded by the right to be secure from unlawful searches and seizures is of little, if any, value." [Paragraph 39]

"If the search and seizure in this case are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used even to the limited extent postulated by the State." [Paragraph 40]

"In order to restore both parties to the position they would have occupied had the unconstitutional search not have occurred, it is necessary that the seized items be restored to the possession of the respondent." [Paragraph 43]

MIDI TELEVISION (PTY) LTD V DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE) [2007] 3 ALL SA 318 (SCA)

Judgment delivered 18 May 2007

The murder of a baby was the subject of a highly publicised criminal trial. The appellant, the broadcaster behind e-tv, produced a documentary relating to the murder. Just before the broadcast was scheduled, the respondent requested that it be allowed to view the documentary before it was aired. The appellant refused and the respondent then obtained an order in the High Court, preventing the broadcast until the respondent was given a chance to view it first. On appeal, Nugent JA held:

"… a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage." [Paragraph 19]

"… there is no general principle of our law, whether common law, or in statute, or to be extracted from the Constitution, that obliged e-tv to furnish its material to the DPP before it was broadcast, and least of all a law that prohibited it from broadcasting the material unless it could first demonstrate that the publication would be lawful … In the absence of a valid law that restricts that freedom a court is not entitled to impose a restriction of its own." [Paragraph 25]

The appeal was upheld (Howie P, Cloete, Lewis JJA and Snyders AJA concurring).

MINISTER OF DEFENCE AND OTHERS V SANDU AND ANOTHER [2007] 2 ALL SA 127 (SCA)

Judgment delivered 31 August 2006

The High Court had held that certain of the regulations contained in Chapter XX of the General Regulations for the South African National Defence Force and Reserve to be constitutionally invalid. The appeal was noted against that order. Nugent JA held:

"Regulation 3(c) does no more than set out one of the objectives of the regulations. By itself it does not purport to restrict the ambit of permitted bargaining and is thus not constitutionally objectionable." [Paragraph 15]

"The matters that [Regulation 19] purports to exclude from collective bargaining (the negotiation of a 'closed shop or agency shop agreement') are undoubtedly legitimate labour issues…I can see no reason, in the circumstances, why a total prohibition on negotiating such an agreement is reasonable and justifiable, and in my view the regulation was correctly declared to be invalid." [Paragraph 16]

"The wide terms in which [Regulation 36] is framed are capable of including, but being restricted to, all legitimate labour issues, and that is the construction that must be preferred in order to maintain constitutional consistency." [Paragraph 17]

Nugent JA also held that the fact that the Minister makes the appointments to the Military Arbitration Board is in the circumstances "not objectionable" and "where a tribunal has a membership of five I see no grounds for finding that it is constitutionally impermissible for that tribunal's decision to be final." [Paragraph 19]

He further held that the limitations imposed by Regulations 8(b), 13(a), 25(a) and (b), 27, 37 and 41 were constitutionally lawful. Only Regulation 19 was constitutionally invalid and the appeal was therefore upheld except to that extent (Mpati DP, Cameron, Conradie and Jafta JJA concurring).

ZANNER V DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG [2006] 2 ALL SA 588 (SCA)

Judgment delivered 3 April 2006

The appellant—indicted on a count of murder more ten years after a charge of culpable homicide had been withdrawn—applied for a permanent stay of prosecution, arguing that he would suffer trial-related prejudice. Maya AJA, for the majority, held that the "…focus is solely on whether [the appellant] has suffered significant trial-related prejudice" [paragraph 16], and that "…the appellant has not contended that there are witnesses who he intended calling in his defence who, by reason of the passage of time, are no longer available" [paragraph 17]. The Court further held that other difficulties "should work to the appellant's advantage as the prosecution's burden to prove its case beyond reasonable doubt will be all the more difficult to discharge" [paragraph 19] or appear to be "no more than speculative" [paragraph 20]. The appeal was therefore dismissed (Scott and van Heerden JJA concurring).

Nugent JA (Cachalia AJA concurring) delivered a separate judgment:

"Whether there has been an unreasonable delay in bringing an accused person to trial … calls for a balanced decision that brings to account the length of the delay, the reason the State assigns to justify the delay, the assertion by the accused of his or her right to a speedy trial, and prejudice to the accused from the delay…Each is capable of being accorded its due weight only relative to the others." [Paragraph 25]

"I am unable to accept that even if the DPP has culpably denied to the appellant for more than ten years his right to be brought to trial promptly, which my colleague assumes to be the case, the appellant is nevertheless not entitled to an order staying any further prosecution in the absence of specific prejudice…" [Paragraph 27]

"For that reason, I have found it unavoidable to decide whether the appellant was indeed denied that right…" [Paragraph 27]

"I do not think the DPP can be faulted for not having brought the appellant to trial during that period, simply because throughout that period the appellant did not stand accused of having committed an offence, and there was thus no accusation upon which to try him. For the right to be brought to trial without reasonable delay is a right that protects the integrity of the prosecution process: it accrues to an accused person and endures for only so long as he or she stands accused." [Paragraph 29]

MINISTER OF HOME AFFAIRS AND OTHERS V WATCHENUKA AND ANOTHER [2004] 1 ALL SA 21 (SCA)

Judgment delivered 28 November 2003

The Respondent, a Zimbabwean national, applied for asylum for herself and her disabled son. The Respondent was issued with a permit prohibiting employment and study pending the finalisation of the application for asylum. Respondent applied to the High Court for an order declaring the prohibition to be unconstitutional, and directing the Appellants to permit her and her son to be employed and to study respectively pending the finalisation of her application for asylum. The court *a quo* granted the order, and on appeal, Nugent JA (for a unanimous court: Howie P, Navsa, Mthiyane and Heher JJA concurring) held:

"Having vested the power to determine such conditions in the Standing Committee the Legislature could not have intended the same powers to be exercised by the Minister." [Paragraph 18]

"In the *absence* of the power to prohibit an applicant for asylum from taking up employment, or from studying, the Minister acted in conflict with the Constitution in purporting to do so and the court *a quo* correctly set aside the prohibition in Annexure 3 of the regulations on that ground." [Paragraph 20]

"Whether the prohibitions in the first respondent's permit fall to be interfered with at all seems to me to depend upon whether and to what extent the Standing Committee's own determination might itself be unlawful." [Paragraph 22]

"In my view the Standing Committee's general prohibition of employment and study for the first 180 days after a permit has been issued is in conflict with the Bill of Rights. I consider the general prohibition in the regulations is unlawful for the same reasons…" [Paragraph 24]

"Human dignity has no nationality…And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights." [Paragraph 25]

"… the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment." [Paragraph 34]

"… a general prohibition will inevitably include amongst those that it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of section 36."

The Standing Committee was ordered to consider and determine whether the first applicant and her son respectively should be permitted to undertake employment and to study.

SELECTED ARTICLES

'SELF-INCRIMINATION IN PERSPECTIVE', 116 South African Law Journal 481 (1999)

The article examines whether "there is any proper foundation for relieving" an accused of the dilemma between disclosing guilt and suffering an undesirable consequence by saying nothing.

"The accused confronts a choice between, on the one hand, disclosing evidence of guilt, and, on the other hand, suffering some undesirable consequence through saying nothing at all. What the accused calls upon the law to do is to dispense with that choice so as to enable him or her to conceal knowledge of guilt. No doubt the choice that faces the accused is unenviable, but is it the function of the law to shield the accused from making it?" (Pages 502 - 503)

The article then examined the history of the accused being used as a source of proof in early English law, noting that an accused "had no assistance" in concealing guilt, and that protection against self – incrimination would have been superfluous in a system where proof was not subject to critical scrutiny (pages 509 – 510).

"... '[P]roof' was material which was determinative of the particular issue, rather than material to be subject to critical scrutiny. ... The law concerned itself with what constituted lawful proof, and not with whether it could withstand critical scrutiny. Clearly the exculpatory assertions by the accused or witnesses who spoke on behalf of the accused ... could not be placed in that category, since they could not be assumed, a priori, to be true. ...It was not self-incrimination which was considered to be objectionable – the objection was to unreliable proof." (Pages 510 - 511)

"The approach towards the admission of proof, and in particular the exclusion of the accused and defence witnesses from proof, point to a fundamental assumption that underlay the early process of criminal justice, which was that the accused must necessarily be guilty once there was lawful proof of the charge ..." (Page 511)

The article then analysed changes to the approach to criminal guilt, noting that by the early nineteenth century, the focus of the criminal trial had moved "from an assumption that the accused must be guilty to a critical appraisal of whether or not that was so." The prohibition on the accused testifying under oath assumed a new significance:

"The guilty accused need take care only not to contribute further evidence by making admissions or confessions before the trial. It was this new approach towards the assessment of proof which allowed for the development of ... the 'tactic of silence'. The accused could hardly be criticised for not answering to the evidence that had been given to establish the charge, when he or she was not permitted to testify ... at all. The refuge this gave to the accused was not the product of a principled entitlement to conceal guilt – it was the coincidental product of a rule arising from a primitive concept of proof when applied in the context of rational reasoning. ..." (Page 513)

"The weight of principle which has been attached to the accused's silence in the context of the common law ... is not borne out by its history. ... With the development of rational reasoning, the premiss upon which the accused's exculpatory evidence was excluded has long since fallen away. But the premiss remains true in relation to coerced self-incrimination, and has been reinforced by other contemporary values. Outlawing coercion as a means of inquiring into criminal wrongdoing requires no apology. It is in

conflict with contemporary notions of liberty and dignity, and is inherently incapable of providing an assurance of the truth. ..." (Page 515)

"While there is no support to be had from the heritage of the common law for an entitlement to conceal the truth, might there nevertheless be some foundation in contemporary principle for recognizing such an entitlement? The issue has arisen most often in relation to the inference that might arise from the accused's silence in the face of incriminating evidence. The inferred fact will generally be no more than that there is no innocent explanation for the evidence which points to the guilt of the accused. When added to the other evidence, it is a fact which might finally seal conviction. ... The problem with which this article is concerned is whether that properly inferred fact ... may be placed in the scales, together with the other evidence, when it comes to determining whether the accused is guilty. ..." (Page 516)

"The argument for excluding that fact from the evidence (or, as it is usually put, for not drawing an adverse inference from silence) is often sought to be found in the nature of the burden of proof. ... [T]he argument is not correct. The burden of proof does not concern itself with the source of the evidence. It is concerned with whether the whether the totality of the evidence is sufficient to tip the scales. It is not uncommon for some of that evidence to emanate from the accused himself ... The real argument relates not so much to the burden of proof as to the admissibility of 'unvolunteered' evidence. ... To say only that it is in conflict with the nature of the burden of proof ... is to beg the question why that should be its nature."

"If the fact sought to be inferred from his silence (that he had no innocent explanation for evidence which seemed to implicate him) is not the correct one, then it is no more than an error in the deductive process. But according to the majority of the [U.S. Supreme] Court [in *Griffin v California*], even if the inference is indeed correct, it ought not to be placed on the scales when the jury comes to weigh the evidence. This conclusion the majority sought to justify by associating the consequence of drawing an inference with a penalty for silence, conjuring up visions of the injustice of the Inquisition." (Page 517)

"The link that was sought to be made between the constraint upon the accused's free will and the compulsion of the Inquisitorial process is surely conceptually quite fallacious. The hallmark of the Inquisition was that it was coercive – its penalty was quite independent of the accused's guilt – and for that reason it conduced to false confessions. The objection to the methods of the inquisition is not merely that they limit the exercise of free will. The objection is that they do so in a way that might induce even the innocent to confess. It has that propensity because the 'penalty' is unrelated to the accused's guilt ...The consequence faced by the accused in a case like *Griffin* on choosing to remain silent ... does not have that propensity at all. On the contrary, it operates with quite the opposite effect to the penalty of the Inquisition, precisely because it is dependent on guilt. By definition, an innocent accused might equally remain silent, and the same consequences will not follow at all (unless there is an error in the process of deductive reasoning ...). ... To draw an inference from the silence of the accused ... has no potential at all for wrongful convictions – it only diminishes the prospect of wrongful acquittals." (Page 518)

The article thus concluded that "there is no rational explanation for an entitlement to conceal the truth" (page 519), and that due to fundamental changes in how the common law approached the assessment of guilt, the reason for imposing silence on the accused had fallen away.

SELECTED JUDGMENTS

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

Case heard 3 November 2011, Judgment delivered 13 March 2012

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

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

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

"In the concurring judgment the applicants' contention that the termination of the leases constituted an unfair practice and was in breach of section 4(5)(c) of the RHA is given consideration on the basis that it is a question of law which a party is free to raise at anytime. I am unable to agree that the determination of whether conduct constitutes an unfair practice is a question of law. In my view it is the passing of a value judgment." [Paragraph 105]

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

"... There is also a suggestion that whether or not the termination of the leases constitutes an unfair practice is a constitutional issue. ... [I]f that were so, there would be no warrant for that issue to be left to the Tribunal to decide as this Court could just as well decide it." [Paragraph 107]

"The concurring judgment sets much store on the fact that MWASA [the Media Workers Association case] was decided before the Constitution came into force. ... [T]he principle it lays down was followed by the Supreme Court of Appeal in a long list of cases after the Constitution had come into operation. The reason is that the Constitution has not changed the principle. The principle has nothing to do with interpreting a statute in accordance with section 39(2) of the Constitution. What the principle does is to

define the process of determining whether what has occurred constitutes an unfair labour practice or is unfair. This indisputably involves a consideration of facts and passing a value judgment on the facts, based not on the questions of legality but on one's sense of justice and fairness. The values invoked to pass judgment are now entrenched in the Constitution. The passing of a value judgment is quite different from raising a point of law." [Paragraph 108]

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

Zondo AJ found further that the termination of the leases was not unfair or unreasonable, and thus not contrary to public policy [paragraph 132]. Zondo AJ then considered further grounds of disagreement with the majority decision, including that the order made (postponing the appeal and giving a set time frame for a complaint to be brought to the Tribunal) effectively stayed proceedings in the Constitutional Court:

"In my view this Court should not make an order staying the appeal proceedings in this matter. This Court should decide the appeal before it on the same record that the Supreme Court of Appeal had when it decided the appeal. It is the decision of the Supreme Court of Appeal that is on appeal before us and we must decide whether that decision is right or wrong. The main judgment does not decide the issue before us and the issue which was argued by the parties for determination by this Court. ..." [Paragraph 135]

Zondo AJ held further that the applicants had previously referred a complaint to the Tribunal, as contemplated by the order, which was withdrawn to enable applicants to concentrate on opposing the eviction application. Zondo AJ characterised this step as "difficult to understand", and held that it would be unfair not to bring the dispute to finality [paragraph 141].

Froneman J (Yacoob J concurring) wrote a separate judgment concurring with the majority:

"Under the Constitution all law is, or needs to be, infused by constitutional values. Legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights. ... Interpretation of what constitutes an "unfair practice" under the Act ... is thus inevitably a constitutional issue, a matter of law. Interpretation and application of the law under the Constitution is never a mechanical application of rules; it always involves a value judgment. Our Constitution and law are infused with moral values. The days of denying the value-laden content of the law are long gone." [Paragraph 151]

"It would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation. ... Fortunately neither the High Court nor the Supreme Court of Appeal did so here. Criticism of the main judgment for considering the Act is in my view unwarranted." [Paragraph 152]

EQUITY AVIATION SERVICES (PTY) LTD V SA TRANSPORT & ALLIED WORKERS UNION & OTHERS (2009) 30 ILJ 1997 (LAC)

The Labour Appeal Court had to determine whether the employees were members of the union when they participated in a strike. The court then considered whether the employees who were not members of the union, which had complied with the pre-strike procedures in terms of s 64(1) of the Labour Relations Act (LRA), were entitled to participate in the strike.

Zondo JP held:

"The provisions of s 3 of the LRA are of paramount importance ... They enjoin everyone who applies the LRA to interpret its provisions to give effect to its primary objects, to interpret its provisions in compliance with the Constitution and also to do so in compliance with the public international law obligations of the Republic." [Paragraph 39]

"It is theoretically possible that one may have an interpretation of a provision of the LRA that gives effect to the primary objects of the LRA but is not in compliance with either the Constitution or the public international law obligations of the Republic or both. In such a case, quite clearly the requirement for an interpretation that complies with the Constitution will prevail. It is not necessary in this case to consider what should happen where an interpretation complies with the Constitution, gives effect to the primary objects of the LRA but is not in compliance with the public international law obligations of the Republic or vice versa." [Paragraph 41]

"The effect of the interpretation of s 64(1) (b) advanced by the respondents is that a union that gives such an undertaking to the employer in its strike notice is not bound by such undertaking and it is free, despite such an undertaking to the employer, to turn around thereafter and instigate those of its members falling outside the strike notice to also commence striking on the day given in the strike notice. The effect of my interpretation of s 64(1) (b) is that a union is free, if it is so chooses, to limit or not to limit the categories of employees to commence striking on the day given in the strike notice but, if it chooses to limit the categories of employees to commence striking on a certain day, it is bound by that limitation. Accordingly, on my interpretation of s 64(1) (b), if a union gave an undertaking to the employer in its strike notice that certain categories of employees will not commence striking on a certain day, it is bound by that undertaking and the employer is entitled to rely on it to make certain decisions relating to the strike or the dispute." [Paragraph 98]

"The limitation is not necessarily that the other categories of employees will never participate in the strike until it ends. It is only that they will not commence striking on the day given in the strike notice and this means that they may not commence striking on some other day, if they so wish, in which case a notice of their intention to commence striking must be given before they commence striking on such a day. On my interpretation a union would also be entitled to say in its strike notice that only the employees (for example its members) employed in certain departments or categories will take part in the strike proposed to commence on a certain day and that employees employed in other departments or categories will not take part in the strike at all. If a union makes such an undertaking in regard to its members, it is bound by it and employees in the excluded categories may not join the strike at any time. On the respondents' interpretation of s 64(1) (b) such an undertaking by a trade union would not be binding on the union and its members and the union would be entitled, despite such an undertaking, to later get its members in the excluded departments or categories to join the strike." [Paragraph 99]

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

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

Zondo JP held:

"It was submitted on behalf of the appellant that the first respondent was an organ of state as defined in s 239 of the Constitution ... and that, therefore, when it makes a decision or performs an act, such decision or act can be said to be a decision or act of the state ... I am satisfied that the submission is correct and that the court a quo did have jurisdiction to entertain the appellant's review application in terms of s 158(1) (h) of the Act." [Paragraph 5]

"As the Labour Court is a court of a status similar to that of a High Court, it has power in terms of s 172(2) of the Constitution 'to make an order concerning the constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President'. As is the case with orders of constitutional invalidity made by a High Court, an order of constitutional invalidity made by the Labour Court does not become operative unless it is confirmed by the Constitutional Court. Section 172(2) (b) provides that a court which makes an order of constitutional invalidity may grant 'a temporary interdict or other temporary relief to a party or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct'. Section 169 (b) of the Constitution provide that a High Court may decide 'any constitutional matter' except a matter that 'is assigned by an Act Parliament to another court of a status similar to a High Court'. This provision ensures that High Courts have no jurisdiction in constitutional matters which have been assigned to the Labour Court by an Act of parliament." [Paragraph 11]

"... When deciding a constitutional matter which is within its competence, a High Court, like any court deciding such a matter, must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of such inconsistency (s 172(1) (a)). It also has power in such a case in terms of s 172(2) (b) to grant a temporary interdict or other temporary relief to a party or to adjourn the proceedings pending a decision of the Constitutional Court on the validity of that Act or conduct ..." [Paragraph 22]

"To compound the problem, if there were to be an appeal against each of the two judgments of these two courts, such appeals would go to two different appeal courts of the same status, namely, the Labour Appeal Court and the Supreme Court of Appeal. If the two appeal courts were to give conflicting judgments, and there was no constitutional issue to be taken to the Constitutional Court, the result would be an intolerable one. There is no justification for any of this. The dispute resolution system applicable to all employment and labour disputes needs to be streamlined as far as possible." [Paragraph 42]

"If the problem of jurisdiction is not resolved by way of legislative intervention, one result may be that, when an employer who is faced with a protected strike realizes that the Labour Court will not grant certain relief, he can arrange for his landlord to approach, not the Labour Court, but a High Court in the hope that the High Court will grant such relief. In that event the High Court, not having the advantage of the specialised knowledge, experience and expertise in labour law required by the Act of judges of the

Labour Court, may grant an order which completely undermines the process of collective bargaining which is one of the fundamental pillars of the Act. The way to avoid this difficulty is to have legislation which will ensure as far as possible that all such matters, if they have to go to a superior court, go to the Labour Court." [Paragraph 43]

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

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

MKHIZE V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND ANOTHER 2001 (1) SA 338 (LC)

During CCMA proceedings, the applicant argued that certain evidence was inadmissible, having been obtained in violation of his constitutional right to privacy. The commissioner declined to consider the argument for lack of jurisdiction. The applicant sought to review and set aside the award.

Zondo J held:

"[L]ike everyone else interpreting and applying the Act, commissioners of the CCMA must … interpret its provisions in compliance with the Constitution. Section 8(1) of the Constitution says the Bill of Rights applies to all law and binds the Legislature, the executive, the Judiciary and all organs of the State. Section 8(2) says a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Section 34 of the Constitution gives everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum." [Paragraph 16]

"Although there is no definition of a tribunal and forum in the Constitution, there can be no doubt that the CCMA is a tribunal or forum such as envisaged in s 39. That being the case, it is crystal clear that, in the light of s 39(1) and (2), when it performs its arbitral functions under the Act, the CCMA is required to promote the spirit, purport and objects of the Bill of Rights. In interpreting and applying the Bill of Rights,

the CCMA is also required to, inter alia, promote the values that underlie an open and democratic society based on human dignity, equality and freedom." [Paragraph 18]

"I am satisfied that the CCMA has not only the power but also is required to interpret and apply provisions of the Bill of Rights when it arbitrates disputes whenever these are relevant or are raised. This does not mean that the CCMA has jurisdiction to pronounce on the constitutional validity of a statute because it obviously does not have that power. That is the jurisdiction which the Constitution reserves exclusively for the High Courts, Courts of the same status as the High Courts … the Supreme Court of Appeal and the Constitutional Court. … It simply means that in performing its statutory functions, where relevant, the CCMA should apply the provisions of the Bill of Rights and promote its values. I am therefore satisfied that, when the applicant's attorney raised the constitutional argument … the commissioner should have considered the argument and taken a view one way or the other. He should not have refused to consider the constitutional issues at all." [Paragraph 19]

"s 41(1) (d) of the Constitution provides another reason. Section 41 requires, inter alia, all organs of State to be loyal inter alia to the Constitution. The definition of an organ of State in s 239 (b) (ii) includes a functionary or an institution that exercises public power or a public function in terms of any legislation. I think the CCMA falls within this definition and is therefore an organ of State in terms of the Constitution." [paragraph 20]

SHOPRITE CHECKERS (PTY) LTD V RAMDAW NO AND OTHERS 2001 (4) SA 1038 (LAC)

The Appellant had brought an application to the Labour Court to review and set aside an arbitration award issued by the CCMA regarding the fairness of the dismissal by the appellant of the second respondent. One of the issues raised was the continued validity of the Labour Appeal Court's judgement in the Carephone case, the court a quo having found that Carephone was no longer good law.

Zondo JP held:

"The Court a quo's conclusion … was based on the conclusion … that the issuing of an arbitration award by a CCMA commissioner did not constitute an administrative action. In Carephone argument had been presented to this Court that the administrative justice provisions of the Constitution did not apply to the issuing by a CCMA commissioner of an arbitration award in compulsory arbitration proceedings under the Act because that did not constitute an administrative action but was an act of a judicial nature. The Court rejected this argument." [Paragraph 10]

"The Constitutional Court did not in Fedsure give a definition of an administrative action. Indeed, it could not have been expected to do so with any degree of precision. However, it did make the observation … that, whilst it might not have served any useful purpose under the previous legal order to ask whether or not an action of a public authority was administrative, under the new constitutional order that question had to be asked in order to give effect to the provisions of s 24 of the interim Constitution and has to be asked in order to give effect to the provisions of s 33 read with item 23 of Schedule 6 of the final Constitution." [Paragraph 13]

"I agree with the above approach by the Constitutional Court. … [T]he judgment in Carephone … does not seem to have appreciated that the administrative justice section could only apply if the action in question was an administrative action and that, because of this, a court would have no choice but to have to

satisfy itself that such action was an administrative action before it could apply the provisions of the administrative justice section to it. This means that, however regrettable or even unpalatable it may be to have to classify actions according to whether they are administrative, judicial or quasi-judicial, courts have no choice but to classify actions according to such categories in certain circumstances under the new constitutional order in order to give effect to certain constitutional provisions." [Paragraph 14]

"What is clear from the judgment of the Constitutional Court [in the Pharmaceutical Manufacturers case] is that:

(1) as long as a particular decision is the result of an exercise of public power, such a decision can be set aside by a court if it is irrational;

(2) the bona fides of the person who made the decision do not by themselves put such a person's decision beyond the scrutiny of the Court;

(3) the rationality of a decision made in the exercise of public power must be determined objectively;

(4) a court cannot interfere with a decision simply because it disagrees with it or it considers that the power was exercised inappropriately;

(5) a decision that is objectively irrational is likely to be made only rarely;

(6) decisions (of the Executive and other functionaries) must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with (the requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary)." [Paragraph 19]

"There can be no doubt that in Carephone this Court viewed the concept of justifiability as related, at least to some extent, to the concept of rationality but emphasised, correctly in my view, in the context of the fact that it was dealing with s 33 read with item 23 which expressly uses the adjective 'justifiable', that it should stick to the term 'justifiable'. In the light of this I am of the view that, although the terms 'justifiable' and 'rational' may not, strictly speaking, be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in Carephone . In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable." [Paragraph 25]

"In the light of the above it appears to me that counsel for the appellant was right … that whether or not Carephone was wrongly decided has become largely academic as a result of the judgment of the Constitutional Court in the Pharmaceutical Manufacturers' case, which decided in effect that in our law rationality has become a constitutional requirement for all decisions taken in the exercise of all public power. Irrationality of such decisions is now a ground of review and, quite clearly, the issuing of an arbitration award by a CCMA commissioner under the Act is an exercise of public power and must, therefore, meet the constitutional requirement of rationality. If an award fails to meet this constitutional requirement, it can be set aside on this ground." [Paragraph 26]

"[A] decision that is objectively irrational is likely to be made only rarely. … It must also be borne in mind that the Act contemplates that the disputes that it requires to be referred to arbitration are meant to be put to an end by way of arbitration and that, the dispute resolution dispensation of the Act - which is meant to be expeditious - would collapse if every arbitration award could be taken on review and set

aside. In my view it cannot be inconsistent with the Constitution to seek to promote an expeditious resolution of these disputes." [Paragraph 82]

The appeal was dismissed.

MODISE & OTHERS V STEVE'S SPAR BLACKHEATH (2000) 21 ILJ 519 (LAC)

This was an appeal against a determination made by the Industrial Court in terms of s 46(9) of the now repealed Labour Relations Act in a dispute between the appellants and the respondent. The dispute was whether or not the respondent had committed an unfair labour practice in dismissing the appellants. The determination of the Industrial Court was that the respondent had not committed an unfair labour practice and the appellants' claim was dismissed.

Zondo AJP held

"……[I]t can now be said with a sufficient degree of certainty that the audi rule applies to contracts of employment in South Africa which are subject to the Labour Relations Act even if such contracts do not contain a provision which, either expressly or by necessary implication, incorporates such rule….."[Paragraph 17]

"… I cannot see why it can be said that a worker who participates in a stay-away is entitled to the benefit of a hearing before he can be dismissed but one who participates in a normal strike is not entitled to a hearing before he can be dismissed. Such an approach would encourage stay-aways more than normal strikes. Under the old Act stay-aways in the form of strikes for political reasons were absolutely prohibited whereas normal strikes were only prohibited in certain circumstances." [Paragraph 22]

"... [T]here are situations where, arguably, an employer may be entitled to dismiss legal strikers, eg where the legal strike has taken too long a time may come when the employer may be entitled to dismiss the legal strikers. I can see no reason why in those circumstances the legal strikes can be said to have no right to state their case before they can be dismissed. Already s 67(5) of the new Act contemplates that legal strikers may be dismissed where the reason for their dismissal is based on the employer's operational requirements. In such a case it seems clear that under the new Act the employer would be obliged to comply with the consultation requirement of s 189 of the new Act which is a form of the observance of the audi rule. I can see no reason why an employer would be obliged to observe the audi rule in the form of consultation if the reason for the dismissal of legal strikers is based on the operational requirements of the employer but would not be obliged to observe the audi rule in whatever form if the reason for dismissal is based on B the notion that the strike, being illegal, constitutes misconduct." [Paragraph 23]

"In the light of all of the above it therefore seems to me that it can be said with a sufficient degree of certainty that, in the context of dismissal, an employer is obliged to observe the audi rule where his decision may adversely affect an employee's rights….." [Paragraph 36]

"The no audi approach is contrary to one of the values which our Constitution enshrines and seeks to instill in our democratic society, namely equality before the law. It perpetuates inequality before the law in the way the courts treat striking workers in the private sector and striking workers in the public service. I say this because, in terms of the no audi approach, it must, in my view, be accepted that, if the

striking workers are public sector workers, they certainly will be entitled to the benefit of the audi rule before they can be dismissed." [Paragraph 77.2]

SELECTED ARTICLES

THE NEW LABOUR COURTS AND LABOUR LAW: THE FIRST SEVEN MONTHS OF THE NEW LRA (1998) 19 ILJ 686

This article gives an overview of the cases which the Labour Court and the Labour Appeal Court had dealt with in the seven months from 11 November 1996 to the end of June 1997.

The first question examined was that of the definition of a strike. It was argued that whether conduct constitutes a strike has nothing to do with what label the parties give such conduct. Accordingly, the court would examine conduct and determine whether it falls within the definition of a strike irrespective of whether one or both of the parties call such conduct a strike.

In SA Breweries Ltd v FAWU the Appellate Division resolved the controversy on whether or not a collective refusal by workers to do work which they were not contractually obliged to do constituted a strike. Within a few months of its birth, the Labour Court was called upon to interpret the word 'work' in the definition of strike in the new Act. In Simba v FAWU an employer sought an order the effect of which was to require workers to work in such a way that they took their lunchbreaks on a staggered basis. For the workers to take their lunchbreaks on a staggered basis, they would have had to work continuously for longer than five hours without a meal interval which is prohibited by s 7(1) of the Basic Conditions of Employment Act (the BCEA). The court held that the word 'work' there did not include work the performance of which beyond a certain time or at a particular time would constitute a criminal offence.

The article then examined the question of who has the right to strike. The labour courts had ruled that the Act created two types of strikes, namely a primary strike and a secondary strike, and that, when workers employed by an employer go out on a primary strike, the only limitations on that right to strike are those set out in s 65 of the Act. The requirements which need to be complied with in order to make the strike a protected strike are those set out in s 64 of the Act and, if those are met, the ensuing strike is a protected strike.

The third question focused on ‘strikeable issues’. It was argued that the new Act places limitations on issues over which strikes and lock-outs may be embarked upon. Whereas as a general rule disputes of right are not strikeable and those of interest are, s 65(2) (a) provides an exception to this general rule in that those organizational rights provided for in ss 12 to 5 of the Act may be the subject of a strike. That some issues are strikeable while others are not strikeable is apparent from the provisions of s 65.

In Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union & others, one of the issues the Labour Court had to decide was whether a strike may be resorted to by workers in relation to a complaint of 'harassment of shop stewards and employees' by other employees or a supervisor or a manager of their employer. The Labour Court reasoned that in essence such a complaint was one of victimization which is a contravention of the right to freedom of association under s 4 of the Act or a perpetration of an unfair labour practice under the residual unfair labour practice provisions which relate to unfair discrimination in item 2(1) of part B of schedule 7 to the Act. The court held that the workers had a right to refer such a dispute to the Labour Court for adjudication and that such a strike was hit by the provisions of s 65(1) (c) and was, therefore, unprotected.

“An analysis of the LAC's judgment reveals, it seems, that where workers make a certain demand, the test whether they can strike over such demand is the basis for such a demand or the reasons for such a demand. If the reasons for a demand by workers that the employer dismiss a certain employee or

supervisor or manager is that such an employee, supervisor or manager is (or alleged to be) harassing workers, that would be a justiciable issue and, therefore, not a strikeable issue. No example was given by the LAC of a situation where the demand for a dismissal of an employee or supervisor or manager could be said not to be justiciable when regard is had to the motivation or reasons for the demand." (Page 694)

"The approach of the LAC raises three issues about disputes that are strikeable and those that are not. The first is whether there is any obligation on a party to a dispute which seeks to resort to a lock-out or a strike to give reasons or motivations for its position on the dispute and, if there is such an obligation, whether a party may exercise the right to strike prior to its giving such motivation or reasons." (Page 695)

"The second issue ... is that, despite the fact that the particular formulation used in s 65(1) (c) was meant to avoid the difficulty of defining a dispute of right (as opposed to a dispute of interest), the issue before the LAC ended up requiring a clear distinction to be drawn between a dispute of right and a dispute of interest and the way the LAC sought to overcome that issue raises more questions than answers." (Page 695)

"The third issue ... is the relationship between form and substance and, to what extent it can be said that the approach it adopted seems to give more weight to form than to substance." (Page 696)

On the issue of pre-strike procedures, the author mentions that:

"The provisions of s 64(1) lay down what procedures need to be followed in order for a strike or a lock-out to be a protected one and the provisions of s 64(3) set out the situations where compliance with s 64(1) procedures is exempted. There are at least two cases which have come before both the Labour Court and the LAC in this regard. In one matter the issue was whether one of the s 64(1) procedures had been complied with and, in the other, the issue was whether the exemption provided for in s 64(3) was applicable so that there had been no obligation to comply with s 64(1) procedures. The one is the case of Ceramic Industries which has already been referred to ... [O]ne of the issues was whether in respect of that strike the union had given such notice as is contemplated by the provisions of s 64(1) (b) . Basson J went on to add that, even if there had not been strict compliance with s 64(1) (b), there had been substantial compliance. ... Landman AJ, like Basson J in at least one aspect, concluded that on those facts there had been substantial compliance with s 64(1) (b). The reason Landman AJ gave as to why he was persuaded that there had been substantial compliance was the time when the strike had commenced. However, in another respect, Landman AJ held that it was important that a s 64(1) (b) notice should say when the strike would commence. He said it was not sufficient for the notice simply to say the strike would commence any time after 48 hours from the date of the notice." (Page 701)

"In a subsequent appeal in that matter the LAC held that the notice given in the Ceramic Industries matter did not comply with the provisions of s 64(1) (b) because there was no specification in the notice as to when exactly the strike would commence. The LAC based its approach on one of the objects of the Act, the object of the section itself, as well as the language of the statute. Insofar as the language of the statute is concerned, the LAC laid emphasis on the use of the word 'commencement' in s 64(1) (b). It noted that the notice used in the matter said the strike would start 'at any time after 48 hours from the date of this notice.'" (Page 702)

The article then considered case law on pre-protest actions, particularly the LAC's decision in *Business SA v COSATU & another*:

"... [I]t is interesting to note that, whereas the majority judgment seems to have attached a lot of weight to the harm that the protest action could do to the national economy ... the minority judgment seems to have placed more weight on the possible socioeconomic benefits which the vast majority of poor and vulnerable workers of this country, who have, for many years been subjected to, inter alia, wage discrimination, would gain if COSATU's protest action were allowed and was successful in getting employers to agree to COSATU's demands." (Page 708)