CONTENTS AND LIST OF CANDIDATES

INTRODUCTION

Background to the Democratic Governance and Rights Unit (DGRU)

1. The DGRU is an applied research unit within the Public Law Department at the University of Cape Town. It is primarily concerned with the relationship between rights and governance. Its work focuses on the intersection between public administration, with the challenge of public accountability, on the one hand, and the realization of constitutionally-enshrined human rights on the other. Currently, one of the DGRU's main projects focuses on judicial selection in South Africa.

Background to this report

2. Members of the commission may recall that DGRU compiled a report on the judicial records of candidates for Constitutional Court positions in September 2009. The intention of this report was to assist the JSC by providing an objective insight into the judicial records of the short-listed candidates. This report follows a request from the Chief Justice, as head of the JSC, for the DGRU to prepare a similar report on the judicial records of the shortlisted candidates for the forthcoming interviews in October 2010.

Methodology of this report

3. Compiling this report in the time available presented some significant challenges. The Constitutional Court report, although voluminous, was made easier by the fact that there were fewer shortlisted candidates, and could be confined to constitutional issues, making it easier to focus on limited aspects of judgements.

4. This narrowed focus is not present in the case of SCA and High court positions – as courts of general jurisdiction, our report could potentially focus on any aspect of any judgement that the candidates have given. This would have made the report over-broad and unwieldy, as well as making it extremely difficult to finish in the allocated time.

5. Bearing these issues in mind, and following discussion between the Chief Justice and the Director of the DGRU, Associate Professor Richard Calland, a methodology was adopted which focuses on the following aspects of candidates' records:

    - The report focuses on candidates' judgments which relate to constitutional issues, or which would shed light on candidates' understanding of constitutional values;

    - The dates on which cases were heard and judgments delivered (where that information was available) are noted, in order to provide evidence of a candidate's industry and capacity for hard work;

    - Where a significant amount of research was evident in the judgment, this is noted;

    - The importance of a judgment, in terms of whether it broke new ground, and relatedly, concurring or dissenting judgments are included, in order to show a candidate's independence of mind. In some cases, concurring or dissenting judgments have been included even if they do not fall within the 'constitutional' focus of the report;

- Where available, selected academic articles written by candidates have been included;
- Where possible, judgments have been included from different stages in a candidate's judicial career, in order to try to reflect signs of a growth in their judicial philosophy.

6. It will be apparent from the focus of the report that the report is not, and was not intended to be, a comprehensive summary of candidates' judicial records. To do so would have been almost in impossible in the time available, and would also have made the report so long that it would be difficult to use. Therefore, the report should be seen as trying to provide selected examples of a candidate's judicial record, in order to assist commissioners in their questioning of the candidates.

7. In preparing the report, we have been assisted by having sight of candidates' application forms, but we have not confined ourselves to these. Whilst many of the cases and articles in this report will be mentioned in candidates' applications, this will not always be so. We have attempted to be fair to all the candidates in selecting material for the report, and the material included should not be seen as an implicit endorsement of any one candidate. However, some candidates have more extensive track records than others, or have written more judgments within the parameters of the report than others. Where candidates did not have any judgments which seemed to fall within the parameters of the report, we included judgments that would give an indication of their judicial qualities.

8. For candidates to the Labour Appeals Court, we have focused on judgments relating to labour law rather than on more general judgments. For the candidate to the Competition Appeals Court, we have included cases of a more commercial nature, as we felt this might be useful to the JSC in assessing the candidate's suitability for that court.

9. We have not included judgments which have been co-written by more than one judge.

Submission

10. We would like to conclude with some submissions relating to the interview process. We have previously submitted to the JSC that it is desirable for interviews to be conducted in light of clear, publically available criteria upon which appointments are made. In this regard, we are heartened to note the JSC's recently released summary of the criteria used when considering candidates for judicial appointment.

11. We have not yet had the opportunity to fully analyse the criteria, but we will be giving them careful consideration and preparing a response which we trust will assist the JSC in both interpreting and implementing the criteria. At this stage, we note that many of the criteria are phrased broadly, and it is not always obvious, *prima facie*, how the JSC will interpret and understand them.

12. The issues we have been asked to deal with in preparing this report, such as candidates' independence of mind and sensitivity to constitutional values, can be useful in helping to flesh out the criteria used by the JSC.

13. We would like to take this opportunity to reiterate our previous submissions regarding our understanding of the attributes which may be said to make up the 'ideal South African judge'. These submissions have previously been made to the JSC, but are repeated here for the sake of convenience.

13. We submit that the following attributes represent a principled approach to answering this difficult question[1]. The criteria that a candidate be 'fit and proper' for appointment might be distilled into five categories:

13.1 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.

13.2 Independence of mind: Judges must have the courage and disposition to act independently and free from partisan political influence and private interests alike[2].

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

13.4 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.

13.5 Judicial temperament: Though a somewhat elastic term, this may encompass qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.

14. The criteria that candidates be "appropriately qualified" might be understood as referring to a candidate's formal qualifications, experience and potential. We are of the view that judges in all courts should demonstrate sensitivity to constitutional values, in order to fulfil the Constitutional injunction that the Bill of Rights be promoted in the interpretation of legislation and the development of common and customary law.

15. The JSC is obliged not only to consider whether candidates meet these criteria, but – importantly – also to consider the <u>need</u> for the judiciary to reflect both the racial and gender composition of the South African population. This is, of course, an obligation which is fundamental to the legitimacy of the South African legal system.

[1] This set of attributes draws on the research of Susannah Cowen, a practising advocate and Senior Research Associate of the DGRU. Her paper, *What Makes an Ideal South African Judge?* will be published soon.

[2] 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 to not slavishly follow 'the line' of any one political or private party or interest.

16. In terms of the relationship between sections 174(1) and (2), we submit that while there is no hierarchy amongst the two sets of provisions, and neither should succumb to the other, nor does it represent a 'zero sum game'. Candidates must be "fit and proper", and "appropriately qualified", but due consideration must also be given to the "need for the judiciary to reflect broadly the racial and gender composition of South Africa". If sections 174(1) and (2) are applied correctly, choosing an ideal judge and achieving equity, diversity and representation is necessarily an inter-related and complementary process.

17. Clearly, the process of interviewing candidates provides an opportunity to assess whether or not they meet the constitutional standard set in section 174(1). Questions should, we respectfully submit, be directed in a consistent fashion towards criteria such as those that we outline above. In particular, we suggest that it will be necessary for commissioners to ask questions about a candidate's "judicial philosophy". We understand "judicial philosophy" to include a candidate's commitment to constitutional values, as well as their views on issues such as the role of the judiciary, constitutional interpretation, and ethical and ideological issues relevant to the judicial function.

Acknowledgments

18. Under the guidance of Richard Calland, this research was carried out by Abongile Sipondo, researcher and advocacy manager of the DGRU; Chris Oxtoby, research associate of the DGRU; and Lwando Xaso and Anisa Mahmoudi, research assistants of the DGRU.

19. We are grateful for the financial support of the Open Society Foundation and the Claude Leon Foundation in making this project possible.

Associate Professor Richard Calland

Director: Democratic Governance & Rights Unit

University of Cape Town

29 September 2010

SELECTED JUDGEMENTS

PHENITHI V MINISTER OF EDUCATION & OTHERS (2005) 26 ILJ 1231 (O)

The case dealt with a constitutional review of a deeming provision in the Employment of Educators Act. Applicant sought to review respondents' decision to dismiss her under the Act, arguing that her rights to fair labour practice and lawful and fair administrative action had been infringed.

"The provisions of s 14(1) and 14(2) give the employer a discretion in each case whether or not to hold a hearing. ... The fact that the employer chooses not to avail himself of the discretion in favour of the employee cannot be used to impute the statute with constitutional invalidity. The statute itself makes provision for the rights of the employee to be respected by way of the exercise of a discretion. The question then becomes whether or not the employer exercised that discretion in a manner that is unconstitutional. Whether the exercise of the discretion is obligatory or not, in my view does not alter the position that the statute does not blatantly ignore the right of the employee to be heard. Where the exercise of a discretion has implications to the rights of the employee, it is in any event difficult to regard the exercise of that discretion as optional."

"While the statute may promote selectivity, in my view it cannot for that reason alone be struck down as being unconstitutional as ignoring the rights to fair labour practice and administrative justice. It may be that in the circumstances of the particular case the exercise of the discretion on the part of the employer not to grant a hearing amounts to an unfair labour practice or unjust administrative action, but that would only be an incorrect exercise of the discretion afforded the employer in terms of the statute. It does not in my view taint the constitutional validity of the statute itself." (paragraph 4).

"To my mind the applicant's conduct smacks of a blatant disregard of her responsibilities. Such responsibilities involving as they did, the education of young children must be taken extremely seriously and her absence caused a major disruption in the life of the young learners in her charge. I find that it was in the circumstances quite natural for the respondents to form the belief and the opinion that she had deserted her post and that in the circumstances no further invitation was necessary to the applicant to make representations prior to being dismissed. Moreover, in these circumstances I can find no reason why the first respondent should repeat the invitation to make representations, make any further attempt to establish the whereabouts of the applicant or exercise his discretion in terms of s 14(1) *(a)* in favour of the applicant." (Paragraph 5)

"In the present circumstances I find established on the probabilities, that the applicant deliberately absented herself from duty with the intention not to return and for reasons best known to herself changed her mind thereafter. I am of the view that the applicant deserted her post and I find therefore that her dismissal was substantively fair." (paragraph 6)

"The correct approach seems to be that where adequate warning is given of the consequences of extended absence without an explanation, the employer is relieved of the obligation to hold a hearing." (paragraph 7)

Ebrahim J thus dismissed the application. The decision was upheld by the SCA on appeal: **Phenithi v Minister of Education & Others (2006) 27 ILJ 477 (SCA)**

S v RADEBE 2006 (2) SACR 604 (O)

Case heard 8 May 2006, Judgment delivered 29 June 2006.

The appellant had been convicted by the Regional Court of culpable homicide and violations of the Arms and Ammunition and General Law Amendment Acts for possession of a firearm and ammunition. On appeal, the appellant conceded that there was no merit in the appeal against the convictions of culpable homicide and under the Arms and Ammunition Act; and the State conceded that the conviction under the General Law Amendment Act was incompetent, as it duplicated the convictions under the Arms and Ammunition Act.

"The substantial issue in this appeal is whether such a duplication has occurred with regard to counts 2, 3 and 4. The rule against a duplication of convictions is a salutary one and it is the court's duty to guard against such duplication where an accused person is charged with multiple charges supported by the same facts." (paragraph 3)

"The rule against a duplication of convictions is a rule primarily aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused person in the form of double jeopardy, that is, being convicted and punished twice for the same offence when in fact he or she has only committed one offence." (paragraph 5)

Ebrahim J therefore found that there had been no improper duplication of convictions, and that the state had proved its case on the charge of contravening the General Law Amendment Act beyond a reasonable doubt. Ebrahim J reduced the sentence imposed as the regional court had misdirected itself in imposing a minimum sentence where none was applicable.

LAMBERTUS HENDRIK NIENABER V MINISTER OF SAFTEY AND SECURITY, CASE NO. 5347/2005, 27 NOVEMBER 2008 (UNREPORTED)

Case heard 20 November 2008, Judgment delivered 27 November 2008.

Plaintiff sued the defendant for damages for unlawful arrest and unlawful detention (a claim for malicious prosecution was abandoned during argument). Plaintiff had been accused of abduction and rape by a 15 year old girl, but the charges against him were subsequently withdrawn.

"[T]he right to and protection of every citizen's individual liberty is so fundamental that the police should not likely arrest without a warrant. The requirement of wrongfulness as an element of unlawfulness must be infused with the protections guaranteed by the Bill of Rights."

"However, in doing so, one must consider the conspectus of the evidence as a whole in each case in deciding the crucial question as to whether the conduct complained of gives rise to reasonable suspicion in the mind of the arresting officer that the arrestee has committed an offence."

"Section 40 of the Criminal Procedure Act ... remains on the statute book. Until it has been amended to bring it in line with the reasoning in support of protecting individual liberty at the expense of an arrest forthwith where the arresting officer believes on reasonable grounds that a schedule 1 offence has been committed, such an arrest will be lawful." (paragraph 13).

The claim was dismissed.

VAN SCHALKWYK & OTHERS V MKIVA N.O. & OTHERS (2009) 30 ILJ 1266 (O)

Applicants, employees of the Free State Provincial Government, had their salaries upgraded during a restructuring process. The increases were approved and made retroactive by the then-MEC for Finance (Dingane). A subsequent audit revealed that the retrospective payments of the salary increases contravened Public Service Regulations, and the Department took steps to reverse and reclaim the retrospective payments. Applicants sought to interdict the department from deducting the monies wrongly paid to them.

"It is trite that a public authority taking administrative action must be authorized to do so. If there is no authorization for the action in some or other way the action taken will be unlawful. ... Consequently, not only must a functionary exercise powers/take administrative action which he is expressly authorized to take but he must also only take such action within the limits provided for in that source of authority. ... Unfortunately ... in authorizing the increases to operate with retrospective effect, he [Dingane] embarked on a course falling outside the boundaries prescribed by the said regulations and his actions were clearly unlawful and invalid and fell foul of the constitutional requirement of just administrative action ..." (pages 1271 – 1272).

"As authority for the proposition that Dingane's invalid administrative act could only be set aside by a court of law in proceedings for judicial review as he was functus officio, Mr *Daffue* , who appeared for the applicants, referred me to the decision in *Oudekraal Estate (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA). It is necessary to give a synopsis of the facts of this case in order that they may be clearly distinguished from those of the present case. The issue in the *Oudekraal* case was whether and in what circumstances an unlawful administrative act might simply be ignored and on what basis the law might give recognition to such an act. ... In deciding that his approval was unlawful and invalid at the outset for reasons not necessary to set out here, the court held that until such approval, and any consequences flowing therefrom, was set aside by court in proceedings for judicial review, it existed in fact and it had legally valid consequences which could not simply be overlooked and ignored. These would continue to operate as long as the unlawful and invalid act was not set aside." (pages 1272-1273)

"In the present case there can be no debate about the fact that Dingane on making the salary increases retrospective in operation became functus officio. ... The issue at hand is therefore a completely different one [to the *Oudekraal* case]. It is whether the department was entitled to use a lawful measure in the form of enacted legislation to recover monies incorrectly paid as a result of the functionary's unlawful and invalid act. This legislation was enacted to deal with precisely the kind of invalid administrative action complained of. ... One can only imagine the chaos which would result in the every day discharge of duties in state departments where quite naturally errors can and

do occur ... if on each occasion the error could only be rectified by a court of law in review proceedings. ... The applicants have clearly misconceived the decision in *Oudekraal* as authority for the proposition that every invalid administrative act can only be set aside in proceedings for judicial review. That is certainly not the ratio of that decision." (pages 1273-1274)

The application was dismissed.

DE BEERS CONSOLIDATED MINES V THE REGIONAL MANAGER, MINERAL REGULATION FREE STATE REGION: DEPARTMENT OF MINERALS AND ENERGY AND OTHERS [2009] JOL 23667 (O)

Case heard 17 March 2008; Judgment delivered 15 May 2008.

Applicant sought judicial review of a decision to refuse to convert a prospecting permit granted under the Minerals Act, which it required to enable it to continue its prospecting operations lawfully under the Mineral & Petroleum Resources Development Act ("MPRDA"). Applicant further sought a declaratory order that its "old order" prospecting rights remained in force for 2 years following the commencement of the MPRDA.

"Moreover PAJA gives effect to section 33 of the Constitution. ... In a codification of the constitutional right ... PAJA cannot be found to have been excluded by the MPRDA, unless such exclusion was expressly authorised in a constitutionally permissible manner. ... Under the respondents' interpretation of section 96(3) and (4) of the MPRDA section 96(4) excludes the competence of the court to grant exemption and, in such cases, the power of the court to hear the review application. Such an interpretation should be avoided if at all possible; indeed there is a long-standing presumption against the ousting of the jurisdiction of courts of law." (page 26).

The decision to refuse to convert the applicant's old order prospecting permit was thus reviewed and set aside (Cillié J concurring).

SELECTED JUDGMENTS:

LE ROUX AND OTHERS V DEY 2010 (4) SA 210 (SCA)

Case heard 8 March 2010; Judgment delivered 30 March 2010

Respondent had sued the defendants for sentimental damages for infringement of his dignity and reputation. Respondent was the deputy principal at a secondary school. The first defendant (appellant) had superimposed pictures of the plaintiff and the school's principal onto photographs of two male bodybuilders "sitting next to each other in a rather compromising position".

Harms DP (Mlambo and Malan JJA and Majiedt AJA concurring) found that there was nothing "objectively speaking" which suggested that the photograph had been perceived as a joke, and that it was defamatory. Harms DP found that the Plaintiff's additional claim based on the infringement of his dignity was misconceived, since a defamatory act does not give rise to two causes of action under the *actio injuriarum*.

Griesel AJA, in a separate judgement, found defamation on different grounds:

"It seems to me that this was what the defendants were trying to convey when pressed to explain the joke to the court below: they referred to the incongruity ... created by the manipulated picture. The defendants said that what made the picture so funny - in their eyes and in the eyes of their fellow learners who saw it - was not the fact that it was so close to the truth, but that it was so very far removed from reality." (page 228)

"The fact that the court - and the plaintiff - may find the defendants' attempt at humour banal or in bad taste or unamusing is neither here nor there. This does not transform a bad joke into a defamatory statement." (page 229)

Grisel AJA referred to the remarks of Sachs J in the *Laugh it Off* case, to the effect that the law must be interpreted so as to protect the advancement of subversive humour, regardless of "our individual sensibilities or personal opinions".

"I turn to the first inquiry, namely to establish the natural or ordinary meaning of the picture in question. As rightly observed by the trial judge, any person who looks at the picture would immediately observe that it is not in fact a photograph of the plaintiff and the principal, but rather the product of amateurish manipulation." (page 229)

"If one were to apply the traditional test by postulating the reaction of hypothetical, ordinary, right-thinking persons generally, such persons who are outsiders to the particular school would not know or understand the context in which it was created or published: thus, they would not know the two men whose faces have been superimposed onto the naked bodies; they would not know their true character and disposition; they would therefore not see the incongruity in the situation; ... In short, such outsiders would not understand the 'natural and ordinary meaning' conveyed by the picture ... Here, the reasonable outsider would require a 'translation' ... before being able to interpret the picture in question."

"The audience for which the picture was intended, namely the defendants and their fellow learners at the school, saw it quite differently. ... Their reactions, while not decisive, were certainly

significant. Being familiar with the context, they immediately recognised the attempt at humour and laughed at the incongruity conveyed by the picture." (page 230)

"[H]ere, it cannot be held that the picture is defamatory per se and the court has to grapple with the natural and ordinary meaning thereof. It would be wrong in these circumstances to require the defendants to prove that it could be taken up in no other light by a reasonable person. ... [I]t would be inappropriate in this case to postulate the reactions of 'ordinary right-thinking persons generally', instead of restricting the inquiry to the microcosm comprising the particular school community and examining the way in which they understood the picture. Applying that test, the plaintiff has failed to prove ... that the meaning conveyed by the picture is the one relied on in the particulars of claim. It follows that the claim based on defamation fails at the first stage..." (page 230-231)

" Having said that, I accept ... that there is only one cause of action arising from the defendants' conduct herein. ... On the facts ... I am firmly of the view that the defendants' conduct amounts to an impairment of the plaintiff's dignity, not his reputation. ... I agree that it is not open to the defendants to rely on jest as a defence against the claim based on *iniuria*. It does not protect them in these circumstances where they foresaw the possibility that their attempts at humour might be perceived as insulting, offensive or degrading by the plaintiff." (page 231)

DU PLESSIS N.O. AND ANOTHER V GOLDCO MOTOR &CYCLE SUPPLIES (PTY) LTD 2009 (6) SA 617 (SCA)

Case heard 18 May 2009, Judgment delivered 29 May 2009

The case concerned the validity and enforceability of an option to purchase immovable property which the respondent had leased from the appellant. Writing for the majority, Lewis JA (Navsa JA, Snyders JA and Kroon AJA concurring) found that the doctrine of fictional fulfilment was applicable, since the respondent had attempted to exercise the option, and had been unable to do so before it expired due to attorneys, acting as agents of a trust, deliberately frustrating their efforts.

Griesel AJA dissented, as he disagreed with the majority on the validity of the option: "In order to be enforceable, an option must be such that the substantive contract ... comes into existence without more by mere acceptance of the offer, that is, by exercise of the option by the grantee."

Griesel AJA held that, in order to comply with the Alienation of Land Act, the entire contract of sale, or at least all the material terms, had to be in writing. He held that the respondent had failed to show that the parties had intended that the written agreement would not contain anything more than what was already contained in the lease. (pages 628-629). Griesel AJA found that the 'option' was in fact "nothing more than an agreement to agree, which is insufficient to serve as the basis for a binding agreement of sale." (page 630).

STANDARD BANK OF SOUTH AFRICA V THE MASTER OF THE HIGH COURT AND OTHERS 2010 (4) SA 405

Case heard 19 November 2009, Judgment delivered 19 February 2010.

The case concerned an application to removing two liquidators (Nel and De Villiers) from their positions, on the basis of three main grounds: their handling of a particular claim; alleged misappropriation of funds; and a fee-sharing arrangement. The majority (Navsa JA; Ponnan, Maya *et* Snyders JJA concurring) ordered the removal of the liquidators, as the totality of the circumstances of the case led to the conclusion that it was not in the best interests of the liquidation for them to continue to serve as liquidators. Ponnan JA wrote a separate judgment, concurring with Navsa JA but expressing "more strident" criticism of the liquidators.

Griesel AJA dissented, finding that the appellant had not made out a proper case for the "radical relief" sought (pages 435-436). Griesel AJA found that the appellant had "not discharged the onus of proving ... that removal of the joint liquidators will be to the general advantage and benefit of all persons interested in the winding-up". Griesel AJA found further that there were no grounds to interfere with the High Court's discretion in refusing the original application, and noted that the Master had not taken action against the liquidators. (pages 436-437). Griesel AJA then rejected the specific grounds advanced for the liquidators' removal.

MINISTER OF HEALTH, WESTERN CAPE V GOLIATH AND OTHERS 2009 (2) SA 248 (C)

Case heard 3 June 2008, Judgment delivered 28 July 2008.

The case concerned whether the compulsory admission to and continued isolation at the Brooklyn Chest Hospital of respondents was legally justifiable. Respondents had been diagnosed with highly infectious and extensively drug-resistant tuberculosis (XDR-TB).

"It is common cause that the respondents have been diagnosed with XDR-TB and are presently infectious. Furthermore, it appears to be beyond dispute that the respondents' contact with their families and other members of the public creates a severe public health risk of infecting others with XDR-TB. In these circumstances, the MEC feels justified in seeking an order permitting their continued isolation at the facility until they are no longer infectious."

"The respondents ... do not dispute the medical evidence nor the risk posed by them as infectious XDR-TB patients to others. ... However, subsequent to commencing their treatment, some of the respondents refused to be isolated or treated for XDR-TB, and regularly absconded from the facility...[I]it is thus clear that the respondents are not willing *voluntarily* to isolate themselves and to prevent them spreading infection to others." (pages 252 – 253)

"It is undisputed that the compulsory isolation of the respondents at the facility amounts to a deprivation of freedom. The first question for decision is whether such deprivation is 'arbitrary' or 'without just cause'. In my view, the answer must clearly be no: isolation of patients with infectious diseases is universally recognised in open and democratic societies as a measure that is justifiable in

the protection and preservation of the health of citizens, even though it necessarily involves some intrusion upon the individual liberty of the patients concerned."

Griesel J then identified numerous authorities in support of this finding, including the International Covenant on Civil and Political Rights, the European Convention on Human Rights, national legislation in Canada, the Ghanaian Constitution, the African Charter on Human and Peoples' Rights, and an academic article, before continuing:

"In the light of the authorities referred to above, it is abundantly clear that, *in principle* , the limitation on the freedom of movement of patients with infectious diseases is reasonable and justifiable in 'an open and democratic society based on human dignity, equality and freedom', as contemplated by s 36(1) of the Constitution." (pages 254-255)

Griesel J then rejected the respondents' argument that their rights were not limited by a law of general application, citing Canadian jurisprudence. (pages 256-257)

Griesel J found that the conditions of isolation at the facility complied with and exceeded the requirements of section 35(2)(e) of the Constitution (having assumed, without deciding, that the section was applicable to the detention of respondents). A final order was issued compelling the respondents to be admitted to the hospital.

S V H 2007 (3) SA 330 (C)

Case heard 14 December 2006, Judgment delivered 22 December 2006.

"This is an application by an unmarried father for certain declaratory orders as a precursor to the bringing of an application in Switzerland under the Hague Convention on the Civil Aspects of International Child Abduction... for the summary return of a young boy, M, to South Africa."
"In the present case the matter was argued before me over two days during the last week of term and the first week of recess. For the same reasons as those mentioned in the above extract, I felt constrained to finalise this judgment before Christmas, doing the best I can in the circumstances." (page 333)

"It ... appears from the facts that are common cause that the mother, without any form of prior notification to the father, removed the child from his place of habitual residence and from the jurisdiction of this Court."

The father sought relief whereby the court was asked to declare that it was 'an institution or other body to which rights of custody can be attributed' under the Hague Convention; to confirm that it was currently seized with an action regarding M's place of residence and that no decision regarding custody or guardianship had been made; and that the applicant (father) has an 'equal parental right' to determine M's country of residence.' Griesel J noted that the relief sought was 'novel', and that he had not been referred to any precedent for it in South African law. (pages 335-336)

"With regard to the father's claim to rights of custody, he is faced by the dilemma that at common-law rights of custody and guardianship in respect of an extramarital child, in the absence of any Court order to the contrary, vest exclusively in the mother."

“The common-law position has been ameliorated somewhat by legislation, especially by the provisions of the Natural Fathers of Children Born out of Wedlock Act ... in terms of which a father of an extramarital child can acquire rights of guardianship or custody... The father's counterclaim in the main action is aimed precisely at establishing his parental rights in terms of the Natural Fathers Act. However, the further dilemma ... is that the mother relocated with the child before his counterclaim could be adjudicated. *Prima facie*, therefore, the father had no rights of custody at the date of the removal of the child.” (pages 339-340)

Griesel J then considered the applicant’s attempt to invoke the provisions of the Children’s Act of 2005, which at the time had yet to come into force and was still in the process of finalisation:
“Wishing to avail himself of the more benevolent provisions of the Children's Act, the father invited the Court to take cognisance of the intention of the Legislature as set forth in this Act, notwithstanding the fact that it is not yet in operation. This can be done, according to the father, on the basis of the Court's power to develop the common law to bring it into line with the Constitution.”
“I do not agree. ... it is not for this Court to 'develop' the common law where the Legislature has already done so ... nor is it for this Court to 'implement' certain provisions of the new legislation where the Legislature has decided that it will only be implemented at some future date and where the legislative scheme is still under construction. To do as the father wants the Court to do would be to usurp the powers of the Legislature and to act contrary to the doctrine of the separation of powers, on which the whole constitutional scheme is based.” (pages 340-341)

“The Convention makes it clear that rights of custody are not necessarily those of a parent. ... Although some Judges have expressed misgivings about attributing to the Court rights of custody, the principle has become firmly entrenched in Hague Convention jurisprudence in a number of international jurisdictions, namely that where a Court is seized with custody proceedings, the pending proceedings could give rise to a right of custody in the Court itself.” (page 341)

After discussing the leading English case regarding a Court’s rights of custody arising from pending legal proceedings, Griesel J continued:
“I am persuaded by the weight and cogency of foreign authority that I should hold that a Court in South Africa may be the holder of rights of custody for the purposes of the Convention.”
“[T]he mother first invoked the jurisdiction of this Court when she launched her action on 22 June 2006. Her claim, however, was only one to determine the father's rights of access and did not raise questions relating to custody. That came later, when the father served his counterclaim ... In these circumstances, it is clear to my mind that the Court is actively seized of the matter and is vested with rights of custody. Moreover, those rights would have been exercised but for the removal of M during October 2006. In the circumstances, the father is in my view entitled to a declaratory order to this effect.” (pages 342-343).

MINISTER OF EDUCATION AND ANOTHER V SYFRETS TRUST LTD N.O. AND ANOTHER 2006 (4) SA 205 (C)

Case heard 6 February 2006, Judgment delivered 24 March 2006.

A charitable trust had been established in terms of a will, the testator having died in 1921. The trust awarded bursaries to deserving students to undertake further study, but the will restricted eligibility to people of 'European descent', and excluded those of Jewish descent, as well as women. Applicants sought an order deleting the discriminatory provisions from the will.

"[T]he present application can be dealt with on the basis of the existing principles of the common law, having proper regard to 'the spirit, purport and objects of the Bill of Rights'. ... I shall attempt to show that the contested provisions in the will ... are indeed contrary to public policy and, as such, unenforceable." (page 215)

"The principle that the courts will refuse to give effect to a testator's directions which are contrary to public policy is a well-recognised common-law ground limiting the principle of freedom of testation ... Public policy ... is not a static concept, but changes over time as social conditions evolve and basic freedoms develop. ... [P]ublic policy is now rooted in our Constitution and the fundamental values it enshrines, thus establishing an objective normative value system. In considering questions of public policy for purposes of the present application, therefore, the Court must find guidance in 'the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism'." (pages 218 – 219)

"[T]he enquiry can be confined to the question whether or not the contested provisions ... constitute unfair discrimination. If so, it must follow, in my view, that the contested provisions should also be regarded as being contrary to public policy."

"[I]t appears to me that the condition limiting eligibility for the bursaries to candidates of 'European descent' constitute an instance of indirect discrimination based on race or colour. The exclusion of Jews and women in terms of the codicil, in turn, constitutes *direct* discrimination on the grounds of religion and gender."

Griesel J analysed the unfairness of the discrimination, and discussed the Convention on the elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. Griesel J found that these international instruments meant that "South Africa – including this Court – is bound by international law to give effect to the provisions of these various conventions so as to eliminate, *inter alia*, all forms of discrimination based on race or gender and to promote greater equality, specifically in the field of education." (pages 223-224)

Griesel J then further analysed "instructive" English and Canadian case law, whilst noting cautions that the South African law of succession did not easily lend itself to comparative research. (page 226)

"In the final analysis, the Court is required to weigh up or balance certain competing constitutional values and principles of public policy. On the one hand, there is the fundamental constitutional right to equality and freedom from unfair discrimination; on the other, the constitutionally guaranteed principle of private ownership... I have shown above the extent to which the values of equality and

non-discrimination have been entrenched in our Constitution. I have also referred briefly to the way in which other jurisdictions have dealt with similar problems. I am accordingly driven to the conclusion that, in weighing up the competing constitutional right to equality, on the one hand, and, on the other, the right to private property and the trust's right to privacy (insofar as such right can be engaged), the former outweighs the latter." (pages 227 -228)

"I conclude that the testamentary provisions in question constitute unfair discrimination and, as such, are contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality. It follows, in my judgment, that this Court is empowered, in terms of the existing principles of the common law, to order variation of the trust deed in question by deleting the offending provisions from the will." (page 229)

INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA AND OTHERS V AFRICAN NATIONAL CONGRESS AND OTHERS 2005 (5) SA 39 (C)

Case heard: 10, 14 February 2005, Judgement delivered 20 April 2005

"The professed aim of this application, as articulated by the applicants in their founding affidavit, is 'to establish the principle that political parties ... are obliged in terms of s 32(1) of the Constitution ... and s 11 or s 50 of the Promotion of Access to Information Act ... (PAIA), to disclose particulars of all the substantial donations they receive, on due and proper request for those particulars made by any adult South African citizen'." (page 45)

"The applicants claim that the principle they seek to establish is of the 'utmost importance' to a range of constitutional values, of which the most important is the due and proper functioning of the democratic state envisaged in s 1 *(d)* of the Constitution, based, *inter alia* , on 'regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'." (page 46)

"[I]t appears to me that the central issue, as formulated by the applicants and quoted in the opening paragraph above, has been stated too widely. To my mind, the issue is *not* whether all South African citizens are in principle entitled to particulars of all substantial donations received by political parties represented in the legislature. The true issues, as defined by the pleadings, are rather whether or not the present applicants are entitled, in terms of the statutory provisions relied on ... to the specific records claimed from the present respondents in respect of the specified period." (page 47)

"In my view, therefore, s 32 [of the Constitution] is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information in circumstances such as the present, where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA. ... Clearly, the Constitutional Assembly recognised that 'an intervening regulatory framework' would be required to give effect to the right of access to information and that Parliament was the most appropriate institution to establish such framework. This has now been done, with the result that, in my view, the applicants must seek their remedy within the four corners of that statute unless, of course, the constitutionality of the statute itself is in issue. To hold otherwise would indeed encourage the development of 'two parallel systems', which would be 'singularly inappropriate'." (page 50)

“It is apparent from these provisions that the definition of 'public body' is a fluid one and that the division between the categories of public and private bodies is by no means impermeable. The Act recognises the principle that entities may perform both private and public functions at various times and that they may hold records relating to both aspects of their existence. ... The language of s 8(1) makes it clear that, in respect of any particular record, a body must be either a 'public body' or a 'private body'; it cannot be both. Whether it is one or the other thus depends on whether the record 'relates to' the exercise of a power or performance of a function by that body 'as a public body' or 'as a private body'.”

“[I]t cannot be said, in my view, that, in receiving private donations, the respondents are: *(a)* exercising any powers or performing any functions in terms of the Constitution; *(b)* exercising a public power or performing a public function in terms of any legislation; or *(c)* exercising any power or performing any function as a *public* body. They simply exercise common-law powers, which, subject to the relevant fundraising legislation, are open to any person in South Africa.”

“I am of the opinion that the matter must be approached on the basis that, for purposes of their donations records, the respondents are *not* 'public bodies', as defined by PAIA, but that they are indeed 'private bodies'.”

“The next stage ... is to consider whether the applicants have shown that the respondents’ records relating to private fundraising are ‘required for the exercise or protection of any rights’.” (pages 53-54)
Having rejected the applicant’s reliance on rights under various several different constitutional provisions, Griesel J continued:
“As far as ss 19(1) and (2) of the Constitution are concerned, the question is whether the applicants reasonably require the respondents' donation records for the period in question in order to exercise or protect their right to 'make political choices' or their right to 'free, fair and regular elections'. ... The difficulty that the applicants face in this regard is that ... they do not explain how the respondents' donation records would assist them in exercising or protecting any of the rights on which they rely or why, in the absence of those donation records, they are unable to exercise those rights.” (pages 56-58)

“The applicants are therefore contending for a general principle or abstract right to disclosure, pointing out, *in general* , that this is desirable in any democracy and that it will be beneficial to openness, transparency and accountability. ... Even if it could conceivably be contended that one or more of the applicants might have required the information requested for the purpose of making political decisions or fostering transparency in relation to the 2004 national and provincial elections, they have not explained why they require such information *now*.” (page 58)

“Donor secrecy does not impugn any of the rights contained in either ss 19(1) or (2) of the Constitution. Put differently, disclosure of donor funding is not a prerequisite to free and fair elections - a proposition borne out by the experience of our first 11 years of democracy, which included no less than three general elections that have universally been accepted as free and fair.”

"[T]he respondents have placed evidence before the Court, showing that the question of whether funding of political parties should be publicly made known and, if so, in what manner, to whom and in respect of which donations, is a complex policy issue best dealt with by way of legislation, which properly balances the various interests at stake, rather than through court orders with retrospective effect. As I have indicated above, I share this view. Consequently, I am not persuaded that it would be just and equitable to grant the relief claimed." (page 59)

SELECTED JUDGMENTS

S V RO AND ANOTHER 2010 (2) SACR 248 (SCA)

Case heard 5 May 2010, Judgment delivered 31 May 2010.

The appellants had been convicted by a regional court on two counts of indecent assault and rape. The complainants were the appellants' nephew and niece, aged six and three respectively at the time of the commencement of the offences. On review by the High Court (the regional court's sentences having been set aside for lack of sentencing jurisdiction), the first appellant was sentenced to six years imprisonment for each indecent assault charge, and 25 years imprisonment for rape; the second appellant to six years imprisonment on each indecent assault charge and 20 years imprisonment for rape.

Heher JA (Lewis JA and Leach JA concurring) found that the accused lacked remorse or insight into their crimes, but took into account evidence that both had been indecently assaulted as children, as had their siblings and their parents. Heher JA found that the appellants' crimes had arisen "in a specific domestic context", and that the probability of repetition was remote. The sentences were reduced to 12 years and seven months imprisonment, with all counts being treated as one.

Majiedt AJA (Griesel AJA concurring) **dissented**:

"The sexual abuse of children is a widespread social ill in our country. ... Statistics for 2007/8 show that a staggering 44,4 percent of all rapes and 52 percent of all indecent assaults were perpetrated against children. It was estimated in 2005 that between 400 000 and 500 000 children are sexually abused each year. Anecdotal data suggests that a vicious cycle F is discernible in such cases, where the sexually abused victim of today is likely to become tomorrow's sexual abuser. Sexual abuse within a family context appears to be on the increase, judging by cases reported in the law reports and from other sources." (page 251)

"[T]he severity of the sentence must be judged against the background that the bench mark for a conviction of rape on a girl under the age of 16 years is life imprisonment in terms of the relevant legislation. It matters not, in my view, that life imprisonment was not an obligatory sentence in the present matter, by virtue of the fact that the appellants had not been informed of the provisions of the Act, either in the charge-sheet or at the trial. This was but a technical defect. The stark reality is that, but for this technical shortcoming, the appellants would have faced a prescribed sentence of life imprisonment on the rape conviction. Any assessment of an appropriate sentence therefore has to be made with full recognition of the legislative bench mark."

"The moral reprehensibility of rape and society's abhorrence of this rampant scourge are unquestioned. The most cursory scrutiny of our law reports bears testimony to the fact that our courts have, rightly so, visited this offence with severe penalties. This reprehensibility and abhorrence are so much more pronounced in the instances of the rape of very young children, as is the case here. The court below correctly took into account the fact that the complainant was an innocent, defenceless and vulnerable victim. She was raped over a prolonged period by her two uncles whom she had trusted. The short-term psychological effects of this heinous crime are readily evident from the psychological report ... One can only speculate on the long-term effects."

"The learned judge below was justified, in my view, in regarding the fact, that the girl had been raped by her own uncles, as an aggravating factor. The notion that rape within a family is less reprehensible than rape outside of it has been firmly dispelled by this court in *S v Abrahams*." (page 256)

"The appellants' low intellect is an established fact. Less clear is the extent thereof. ... I think it is greatly exaggerated. On the evidence before us these two men were in gainful employment at a number of places. ... On the available evidence this hardly fits the profile of two young men who were so intellectually challenged that their raping of their young niece over an extended period should invite a measure of leniency. The expert witness['] ... unchallenged evidence contained in her report, was that, notwithstanding the appellants' limited intellectual capacity, they were capable of distinguishing between acceptable and unacceptable conduct."

"A factor which weighs with me more is the evidence that the appellants themselves had been subjected to sexual abuse during their formative years. Regrettably, no evidence was adduced on the effect of this abuse on their sexual development in later life. But ... anecdotal information suggests that the young abused become abusers themselves in later life." (page 257)

"The sentences imposed are indubitably severe. But I do not regard them as shockingly inappropriate ... Imprisonment of 25 and 20 years, respectively, encapsulates the undeniable gravity of the rape of a very young child over a protracted period. ... Any sentence with a shorter term of imprisonment would to my mind overemphasise the appellants' personal circumstances and underemphasise the seriousness of the rape." (pages 257-258)

S V DEMBE 2010 (1) SACR 360 (NCK)
Case heard 23 November 2009, Judgment delivered 30 November 2009.

Appellant pleaded guilty to, and was convicted on, six counts under the Choice on Termination of Pregnancy Act. The accused was sentenced to five years imprisonment on counts 1-3, and five years on counts 4-6. Counts 1-3 related to the termination of the pregnancy of a 23-year old woman in the 20th week of her gestation period; and counts 4-6 to the attempted termination of the pregnancy of an 18-year old woman between the 13th and 20th week of her gestation period. On appeal:

"[C]ounsel for the appellant submitted that counts 1 and 3 and 4 and 6 are so closely related to each other that the appellant's convictions on counts 3 and 6 amount to a duplication of convictions."
"The convictions on counts 2 and 5 are uncontentious. It would suffice to record that the appellant was correctly convicted on these two counts which relate to the termination of a pregnancy ... and the attempted termination of a pregnancy ... at a facility not approved in terms ... of the Act." (page 363)

Majiedt J then summarised the relevant legislative provisions, holding that it was clear that the termination of a pregnancy during the first 12 weeks of the gestation period may occur at the woman's request, and may be performed by a medical practitioner, registered midwife or registered nurse. A termination between from the 13th up to and including the 20th week of gestation may only

be performed by a medical practitioner, who must consult with the woman and form an opinion that various listed factors prevail. Termination of a pregnancy outside these parameters constitutes a criminal offence.

"Having regard to the facts and the legislative provisions set out above, it is plain that neither one of the two complainants could lawfully have their foetuses aborted simply at their own request by a qualified medical practitioner. This is so because both of them were beyond the twelfth week of the gestation period of their pregnancies. In any event, the appellant is not a medical practitioner, registered midwife or registered nurse."

"The problem is simply that the appellant should never have been charged with counts 3 and 6. ... These sections are not applicable at all. They relate to the termination of a pregnancy ... during the first 12 weeks of the gestation period of ... pregnancy. In neither of the two instances before us did the abortion or attempt thereto occur within that period. The convictions on counts 3 and 6 can therefore not stand and ought to be set aside." (pages 364-365)

Regarding sentence, Magiedt J found that the Magistrate in the court *a quo* had misdirected himself in describing one of the complainants as a minor.
"The aforementioned misdirection empowers us to interfere on appeal. In any event, I am of the view that the sentences imposed are shockingly excessive, which would warrant interference on appeal anyway. The setting aside of the convictions on counts 3 and 6 is a further basis for interference with the sentence on appeal."

Majiedt J noted that no decided cases on sentencing under the Act could be found. After analysing cases challenging the Act; cases analysing the structure and framework of the Act; and provisions of the repealed Abortion and Sterilization Act, before continuing:
"The sentences imposed by the magistrate are far too severe and induce a sense of shock. In my view, upon a careful consideration of the mitigating and aggravating features of this case ... and having regard to the general objectives of sentencing, an appropriate sentence would be an effective term of imprisonment of three years. Such a sentence would to my mind do justice to the offences, the offender and society. Having regard to the increased penalties, compared to the repealed Act ... such a sentence would serve as a deterrent to other aspiring backstreet abortionists."

KIMBERLEY GIRLS' HIGH SCHOOL AND ANOTHER V HEAD, DEPARTMENT OF EDUCATION, NORTHERN CAPE PROVINCE AND OTHERS 2005 (5) SA 251 (NC)
Case heard 2 May 2003, Judgment delivered 30 May 2003

Applicant sought to review and set aside first respondent's decision to decline a recommendation by the school's governing body for the appointment of an English higher grade, first language teacher. First respondent had declined the recommendation on the basis that the governing body had failed to give preference to candidates disadvantaged by injustices of the past, as required by the Employment of Educators Act; and that the recommendation had failed to have regard to the democratic values and principles referred to in the Act. All three of the candidates short-listed for the post were white women.

" [I]t is the head of department's contention that suitably qualified candidates from previously disadvantaged backgrounds were completely overlooked to the extent that they had not even been short-listed and invited for interviews." (page 255)

"It is abundantly clear, *ex facie* the papers, that the three disadvantaged candidates are, at the very least, on par with the three short-listed candidates as far as their academic qualifications, more particularly in English, are concerned. Their exclusion from the interviewing phase can, on this score alone, hardly be justified, in my view."
Applicants sought to argue that, even if the disadvantaged candidates scores in respect of their academic qualifications were corrected, they would still not have had sufficient points to advance to the interview stage.
"This begs the question, however - why were they not afforded an equal opportunity with the other short-listed candidates to demonstrate their proficiency in English and their competence as educators at the interview?" (page 256).

"The head of department has the power to appoint educators in this province ... His power to do so is regulated by s 6(3) *(a)* [of the Employment of Educators Act], which provides that an appointment may only be made on the recommendation of a governing body. It is further regulated by s 6(3) *(b)* , which sets out the limited grounds upon which a head of department may decline a recommendation. The head of department's discretionary power is thus severely curtailed under s 6(3) *(b).*" (page 257)

Majiedt J then considered the decision of the Northern Cape Division in *High School Carnarvon*:
"I find myself in respectful disagreement ... that the head of department is 'not concerned with whether or not it meets the requirements of s 6(3) *(b)* . *The question is not whether the recommendation accords with those values and principles, but simply whether or not the recommendation had regard* G *thereto.'* (My emphasis.) This approach completely negates the positive obligations imposed upon a head of department in terms of s 7(1). It, furthermore, reduces the role of a head of department in making the appointment of an educator into a rubber-stamping exercise. No enquiry as to whether a governing body has paid mere lip-service to the democratic values and principles referred to in s 7(1) is permitted on the part of a head of department on this approach." (pages 257 – 258)

"It can hardly be said, in my view, that there had been equitable and equal treatment afforded to the three disadvantaged candidates (whose ability on their application forms and *curricula vitae* cannot be questioned), in refusing them an opportunity to compete on an even footing at an interview with the three short-listed candidates."
"Moreover, and most importantly, the governing body's recommendation and the process which preceded it does absolutely nothing to redress the imbalances of the past in order to achieve broad representation in the school's staff establishment."

"The imperatives contained in s 6(3) *(b)* (v) and s 7(1) of the Employment Act, and, more importantly, s 195(1) of the Constitution, are of the utmost importance in this matter. In addition, it has to be borne in mind that all legislation now has to be interpreted and measured in accordance

with the constitutional imperatives; *inter alia* , the need to redress the imbalances of the past."(page 259).

"The notion that a head of department may not, in terms of the provisions ... of the Employment Act, independently and objectively ascertain whether a recommendation does indeed ... accord with the democratic values and principles, is untenable, in my view. In the present case, the head of department was fully justified to decline the recommendation and to remit the matter to the governing body. It follows that I am of the respectful view that the *High* E *School Carnarvon* case (*supra*) has been wrongly decided." (page 260)

"I fail to comprehend how an educator (who is otherwise suitably qualified and has the requisite experience) can be excluded on the basis that it is an 'inherent requirement' of the post in this matter that he or she must be an English first language speaker (as opposed to being *proficient* in English). Furthermore, the interview committee itself has set only the following two criteria in the short-listing process as far as language is concerned; namely, *proficiency* in English, and whether the candidate has already taught through the medium of English..." (page 261)

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

"[I]t has never been the applicants' case that they strove, through the recommendation for appointment of Ms Matthews, to correct past imbalances of *gender representivity* on their educator establishment. There is in any event no evidence ... of such an imbalance. What is clear, however, is that there is a serious imbalance in racial/demographic representivity in the school's educator establishment. The short-listing process, culminating in the recommendation as had occurred in the present matter, whereby the three (suitably qualified) disadvantaged candidates were not even afforded the opportunity to compete on an equal footing at an interview, does nothing at all to begin to redress the racial imbalance of educators at the school as required by ... the Employment Act and s 195(1) of the Constitution." (page 262)

"It bears repeating that the three disadvantaged candidates are suitably qualified for the vacant post - that much is common cause or, at the very least, not seriously placed in issue on the papers. The requirement of rationally justified administrative action demands that a candidate can only be appointed by virtue of affirmative action or by the demand of representivity if such a candidate is suitably qualified and capable of doing the work." (page 263)

"Regardless of how much compliance there may have been with regard to procedural guidelines, norms, criteria, regulations and prescripts in the selection process, the entire exercise is rendered completely futile if the constitutional and legislative imperatives contained in the aforementioned sections are overlooked. What is called for is more than a mere mechanical allocation of points and a mere say-so that regard has been had to the democratic values and principles."

"There are therefore no grounds, either as advanced by the applicants or any other grounds, to review the head of department's decision to decline the governing body's recommendation for the appointment..." (page 264)

MATROOS V S [2005] 2 ALL SA 404 (NC)

Appellant had been convicted of murder in the regional court, having been unrepresented at trial. On appeal, the conduct of the presiding Magistrate came under scrutiny:

"Problems arose at the very commencement of the trial and continued throughout. The Magistrate gave a lengthy and detailed explanation to the appellant as to his rights at plea stage, including the right not to give a plea explanation. He failed, however, to explain to the appellant that he also does not have to answer any questions from the Bench at this stage of the proceedings."
"Astonishingly ... the Magistrate then rode roughshod over the appellant's rights and commenced putting questions to the appellant before he had made an election as to whether he would elucidate his plea of not guilty."
"It is trite that an accused has the right to remain silent. He/she may elect not to give a plea explanation and not to answer any questions. ... It must be made clear to an unrepresented accused that there is no obligation to say anything. ... It is also irregular to question an accused in terms of section 115(2) without having first invited the accused to give a plea explanation..." (page 407)

"During the course of the evidence-in-chief of every State witness the Magistrate without fail took over the questioning from the prosecutor. ... [I]t suffices to make the point that the Magistrate had fully assumed the mantle of the prosecutor with the very first witness to be called by the State and things continued much along the same line throughout the trial.(page 408)

"Not only did the Magistrate take over the prosecutor's functions during the examination-in-chief ... but he also elicited inadmissible evidence in an entirely improper manner."
"From the aforegoing extracts from the record it is abundantly clear that the Magistrate had now fully assumed the role and funtion of the prosecutor. He merrily continued along this way throughout the trial. The poor unrepresented appellant found himself at the mercy of a presiding officer who proceeded to descend into the arena on the side of the prosecution with great vigour and zeal from the outset and continued to do so throughout the trial. In these circumstances justice and fairness are but mythical illusions, completely absent in these proceedings." (pages 409-410)

"The Magistrate also displayed considerable impatience with the appellant's cross-examination, disallowing a number of relevant and permissible questions in the process. ... The conclusion is unavoidable that the appellant has not had a fair trial. The numerous irregulatities [sic] committed at the trial ... vitiates the proceedings." (pages 411-412)

"Judges and magistrates have an important responsibility to ensure that justice is done in their courts. We are not mere mechanical purveyors of the law –section 165(2) of the Constitution demands from us that we must apply the provisions contained in the Constitution as well as the law in general "impartially and without fear, favour or prejudice".

One of those constitutional provisions, entrenched in the Bill of Rights, is the right to a fair trial which accused persons have (section 35(3)).”

“I venture to suggest, as did Cameron J in *S v Malatji* ... that “the Regional Magistrate . . . appears to have been a law unto himself in his court” “ (page 413)

“Having regard to the aforegoing cases and the present matter, I am of the view that the magistrate’s conduct requires the scrutiny of the Magistrates’ Commission. I come to this conclusion with considerable regret, since [the] Magistrate ... is in my view not only one of our most experienced, but also one of the most hardworking regional magistrates. He does, however, seem to be going about his work in completely the wrong way.” (page 416)

SELECTED JUDGMENTS:

CHONCO AND OTHERS V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2008 (4) SA 478 (T)

Case heard 30 January 2008, Judgment delivered 11 February 2008.

Applicants were prisoners who had applied for Presidential pardons in 2003, but received no response on the merits of their applications. Applicants sought an order compelling the first respondent to take the necessary steps to enable the second respondent (the President) to exercise the relevant constitutional powers.

"Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. When processing the applications under consideration, the minister is exercising a public function and she is bound to perform the said function diligently and without delay." (page 486)

"In my view the processing of the applications of the applicants has taken an unduly long time and the minister has failed to perform her function as required by s 237 of the Constitution." (page 487)

Seriti J ordered that the first respondent do all that was necessary, within three months, to enable the second respondent to exercise the powers conferred by the constitution to deal with the applications for pardon.

Confirmed on appeal: **The Minister for Justice and Constitutional Development v Chonco** [2009] ZASCA 31.

PEENS V MINISTER OF SAFETY AND SECURITY AND OTHERS 2000 (4) SA 727 (T)

Case heard 11 May 1999, 10 May 2000; Judgment delivered 23 May 2000.

The case concerned the constitutionality of provisions of the South African Police Services Act, which provided for a period of 12 calendar months within which an action against the police had to be instituted and required one month's notice of intention to institute such proceedings.

Seriti J distinguished the Constitutional Court decision in Mhlomi v Minister of Defence, which had found similar provisions of the Defence Act to be unconstitutional, on the basis of fundamental differences between the relevant sections (page 731).

"The question that the Court must deal with at this stage is whether s 57 of the Police Service Act infringes the rights of the plaintiff as contained in ss 9 and 34 of the Constitution and if so, whether such violations are justifiable or not." (page 732)

"The protection against delayed claims afforded to the State and its different departments seem to be reasonable because of the vast areas covered by its operations, the big number of people

involved and the fact that the State and/or its different departments operate for the benefit of the entire public of the country."

"To me, it appears that there are good reasons why the State enacted s 57 of the Police Service Act.

The provisions of s 57(1)(2) of the Police Service Act do infringe the rights of the plaintiff as contained in ss 9 and 34 of our Constitution. The next enquiry is whether the said infringement can be justified in terms of s 36 of the Constitution. The said section, as stated above, provides that rights contained in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

Section 113(1) of the Defence Act was declared unconstitutional as the Court was of the view that, even though it serves a useful and legitimate purpose, it is too rigid and does not allow litigants enough time to comply with its provisions.

On the other hand s 57(1) of the Police Service Act allows the prospective litigant a period of 12 months within which to institute an action. One month's notice should be given.

The period of 12 months is double the period allowed by s 113(1).

Furthermore, s 57(5) of the Police Service Act enables a litigant an opportunity of approaching the court for condonation in case of failure to comply with the provisions of s 57. There is no time period within which the litigant can approach the court for condonation. (page 733)

"Section 57 of the Police Service Act, read in its entirety, is not too rigid as it creates an opportunity to litigants to approach the A court for condonation and the period within which to institute action is longer than provided for in s 113(1) of the Defence Act.

My view is that the provisions of s 57 … even though they infringe the rights of the plaintiff mentioned above, passes the test of validity as provided for in s 36 of the Constitution. The limitations provided for in the said section are reasonable and justifiable in an open and democratic society referred to in the said section." (page 734)

SELECTED JUDGMENTS:

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

Case heard 9 May 2007, Judgment delivered 1 June 2007.

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

Theron AJA (Snyders AJA concurring) held:

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

"I am of the view that it is in the best interests of children generally that inter-country adoptions be effected in accordance with the principles of…international instruments." (paragraph 17)

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

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

Heher JA dissented:

"In my assessment the best interests of the child R were overwhelmingly favoured by the grant of the application." (paragraph 29)

"What is clear is that R has a need for and a right to family or parental care…Her prospects of satisfying either the need or the right are bleak and diminishing as the months pass." (paragraph 40)

"I disagree strongly with Theron AJA that the grant of the application would 'sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified'." (paragraph 54)

"The substantial value to R of a stable, happy and potentially prosperous future with the applicants in the United States and the enormity of the deprivation and prejudice which she will suffer if no adoptive parent should come forward far outweighs the sum of formal compliance with the Child Care Act…I am left in no doubt that the appeal should succeed." (paragraph 77 and 78)

Ponnan JA concurred in conclusion of Theron AJA:

"The real issue in this matter, to my mind, relates to the procedure adopted by the appellants and the form chosen to press their claim."

"The High Court was therefore being asked in effect to grant an adoption order to foreign nationals. That it could not do." (paragraph 82)

"South African nationals seeking an adoption order are obliged to approach the Children's Court which has the sole authority and power to grant orders of adoption. I can conceive of no basis on which foreign nationals should escape that stricture." (83)

"The safeguards essential to the enquiry, such as independent experts and an inquisitorial procedure of the nature envisaged in the Child Care Act during adoption proceedings, are absent in the procedure chosen by the appellants." (paragraph 95)

Hancke JA concurred in the judgment of Heher JA.

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

The appellant had been convicted of rape and kidnapping. As the appellant was convicted of raping the complainant five times, the High Court sentenced him to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The Court found no substantial and compelling circumstances that warranted a sentence less than life imprisonment. Lewis JA (Cameron JA concurring) held:

"The court below did not consider the mitigating factors adduced by the appellant to constitute substantial and compelling circumstances. In that respect it erred. (paragraph 4)

"The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes [29 when he raped the complainant], that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect, however." (paragraph 13)

"Nonetheless these are substantial and compelling circumstances which the sentencing court did not take into account. As sentence of life imprisonment – the gravest of sentences that can be passed even for the crime of murder – is in the circumstances unjust and this Court is entitled to interfere and to impose a different sentence, one that it considers appropriate." (paragraph 14)

"…I do not believe that his crime should attract the heaviest sentence permitted by our law, life imprisonment. I recognise that it may be difficult to imagine a rape under much worse conditions. But it is possible, and I consider that the prospect of rehabilitation and the fact that the appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence." (paragraph 21)

The appeal was upheld. The sentence of the court a quo set aside and replaced with 16 years' imprisonment.

Theron AJA (dissenting) held:

"The fact that the complainant jumped from the second floor, despite the possible threat of physical injury or worse to herself, is indicative of the desperation that she felt and the lengths to which she was prepared to go to escape from the clutches of the appellant. The complainant was deprived of her liberty for the entire night, during which she was forced to remain naked…During the course of the night she was subjected to a physical assault to overcome her resistance to performing oral sex on the appellant. She was raped a further four occasions." (paragraph 26)

"In my view, the rape of the complainant is one of the worst imaginable. If life imprisonment is not appropriate in a rape as brutal as this, then when would it be appropriate?" (paragraph 27)

"Courts must not shrink from their duty to impose, in appropriate cases, the prescribed minimum sentence ordained by the legislature." (paragraph 27)

"…courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women." (paragraph 28)

"…what is set out in paragraphs [13] and [14] of the judgment of Lewis JA do not substantiate the conclusion contended for. There is hardly a person of whom it can be said that there is no prospect of rehabilitation. The appellant was 29-years-old at the time and would ordinarily not be regarded as a youthful or immature offender…The basis therefore suggested by Lewis JA in paragraph [4] of her judgment for interfering with the sentence is unwarranted." (paragraph 31)

GUMEDE V PRESIDENT OF THE RSA AND OTHERS (WOMEN'S LEGAL CENTRE AS AMICUS CURAE) [2008] JOL 21972 (D)

The applicant sought an order declaring certain provisions of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proclamation R151 of 1987 (which govern customary marriages concluded prior to 15 November 2000) unconstitutional. The applicant also sought an order declaring that the distinction that the Recognition of Customary Marriages Act 120 of 1998 draws between the two categories of marriages was unconstitutional. Theron J held:

"In my view, the proprietary regime established by the codification of customary law, is, prima facie, discriminatory. It is discriminatory as only African women are subjected by the law to such consequences. The discrimination is on two of the prohibited grounds listed in section 9(3) of the Constitution, namely race and gender. (paragraph 12)

"…the provisions of the Divorce Act do not affect the proprietary regime which exists during the subsistence of the customary marriage. Secondly, the current statutory provisions creates a default situation in which, upon divorce, the fifth respondent will remain the owner of all the property acquired during the course of the marriage, unless the applicant is able to persuade the Divorce Court to make an order transferring some of the fifth respondent's property to her…The position of

the applicant in this regard is sharply different to that of women who are not black or who entered into customary marriages after the commencement of the Recognition Act. (paragraph 14)

Certain sections of the Recognition Act, the KwaZulu Act and the Natal Code were therefore declared to be inconsistent with the Constitution and invalid.

The decision was upheld on appeal, [2008] ZACC 23, 8 December 2008.

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

The issue to be decided in this case was whether the appeal procedure created by sections 309(3A), 309B and 309(C) of the Criminal Procedure Act 51 of 1977 were constitutional. Theron J (Hugo J and Koen AJ concurring) held:

"The effect of section 309(3A) of the CPA…an accused/appellant (and not just the public at large), as a necessary party to the proceedings, is denied the right to be present at and participate in the hearing of his or her appeal." (paragraph 10)

"The requirement of written argument prejudices an appellant who, if he or she does not have access to legal representation, will find it nearly impossible, as a lay litigant, to adequately prepare written argument. The requirement of written argument will also prejudice an appellant who has access to legal representation. Even experienced counsel cannot be expected in all cases to produce fully comprehensive written argument which addresses all possible issues which may be, or become, relevant when the appeal comes under consideration." (paragraph 14)

"I am of the view that section 309(3A) of the CPA, by depriving an appellant of the right to be present and have an audience at the hearing of such appellant's criminal appeal, offends constitutional norms and unjustifiably limits individual rights in particular, the right to a fair trial as contemplated by section 35(3) of the Constitution." (paragraph 15)

"The Constitutional Court emphasised the paucity of information required in terms of the statute to be placed before the Judge President by way of a petition for leave…The court concluded that this paucity of information, as dictated by the then section 309C(3), did not allow for an adequate reappraisal and the making of a properly informed decision upon the petition for leave to appeal…" (paragraph 21)

"The procedures contemplated in sections 309B and 309C, taken as a whole and in the broad context within which the lower courts operate, limits the rights afforded to an accused person, particularly an unrepresented accused, in terms of section 35(3)(o) of the Constitution." (paragraph 24)

Certain sections were therefore declared to be inconsistent with the Constitution and therefore invalid. The matter was referred to the Constitutional Court for confirmation. The Constitutional Court declined to hold sections 309B and 309C unconstitutional in their entirety, and referred the case back to the High Court.

CHAGWE V S [2005] JOL 13898 (N)

The question before the court was whether the High Court had jurisdiction to grant leave since section 309(B) of the Criminal Procedure Act 51 of 1977 removed a convicted person's automatic right of appeal and required him to obtain leave from the magistrate's court or to petition the Judge President of the High Court in terms of section 309(C). The Constitutional Court had declared the two provisions to be unconstitutional in November 2000 and suspended invalidity for six months to give the legislature time to rectify the situation. It had not done so leaving the matter uncertain. Theron J (Kondile J concurring) held:

"It is my view that sections 309B and C can not be invoked and applied after 28 May 2001, even in respect of convictions and/or sentences imposed on or before 28 May 2001."

"The suspension gave temporary validity to sections 309B and C, but such temporary validity expired on 28 May 2001. After that sections 309B and C were invalid, and had, according to the doctrine of objective constitutional invalidity, been invalid from the day on which they came into effect."

"In my judgment, the effect of the lapsing of the suspension of invalidity is that any action taken in terms of sections 309B and C after 28 May 2001 is invalid."

SELECTED JUDGMENTS:

OFFIT ENTERPRISES (PTY) LTD AND ANOTHER V COEGA DEVELOPMENT CORPORATION AND OTHERS 2010 (4) SA 242 (SCA)

Case heard 3 November 2009, Judgment delivered 15 February 2010

The appellants sought an order declaring that any expropriation in terms of current legislation of three properties owned by them, and falling within the Coega Industrial Development Zone (the Coega IDZ) was neither permissible nor lawful and, in the alternative, an order compelling any of the respondents wanting to expropriate the properties to initiate expropriation proceedings within one month of the court's order

Wallis AJA held that:

"There is no apparent reason why the identity of the party undertaking the relevant development, as opposed to the character and purpose of the development, should determine whether it is undertaken for a public purpose. Thus the expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself, using the same contractors. I do not think it can be said in our modern conditions and having regard to the Constitution that an expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company."

[Paragraph 15]

"In terms of s 6(2) (g) of PAJA a decision includes a failure to take a decision. The failure to take a decision in regard to the expropriation of the appellants' properties is therefore administrative action. It proceeds that, in view of the history of the matter and the impact that the ongoing threat of expropriation has had on the value of these properties, the appellants have pro tanto been deprived of property in terms of s 25(1) of the Constitution. It follows, so the argument goes, that the failure to take the decision to expropriate has not only itself been unfair and given rise to a breach of their constitutional rights, but, in addition, to permit it to be taken at this stage, after all the inconvenience and financial detriment that the appellants have undergone, would itself be unfair. Hence any expropriation that took place now or hereafter would constitute unfair administrative action and an interdict should issue to prevent it." [Paragraph 36]

"In my view both the constitutional argument based on s 25(1) of the Constitution and the syllogism leading to the conclusion that the failure to take a decision to expropriate the property is administrative action are incorrect." [Paragraph 37]

The findings of the Eastern Cape High Court were accordingly confirmed and the appeal dismissed.

SOUTH AFRICAN MARITIME SAFETY AUTHORITY V MCKENZIE 2010 (3) SA 601 (SCA)

Case heard 18 November 2009, Judgment delivered 15 February 2010

Respondent was formerly employed by the appellant as its chief internal auditor, but was dismissed in a manner he alleged was procedurally and substantively unfair. After pursuing his remedies under the Labour Relations Act (the LRA) and reaching a settlement with the appellant, in terms of which he was paid an amount equivalent to one year's salary, he instituted this action, claiming that his contract of employment was subject to 'an explicit, alternatively implied, further alternatively tacit term.

In the court a quo appellant filed several special pleas that were ultimately dismissed, along with its application for leave to appeal. Among the special pleas was one nominally expressed as a challenge to the jurisdiction of the High Court to consider the claim. In substance it was alleged that respondent's remedies for unfair dismissal were those provided for in the LRA and that the High Courts have no jurisdiction to grant such remedies.

Wallis AJA held:

“When a jurisdictional challenge is raised the court must necessarily dispose of it before entering upon any further questions that arise in the case.” [Paragraph 6]

“The fundamental difference between rights arising from a contract and rights arising from statute is that the former depend upon the actual or imputed consent of the parties whilst the latter are imposed by the legislature in order to give effect to social policies underpinning the legislation…..Rights to safe working conditions are protective in nature. All of this has limited the extent to which employers and employees are free to determine the terms of their relationship…..” [Paragraph 14]

“The LRA was enacted in order to give effect to the labour rights now guaranteed by s 24 of the Constitution, and in particular the right to fair labour practices. One of the most important rights flowing from that constitutional guarantee is the right not to be unfairly dismissed, embodied in s 185 of the LRA.” [Paragraph 21]

“I would add to it that there is the further bar in South Africa that the legislation in question has been enacted in order to give effect to a constitutionally protected right, and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment. I am also fortified in that conclusion by the fact that it reflects an approach adopted in a number of other jurisdictions. In addition the Constitutional Court has already highlighted the fact that there is no need to imply such provisions into contracts of employment because the LRA already includes the protection that is necessary.” [Paragraph 33]

“While the Constitution guarantees to everyone 'the right to fair labour practices', and also calls upon courts, when developing the common law, to 'promote the spirit, purport and objects of the Bill of Rights', it does not follow that courts are thereby enjoined to develop the common-law

contract of employment by simply incorporating into it the constitutional guarantee. Where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed…." [Paragraph 35]

"I share the view of Professor Halton Cheadle, whose role in the drafting of the LRA is well documented, that where, as here, the employees are protected by the LRA, s 8(3) of the Constitution does not warrant or require an importation from the realm of constitutionally protected labour rights into individual contracts of employment by way of an implied term. The LRA specifically gives effect to the constitutional right to fair labour practices and the consequent right not to be unfairly dismissed. Accordingly the constitutional basis for developing the common law of employment and thereby altering the contractual relationships is absent." [Paragraph 37]

"I am not sure that the common law required development in order to reach that conclusion, but ... [w]hat is important to bear in mind is that the effect of any extended duty of fair dealing must be worked out in individual cases in the light of the statutory provisions giving effect to the constitutional guarantee of fair labour practices. The constitutional rights that were drawn upon in that case for importing into the contract a term protecting the employee against constructive dismissal are given full effect in relation to employees falling under the LRA by the definition of 'dismissal' in s 186(1). *Murray* seems to me to be authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed, whatever else might have been said en passant. It is possible that there is some need to develop the common law by importing into the contract of such employees terms that give effect to their right to fair labour practices, but that is not a matter that need now concern us." [paragraph]

The appeal was upheld.

S V KOTZE 2010 (1) SACR 100 (SCA)

Case heard 20 August 2009, Judgment delivered 15 September 2009

This appeal raised the interpretation and application of section 252A of the Criminal Procedure Act.

Wallis AJA held:

"……Whilst the section refers to the burden being discharged on a balance of probabilities, it is in my prima facie view incompatible with the constitutional presumption of innocence and the constitutional protection of the right to silence. Those rights must be seen in the light of the jurisprudence of the Constitutional Court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt……" [Paragraph 20]

"……..It is not correct to say, as does one leading commentator, that it is an authority to use traps and undercover operations 'in certain circumstances'. There is no such qualification in the section. Absent a constitutional challenge - and there is no such challenge in the present case - there is no

room for an argument that the use of a trap or the undertaking of undercover operations is unlawful in South Africa." [Paragraph 22]

"The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted." [Paragraph 23]

"The starting point is that, in each case where the evidence of a trap is tendered and its admissibility challenged, the trial court must first determine as a question of fact whether the conduct of the trap went beyond providing an opportunity to commit an offence. It does that by giving the expression its ordinary meaning and makes its decision in the light of the factors set out in ss (2)." [Paragraph 26]

The appeal was dismissed.

MKHIZE V UMVOTI MUNICIPALITY AND OTHERS 2010 (4) SA 509 (KZP)

Case heard 19 April 2010, Judgment delivered 21 May 2010

In Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others C 2005 (2) SA 140 (CC) (2005 (1) BCLR 78) the Constitutional Court made the order that:

'1.1 The failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1) (a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid.'

The order made by the Constitutional Court should be construed as applying only when the immovable property in respect of which execution is sought is the debtor's home.

Wallis J held:

".....in the process of ascertaining the meaning of words in a document, the court must pay regard to the whole factual matrix or context surrounding the use of those words, and is not restricted to what was formerly described as 'background circumstances', with reference to 'surrounding circumstances' being limited. Also, one does not start with some a priori view of the meaning, but determines the meaning of the words in question in the light of the entire context....." [Paragraph 17]

"For present purposes the important point that emerges from these cases is that reading-in, as a remedy, always takes place within the context of the separation of powers that is a fundamental part of our constitutional order. Under the Constitution responsibility for legislation lies with the legislative bodies established in terms of the Constitution. Where a court interferes with legislation it does so within the ambit of its own constitutional responsibility for determining whether legislative provisions comply with the Constitution. Whether it applies a remedy of severance or one of reading-in, or a combination of the two, its sole aim and function are to render the legislation

compliant with the provisions of the Constitution. It is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not to comply with the Constitution. Its function is to frame an appropriate order that remedies the constitutional defect. It is for this reason that stress is laid on the court's obligation to endeavour to be faithful to the legislative scheme." [Paragraph 30]

".....It is the function of the courts to ensure that the limits of public power are not transgressed; to ensure the appropriate division of powers among the various spheres of government, and to determine the legality of government and executive action measured against the Bill of Rights. That authority empowers courts to determine the constitutionality of legislative provisions. When they determine that a provision is unconstitutional, they are obliged to declare it to be unconstitutional to the extent of that unconstitutionality.....Courts have no function in determining the content of such legislation. It is not for courts to involve themselves in the development of policy, as that is the sphere of the executive. It is only when a provision in the legislation crosses the boundaries established by the Constitution and is declared unconstitutional, and then only to the extent of such unconstitutionality, that the courts can influence its terms and those of the legislation of which it forms a part, either by striking it down, or by amending it through the processes of severance or reading-in." [Paragraph 36]

NATIONAL HORSERACING AUTHORITY OF SOUTHERN AFRICA V NAIDOO AND ANOTHER 2010 (3) SA 182 (N)

Case heard 3 February 2009, Judgment delivered 23 February 2009

A board of inquiry, convened by the appellant, convicted the first respondent, a trainer of racehorses, on charges of possession of certain drugs, and of attempting to mislead the board. The board imposed a sanction of a warning off. Respondent challenged the convictions and sanction in the Local Division of the High Court, which upheld the convictions, but set aside the sanction. The appellant appealed that decision to the Provincial Division of the High Court. There, the respondent contended that the enquiry had violated the principles of natural justice, and that the sanction of warning off was not rational in the circumstances.

Wallis J held:

"It seems to me that there are two difficulties in the path of this approach. The first is that in the very same paragraph of the founding affidavit the respondent invoked the provisions of s 39(2) of the Constitution and the court's obligation to develop the common law by promoting the spirit, purport and objects of the Bill of Rights. Secondly, when dealing specifically with his challenge to the sanction of warning off the respondent contended that this sanction was 'neither justified nor rational in the circumstances'. On several occasions thereafter he complained that the sanction is 'unfair and irrational'. That is language appropriate to a review on the grounds of rationality in terms of the provisions of s 6(2) (h) of PAJA as construed by the Constitutional Court." [Paragraph 14]

"Insofar as the application of PAJA is concerned it is not and never has been a rigid rule that a litigant seeking to rely upon a statute must refer to that statute in the founding affidavit or risk being non-suited. Where a litigant relies upon a statutory provision it is not necessary to specify it, provided that it is clear from the facts alleged that the relevant statutory provision is applicable….."
[Paragraph 16]

SELECTED ARTICLES

Civil Litigation: Who can afford it? Consultus, (1996) Volume 9, 121.

The article begins by pointing out how the cost of civil litigation is at the forefront of the challenges facing the South African justice system, where civil litigation is often seen as privilege of the rich. The introduction of the Bill of Rights in the Constitution raised the question of how such rights would be enforced in the absence of the means to enforce them by litigation.

It further sets out categories of groups within the society who can afford civil litigation. The author argues that the first and foremost obvious group who can afford civil litigation is the judiciary. The judiciary runs the process; they control the court rolls; they decide when they will sit and for how long; they have power to refuse to hear cases; and the salaries they are paid enable them to afford litigation.

The second category is the corporations and institutions. The institutions include government institutions. He singles out insurance companies as funding much of civil litigation. The process of litigation becomes an inevitable thread running through their business life. They use civil litigation as a tactic to limit, reduce or defeat the meritorious by using the insurer's great financial resources.

The author then examines the situation of what he calls the 'masses'. He argues that an essential component of community acceptability is that the legal process should be seen to be fair, a value enshrined in human rights instruments throughout the world. However, the rules under which civil litigation is conducted are designed to deal with major litigation, involving millions of Rands, multiple parties and complex questions of law. What is often overlooked is that most civil disputes involve simple issues, and yet the same complex rules are used for such disputes 'because fairness must be extended to all'.

The author recommended what he calls a 'tiered approach' to civil litigation rules. Most cases should proceed on simple rules involving little more than a statement of claim and defence, limited discovery and a basic pre-trial procedure. In more complex cases the option to add additional procedural layers should be there but subject to strict judicial control to be exercised informally and relatively summarily.

The article concludes by suggesting a change of attitude. There should be a recognition that the legal professionals exist to provide a service. There cannot be talk of scarce judicial service when the way court hours are structured and courts makes those resources unavailable for most of the time. There cannot be worries about costs of trials, when trials which could finish in eight hours take two days. The problems of who can afford civil litigation will not go away until "we recognise that the fault is not in our stars but in ourselves".

THE NEW LRA - HOW DECISIVE IS THE BREAK FROM THE PAST? (1997) 18 ILJ 902

This article reflected on the new Labour Relations Act 66 of 1995 and the extent to which it involves a break with the past. It argues that the point of departure is that the new Labour Relations Act makes sweeping changes to the familiar terrain of labour law and industrial relations practice in South Africa. With three new labour law regimes in South Africa in ten years South Africa has obviously acquired a taste for novelty.

In a world of constant change being new is important. But in the context of the law - and particularly in the context of labour law one finds himself constrained to pose two questions. Firstly, is complete novelty achievable and desirable? Secondly, to what extent has something new been achieved in the Labour Relations Act?

Law builds the future on reflections on the past. South Africa's legal system is a civil law system. The procedures in South African courts and the processes of interpretation and legal reasoning employed have been moulded not only by the civilian legal systems but more significantly by the common law whose influence has spread from England throughout the world.

The purpose of the paper is to note as a fact that these were the background influences on those responsible for the drafting of the Labour Relations Act. With the best will in the world it was impossible for the drafting team to operate entirely outside and unaffected by the legal system and legal structures with which they were most familiar.

To approach the Act therefore on the basis that it was drafted on a tabula rasa - by suggesting that it is something wholly new unaffected by what has gone before - is, the author suggests, erroneous. Any process of interpretation of a statute requires a conceptual framework and an approach to the Labour Relations Act which treats it as consisting entirely of new wineskins into which its interpreters can pour the wine of whatever new meaning seems to fit the present moment suggests the absence of such a framework.

The author then makes reference to two provisions of the Act. The first is s 64(4) which is the status quo provision in regard to unilateral changes in terms and conditions of employment. Such a provision is not new. The expression 'unilateral changes in terms and conditions of employment' is not new. Its meaning can be taken as reasonably established and it has consistently been held that the terms and conditions of employment to which it refers are the contractual incidents of the employment relationship.

He then examines s 145 which deals with the review of arbitration awards rendered under the auspices of the CCMA. He suggests that it is of vital importance because of the central role which such arbitrations play in the Act's dispute resolution procedures. Much of their effectiveness in providing the intended swift and relatively summary resolution of many types of dispute - particularly those concerning dismissal which clogged the workings of the old Industrial Court - will depend on the ease with which such awards can be challenged. It will assume that there was a purpose in adopting them in this context and recognize that the purpose was that of upholding the integrity of the process of arbitration. Section 145 will then be given the same meaning as its equivalent under the Arbitration Act.

The author further suggests that one thing the new Labour Relations Act does is to provide a more stable foundation upon which to build a labour law jurisprudence for the future. While the past saw significant progress it sacrificed even the remotest degree of certainty in its pursuit of flexibility.

The article concludes by suggesting that very often the old system is the sturdy foundation upon which the new, such as entrenched organizational rights, bargaining councils, the CCMA and the Labour Court have been constructed. New solutions will be seen to flow from the problems of the old system and where old concepts are again encountered they are there because their worth has been established.

SELECTED JUDGMENTS:

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), were entitled lawfully to participate in the strike.

Zondo JP held:

"The provisions of s 3 of the LRA are of paramount importance in the construction or interpretation of the LRA. 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]

".....In my view the effect of s 3 of the LRA is that whenever one seeks to interpret any provision(s) of the LRA, one is required to always give effect to the primary objects of the LRA and to always give an interpretation that will also be in compliance with the Constitution and with the public international law obligations of the Republic...." [Paragraph 40]

"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]

"Section 172(2) (a) of the Constitution confers jurisdiction on, among other courts, a High Court to 'make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court'. 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 F 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 therefor(e)……" [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 A 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 thus 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]

"……. there 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 have 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 is argued that whether conduct constitutes a strike has nothing to do with what label the parties give such conduct. Accordingly, the court will 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. This is the approach which the Labour Court adopted in Afrox Ltd v SACWU & others (1) (1997) 18 ILJ 399 (LC).

In SA Breweries Ltd v FAWU the Appellate Division finally put to rest 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 3 of 1983 (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 creates 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 and that 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 that, if those are met, the ensuing strike is a protected strike.

The third section focuses on ‘strikeable issues’. It is 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 Basson J had occasion to apply inter alia the provisions of s 65(1) (c) . In that case 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 which the approach of the LAC raises 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." (p695)

"The third issue which the approach of the LAC raises 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." (p696)

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 ... When the Ceramic Industries case came before Basson J one 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. Dealing with the issue on the return day 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." (p701)

"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.'" (p702)

"In conclusion it seems that to a very large extent the main difference between the majority and the minority was the approach to be adopted in interpreting s 77 and the factual finding on whether or not the matter giving occasion to the protest action had been considered as required by s 77(1) *(c)* . Not unimportantly it 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]

" In this regard Nicholson JA referred to what Mahomed DP ... said in *S v Makwanyane*: 'The South African Constitution is different; it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past and which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'" [page 708]

SELECTED JUDGMENTS

B BRAUN MEDICAL (PTY) LTD V FRESENUS KABI SA (PTY) LTD 2008 BIP 389 (SE)
Case heard on 1 November 2007, judgement delivered on 15 April 2008

The applicant sought an interim interdict, on an urgent basis, restraining the respondent from distributing certain documents and from spreading information about a medical product marketed and sold by the applicant known as Venofundin, which was a similar product to that known as Voluven marketed and sold by the respondent. The applicant and the respondent were competing pharmaceutical companies. The applicant argued that the respondent's conduct amounted to unlawful competition. Dambuza J held:

"In an action for damages founded on unlawful competition, a party alleging injurious falsehood has to allege and prove that the other party has, by word or conduct or both, made false representations; that it had known the representations to be false; that the plaintiff had lost or would lose customers; that the false representation had been the cause thereof; and the defendant had intended to cause the plaintiff loss by the false representation. Fault, however, is not a requirement for an interdict directed at prevention of unlawful competition." (Paragraph 11)

"The applicant's case, as I understand it, is that the respondent's conduct constitutes unlawful interference with its (respondent's) right to engage in its trade and to market Venofundin." (Paragraph 12)

"That the applicant is entitled to the free exercise of its trade cannot be disputed. However, this right to free exercise of trade is not without limitations. There is a general acceptance that because of self-interest, competitors cannot evaluate their performances and products objectively and impartially. Misleading images therefore become an almost inevitable feature of comparative advertising even if only to a small extent. The South African Courts, in line with English and American law, have held that publication of true disparaging statement is lawful. In this case, however, the application is founded on falsity and misleading nature of the statements. Further, I am satisfied that the statements under consideration are relevant to the competitive struggle between the parties." (Paragraph 13)

“From the evidence before me, I am of the view that a reader of the statement who has background knowledge of Voluven may indeed draw from the statement, the conclusion put forth by the applicant. But that conclusion may, in my view, be drawn from a mere reading of the article. Further, I am not able to find any basis on which to conclude that the statement is false. The applicant does not demonstrate that Voluven is not associated with hyperbilirubinaemia. It does not explain why the statement is false. It does not dispute the assertion by the respondent that despite the numerous tests done on Voluven, there has been no association between the product and hyperbilirubinaemia….. Even if the Sander study is inconclusive on the association between Venofundin and hyperbilirubinaemia, that does not make the statement false. Neither does the fact that other factors may cause hyperbilirubinaemia.” (Paragraph 18)

“The applicant's case in this regard ... is that data acquired in clinical studies on a potato and maize- based HES cannot be utilised to infer similar properties in Venofundin and Voluven. There is, however, no explanation why such an inference cannot be made either generally or in this particular case.” (Paragraph 24)

“In my view the comparison of the package leaflets does not prove the falsity of the statement or that the statements are misleading.” (Paragraph 29)

“I am not persuaded that the statements made by the respondent are misleading or constitute injurious falsehood and/or find no basis in the articles cited by the respondent..... Even if the criticism by the applicant that the statements are not supported by the articles cited in Annexure "E" is well founded, it does not follow that the statements are false. "It is an error to say that false premises must logically lead to propositions which are false: it is plain that a good cause may have bad reasons offered on its behalf". (Par 30)

“It is my view in the circumstances that the applicant has not made out a case for the relief it seeks.”

J PAGE V FIRST NATIONAL BANK & ANOTHER 2009 (4) SA 484 (E)

Case heard on 20-21 November 2006; 23-24 June 2008; Judgement delivered on 16 October 2008.

The plaintiff claimed damages in delict, seeking to hold the first defendant vicariously liable for his loss flowing from having followed the advice of one of the bank's employees to take some of his funds out of a moneymarket account and to place it in an offshore investment. The defendants claimed not to have assumed liability for the performance of the plaintiff's offshore investment, relying on a clause in the agreement between the bank and the plaintiff which provided that: 'We do not assume responsibility for the performance of investments.' The defendants also claimed that it had not been on the second defendant's advice that the plaintiff decided to invest his funds offshore but, rather, on the subsequent advice of his own financial advisers. Dambuza J held:
“The defence that the plaintiff is bound by the terms of investment agreement and that the defendants never assumed liability for performance of the investment does not, in my view, afford the defendant’s any assistance.”

“A contract needs to be closely examined before one can say that exemption from such negligence is agreed upon. In this case the very same document in which there appears to be exclusion of liability also anticipates that the first defendant may be held liable for professional negligence of its consultants. Read against this clause, the exclusion of liability for the performance of the investment becomes ambiguous. It seems to me that if there was little or no exercise of skill and care to determine whether the offshore investment was likely to yield a better return than the money market account, the defendant’s cannot simply hide behind the exemption clause. ” (Paragraph 10)

“The contention by the defendants that the investment was made on the advice of persons other than the second defendant can also not stand. Even if I were to accept that the Plaintiff discussed the investment with Page and Vice there is, in my view, no sufficient evidence to conclude that it is those discussions that led to investment. In any invent it is not in dispute that it is the defendants that owed the plaintiff a duty of care.” (Par 11)

"During argument it was concluded, correctly in my view, that the plaintiff had not been a good witness.....Nevertheless, my view is that not all of the plaintiff's evidence falls to be rejected." (Par 12)

The court referred to *Van Wyk v Lewis 1924 AD 438 at 444*.
"Rule 10 (2)(a) of the Insurance Brokers Registration Council Rules provides that a firm shall not recommend a transaction in a relevant investment to an advisory client unless it has reasonable grounds for believing that the transaction is suitable for the client having regard to the facts known.....It is my view that the position held by the second defendant is comparable to that of an Insurance Broker. The principle expresses in this Rule, is in my view, relevant in the determination of the degree of skill and care that is required of persons in the position of the second defendant.....I cannot find the basis on which he concluded that the offshore investment was suitable for the plaintiff." (Par 15)

"...the advice to invest offshore was a breach of the second defendant's duty of care to the plaintiff." (Par 16)

THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY V AFRICAN CATHOLIC CHURCH 2010 JDR 0590 (ECP)

Date Heard March 18, 2010 Date of Judgment May 04, 2010

The applicant sought an order setting aside as invalid agreements of sale between itself as the seller, and certain entities and/or individuals as purchasers. It maintained that the agreements were invalid for want of compliance with provisions of section 2 (1) of the Alienation of Land Act, Act 61 of 1981 (The Act). Dambuza J held:

"It has been said that the general approach to be adopted in deciding whether the contents of a written contract are sufficiently full and certain to comply with Section 2(1) is the following: "The section being directed against uncertainty, disputes and possible malpractices, meticulous accuracy in the description of the subject matter of the sale, the parties, the price and the method of payment is not required. Cerium est quod cerium redid

potent. This does not mean that the court is to make out a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty. In endeavouring to ascertain the intention of the parties no recourse can be had to evidence from the parties as to their negotiations and consensus, but evidence of identification or of an explanatory nature is admissible. The point is that, to fulfil the intention of the legislature, the written contract must place the essentials of the contract of sale, and all the material matters with which it deals, out of range of the clash of will of the parties." (Paragraph 14)

“So a written contract that leaves the method of payment vague or leaves it over for further negotiation is void and cannot be rectified. The method of payment may be made sufficiently certain by implied terms, provided those terms can be implied from the document itself. Evidence to prove a contemporaneous oral agreement or a subsequent oral variation relating to the method of payment is inadmissible.” (Paragraph 15)

“Contrary to the submission on behalf of the ninth to twelfth respondents I do not agree that extrinsic evidence may be admitted to give meaning to the defective terms of the agreements. Unlike in *Johnstone v Leal* the defective Clause 3 of the agreements is not ambiguous or capable of more than one meaning. It is incomplete and any evidence led to complete it would, in my view be an attempt to make an agreement for the parties.” (Paragraph 20)

“Consequently, I agree with the submission on behalf of the applicant that, insofar as the method of payment of the purchase prices is not stipulated in the agreements under consideration, the agreements fall foul of the provisions of not only the provisions Alienation of Land Act but also the general principles of law relating to purchase and sale agreements.” (Paragraph 21)

SELECTED JUDGMENTS:

F NDZAMELA V MR SCHEEPERS, THE SHERIFF OF UMTATA & THE EASTERN CAPE DEVELOPMENT CORPORATION

Transkei Division case no 830/01 heard on 8 July 2004 and judgement delivered on 24 August 2004

The court in this matter granted an interim order on an urgent basis setting aside writs of execution against the respondents pending the final judgement on the respondent's application that the writs be set aside. The application was opposed by the first applicant only. The respondent contended that it was an organ of state and therefore it was protected from execution against its property in terms of the State Liabilities Act. The applicant contended that the respondent does not fall within the definition of a state or state organ as envisaged by the State Liabilities Act. Dilizo AJ held:

"When having a due regard to the meaning of the organ of State as envisaged in terms of Section 239 of the Republic of South Africa Constitution Act 108 of 1996 that in order to know whether a particular entity is an organ of the State or not the interpretation given to the provisions of the aforesaid section is decisive." (Paragraph 39)

In the case of *Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA)* it was held that Transnet was an organ of State as defined in the Constitution..... This conclusion was reached as a consequence of the following factors having been taken into account: that the government still owns all the shares of Transnet though it is a limited company and that it does exercise an ultimate control and provides a general service in the public.....Transnet was a product of a statutory creation with the State being the only and the sole shareholder.....An employee of Transnet was deemed to be an employee of the state but Transnet was obliged to provide service in the public interest and the Minister was also obliged to make regulations on a large number of matters in relation to the control and functioning of Transnet." (Paragraph 25)

"In the Canadian case "referred to above" of *McKirnye v Board of Govenors v University of Guelph & Attorney –General for Ontario 1990 (3) SCR 229* was held that the court would more readily come to the conclusion that a particular entity is an organ of the government if it relies on government funding". (Paragraph 31)

"In terms of the Eastern Cape Development Corporation Act No.2 of 1997 it is clearly stated that the operations of the corporation shall be managed and controlled by a board of directors. And such board of directors consists of not more than 11 directors having been appointed by the responsible

member. A "responsible member" means the member of the executive council responsible for Economic Affairs in the province." (Paragraph 32)

"It is noticeable in terms of section 15(1) of the Act that it is the government of the province that will take up 100 shares and that subject to subsection 6 only the government of the provinces shall be entitled to hold shares in the corporation...." (Paragraph 34)

"Considering the provisions of the Eastern Cape Corporations Act coupled with the Public Finance Management Act No. 1 of 1999 it is quite clear that Eastern Cape Development Corporation is a provincial public entity....." (Paragraph 38)

The court referred to *SAAPAWU & Others v Premier of the Eastern Cape & Others 1998 JOL 1564 (LC)*. (Paragraph 39)

"On page 6 of the aforesaid case it was stated "it would seem to be clear that the founding parties of the Constitution envisaged a broad conception of the State to include not only the State as it is traditionally known but also to include other functionaries or institutions exercising a power or a function in terms of the Constitution"...." (Paragraph 40)

"I accordingly come to the conclusion that the respondent is an organ of State in terms of section 239 of the Constitution."(Paragraph 45)

"In any event such execution would be fatally frustrated by protection provided by provisions of section 3 of the State Liability Act 20 of 1957. Also see *Jayiya v MEC for Welfare, Eastern Cape (2003) 2 ALL SA 223 (SCA)* where section 3 of the aforesaid Act was held to preclude execution against property of the State." (Paragraph 54)

The writs of execution were set aside.

THE STATE V N MAKELENI, Transkei Division Review No 212098

This was an automatic review. The question raised was whether the Magistrate who presided over the proceedings should have recused himself considering that the complainant is a Public Prosecutor at Elliotdale establishment, the Magistrate who presided over the case, is also the magistrate of Elliotdale establishment. Dilizo AJ held (With another judge concurring but the name of the judge cannot be discerned from the signature):

"This therefore behoves that it must not be forgotten or overlooked that an impartial judicial officer is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehension that the judicial officer, for whatever reasons , was not or will not be impartial." (Paragraph 7)

"The essential key issue in dealing with the issue of recusal is, having been informed of the facts and the circumstances and the issues involved, and having viewed the matter realistically and practically the conclusion was inescapable that there is a reasonable apprehension that the judicial officer will be biased against the other party in the hearing of the matter."(Paragraph 8)

"The Supreme Court of Appeal formulated the requirements for a judicial bias test as follows: there must be a suspicion that the judicial officer might, not would be biased, the suspicion must be that of a reasonable person in the position of the accused or litigant and the suspicion must be based on reasonable grounds. (*S v Roberts 1999 (4) SA 915 (SCA*)" (Paragraph 9)

"With regard to a conduct indicative of bias or a perception of bias, it was held in *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union 1992 (3) SA 673* that suspicion of bias or perception of bias may assail the minds of the parties not only by reason of opinion expressed by a judicial officer, but in the particular circumstances of a case also by reason of the conduct of the judicial officer or by reason that the judicial officer is so associated with one of the parties in the matter before him as reasonably to create an impression of a predisposition in favour of one of the parties that he should have recused himself or herself." (Paragraph 10)

"The court has to scrutinize carefully the apprehension and the litigants potential anxieties and to attribute to such apprehension or potential anxieties legal value and thereby decide whether it was such that it should eventually be countenanced in the eyes of the law." (Paragraph 11)

"The common law basis of the duty of a judicial officer to recuse himself or herself is, inter alia, where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer that he will not adjudicate impartiality. (*Council of Review, SADF, and others v Morning and others 1992 (3) SA 482 (AD*)" (Paragraph 13)

"In view of the above nature of the criminal justice system, it would not be far-fetched or unreasonable to expect any reasonable person, circumstanced as accused was, perceiving the prosecutor and the Magistrate of the same establishment as colleagues and a single entity who are always together whenever the court is in session." (Paragraph 16)

"These perceptions would be more accentuated or fortified by the fact that the commission of the charge accused was being tried for took place within what I would term the "domain" or the premises of the Magistrates Court, that is now prosecuting and also adjudicating upon him as a single entity." (Paragraph 18)

"In applying these principles as it goes without saying that one does not look so much at the mind of the presiding officer, but rather at the impression that his or her actions might create in the minds of right-minded persons with a view that justice must be rooted in confidence which, if destroyed, right minded persons will always perceive that the presiding officer was biased." (Paragraph 24)

"Possessed of all the above facts and the perception as fully enunciated above, I am inclined to conclude that this is a proper case which should have prompted or excited *mero motu* recusal on the part of the judicial officer." (Paragraph 20)

"In the result, both conviction and sentence be and are hereby set aside."

D MADYIBI V THE MINISTER OF SAFETY AND SECURITY & ANOTHER

Transkei Division case no 1034/2004. Case heard 26 November 2006, Judgement delivered on 8 December 2006.

The plaintiff in this matter instituted an action against the defendants in her personal and representative capacities. The defendant's excepted to the plaintiff's particulars of claim as lacking averments that are necessary to sustain a cause of action because the deceased had shot and killed himself, given the nature of suicide and the fact that it does not constitute an offence, the plaintiff's allegations disclose no cause of action. Dilizo AJ held:

"In my view the mere fact that the last act of committing suicide was an own voluntary, non criminal act by the deceased , does not necessarily mean that the servants of the 1st defendant, who behaved as alleged in the particulars of claim, and cannot be held accountable....One should be concerned rather with conduct of the servants of 1st defendant whether, in the circumstances, they ought to have taken reasonable steps to prevent any reasonably foreseeable harm being done to the Plaintiff and or to prevent loss or damage to her and her minor children from occurring as a consequence of use of firearm by the deceased as herein complained of." (Paragraph 5)

"Whether suicide is no longer a crime nor it is an actionable wrong or not, is to me not the issue for determination whether the pleadings under claim C are excipiable or not. .....as this court has to consider whether policy considerations do exist which exonerate the servants of the 1st defendant from liability for the consequences that eventuated from their failure to prevent the harm or for breach of any legal duty and or negligence. In any event, liability, in my view, is not necessarily based on approximate cause of the deceased's last own act of shooting the plaintiff as well as commission of suicidal act by himself." (Paragraph 6)

"The inquiry is whether the infringement of the plaintiff's interests and those of her minor children was, in the particular circumstances objectively unjustifiable." (Paragraph 7)

"In my view, therefore, the omission on the part of the 2nd defendant and or some of the members of the South African Police Service to act in the circumstances as alleged in the particulars of claim and in the light of the reports brought to their attention now and again as also alleged , would be wrongful when judged by legal convictions of the society, and on the strength of *boni mores*, it would be reasonable and expected of such member of service to have set law in motion to disarm the deceased of his firearm." (Paragraph 8)

The court referred to *Minister of Safety v Van Duivenboden (6) SA 431 (SCA) at 441E-442A*. (Paragraph 12)

"The aforegoing demonstrates clearly that, in matters of the nature as one under consideration *in casu*, it is premature and highly ill-advised to except to the pleadings as alleged in claim c. It is always after consideration of particular facts of the case, its peculiar circumstances and other relevant facts, which cannot be known during pleading stage...." (Paragraph 13)

Exception dismissed.

King Sabata Dalindyebo Municipality v N Magavu

Transkei Division case no 1662/07, case heard 7 August 2008, Judgment delivered 21 August 2008.

This was an application by the applicant to interdict and restrain the respondent from attaching and removing the applicant's goods referred to in the notice of attachment. The applicant argued that a municipality is an organ of State and that it therefore follows that its assets are indemnified or protected from attachment as envisaged in terms of section 3 of the State of Liability Act.

Respondent claimed that section 3 excludes local authorities from protection accorded in terms thereof.

Dilizo AJ referred to sections 239, 151(1) and 154(1) of the Constitution. (Paragraph 5-8)

"In *Mateis v Ngwathe Plaaslike Municipalities en andere 2003 (4) SA 361 (SCA)* the Supreme Court of Appeal held that it was clear that sections 2 and 3 of the State Liability Act are concerned with liability of the central or provincial government. The liability of the municipalities, which were indeed also a form of government, was not mentioned, nor neither with regard to cause of action, nor as possible Defendant, nor as possible paying party, and was therefore excluded by the necessary implication." (Paragraph 9)

"The court proceeded to state that it was, as unquestionably indicated by material provisions of the Act, never the intention of the Legislature to provide liability of municipalities to third parties as a form of state liability nor include the municipality in the word "State" for the purposes of the Act. It was therefore held that sale in execution of assets of a municipality in satisfaction of a judgement against it is competent." (Paragraph 10)

"In the light of the above legal expositions, I am unable to come to the conclusion that a municipality, though it is admittedly an organ of state in terms of section 239 of the Constitution, is a "STATE" as envisaged in terms of the State Liability Act." (Paragraph 11)

"Though the municipality is an organ of State in terms of section 239 of the Constitution, in my view, it is not part of the government in that, as an organ of state, it does not fall within the national or provincial spheres of government as contemplated under chapter 3 of the Constitution. *(Independent Electoral Commissions v Langenberg Municiaplity 2001 (1) 3 SA 925 (CC))*. Both national and provincial spheres of government have concurrent powers in relation to those functional areas as described in Schedule 4 of the Constitution." (Paragraph 13)

"A municipality cannot be said, in my view, to be a department or administration within the national or provincial spheres of government in respect of which national or provincial spheres of government in respect of which national or provincial executive has a duty of coordinating the functions of the state departments and administrations as envisaged in terms of section 85(2) of the Constitution." (Paragraph 14)

"In my view, based upon the above legal exposition and interpretation of the relevant legislations, section 3 of the State Liability Act was intended to deal with cases of actual claims against the state and where such claims can only be satisfied out of national revenue fund or provincial revenue fund,

as the case may be. A municipality has no control over or entitled to payment out of such funds; be it national nor provincial." (Paragraph 15)

"It brooks of no argument to me that parliament when enacting the Constitution as well as relevant legislations, intended that there should not be execution against the government in respect of matters in which a judgement is given against the state itself. I am therefore not persuaded that a municipality, such as applicant, is a state it is admittedly an organ of the State as envisaged in terms of section 239 of the Constitution." (Paragraph 16)

The Respondent referred the judge to his judgement in the *Ndzamela* case where he found that the respondent in that case was an organ of State. The respondent argued that the municipality *in casu* and the respondent in the *Ndzamela* were on the same footing and therefore the judge was bound by the judgement.

"In reaching the conclusion arrived at in *Ndzamela's* case, the court was bound by the approach adopted in terms of the control test issue by the government over the development corporation which is not obtaining in municipalities, such as applicant herein." (Paragraph 20)

"*In casu* the State does not exercise such powers and control over the applicant, as a municipality as to, for instance, when and in what manner it should carry out its businesses, nor does the state maintain control of when and how its powers are to be exercised." (Paragraph 23)

SELECTED JUDGMENTS

GWEDLA V MINISTER OF SAFETY AND SECURITY CASE NO: 1102/08 (UNREPORTED), 16 MARCH 2010 (EASTERN CAPE HIGH COURT: MTHATHA)

The plaintiff claimed damages from the defendant for pain and suffering and contumelia respectively in the amount of R100 000,00 each arising from an assault on him by members of the South African Police Service, acting within the course and scope of their employment with the latter.

Hartle AJ held:

"The Constitutional Court has emphasized the notion that claims in delict should not carry punitive sanctions, which is against the basic purpose of a civil action in delict to compensate the victim for the actual harm done….Hence where police members entrusted with the maintenance of law and order and the protection of the citizens of this country breach the constitutional mandate of policing and cause harm to a person held at their mercy in a deplorable manner, an award of substantial damages ought generally to be sufficient vindication of the personality rights breached, requiring no further redress other than through s traditional award of damages. Further, I should not allow my abhorrence of the conduct of the members to influence my discretion when determining the amount to be awarded for damages, even though one's sense is that the Defendant ought to be punished for its member's high-handed treatment of the Plaintiff, his son and their guests." [paragraph 30]

"My conclusion is that an award of R90 000,00 is justified especially taking into account the high degree of contumelia which I have made allowance for." [paragraph 51]

ZAKADE V THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA CASE NO: 330/1993 (UNREPORTED), 6 JULY 2010 (EASTERN CAPE HIGH COURT: BISHO)

Case heard 3 March 2010, Judgment delivered 6 July 2010

The plaintiff sought to recover damages in the sum of R2 752 350,00 arising out of an alleged breach of agreement to reinstate him to a position which he held in the then directorate of Planning.

Referring to the right to fair trial, Hartle AJ said "The reply by the Plaintiff presently under consideration is, therefore, a critical pleading, as is the trial issue to be determined. It goes to the heart of his right in terms of the provisions of section 34 of the Constitution to have any dispute decided in a fair public trial before a court……" [paragraph 21]

"In terms of s 173 of the Constitution, the High Court has an inherent jurisdiction to control its own proceedings which includes the power to dismiss an action on account of delay or want of prosecution. The discretion arises from the court's inherent power to prevent abuse of its process…." [paragraph 36]

“The court will, however, exercise such powers sparingly and only in exceptional circumstances because dismissal of an action seriously impacts on the constitutional and common law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial” [paragraph 37]

“A court is unlikely to exercise such discretion unless there is real prejudice which is hypothetical and speculative would hardly suffice, neither will an action be dismissed merely to placate notions of injustice or inequity” [paragraph 38]

“The plaintiff’s fair trial right to prosecute an action to its end, against the defendant’s that the litigation be finalized without undue delay are further factors that the court will have regard to. These factors are, however, not intended to be exhaustive. Since the matter involves the exercise of a judicial discretion, which is undesirable circumscribe, they are inter-related and not individually decisive. Ultimately there must be a balancing of all the relevant considerations; the weight to be given to any one of them dependent on the facts and circumstances of each case” [paragraph 51]

The Plaintiff’s claim was dismissed.

SELECTED JUDGMENTS:

S V DUKISA CASE CASE NO: A1873/2009 (UNREPORTED), 15 JUNE 2010 (EASTERN CAPE HIGH COURT: BISHO)

The matter was referred to the court for special review in terms of section 304 of the Criminal Procedure Act on the basis that the order declaring the accused as a State Patient given by the magistrate was incompetent.

Kemp AJ held:

"if there is no evidence that grievous bodily harm was inflicted I am of the view that the accused should get the benefit of the doubt and receive the lighter "sentence" in terms of subsection (ii), which in any event would have been a competent order even if no actus reus had been proven,……." [Paragraph 10]

"I am satisfied that at the end of the day, justice has been done, and will not be undone by the order which I propose to make. I must emphasize, in case there is any doubt, that what I seek to achieve is merely that the administrative errors be corrected and that the accused not be re-arrested"

The order of the magistrate declaring the accused a State Patient was set aside.

VELAPHI V S CASE NO: CA & R 15/09 (UNREPORTED), 09 MARCH 2010 (EASTERN CAPE HIGH COURT: BISHO)

Case heard 5 March 2010, Judgment delivered 9 March 2010

This was an appeal against the refusal by a magistrate in Mdantsane to grant bail to the Appellant.

Kemp AJ held:

"It seems to me that although his incarceration would inevitably inconvenience him, or even threaten his health and well being more than it would a healthier prisoner, that this factor on its own would not qualify as an exceptional circumstance." [paragraph 4]

"…….it seems that the only direct evidence against the Appellant is that of the complainant…….in the court's experience, when it comes down to one witness word against another, and bearing in mind that the Appellant does not have to prove his innocence, it is in my view highly unlikely that the state will prove…that the Appellant is guilty of the crime alleged." [para 10]

"…….there is no doubt that the nature of the offences that the public thought that the Appellant was charged with would have induced an enormous sense of shock and outrage but that is not the test. The test is whether the actual offence charged with would induce a sense of shock or outrage. It is unfortunately all too often that the courts face the sort of offence with which the Appellant is charged and without taking anything away from the victim, it is far removed from the offences which the community thought that the Appellant was charged with." [Paragraph 13]

"……one is left with the impression that the magistrate found, based on his own observations of the accused in the witness box, that the Appellant was indeed fearful of the public. This appears to have played a role in the magistrate's view of the Appellant's credibility relating to this aspect as well as to his views of the appellant's credibility in so far as the conditions in prison were concerned…….. Making findings adverse to an accused without giving him an opportunity to consider them offend against the most basic tenets of audi al(t)eram partem." [paragraph 19]

The Appeal was accordingly successful and the refusal to grant bail set aside.

MAGALELA AND OTHERS V MAGALELA AND OTHERS CASE NO: 873/08 (UNREPORTED), 11 MARCH 2009 (EASTERN CAPE HIGH COURT: BISHO)

The applicants sought a declaratory order declaring them to be the heirs and beneficiaries in the estate of a late Richard Sixenza Magalela.

Referring to the Constitutional Court Judgment of *Bhe*, Kemp AJ said "Although paragraph 4 of the order only deals with women and extra-marital children, other children born in wedlock are not left out of the effect of the order. They are dealt with in paragraph 6, which provides that section 1 of the Intestate Succession Act applies to the intestate deceased estates that would formerly have been governed by s 23 of the Black Administration Act." [paragraph 8]

"Although Langa DCJ held that the declaration of invalidity should be made retrospective to 27 April 1994, this was not contained in the order and appears to have been an oversight. It is quite clear that the intention of the court was to limit the retrospective operation of the order to the date on which the interim Constitution became operable, namely on the 27th April 1994" [paragraph 9]

"One only has to have regard to Paragraphs [126] to [129] of the Bhe judgment to realise that the order of retrospectivity was an integral part of the judgment and even though not expressly embodied in the final order, it is incorporated therein by necessary implication……..Paragraph 8 of the order also commences with the qualification that in terms of section 172 (1)(b) of the Constitution, the operation of the order is limited and it would make no sense to do so unless the order was made retrospective……" [paragraph 10]

"In terms of the principles of Constitutional Supremacy and Objective Constitutional Invalidity, in terms of which a law which is repugnant to the Constitution is automatically invalid, although a court may, in terms of s 172(1)(b) of the Constitution limit the invalidity of the law. It seems from the aforegoing to be obvious that the Bhe judgment was operative with retrospective effect….." [paragraph 11]

The application was dismissed.

SELECTED JUDGMENTS:

H RICH N.O & OTHERS V LORRAINE & ANOTHER

Northern Cape High Court Kimberley case no 476/09, heard on 18 September 2009 and judgement was delivered on 13 November 2009.

The applicants sought a declaratory order that the contract of sale concluded between the applicant and the first respondent is cancelled. The issue to be determined was whether the cancellation clause in this contract is contrary to the public policy and unconstitutional. Mjali AJ held:

"Contractual terms are subject to constitutional adjudication. Contractual obligations are enforceable unless they are contrary to public policy, which is embodied in the Constitution and in particular the bill of rights. Where the enforcement of a contractual provision would be unreasonable and unfair in the light of those fundamental values it will be contrary to public policy to enforce it. Courts will invalidate and refuse to enforce agreements which are contrary to public policy." (Par 20)

The court had reference to *Barkhuizen v Napier 2007 (5) SA 323 (CC)*. (Paragraph 20&22)

"This does not, however mean that compliance with contractual obligations freely and voluntarily undertaken is irrelevant to the enquiry into public policy. Thus our courts have warned that the decision to declare contracts or terms thereof contrary to public policy should not be hastily and arbitrarily taken so as not to erode the liberty of the parties to enter into agreements." (Paragraph 21)

The court had reference to *Sasfin (Pty) Ltd v Beukes 1998 (1) SA 1(A).* (Paragraph 21)

"What is evident is that the agreement was voluntarily entered into by the parties. The terms of the contract were known and agreed to by the parties. Public policy includes the freedom of the parties to enter into contracts even to their own detriment. Contractual autonomy being part of the freedom enshrined in the bill of rights and in the absence of anything pointing to the fact that the cancellation term on its own is contrary to public policy, the doctrine of *pacta sunt servunda* should find application in this matter." (Paragraph 28)

The court had reference to *Brisley v Drotsky 2002 (4) SA 1 (SCA).* (Par 28)

"While I have great sympathy for the respondents the authorities make it plain that sympathy is not the test and one must be careful not to conclude that a contract is contrary to public policy merely

because its terms offend one's individual sense of propriety and fairness." The contract of sale was declared cancelled.

J JORDAN AND ANOTHER V C FARBER

Northern Cape High Court, Kimberley case no 1352/09 heard on 29 October 2009 and judgement delivered on 15 December 2009

The applicants sought a declaratory order that the lease agreements concluded between the first applicant and the respondent are void alternatively are cancelled and the respondent be evicted the leased property. Mjali AJ held:

"It is worth noting that the lease agreements were signed only by the first applicant and the respondent. The second applicant who is married to the first applicant in community of property and a co-owner of the farm did not sign the lease agreements." (Paragraph 6)

"I turn now turn to consider whether the contract is *contra bonos mores*. It is trite that our courts will invalidate and refuse to enforce agreements which are contrary to public policy. As to what public policy entails the Constitutional Court in *Barkhuizen v Napier 2007 (5) SA 323 (CC)* recognised that the bill of rights represents a reliable statement of public policy." (Paragraph 12)

"Thus, what public policy is and whether a term in a contract is contrary to public policy needs to be determined by having regard to the Bill of Rights and the values that underlie our constitutional democracy." (Paragraph 12)

The court also discussed unequal bargaining power by referring *to Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).* (Paragraph 15)

"In this matter despite the fact that the parties signed the agreement freely and voluntarily, I would in my view be short sighted not to acknowledge that this is an agreement between an attorney on the one hand and a client who solely relies on his (the attorney's) advice on the other. Attorneys wield tremendous power over clients who depend on them to handle their affairs in stressful situations. ..... It is clear that the applicants could not have been on par, with or in a stronger bargaining position than, the respondent." (Paragraph 16)

"Yet another reason for holding that the contract is against public policy and of great concern is the fact that respondent breached the standards of professional ethics by knowingly entering into a

business transaction with his clients and failing to advise them to seek independent legal advice before concluding the lease agreements with them." (Paragraph 17)

"I am satisfied that the contracts forming the subject matter of this application are against public policy."

C G VAN DER HEEVER V J A J FOURIE

Northern Cape High Court Kimberley case no 1692/08 heard on 23&24 February 2010 and judgement delivered on 26 March 2010

The plaintiff sued the defendant for damages for an alleged defamation of character arising from the publication of an alleged defamatory article. Mjali AJ held:

"....in my view the publication was not defamatory and even if it was, the substance thereof was factually true and for the public benefit." (Paragraph 12)

The court looked at the test for determining whether words published are defamatory set out *Argus Printing and Publishing Co Ltd v Esselen's Estate 1994 (2) SA 1 (A.* (Paragraph 12)

"The authorities make it plain that the test for defamation is objective and that to be defamatory the words must be understood as such in their natural and ordinary meaning by a reasonable person of ordinary intelligence. The source and the acrimonious history of the parties is immaterial in the determination of whether the information supplied is defamatory or not." (Paragraph 13)

"Even if the publication were to be found to be defamatory, publication of defamatory material which is true and for the public benefit is justified and therefore lawful." (Paragraph 14)

Application for absolution from instance was granted with costs.

SELECTED JUDGMENTS

CAMERON V S, Natal Provincial Division case no. AR420/99

The appellant was appealing his conviction of pointing a firearm and his sentence. Mkhize AJ held (Mthiyane J concurred):

"It is trite law that, although demeanour can never serve as a substitute for evidence, it can and often does reflect on and enhance the credibility of oral testimony."

"The correct approach was to apply to the totality of the evidence, the only test of a reasonable possibility that the defence version may be true. If there is such a possibility then the accused is entitled to the benefit of the doubt. Without giving proper reasons why he was of the opinion that the defence version was not reasonably possibly true, the magistrate could not have applied the test properly."

The appeal was up held and the sentence was set aside.

S V ZONDO

Natal Provincial Division case no. R 1347/99 23 September 1999

This matter was an automatic review in terms section 302 of the Criminal Procedure Act 51 of 1977. Mkhize AJ held:

"The accused was never questioned as to whether he knew that it was unlawful to possess a firearm without a licence. The aspect of awareness of unlawfulness was not dealt with at all. It was imperative for the magistrate to deal with this aspect because the accused alleged that the firearm belonged to his late brother who may have had a licence to possess it. The accused may have thought that he had the right to inherit the firearm. "

"The mental element in respect of both counts was not dealt with as required by the Act."

The conviction and sentence are set aside and the matter is referred back for retrial before another magistrate.

PADAYACHEE V S, Durban and Coast Local Division case no 7849/99 3 September 1999.

This matter was a bail appeal. The appellant applied for and was refused bail in the magistrate's court. Mkhize AJ held:

"In matters of bail, the starting point is to look at the strength of the case against the accused, this would have an impact on the possible reasons for the accused either evading trial or attempting to tamper with evidence."

"The next aspect to consider is the question of delays which in some instances may run to one and a half to two years before a matter is heard in court. There is no doubt that this aspect is important in assessing the question of exceptional circumstances. There is indeed no guarantee that the case will be heard in the not distant future in view of the present climate of congestion of the rolls."

"The onus is on the appellant in terms of section 60(11)(a) to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release."

The court looked at what exceptional circumstances are by referring to an unreported judgement of *Farhaad Khan & Others v the State* and the Constitutional Court's case of *S v Dlamini 1977 (sic) BCLR 771 (CC)*.

"Evidence establishes about 18 factors which are normal circumstances in bail application. Taken together they may establish exceptional circumstances. They must however be taken in the light of the totality of the evidence. They must be weighed together with other factors to establish whether they prove exceptional circumstances or not on a balance of probabilities."

"The appellant has not succeeded in proving the existence of exceptional circumstances in his case on a balance of probabilities entitling him to a release on bail."

GOVENDER V S

Natal Provincial Division case no AR109/99 30 September 1999

This is an appeal against the conviction and sentence by the regional court at Verulam. The appellant was charged with murder. The appellant pleaded self defence. The appellant shot the appellant when the deceased was no longer a threat to the appellant. Mkhize AJ held:

" The test to be applied to these facts, therefore is whether or not the appellant was aware that he had exceeded the bounds of defence, that is , that his conduct was unlawful and further that his

conduct was unlawful and further that his conduct would result in the deceased's death but nevertheless reconciled himself with this possibility."

"In considering the totality of the evidence, including the appellant's own evidence, there was no suggestion that the appellant was so provoked that he did not know what he was doing when he shot the deceased."

"The appellant's allegation on the actions of the deceased cannot be dismissed as improbable, as it cannot be said that he fired at the deceased for no apparent reason."

"The crux of the matter is whether, when he allegedly defended himself, his defensive act did not exceed the bounds of defence. "

"The appellant indeed exceeded the bounds of reasonable defence by shooting the deceased when he was no longer a threat to him and foresaw the possibility that he may die and reconciled himself with this fact. The intention to kill was present."

The appeal is dismissed

MAZIBUKO V S

Natal Provincial Division case no AR 247/99 September 1999

This was an appeal against the conviction and sentence in the regional court at Ladysmith. Counsel of the appellant submitted that the magistrate erred in imposing a sentence exceeding ten years imprisonment, which was the maximum sentence a regional court could impose before the coming into operation on 7 October 1997 of the provisions of the Magistrates Courts Amendment Act 1998. He relied of section 35(3) and 39(3) of the Constitution. Mkhize AJ held (Levinsohn J concurred):

The court referred to *Mahomed NO v Union Government 1911 AD 8* which held that the principle that no statute is presumed to operate retrospectively is one recognised by the civil law. The law giver is presumed to legislate only for the future.

"The rationale for this rule has been held to fear injustice which in some instances is inherent in the retrospective application of legislation."

"The dual values are, due notification ensuring fundamental fairness to individuals and protection against abuse of the criminal sanction by state. As an aspect of the right to a fair trial, this reflects the right to substantive fairness in the institution of a prosecution."

"In respect of penal statutes, especially in criminal matters involving the amendments which increase or replace the penalties appearing in the penalty clauses of the existing statutes, the courts have held that the general rule against retrospectivity applies, even in dealing with existing crimes. "

"In cases not clear as to whether the retrospectivity of the provision is applicable, despite the application of the principles highlighted above in respect of a penalty clause, the general rule is that the interpretation must be made to favour the accused."

"In the case of *Mbuyane, Nkitle 1999 (6) BCLR 699 (T),* the court, in passing, stated that in the light of the provisions of section 35(3) of the Constitution, the decision in Mazibuko on the aspect that the court has to enquire whether or not the provision of the Statute increasing a penalty is retrospective, is no longer good in law. This is so because the constitutional provision now prevails."

The court referred to Minister of Safety and *Security v Molutsi and Another 1996 (4) SA 72 (A)* where the judge referred to an Australian case of *Pixie v Royal Columbian Hopsital (1941) 2 DLR 138.*

"To my mind the principles highlighted in the Australian case quoted by the learned judge of appeal are sound and logical."

The court referred to section 35(3)(n) of the Constitution.

"This provision gives constitutional status to the common law rule against the retroactive application of a more severe penalty. This means that, whenever there is a variation in the punishment, whether it is an increase or decrease, the accused gets the benefit of the least severe punishment."

"It is however clear that the provision in section 35(3)(n) of the constitution refer to situations where a penalty clause has been increased. The provisions of this section therefore, do not apply to an amendment conferring increased general jurisdiction on a court of law, as this does not involve 'the prescribed punishment for the offence."

Appeal dismissed

SELECTED JUDGMENTS:

K.S.D Municipality v Unknown persons erecting structures on that portion of the remainder of Erf 912, Mthatha situated on Township Extension no. 77 & 15 Others

High Court of South Africa Transkei Division case no. 392/08 heard on 24 October 2008 and judgement delivered on 20 November 2008

The applicant sought an order interdicting and restraining the respondent and/or any persons acting on their or stead from erecting fences and/or structures on that portion of the remainder of Erf 912. Ndengezi AJ held:

"The identity and *locus standi* of the parties in a law suit cannot be overemphasised. An application can easily be dismissed on the lack of the *locus standi* of a party be he applicant or respondent. I propose to deal with *locus standi* of the respondents in this matter." (Paragraph 4)

The court referred to *Nonene Rosemary Tibeza Jama and 135 Others v The Minister of Safety and Security and Another case no. 314/2003*.

"..the respondent attempted to distinguish Jama's case on the basis that the case I dealt with was concerned with the citation of applicants and not respondents." (Par 5.2). "I am of the view that his argument cannot stand, both parties must prove their *locus standi* particularly when challenged." (Paragraph 5.3)

"The application sought in the notice of motion must be granted on this ground alone which is that there is no answering affidavit to the founding affidavit." (Paragraph 5.5)

"I hold the view that the unknown persons, second to fifteenth respondents and or any other person has no right in law to interfere with applicant's ownership of the land until such ownership is set aside or annulled by a competent authority." (Paragraph 6.5)

"I am satisfied on the facts before me that the applicant has satisfied all the requirements for the grant of the final interdict."

MASAKHANE SECURITY SERVICES (PTY) LTD V MEC FOR PUBLIC WORKS, EASTERN CASE & OTHERS

High Court Eastern Cape Bisho case no. 205/09 12 heard on 27 October 2009 and judgement delivered on November 2009

The applicant instituted the present proceedings seeking an order directing that the bid awarded to the third respondent by the Department of Public Works be judicially reviewed in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000, alternatively be set aside. On the date of hearing, the contract of service between the first, third and fourth respondents had expired at the end of September. Ndengezi AJ held:

"The question that arises is whether the matter has not become academic. Is it in the interest of justice that the court pronounces on the merits? I think not." (Paragraph 1 pg 3)

"The view I hold is that this matter has become academic and the order will have no effect. It is obvious there is no award of bid or contract to be set aside since it expired." (Paragraph C)

Application dismissed.

CHURCH OF CHRIST MISSION V V JAMES & OTHERS

High Court of South Africa Eastern Cape, Bisho case no. 125/ 08, Heard on 20 October 2009 and judgement delivered on 29 October 2009

The applicant sought an order restraining the respondents from threatening the members of the applicant and from conducting any activities within the applicant's premises. Ndegenzi AJ held:

"What is clear is that Article 3 (of the applicant's constitution) does not provide for any penalty for failure to pay membership fees. It does not authorise the applicant to excommunicate members. Effectively, to grant the order prayed for would be tantamount to excommunication of respondents by this court. In any even there is sufficient evidence and proof that membership fees have been paid how late it may be. In my view it should never be the function of courts to enter into disputes of voluntary associations like applicant who should resolve their disputes amicably." (Paragraph 7.2 a)

"It is doubtful that applicant owns the church at Zwelitsha because the permission to occupy was granted to the Zweliistha Congregation and nobody else. I am not satisfied that the applicant is the owner and therefore has a right to interdict other people from entering the premises." (Paragraph 7.2)

"I must state that it is undesirable for members of voluntary associations like applicant to approach courts of law when they can easily resolve their differences."

The application is dismissed.

SCHOOL GOVERNING BODY OF NTILINI J.S.S & OTHERS V N MAKHITSHI &OTHERS

Eastern High Court: Mthatha heard on 6 November 2009 and judgement delivered on 25 March 2010

The respondents instituted review proceedings in the court *a quo* seeking an order setting aside the appointment of the fifth appellant by the Superintendent General for Department of Education. The application was opposed by the appellants but it was successful. With the leave of that court the appellants are now appealing that decision. Ndengezi AJ held (Sandi J concurring):

"In my view educators have a substantial interest in the appointment of a school principal. It is a legal requirement that they be represented in the body that governs the school and which, among other things, has the power to recommend the appointment of a school principal." (Paragraph 14)

"The resolution taken by the school Governing Body to delegate its powers is null and void. The Department of Education ought not to have relied on it." (Paragraph 17)

"The judgement of the court a quo is correct and the submission by the appellants' counsel is rejected."

Petse ADJP wrote a separate but concurring judgement. Petse ADJP held:

"Apropos the issue of the respondent's *locus standi* the pith of the argument advanced...was that the respondents had no direct and substantial interest in the matter qua educators should have thus been unsuited on that ground alone. The majority judgement has rejected this submission as devoid of substance a view to which I fully subscribe. ...I would add that since the advent of our constitutional order the trend has been, in a manner of speaking, to cast the net as wide as possible so as to extend the scope of the concept of a direct and substantial interest in a cause beyond what was traditionally the case before. That this is so is apparent from the judgement of the Constitutional Court in *Ferreira v Levin N O and Others: Vryenhoek and Others v Powell N O and Others 1996 (1) SA 984 (CC)."* (Paragraph 5)

SELECTED JUDGMENTS:

MACICI V SOUTH AFRICAN SOCIAL SECURITY AGENCY (SASSA) CASE NO: 2234/2009 (UNREPORTED), 2010 (EASTERN CAPE HIGH COURT: MTHATHA)

The Applicant brought an application declaring the Respondent's decision to terminate the Applicant's disability grant invalid and of no force and effect, that it be set aside.

Ndzondo AJ held:

"The doctrine of legitimate expectation finds application where a person enjoys a privilege, advantage or benefit which it would be unfair to deny such person without giving him or her hearing" [paragraph 11]

"….I shall decide the matter on the basis of the principle laid down in Plascon Evans Pains Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) which stated as follows: 'where the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant are admitted by the respondent, justify such an order." [paragraph 19]

MAFONGOSI V REGIONAL MAGISTRATES COURT NEL AND ANOTHER CASE NO: CAR 17/2006 (UNREPORTED), 30 AUGUST 2007 (EASTERN CAPE HIGH COURT: BISHO)

Case heard 22 June 2007, Judgment delivered 30 August 2007

This is a review application seeking an order reviewing and setting aside the decision of the first respondent when she appeared before him on charges of fraud.

Ndzondo AJ held:

Referring to section 342(A) of the Criminal Procedure Act, "It becomes clear from a reading of the provisions of the section that it could only have been applicable if the applicant had applied for the postponement of the case……..the section was not relevant whatsoever at that stage because there was no delay that the magistrate had to investigate……" [paragraph 14]

"it was grossly irregular for the first respondent to simply decide, after Mr ngwenya had informed him that he intended to withdraw as the attorney of record, to proceed with the case without having heard the applicant on the issue" [paragraph 18]

"There are numerous cases that have come before courts in which this kind of conduct has come under judicial scruitiny. I shall refer only to those cases that have been decided after the coming into effect of the Constitution of South Africa Act 108 of 1996……" [paragraph 20]

“in S v Mackenna 1998 (1) SACR 106 (CPD) the court held, inter alia, that the right to legal representation has long been recognised in this country and is today guaranteed by section35 of the Constitution, and if the right to legal representation is to have any meaning, it must include the right to be afforded a reasonable opportunity of securing it. The denial of such opportunity, when it is demanded, is a denial of the right to legal representation, and thus of the constitutionally guaranteed right to a fair trial, that the magistrate committed a gross irregularity when he denied the appellant the opportunity of securing a legal representative and on this ground alone, the conviction had to be set aside.” [paragraph 23]

Ndzondo AJ concluded that “I am therefore satisfied, from the aforegoing, that the applicant did not have a fair trial and this resulted in a failure of justice and consequently the conviction and the sentence cannot be allowed to stand and ought to be set aside” [paragraph 36]

SELECTED JUDGMENTS:

SIBIYA V MINISTER OF SAFETY AND SECURITY 2008 JOL 22084 (N) heard on 14 & 15 April 2008 and judgement delivered on 26 May 2008

The plaintiff instituted a claim against the defendant for damages arising out of his unlawful arrest and detention by members of the SAPS. Balton J held:

"The evidence illustrates that the plaintiff was not afforded any of the above basic rights enshrined in the Bill of rights. The police treated the plaintiff in an inhuman and degrading way by ignoring his disability and transporting him in the back of an open handcuffed and seated on the floor. He posed no threat to the police as he was unable to walk."

"The effects of this degrading and inhuman treatment have undoubtedly traumatised the plaintiff."

"The Constitution affords him special rights with regards to his disability, let alone the general rights which he is entitled to. The police failed to afford him any of these rights."

"The defendant is ordered to pay the plaintiff R308 750."

M SITHOLE V THE STATE

Kwazulu-Natal Pietermaritzburg case no. AR216/08 heard on 29 July 2009 and judgement delivered on 27 August 2009

The appellant was convicted of murder, two counts of attempted murder, robbery with aggravating circumstances and unlawful possession of a firearm. The appellant was sentenced to life imprisonment in respect of the murder, 30 years imprisonment in respect of each of the counts of attempted murder and robbery and 2 years for the unlawful possession of the firearm. The appellant appealed his sentence. Balton J held:

"It is clear that the court *a quo* did not apply the test which it had initially considered appropriate, namely that it was obliged, in view of the fact that the appellant fell in the 16 to 18 years category, to set out the reasons why the minimum sentence should be imposed. The court *a quo* misdirected itself in adopting the approach that it was obliged, in the absence of substantial and compelling circumstances, to impose the minimum prescribed penalty of life imprisonment. This Court is thus entitled to approach the question of sentence afresh."

The court referred to *Director of Public Prosecutions, Kwazulu-Natal v P 2006 (1) SACR 243 (SCA).*

"The above case of *P* was referred to with approval in a decision of the Constitutional Court in *S v M* wherein SACHS J confirmed the need for a re-appraisal of the juvenile justice system in the light of the Constitution and held that: A truly child centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances would in fact be contrary to the best interest of the child involved."

"However, a court punishing an offender under the age of 18 at the time of the commission of the offence must not lose sight of the provisions of section 28 of the Constitution and the guidelines laid down by the courts in this regard."

The court referred to the principles applicable to sentencing child offenders reiterated by Cameron J in *The Centre For Child Law v The Minister For Justice and Constitutional Development & Others (2009) ZACC.*

"One must derogate from the fact that the circumstances of this case calls for severe punishment. However a sentencing court should not lose sight of the distinction that our law has drawn in respect of offenders under the age of 18 against that of adult offenders. The test to be applied differs from that applicable to adult offenders. Section 28 of the Constitution entrenches this right."

"I propose that, in light of the circumstances of this case, the sentence of life imprisonment be altered to a term of imprisonment of20 years."

Theron J agreed

SELECTED JUDGMENTS:

KRITZINGER V NEWCASTLE LOCAL TRANSITIONAL COUNCIL AND OTHERS 2000 1 (SA) 345 (N) heard 19 September 1998 and judgement delivered on 28 June 1999

The applicant sought an order declaring that his employment with the first respondent had become redundant due to restructuring. The applicant did not rely on any provisions of the Constitution nor did he claim that any of his constitutional rights were violated. The respondent claimed *in limine* that the court lacked jurisdiction to adjudicate the matter as it was the *domaine reserve* of the Labour Court. Patel AJ held:

"It is trite law that the applicant bears the *onus* of establishing that this Court has jurisdiction. To that end the applicant must set out sufficient facts in his founding affidavit to justify a conclusion that this Court indeed has jurisdiction"

"I might in passing mention that the object of the Labour Relations Act was to create mechanisms whereby labour disputes could be resolved expeditiously by people who were knowledgeable in the field of labour law. One of the mechanisms so established is the Labour Court, which has the same status as the High Court in respect of matters falling within its jurisdiction."

"The applicant has not relied on any provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and neither does he in his founding affidavit nor in reply allege a violation of any constitutional rights. Mr *Muller* ... submits that, although there is no specific reference in the affidavits to the violation of any fundamental rights of the applicant, the breach nevertheless of the applicant's constitutional right of having been properly heard or consulted is implied."

"Mr *Muller's* submission, accordingly, verges on being disingenuous as nowhere in the papers is there a hint of the same. "

"Accordingly, this Court is of the view that an implied violation of a constitutional right appears to be an afterthought."

"It is not apparent from the papers nor was it argued by either party that a residual unfair labour practice has been perpetrated so as to visit the Labour Court with exclusive jurisdiction."

"Can the mere reliance by the applicant on the industrial council agreement and the circular for a *declarator* of redundancy oust the jurisdiction of this Court? In terms of s 19(1) *(a)* of the Supreme Court Act 59 of 1959, a Provincial or Local Division of the High Court has jurisdiction."

"In terms of this provision the Court certainly has jurisdiction over this matter. Further, it is a well-established rule of statutory interpretation that there is a strong presumption against the Legislature ousting the jurisdiction of a Court of law and, further, a clear legislative provision is required to displace this presumption."

MEC: DEPARTMENT OF FINANCE, ECONOMIC AFFAIRS, ECONOMIC AFFAIRS & OTHERS V MAHUMANI (2005) 2 ALL SA 479 (SCA) heard on 8 November 2004 and judgement was delivered on 30 November 2004.

The appellant, the MEC for Finance, Economic Affairs and Tourism, appealed against the finding by that court that the respondent was entitled to be legally represented at a disciplinary hearing. The presiding officer's decision was reviewed and set aside by the court *a quo*. It held that the respondent was entitled to be legally represented at the disciplinary hearing. Patel AJA held (Streicher, Navsa JJA, Jafta and Ponnan AJJA concurring):

"I agree with Wallis AJ that clause 2.8 is an injunction as to the general approach that should be followed. I furthermore agree that clause 7.3(e) is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation."

"In terms of our common law a person does not have an absolute right to be legally represented before tribunals other than courts of law."

"However, it does require disciplinary proceedings to be fair and if in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion" (*per* Marais JA in *Hamata "*.

"The parties, who agreed on the Code, were intent on devising a fair procedure ... and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended the presiding officer to have a discretion to allow legal representation in circumstances in which it would be unfair not to do so. I can find no indication in the Code to the contrary. There is, therefore, no justification for interpreting "appropriate circumstances" in clause 2.8 so as not to include circumstances, which would render it unfair not to allow legal representation at a disciplinary enquiry."

"The presiding officer erred in holding that he had no discretion to allow such a departure. The court *a quo*, therefore, correctly reviewed his decision and set it aside."

S V BALKWELL & ANOTHER 2006 (1) SACR 60 heard on 2 June 2005 and judgement delivered on 18 October 2005 (right to a fair trial)

Both the appellants were convicted of culpable homicide. They were each sentenced to seven years' imprisonment. The magistrate found corroboration of a witness' evidence in an affidavit deposed to by the first appellant. It was argued on behalf of the first appellant that this constituted a misdirection since he had not been warned by the magistrate hearing the bail application that the affidavit would feature in his trial. Patel J held (Radebe AJ concurring):

"In my view, there is no merit in this argument, since the State did not introduce the affidavit in terms of s 60(11B) *(c)* of the Criminal Procedure Act ... It was freely and voluntarily injected into the proceedings in terms of s 220 of the Act. In any event, the appellant chose not to testify in his bail application but elected to file an affidavit. At the time the admissions were made the first appellant was legally represented."

"The affidavit, in my view, is the proverbial nail in the coffin for both the appellants, since, although the contents of the affidavit are not directly admissible against the second appellant, the contents thereof provide corroboration of Jinenka's evidence that a serious assault was perpetrated on the deceased in the parking lot by both the appellants." (Par 43)

The appeals of the appellants both against their convictions and sentences are dismissed.

The judgment was upheld by the SCA on appeal.

SINGH V RAMPERSAD & OTHERS 2007 (3) SA 445 (DCLD) heard from 22-25 May 2006 and judgement was delivered on 22 January 2007

The plaintiff and first defendant had been married according to Hindu religious tradition and the parties had agreed not to register the marriage in terms of the Marriage Act 25 of 1961. It was common cause that their marriage had broken down. The plaintiff sought, *inter alia* , to have the marriage declared legal in terms of the Constitution, the amended Marriage Act, and the Divorce

Act, so that religious marriages would in future be recognised under these two statutes. The plaintiff in addition sought a decree of divorce. She claimed that the non-recognition of Hindu marriages violated her constitutional rights to equality and dignity. Patel J held:

“It is common cause that in India, the Hindu Marriage Act 25 of 1955 was promulgated to ameliorate the position of spouses married according to Hindu customary law.” (Paragraph 9)

Legislatures all over the world require registration of a marriage for the purpose of proof thereof and to afford parties an opportunity to select the proprietary regime that will attend their marriage. (Paragraph 11)

“In South Africa the Marriage Act similarly accommodates the registration of marriages either after the celebration of a Hindu marriage according to rites and rituals chosen by the parties….” (Paragraph 11)

“Our Courts have, since the advent of the Constitution, consistently come to the aid of spouses and their children if the marriage was one under the common law if there was a need, especially if unfairness would result by the application of the strict letter of the law.” (Paragraph 38)

“ Accordingly in my view the argument that the plaintiff is unfairly discriminated against because the Legislature through the promulgation of the RCMA has given recognition to customary marriages entered into by people of African descent and has thereby favoured them has no validity.” (Paragraph 49)

“In any event if I were to rule in favour of the plaintiff and adopt the arguments constrained by her and grant her divorce I would be interfering in theological issues which may cause offence to members of the Hindu community. Our Courts have tried assiduously not to get entangled in doctrinal issues and it can be safely accepted that 'the doctrine of non-entanglement' is part of our law.” (Paragraph 50)

“Accordingly on the basis of this doctrine it is not for the Court to pronounce the parties as being divorced if they elected to practise a faith and took vows which did not countenance divorce.”(Paragraph 51)

“The Marriage Act in my view provides a compromise which permits parties to marry according to the tenets of their religion and obtain secular recognition through the process of registration.” (Paragraph 52)

"The plaintiff failed to advance any cogent or acceptable evidence establishing that the non-recognition of the marriage as a valid legal marriage offended her dignity." (Paragraph 53)

NDPP V MOHUNRAM & OTHERS (2005) JOL 13223 (N) heard on 5 May 2005 and judgement was delivered on 2 February 2005

The Director of Public Prosecutions sought the forfeiture of immovable property in terms of section 48(1) of the Prevention of Organised Crime Act. Patel J held:

"When the first respondent acquired the shares in the second respondent it was clear and is common cause that he did so with the intention of conducting a legitimate operation. It is also common cause that the whole building was not used as a gambling house ... The entire building cannot, accordingly, be deemed to be an instrumentality of the offence. Different considerations may prevail had the entire property been purchased for the purpose of running an illegal operation and illegal operations were indeed conducted on the entire property."

"In this case, it was the gambling machines, not the entire building, which was used as a means or instruments in the commission of the offence."

"In the *Seevnarayan* case ... Griesel J sounded a word of caution against the wide interpretation of "instrumentality of an offence" as it could result in unconstitutionality of the very provision. I do not propose to deal with the constitutional aspects since the same were not argued before me, save to quote Professor AJ van der Walt: "In view of the characteristics of the Bill of Rights in the 1996 South African Constitution (and particularly the property clause in s 25 and the general limitation provisions in s 36), the courts should consider the possibility that an excessively unfair or disproportionate forfeiture might have to be treated as a material expropriation of private property rather than a legitimate deprivation".

"This caution is particularly relevant in this case where the first respondent has already paid a heavy fine and had his machines confiscated."

The court referred to American Case law which was presented by the applicant.

"I am accordingly not satisfied that the immovable property is an instrumentality of an offence as envisaged by the Legislature and the present application must accordingly fail."

On appeal, the SCA held that the use of premises was of the essence of the crimes defined in the Gambling Act. It followed, therefore, that the particular premises, having been intimately concerned in the commission of the crimes, were an instrumentality thereof. **National Director of Public Prosecutions v Mohunram 2006 (1) SACR 554 (SCA).** On appeal to the Constitutional Court, a majority found that the forfeiture was disproportionate (although there was agreement that the property was an 'instrumentality of the offence' in terms of POCA). **Mohunram v National Director of Public Prosecutions 2007 (4) SA 222 (CC)**.

SELECTED ARTICLES

Race and Labour Law, in – Race and the Law in South Africa by A Rycroft pg 163-173

"More than any other branch of legal studies labour law is regarded as more accessible to a radical analysis because labour jurisprudence evidences in a very transparent way power struggles in the workplace . This is particularly so in South Africa where the state has used labour legislation in a quasi-instrumental way to achieve its political design dividing the working class along racial lines, thereby inhibiting a class consciousness and identity from emerging." (pg 163)

"At the same time racial determinants have cannot be underplayed since South African black people irrespective of their class positions have been systematically denied equal opportunity. South African labour history is a sad tapestry through which the threads of racism and class exploitation interweave to create a divided response to capital and state intervention in labour relations." (pg 163)

"White workers were rudely surprised to find that capital was colour blind when it came to profit maximization and this was particularly so in recessionary times when it was willing to reallocate job categories to poorly paid blacks. It was this fact which precipitated the first strike in 1907 by white miners on the goldfields which in turn led to the passage of the Industrial Disputes Prevention Act 1909. The Act excluded blacks from participating in the collective bargaining machinery. The 1909 Act had important underlying ramifications for future industrial relations. The primary weapon of the industrial worker, the strike, was severely restrained." (Pg 164)

"Matters came to a head at the end of 1921 when, because of losses caused by a drop in the gold price, mining capital once again replaced semi-skilled white miners with blacks. This led to the Rand Revolt and passage of the Industrial Conciliation Act of 1924." (pg 165)

The mechanics of dispute settlement was a departure from the previous system. Industry based Industrial Councils were set up with employer and employee representation. Black workers and a section of Indians were excluded from the ambit of the Act by defining an employee under the Act to include all workers except 'pass-bearing Africans' and 'contract Indians'." (pg 165)

The Industrial Conciliation Act 1924, The Mines and Works Act of 1911, The Apprentice Act of 1922 and the Wage Act of 1925 were all utilized to advance the cause of the white worker at the expense of his black counterpart." (Pg 165)

"Black workers were becoming unionized and the unions started to flex their muscles in the 1973 Durban strikes and the strikes which were to follow. The state's reaction to these pressures was to hit out at the trade union movement with the security legislation at its disposal, at the same time being forced to develop a new policy in respect of blacks." (Pg166)

"The Wieham aim of encouraging black worker participation in the official bargaining and dispute resolution system has met with qualified success. Industrial unrest has not been reduced and this can be attributed to a great extent to the deficiency in the institutions of collective bargaining." (PG 167)

"It is therefore not surprising that a separate system has developed virtually spontaneously, namely, plant- and – company level bargaining in terms of recognition agreements. Black trade unions have in the main resorted to recognition agreements to negotiate with management." (Pg 168)

"On the positive side the industrial court, using the concept of unfair labour practice and the interim relief status quo order, has created spaces which can be utilised in the short term to redress the collective bargaining imbalance." (pg 168)

Industrial workers enjoy significant and equal protection in terms of the other protective legislation which exists today. However two very important sectors of the labour force who in the main are black have been sadly neglected, namely domestic and farm workers." (pg 168)

"With inadequate financial resources a domestic servant has very little chance of challenging unilateral repudiation of the contract by the employer. Common law requires a month's notice or payment in lieu of notice, no minimum wage provisions exist and domestic servants as a class are exposed to extreme exploitation." (pg 169)

"No discussion on race and labour law is complete without reference to the products of apartheid. The so-called 'independent TBVC states and the homelands have either modified or retained the pre-Weihahn law regime which existed prior to their independence." (Pg 170)

"It is a sad indictment of homelands that independence was achieved at the expense of their workers." (Pg 171)

"South African labour legislation is rapidly moving away from racial discrimination….We are entering the phase where increasingly the focus will be adapting legislation to harness the labour management conflict." (pg 171)

SELECTED JUDGMENTS:

BODY CORPORATE CROFTDENE MALL V THE ETHEKWINI MUNICIPALITY

Durban and Coast Local Division case no 16977/2009 heard on 5 March 2010 and judgement delivered on May 2010

The applicant sought an interdict prohibiting the respondent from disconnecting or otherwise interrupting its supply of electricity and water. The applicant argued that the dispute with the respondent arose when they were being controlled by liquidators and the majority shareholders of the mall and that it was unclear who was liable for what in respect of payments due to the respondent. The applicant was of the view that a percentage of those accounts needed to be paid by the liquidators. Hughes-Madondo AJ held:

"The applicant was the creator of the current situation that existed due to its failure to recover the amount due to the municipality from the liquidators when the liquidation was taking place."

"In accordance with section 64(1) of Ordinance No. 25 of 1974 the respondent may establish various accounts such as rates accounts, water accounts and the like. These charges or amounts are reflected in these different accounts as amounts due to the respondent and can be consolidated into a single account in terms of section 68. Section 68(h) empowers the respondent to cut off the supply of water and electricity if any amount reflected in the said account is not paid as if the aforesaid amount related to the supply so cut off. "

"The Respondent has the power to cut off the electricity and water services of the applicant if the rates amount is not paid in its consolidated account."

Application dismissed with costs.

J PILLAY V THE STATE

Kwazulu- Natal High Court case no. AR667/2009 29 April 2010

The appellant was charged with 34 counts of fraud. The trial court sentenced the appellant to 5 years imprisonment. The appellant lodged an appeal against her sentence as a result of alleged exceptional circumstances having come to light after the sentence was imposed. Hughes-Masondo AJ held:

"As set out in *S v H 1998 (1) SACR 260 (SCA)* the court may admit evidence that occasioned subsequent to the judgment if that evidence is materially relevant to the outcome of the trial, if the evidence is prima facie true and a reasonably sufficient explanation based on the true allegation as to why this evidence sought to be held was not led at trial." (Paragraph 15)

"From the record it is clear that the magistrate, having due regard to the demeanour of the witness, clearly considered that the appellant was not remorseful. The finding of the magistrate was indeed correct and as such this court will not interfere with the credibility finding." (Paragraph 25)

The court referred to the Constitutional Court's guidelines of the needs to be given to the interest of children of the accused when sentencing.

"From the record one can glean that the magistrate placed much emphasis on the well being of the children." (Paragraph 20)

"The evidence set out in the appellant's affidavit does not amount to exceptional circumstances." The court a quo's sentence was confirmed. (Paragraph 15)

SELECTED JUDGMENTS:

C V SHEA V LEGATOR MCKENNA & OTHERS (2008) JOL 21124 (4) 16 November 2007

This matter concerned the validity of the conduct of a *curator bonis* appointed to a patient declared to be incapable of managing her own affairs and the legal ramifications of such conduct. Specifically whether the curator's conduct was in contravention of section 71 of the Administration of Estates Act (the Act).The plaintiff sought an order declaring that the transfer of certain immovable property from plaintiff to third defendant was invalid and setting aside such transfer. Motala AJ held:

"It could therefore not be accepted that measures intended for the protection of the *de cujus,* such as the need for the *curator bonis* to find security to the satisfaction of the Master as a necessary precursor to the issue of letters of curatorship, were not intended by the legislature to be of cardinal importance and that acts in conflict therewith would nevertheless be valid."

"In my view, the proposition cannot be cavilled at that the intention of the Legislature behind the enactment of section 6(1) of the Trust Property Control Act 1988 and section 71(1) of the Act was informed by a common consideration, i.e the protection of the interests of the person (i.e the *de cujus*) on whose behalf the nominated functionary was in each instance appointed to act."

"....the Legislature clearly intended to visit with nullity any act or conduct in contravention of section 71."

"I am satisfied on the principles and authorities canvassed above that the agreement of sale purporting to have been concluded between the second and third defendants was a nullity."

"I am satisfied, in all circumstances, that the so called real agreement attending the transfer in this case suffers the same fate as the underlying agreement of sale. It cannot in my view, having regard to the intention of the Legislature as expressed in sections 71 and 102(1)(g) of the Act, be said to have escaped the nullity visited upon the underlying agreement ."

"I am satisfied that to allow the enforcement of a legally prohibited contract on the basis of the recognition of a real agreement in terms of the abstract theory of transfer would be to undermine the policy of the law."

"The conclusion reached by me is that the Plaintiff is entitled to the principal relief in terms of claim 1 of the action *rei vindicatio."*

"The aforegoing *in casu* is to entitle the plaintiff to return of the property against payment to the third defendant of the purchase consideration under the sale agreement."

Overturned on appeal – **Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA)**

MIDDLETON V MIDDLETON AND ANOTHER 2010 (1) SA 179, heard on 8 February 2007 and judgement delivered on 13 February 2007

The applicant and the first respondent were married in community of property. In anticipation of their divorce they entered into a settlement agreement in terms of which the applicant was to take transfer of the first respondent's one half undivided share of an immovable property that formed part of the join estate. The applicant brought an application for an interdict restraining the second and third respondents from proceeding with the sale in execution of the first respondent's undivided share in the property and a declarator that he was the sole owner of the property. Motala AJ held:

"It is trite that the principle of registration *coram judice loci rei sitae* forms the backbone of the system of transfer of immovable property in this country. Such principle finds confirmation in s16 of the Act, which provides that ownership of land may be conveyed by one person to another only by means of a deed of transfer executed or attested by the registrar, save otherwise provided in the Act or in any other law."

"The applicant's contention that actual ownership of the first respondent's undivided one half share in the property became vested in him, notwithstanding the lack of tradition by way of registration or endorsement in the deed registry is in my view untenable."

"I am in all circumstances satisfied that the first respondent's rights *in rem* and to the property did not become vested in the applicant, either upon conclusion of the addendum to the settlement agreement or upon the dissolution of the marriage in community of property in terms of the decree of divorce."

The court distinguished this case from Ex parte Menzies et Uxor 1993 (3) SA 799.

E MBAMBO & ANOTHER V THE STATE

Kwazulu- Natal Pietermaritzburg case no. 10849/2009 heard on 19 March 2010 and judgement delivered on 19 March 2010

The appellant were charged with theft. They unlawfully and intentionally stole cash to the value of R1 527 383.93, an LM 5 rifle and a .38 calibre revolver – being property of Group five Securico, and

an alternative count of contravening the provisions of section 36 of the General Law Amendment Act 62 of 1955. The appellants were refused bail by the court a quo. The appellants now appeal against the decisions of the court a quo in refusing to admit them bail. Motala AJ held:

"The appellants clearly bore the onus to satisfy the court a quo on a balance of probabilities that the interests of justice did not require their detention."

"It is well established that the functions and powers of a court hearing an appeal against the refusal of bail under section 65 of the Criminal Procedure Act, 1977 are similar to those in an appeal against conviction and sentence. "

"There is no doubt that the strength of the state case is relevant to the determination of where the interests of justice lie for the purposes of section 60(11)(b) of the Criminal Procedure Act. The stronger the state case against an accused the less the prospect of the interests of justice favouring his release."

"In all circumstances, the considerations militating against the appellants' release on bail in their cumulative effect substantially outweigh the factors raised by them in their affidavits in favour of such release. "

Appeal dismissed.

No Judgements or articles which fell within the parameters of this report could be found in respect of Advocate Ploos Van Amstel SC.

SELECTED JUDGMENTS:

S V MBAMBO & OTHERS

Durban and Coast local Division case no CC114/04 22 **December 2004**

The defendants were accused of murder and robbery. The State's case was that the deceased was murdered because she was pursuing a claim against the estate of the late father or her children. Radebe AJ held:

"A person who committed an offence should not be acquitted on technical grounds. The court has a duty to perform and ensure that justice is properly and effectively done and it is fairly administered, taking into account the situation of the accused as well."

"It is in the interest of society that people should be free to seek redress to the law courts without fear of being killed or murdered in this fashion in order to prevent them from pursuing their civil claim." (Paragraph 10)

"It is the duty of this court even to consider taking judicial notice of the notorious fact that if a human being is approaching towards another human being he has got more fear than when he is approaching a dog. Even when you slaughter an animal you do it with minimal pain." (Paragraph 5)

Accused 1 and 2 are sentenced to life imprisonment and the accused no 3 because of his age when he committed the crime was sentenced to 25 years.

S V DLUDLA, Kwazulu Natal Provincial Division case no. CC 6/2006 19 July 2006

The accused was charged with murder. The question to be decided by the court was whether the accused was the person who gunned down the deceased and if so whether he unlawfully and intentionally killed the deceased. Radebe AJ held:

"It is the view of this court that a person who is alleged to have committed an offence should be convicted if there are enough reasons to do so." (Paragraph 20)

The court referred to the requirements regarding the evidence of identification set out in *S v Mthethwa 1972 (3) SA 766*. (Paragraph 15)

"It is imperative for a trial court to weigh the evidence of a single witness and to consider the merits and demerits and having so, to decide whether it is satisfied that the truth has been told". (Paragraph 5)

The court looked at cases dealing with identification parades, *R v Masemang 1950 (2) SALR 488* and *S v Mlathi 1984 (4) SALR 629 AD*. (Paragraph 10)

The court held that the accused gave a false alibi and that the State had discharged its onus by proving the guilt of the accused beyond reasonable doubt. (Paragraph 15)

In sentencing the accused the court had regard to the personal circumstances of the accused, public interest, minimum sentences, and previous convictions and sentenced the accused to life imprisonment.

R THANDROYEN V M D MAHARAJ

Durban and South Coast Local Division case no 9873/2003 13 March 2007

The applicant brought an application for an order re-opening the taxation of a bill of costs which had been taxed and in respect of which the allocator by the taxing master had been signed. The respondent opposed such application. The respondent raised a point in *limine* that the applicant lost his *locus standi* when he signed the Deed of Cession in favour of his attorneys. Radebe AJ held:

"The Cession covers only personal rights and not procedural rights, to have the bill taxed. Therefore the applicant had *locus standi* to bring the application."

"With regard being had to the inherent jurisdiction of the court, what is not provided for in the Rules of Court, but which belongs to the area of procedure is not necessarily incapable of being dealt with by the court. The test to be applied is whether the interests of justice require that such matter be dealt with and the matter was dealt with on this basis."

The order was granted.

B MNUNU V RAF

Durban and Coast Local Division case no. 2176/2004 6 March 2007

The plaintiff claimed past and future loss of support against the defendant. The plaintiff alleges that she was married by customary union to the deceased who died in a motor vehicle accident. The plaintiff alleges that during his lifetime the deceased was under a legal duty to support her. Counsel for both parties confirmed that the issue to be determined by the court was whether a customary marriage existed between the parties and that section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 applies. Radebe AJ held:

"The negotiation and payment of the lobola took place after the commencement of the Act. Mere payment of lobola in itself does not mean that the persons are then married."

The court referred to the definition of lobola in the Kwa Zulu Act on the Code of Zulu Law Act No. 16 of 1985 as amended by Act 120 of 1998 and held that "from this wording of the definition that mere payment of lobola does not amount to the act of marrying."

"The provisions of the Act were not complied with and therefore no customary marriage existed between the plaintiff and the deceased."

J D LUKHELE V THE STATE

Kwazulu- Natal Provincial Division case no. AR78/2007 judgement delivered on 13 March 2008

The appellant was charged with rape and attempted murder. He was acquitted on the attempted murder charge and convicted of rape. He appealed against the conviction unrepresented. Radebe AJ held (Swain J concurring):

"If one looks at the misdirection of the court a quo, firstly the magistrate found that there were contradictions which should be regarded as fatal to the State's case yet went on to find that the State had proved its case beyond reasonable doubt in respect of the rape." (Paragraph 15)

"What had to be determined was whether or not the complainant's evidence that she had not consented to sexual intercourse could be accepted as true beyond reasonable doubt." (Paragraph 10)

"The onus rests with the State to prove the guilt of an accused person beyond reasonable doubt. The magistrate misdirected himself in concluding that the failure of the appellant to testify proves his

guilty in respect of the rape count especially when there were contradictions in the evidence adduced by the State." (Paragraph 15)

The rape charge was set aside and substituted with the conviction of assault with intent to do grievous bodily harm.

SELECTED JUDGMENTS:

SHOPRITE CHECKERS (PTY) LTD V J COSKEY & ANOTHER Durban and Coast Local Division case no.11626/2008 heard on 21 October 2008 and judgement delivered on 11 November 2008

This matter was regarding the enforceability of a restraint of trade by the plaintiff against the defendant. Seegobin AJ:

"In *Reddy vs Siemens Telecommunications Pty* Ltd Malan AJA observed that all agreements including agreements in restraint of trade are subject to Constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution." (Paragraph 6)

"A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without corresponding interest of the other party deserving of protection. Such restraint is not in the public interest." (Paragraph 9)

"Given the current depressed economic climate in which we live, I do not believe that public policy would demand that the respondent should not be able to engage himself in suitable employment if he can do so. I find that the sheer breadth and scope of the restraint undertaking herein it unreasonable and contrary to public policy." (Paragraph 28)

M CASSIMJEE V THE HONOURABLE MINISTER OF FINANCE, Kwazulu-Natal High Court, Durban case no 14029/77 Date of hearing 23 March 2010 and judgment delivered on 23 July 2010

This matter involved two applications brought by the respective parties. The first was an application by the plaintiff for the striking out in terms of rule 30 of the uniform rules of the defendant's notice of objection to a proposed amendment to the plaintiff's particulars of claim. The second was a counter application by the defendant that both the main action and the counterclaim in that action be dismissed. The latter aspect is premised mainly on the grounds of an unreasonable delay on the part of the plaintiff to finalise the litigation in question. The summons in this matter was issued on 16 November 1977 and the matter lay dormant for more than 20 years. Seegobin AJ held:

"While Roman law provided that civil suits were to be deferred for no longer than three years, this has not been incorporated into South African law. A court may dismiss an action on account of delay in prosecution of the matter. The inherent power is further derived from s173 of the Constitution which gives a court the power to protect and regulate its own process." (Paragraph 9)

"The test is essentially whether the plaintiff has abused the court process in engaging in frivolous or vexatious litigation. .... a court will only exercise its discretion if there exists strong grounds for doing so. As pointed out by Solomon JA in *Western Assurance Co. v Caldwell's Trustee* '*the courts of law are open to all, and it is only in exceptional circumstances that the court will close the doors on anyone who desires to prosecute an action'.*"(Paragraph 10)

"Theoretically such an order will rarely be granted since on abuse of process is difficult to prove. It also impacts on a litigant's constitutional and common law rights to have a dispute adjudicated in a court of law. Nevertheless, it is in the public interest that litigation be finalised without undue delay and a court will exercise its discretion where the abuse of court process is clear."(Paragraph 11)

"Neither an unreasonable nor an inexcusable delay on the part of the plaintiff or any prejudice to the defendant on their own is decisive of the matter. For a court to exercise its discretion both of these prerequisites must be present and the proper approach is to weigh these two aspects against one another." (Paragraph 12)

"Where there is a long delay, the court can nevertheless dismiss the action if it is clear that the plaintiff has lost interest in pursuing the matter and its presence on the court roll is prejudicial to the due administration of justice."(Paragraph 13)

"The issue is ultimately about whether the delay is so unreasonable so as to amount to an abuse of court process and the plaintiff's behaviour oversteps the threshold of legitimacy." (Paragraph 13)

"Having regard to the facts it was found that the plaintiff had failed to explain the reason for the delay, secondly, given that the proceedings were provisional sentence proceedings, the long delay had destroyed the very basis of such proceedings, which were meant to provide a speedy remedy. It was pointed out that the delay, therefore seriously called into question the legitimacy of the plaintiff's conduct." (Paragraph 20)

"While I accept that there are circumstances when delay on the part of a litigant can be condoned, the delay in this instance is so great that the conduct of the plaintiff oversteps the threshold of legitimacy and accordingly the continued presence of this matter on the court roll is prejudicial to the due administration of justice." (Paragraph 24)

The action instituted by the plaintiff and the counter-claim instituted by the defendant were dismissed

SELECTED JUDGMENTS

NATIONAL UNION OF MINEWORKERS & OTHERS V GEFFENS DIAMOND CUTTING WORKS (PTY) LTD (2008) 29 ILJ 1227 (LC)

"The second to fourth applicants were all employees of the respondent. Their services had been terminated on 15 July 2005 due to operational requirements. The applicants contend that their dismissals were substantively and procedurally unfair and claim reinstatement as well as compensation equivalent to 12 months' remuneration."

"Respondent conducts business as a diamond cutting and polishing firm ... It consisted of two sections, namely a large diamond section and a small diamond section ... It was found that small diamonds were not cost effectively cut and polished in South Africa because of international competition. The supply of small diamonds ... was stopped during 2005 which resulted in jobs in the small diamond section becoming redundant. A decision was taken to reduce the workforce by retrenching the employees in the small diamond section and ultimately to close it down." (pages 1228-1229)

The Applicants referred an unfair dismissal dispute to the CCMA. Respondent argued that the CCMA lacked jurisdiction, as the applicants were arguing that the retrenchment had targeted the union's members, and that the CCMA lacked jurisdiction to determine the issue of freedom of association. The CCMA accordingly referred the dispute to the Labour Court. (pages 1229-1230)

Hendricks AJ identified the main issue for determination as being whether the applicants' retrenchment had been substantially and procedurally fair. Respondent put forward evidence that there had been a recognised union (UASA), with whom respondent had concluded a recognition agreement. (pages 1231-1232)

"[I]t is common cause in terms of the pretrial minutes, that the four individual applicants were members of UASA at the time of their retrenchments and, as such, UASA was authorized and mandated to act on their behalf.

If there is any dispute of a procedural nature, the individual applicants were suppose [sic] to take it up with UASA." (page 1235)

" The fact is that an agreement was reached between UASA and the respondent with regard to the substantive and procedural aspects of the retrenchment in question and should there have been any defects, surely UASA should then declare a dispute and not the applicants as represented by the first respondent. ... The applicants' relationship with UASA has nothing to do with the respondent."

"Further, there is nothing from the evidence led during the trial suggesting that there were irregularities in procedure or that a proper and fair retrenchment procedure was not followed..."

"Whether the respondent had a legal duty to consult with NUM or individual applicants individually was another issue in dispute between the parties. There is simply no basis in law why the respondent should consult NUM as a minority union or with the individual applicants individually despite the individual applicants being members of UASA and the latter being the majority union at

the time. The respondent correctly and legally consulted with UASA which was a majority, recognized union and of which the four applicants were members."(page 1236)

Hendricks AJ considered the Labour Appeal court decision in *Baloyi v M & P Manufacturing*, and an arbitration award in *Profal (Pty) Ltd* , before concluding:

"Finally, and from the evidence, there can be no doubt that the retrenchment of the individual applicants was necessitated by the lack of supply of small diamonds, and the ultimate closure of the small diamond department ... It is also clear from the evidence that the individual applicants were in fact selected for retrenchment based upon LIFO. Therefore, irrespective of all the issues relating to the agreement with UASA, there is simply no doubt that the retrenchment of the individual applicants was substantively justified and procedurally fair." (page 1238)

UNITED TRANSPORT & ALLIED WORKERS UNION V G E BARLOW N.O. AND OTHERS CASE NO: JR2332/2006 (UNREPORTED), 4 DECEMBER 2007 (LABOUR COURT)

"This is an application to review and set aside an arbitration award made by the first respondent acting under the auspicious [sic] of the second respondent ..."

"[A] wage agreement was concluded *inter alia* between the applicant and the third respondent [Spoornet] ... The parties agreed ... to the alignment of salaries with the 25th and 50th percentile of the market; and ... to negotiate and jointly develop an assessment system and tools which would be used to assess employees for progression from one notch to the next..."

"On 12 November 2003, another written agreement was concluded ... entitled "Principles governing the implementation of the new notch dispensation and salary structure in Spoornet" and provided for implementation of the wage agreement."

"On 5 October 2005, the third respondent notified *inter alia* the applicant that it intended to terminate the collective agreement... At arbitration, the dispute to be determined was whether the third respondent was entitled to unilaterally terminate the agreement on notice of 30 days. ... The collective agreement concluded between the parties is silent as to its duration ... the agreement does not provide that a party may not terminate the agreement by giving reasonable notice ... to the other party. First respondent (arbitrator) found that the written notice of termination ... lawfully terminated the collective agreement..."

"It should be borne in mind that this is a review and not an appeal. ...[I]t is incumbent on the applicant to establish grounds justifying the review of the award. ... [In *Sidumo v Rustenburg Platinum Mines*] the Constitutional Court held that the constitutional standard of reasonableness suffuses the grounds of review in Section 145 of the Labour Relations Act ... "

"[I]t cannot be said that the decision reached is one that a reasonable decision maker could not reach. ... Section 23 (4) of the Labour Relations Act provides, that unless the collective agreement provides otherwise, any party to a collective agreement, that is concluded for an indefinite period, may terminate the agreement by giving reasonable notice in writing to the other party. A 30 day notice period is in my view reasonable."

"The first respondent also considered and rejected the submission ... that a tacit of implied term had to be read into the collective agreement, to the effect that it could not be unilaterally terminated by one party. ... [T]his finding is correct."

The application for review was thus dismissed.

UNITED TRANSPORT & ALLIED WORKERS UNION V G E BARLOW N.O. AND OTHERS CASE NO: JR2332/2006 (UNREPORTED), 5 AUGUST 2009 (LABOUR COURT) [Application for leave to appeal in respect of the judgment above]

"It is common cause that there was no express provision ... dealing with the issue of cancellation. It was contended on behalf of the Applicant that based on the nature, objectives and scope of the agreement, there was a tacit term that the expressly stated aim of implementing "a *market related salary between the 25th and 50th percentile*" would be completed prior to the Agreement either lapsing or being cancelled by either party." (paragraph 16)

"The tacit term ... was also grounded on the premise that the Applicant's members were required to fund the new dispensation in the form of salary sacrifices." (paragraph 17)

"In his Award, the First Respondent states the following:-

> "I am of the view that Section 23(4) of the Labour Relations Act precludes the concept of a tacit or implied term overriding the power of one party to terminate a collective agreement concluded for an indefinite period by giving reasonable notice. ..."

"It is contended on behalf of the Applicant that the ... agreement was not subject to ... Section 23 (4)..., which reads as follows:

> "...unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties."

"I do not agree ... Section 23 (4) ... is applicable and the conclusion reached by the First Respondent is not only reasonable but it cannot be said that ... no reasonable decision maker could not reach such a decision on the facts presented."(paragraphs 18-20)

LAW SOCIETY OF THE NORTHERN PROVINCES V GABARONE MOTHOGAE & ANOTHER [2007] JOL 19024 (B)

Case heard 24 November 2005, Judgment delivered 12 January 2006.

Applicant sought an interim order, suspending the first respondent from practising as an attorney. Respondents argued *in limine* that applicant lacked *locus standi*; that section 84A of the Attorneys Act was unconstitutional; and that the Bophuthatswana Law Society had exclusive jurisdiction over the first respondent.

Regarding *locus standi*:

“It is argued that the applicant is not a statutorily recognised body whose continued existence is ensured or recognised by section 56 of the Act. The Law Society, which has powers to regulate the exercise of the Attorneys' profession in the area of jurisdiction of the Transvaal Provincial Division, is the Transvaal Law Society and is thus the only entity ... which could and should have launched this application.”

“[A]pplicant describes itself in the founding affidavit as the Law Society of the Northern Provinces, incorporated as the Law Society of the Transvaal ... It is true that the name of the applicant does not appear amongst the Law Societies mentioned in section 56 of the Attorneys Act, but, on its letterhead ... below the name of the applicant appears the words "Incorporated as the Law Society of the Transvaal." ... It can hardly be disputed that the old Transvaal no longer exists ... judicial notice can be taken of the fact that the areas served by the applicant as indicated on his letterhead now makes up the biggest portion, if not all, of what used to be known as "Transvaal". ... [T]he fact that the applicants' name does not appear in ... the Attorneys Act does not mean that it cannot and should not be recognised.” (pages 3-5)

Regarding the alleged unconstitutionality:

“In essence section 84A provides that notwithstanding any other law, the Law Society of the Northern Provinces may, in respect of practitioners practising in the area of the former Republic of Bophuthatswana perform any functions "which is similar to a function assigned to that Law Society" by various sections of the Attorneys Act ... “ (page)7

“Prior to the enactment of the Attorneys and Matters Relating to Rules of Court Amendment Act ... an Attorney who practised in the erstwhile Republic of Bophuthatswana, belonged to the Bophuthatswana Law Society...”

Hendricks J then analysed the jurisdiction of the respective societies, and found that an attorney practising in the former Bophuthatswana was obliged to belong to the Bophuthatswana Law Society; and were thereby also regarded as members of the Law Society of the Northern Provinces, for the purposes of Chapter 2 of the Attorneys Act. Furthermore, the Bophuthatswana Law Society did not exercise jurisdiction over fidelity fund matters; and both societies exercised concurrent jurisdiction over an attorney practising within the former Bophuthatswana. (pages 9 - 10)

“It is contended ... that section 84A is unconstitutional and invalid because it unfairly discriminates against attorneys belonging to the Bophuthatswana Law Society in that, they are subjected to the control and regulation of two Law Societies, quite different from their counterparts who belongs to Law Societies of the then Republic of South-Africa, which did not fall under the former homelands.”

“I am unconvinced that the dual membership amounts to unfair discrimination.

The fact that two Law Societies have concurrent jurisdiction over an attorney and exercise control over such attorney is in my view not discriminatory. Either of the two Law Societies may take action or appropriate steps against a member. ... If however, these Law Societies take separate action against an attorney, for the same misconduct, such an attorney will have the appropriate remedies or defences at his or her disposal.”

"...I cannot think of any situation that can arise in practice where such an attorney cannot inform either of the Law Societies that the other Law Society dealt with or is dealing with the same matter. I also cannot understand why it will be so difficult for the two Law Societies not to communicate with one another." (pages 11-12)

"It was also contended that section 84A has the effect that an attorney of the Bophuthatswana Law Society can be subjected to litigation before an enquiry is held or to give such an attorney the opportunity to present his case at a disciplinary hearing..."

Hendricks J analysed two judgments from the then-Transvaal Provincial Division, and then continued:

"This Court can determine whether an attorney, as an officer of this Court, is a fit and proper person to practice, or continue to practice as such. ... As pointed out by Van Dijkhorst J in the case of *Prokureursorde van Transvaal v Kleynhans* ... an application to either suspend or strike an attorney from the roll of attorneys is indeed a disciplinary hearing and not a civil action."

"Although it might be said that the regulation of an attorney who practices in the territory of the former Republic of Bophuthatswana is a little complicated and not altogether satisfactory, because of the concurrent jurisdiction over such an attorney also by the Law Society of the Northern Provinces, I am of the view that it is not unconstitutional. I also do not agree with the contention that such an attorney is at a disadvantage, as compared to his/her counterparts in the areas of the Republic of South Africa which did not fall under the erstwhile homeland areas." (pages 13-15)

"As the third point *in limine*, it was argued that this court should direct that the Law Society of Bophuthatswana and the Law Society of Venda shall retain its exclusive jurisdiction over the areas for which they have been established by statute.

I am of the view that this Court is not empowered to order the exclusive jurisdiction of the Law Society of Venda over the areas for which it has been established simply because this Court does not have jurisdiction over that areas or over the Law Society of Venda."

The points *in limine* were thus dismissed.

Selected Judgments

SA CHEMICAL WORKERS UNION V AFROX LTD (1998) 19 ILJ 62 (LC)

Respondent had dismissed 52 workers, arguing that the dismissal was fair and justifiable for operational requirements. Applicants challenged the dismissal on the basis that it was dismissal for striking, alternatively a lock-out dismissal, and therefore automatically unfair. If the dismissal was for operational requirements, applicants argued that it was procedurally and substantively unfair. Respondent's drivers were working overtime in excess of that permitted by law and of the company's safety limits. Respondent attempted to introduce a system of staggered shifts, but agreement could not be reached with the applicant union, and the drivers embarked on a strike. Respondent implemented a lock-out but was unable to break the strike. It was common cause that the dismissal took place whilst the applicants were taking part in a protected strike.

Landman J began by exploring "the relationship between termination for operational requirements during a protected strike, which is permissible, and a dismissal for striking or in order to secure compliance with a lock-out demand, which is impermissible."

"The right to strike is guaranteed by s 23(2) *(c*) of the Constitution ... The right to strike is given further expression in the Labour Relations Act ... which removes the fundamental impediments to a right to strike. One impediment is the right or power of an employer to dismiss striking workers for breaching their contracts of employment by not tendering their services during the strike."

Landman J noted that the LRA provides two exceptions to this rule, by allowing dismissals for employees' misconduct during a strike, and for an employer's operational requirements.

" These two exceptions ... are the product of compromise between labour and management. ... The first exception may be explained by the fact that strikers are employees and, although one may say that the duty to work is suspended during a protected strike, the obligation to observe acceptable conduct towards the employer is not suspended." (page 65)

"The second exception relates to the economic foundations of employment. Although we may speak of the right to a job, this right is itself dependent, at least in the private sector, on the existence in economic terms of the enterprise. ... Economics dictates that if it is necessary to shed jobs so that the enterprise may survive or alter or adapt its business then so be it. This basic economic premise has been incorporated in the Act by way of the exception permitting dismissal for operational requirements."

"There is a tension between the right to dismiss for operational requirements and the right to lock-out. ... A difference however lies in the fact that a lock-out may be instituted for a wide number of reasons falling with the phrase 'matters of mutual interest' and occurs in a province beyond the law - the realm of power play. In the case of dismissal for operational requirements the termination is limited to operational requirements as defined in s 213 of the Act and is moreover the subject of judicial scrutiny. ... Dismissal for operational requirements is expressly permissible. The other, the termination lock-out, is not." (page 66 – 67)

"It is clear on the evidence that Afrox was unable to continue doing business as it had in the past. It was obliged both morally and in law to eliminate excessive overtime. Afrox was aware that in order

to dismiss its drivers for operational requirements it was obliged to follow the procedure laid down by s 189 of the Act. It informed the union representing the drivers that it was contemplating a change in the way it was doing business. It did so timeously. It consulted with the union on alternatives to address the overtime problem. ...”

“The decision to make the drivers redundant took place during a protected strike. It was a decision which was made because the strikers were too powerful and could not be broken. It was a decision which was an alternative to an unsuccessful lock-out. In this sense there is a real and definite link between the dismissals and the strike and the lock-out but this does not, on its own ... justify an inference that the dismissals were to compel compliance with the demand or to punish the strikers. On the contrary the evidence shows that there was good reason to declare the redundancy, in order to service the customers of Afrox through outside contractors and to combat the potential loss of custom to competitors. The decision was made in good faith. Exhaustive efforts were made over a long period of time to accommodate the union and to avoid dismissal but they were unavoidable for operational requirements... (page 74)
“Consultation during a process of retrenchment is the opportunity allowed by law and fairness to the consulting party, such as a union, to influence the exercise of the employer's managerial prerogative. A failure to utilize this opportunity closes this avenue. Criticism after the event is no substitute for cooperation when it is called for B during the consultation process.” (page 75)

The dismissal was found to have complied with the requirements for a dismissal for operational requirements, and to have been substantively and procedurally fair.

Upheld by the Labour Appeal Court in **SA Chemical Workers Union & Others v Afrox Ltd (1999) 20 ILJ 17178 (LAC)**

NATIONAL UNION OF LEATHER & ALLIED WORKERS UNION & OTHERS V BADER BOP (PTY) LTD (2004) 25 ILJ 1469 (LC)

“Bader Bop dismissed 428 employees who were on an unprotected strike. They and their union have referred a dispute to this court concerning the dismissal of the individual employees ... At this stage I am only required to determine whether the dismissals were substantively and procedurally unfair.” (Page 1471)

“The immediate trouble started ... when Bader required the 26 workers in its trimming division to work a double shift to meet an urgent order from a client. It is doubtful whether Bader was lawfully entitled to make this request, but the trimmers agreed to work this overtime provided they were each paid R300 tax free. The company acceded to their demand.”

Other workers who had previously worked overtime then demanded similar payment, and a strike ensued.

“The workers were on a full-time strike. They behaved badly and created a hostile atmosphere. Casual employees were threatened with the loss of their lives.”

“The various meeting between management and the shop stewards, including those where the union leadership was present, constituted the audi alteram partem which the company was obliged to afford the strikers.” (page 1475)

“[M]anagement issued a written ultimatum to the strikers. ... The ultimatum gave the workers sufficient time to reflect on the fact that their strike was an unprotected one and that only an unconditional return to work would prevent their dismissal. ... on the union's version the ultimatum had served its purpose for the strikers resolved to return to work.”

“There was never any doubt that the strike was a wildcat strike. It had not been sanctioned by the union. ... Not the slightest attempt had been made to engage the procedure laid down by the LRA. I assume in favour of the applicants that there was no prohibition on industrial action, but there was no attempt to conciliate the dispute. There was no notice of intention to proceed with the strike. There was no immediate and urgent need to embark on the strike.”

“It has been submitted that Bader may have done more to resolve the dispute ... There is some merit in this. But the settlement of the dispute was primarily a matter for discussion at informal processes designed to conciliate disputes and the formal conciliation processes of the LRA.

In my view the dismissals following upon a failure to comply with a proper ultimatum would be substantively fair.” (page 1476)

“The behaviour of the strikers had persuaded management that an interdict was required to secure the safety of other employees and casual employees. ... Bader sought, on an urgent basis, and obtained an interdict from the Transvaal Provincial Division (TPD). The union was given notice of the application ...

The interdict itself has no legal validity. The TPD had no territorial jurisdiction over the parties. But the fact that it was issued and served upon most of the strikers must be taken into account. At the same time sufficient cognizance must be paid to the fact that the unlawful conduct of the strikers played a role in the decision to seek an interdict.”(pages 1476-1477)

“The applicants' case is simply that the interdict was read. It or rather its terms forbade them from entering Bader's premises and Bader dismissed the individual applicants. I have found that although the interdict was of no legal effect it must be treated as being of full legal effect where its true nature would prejudice the applicants. But I have found that the interdict was not read in isolation. It followed the reading of the ultimatum and an invitation to enter the premises and clock in. It was only when this invitation was refused that the interdict was read.

... the evidence does not show that any applicants were dismissed without, at least, receiving orally the ultimatum. “

“I am constrained by the narrow compass of the defined issues. On this basis I find that the dismissal of the individual applicants was procedurally and substantively fair.” (pages 1483-1484)

COETZER & OTHERS V MINISTER OF SAFTEY AND SECURITY & ANOTHER [2003] 2 BLLR 173 (LC)

The case concerned the promotion of members of the explosive unit of the South African Police Services ('SAPS'). SAPS had established guidelines whereby posts were classified as designated or non-designated. Designated posts were reserved for black people, women of all races and people with disabilities. White males not suffering disabilities were classified as non-designated, and thereby precluded from applying for designated posts, whereas designated individuals could apply for non-designated posts, in order to advance racial and gender representivity.

"The eleven applicants ... applied for designated posts for captains in other units and branches of the service. They would have preferred promotion within the explosives unit. But there were limited posts for the non-designated group. None of the applicants were appointed as captains in the explosives unit nor elsewhere... Fifty-one of the 70 advertised posts in the Lab [the Forensic Science Laboratory, where the explosives unit was based since 2000, located in the Detective Service] were filled. ... Twenty-eight unfilled posts (seemingly those in the Detective Service) were readvertised for designated members. Eight of these posts were filled by officers from the designated group. Twenty posts remained unfilled." (page 176)

A letter was written by the Commander of the Lab requesting that at least some of the unfilled position be filled by members of the non-designated group, due to a lack of qualified and experienced members of the designated group. This request was rejected.

Landman J identified the main issue in the case as being whether SAPS had discriminated unfairly against the applicants by not appointing them to the 20 main posts, and continued:

"SAPS discriminated against the applicants on the grounds of their race. But it was SAPS's case that this discrimination was not unfair as it was in accordance with affirmative action measures consistent with the purposes of the Employment Equity Act of 1998." (page 178)

"As a designated employer SAPS is obliged to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce." (page 179)

"An employment equity plan is ... relevant because it contains the affirmative action measures which may be used to justify discrimination. ... The first round of the 2001 promotions did not place an absolute barrier on the promotion of non-designated members to the rank of captain in the explosives unit. Non-designated inspectors in the Lab could and did apply for posts allocated for this group. ... [T]he result shows that no absolute barriers were in place. ... There were limited promotional posts for non-designated employees in the explosives unit. All the non-designated posts were filled by non-designated members. No applications were received for the posts reserved for designated members."

"As far as the second round is concerned, ie the readvertisement of 28 posts, if it were taken as a second round, it would have constituted an absolute barrier. This is because non-designated members were not invited to apply. But it is not permissible in my view to separate the first and second rounds as distinct processes."

Landman J then analysed the SAPS employment equity plan in light of the Constitution:

"The injunction to interpret the EEA in compliance with the Constitution relates, in my view, not only to principles of interpretation, equality and the affirmative action provisions of the Constitution but also the Constitution generally.

The Constitution is the source of the EEA. It is hardly necessary to state that the Constitution also sets other goals and values for our society." (page 181)

"The Constitution envisages a balance between the affirmative action imperative and other imperatives, including, for present purposes, the need for the police service "to discharge its responsibilities effectively". The Constitution does not prescribe how the two imperatives are to be balanced but the balance must be a rational one" (page 182)

Landman J held that where an affirmative action justification is raised, it was necessary to show that the affirmative action measures were "in harmony with other constitutional provisions", "because the Constitution requires the common law and Acts of Parliament giving expression to the Constitution, to enhance the values and ideals set out in the Constitution. The Constitution envisages one whole integrated system of law and government."

Landman J then analysed the SAPS affirmative action measures:

"The EEA and the goals it is intended to achieve are critical to the normalisation of South African society. ... The EEP does not deal specifically with the obligation resting on SAPS to discharge its responsibilities effectively. But, undoubtedly this must have been in the mind of the planners. The migration from an unrepresentative police service to a police service representative of the demographics of the South African population is being done incrementally so as to retain the expertise of serving non-designated members of the police service." (page 183)

"[N]o evidence was led that the National Commissioner had considered the efficiency imperative. .... But was it, in view of the absence of a specific plan and a rational consideration of the need for the explosives unit to be efficient, reasonable and rational not to consider or to reject the applicants for promotion to the designated posts in the second round? The evidence placed before me show that it would have been reasonable and rational to make these appointments." (page 184)

"In my opinion SAPS's justification of its conduct *vis-à-vis* the applicants fails in two respects.

First there is no specific affirmative action plan for the explosives unit. ... [S]econd ... the National Commissioner's refusal to promote the applicants was based purely on the imperatives contained in the EEP to promote representivity. His decision overlooked ... a consideration of the constitutional imperative that the service maintain its efficiency." (page 185)

The court directed that the applicants be promoted.

LOUW V GOLDEN ARROW BUS SERVICES (PTY) LTD [2000] 3 BLLR 311 (LC)

Applicant alleged an unfair labour practice on the grounds that respondent had paid him less than a white colleague for work of equal value, alternatively that the difference in their salaries was disproportionate to the difference in value of their jobs. Respondent acknowledged the wage

differential, but argued that the jobs were not of equal value, and that the difference was not attributable to racial discrimination.

Landman J considered an argument by the Respondent that intention or motive was an integral part of a residual unfair labour practise. After considering United States case law, academic articles and the history of South African labour legislation, Landman J found:

"It does not seem that the LRA ... intended to change the basic fabric of the concept of an unfair labour practice, although it trimmed its ambit to the bare essentials pending the enactment of more comprehensive legislation. This has materialised as the Employment Equity Act ... I could trace no case which required an applicant to prove *culpa* ... on the part of an employer or employee. This is probably because the definition of an unfair labour practice was an effect-based one. ... The definition of an unfair labour practice and its successor, the residual unfair labour practice, is not based on delict which would require *culpa*. Nor is the concept deemed to be a term or an implied term of the contract of employment. ... The answer to the question of *culpa* lies in the interpretation of the statute. The statute creates, in my view, a form of strict liability. An applicant need not prove *culpa* although the act in question may, in the ordinary course of events, be accompanied by intention, negligence and motive..."(pages 316-317)

"Fairness requires that persons doing equal work should receive equal pay ... The principle "equal work should receive equal pay" in its true form may be extended to an analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed ... it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is, however, an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin." (pages 318-319)

"It follows, in our law, that an employer may therefore discriminate, even unfairly, on any grounds or for any reasons which are not proscribed..."

"It is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. ... The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr Beneke's salary *because* of his race..." (page 319-320)

Landman J then undertook an extensive survey of English case law on the standard of causation, and then turned to consider the burden of proof:

"I believe it is correct that the onus or burden of proof lies on the applicant claiming relief. I use the term onus or its equivalent, burden of proof, in the sense used in *Pillay v Krishna* 1946 ... to mean the duty upon the litigant, in order to be successful, of finally satisfying the court that he or she is entitled to succeed..." (page 322)

"I do not think it will be helpful to go down the American road of the burden of production particularly where the applicant in a claim involving a residual unfair labour practice need not prove intention. The burden of production seems to involve the setting up of a skittle which if knocked down may have no appreciable effect. Nor is a consideration of the shifting onus useful. ..." (page 324)

"To succeed the applicant must convince this Court on a balance of probabilities that the job of a buyer and a warehouse supervisor at Golden Arrow, not necessarily elsewhere, are of equal value. This presupposes that they are not the same job." (page 331)

"I conclude that the applicant has not succeeded in demonstrating that the two jobs, on an objective evaluation, are jobs of equal value. It is therefore unnecessary to delve into the reasons, causes or motivation for the difference in wages. It does not mean that the difference is not attributable to race discrimination. It does mean that racial discrimination has not been proven." (page 332)

Finally, Landman J rejected the argument that the salaries were disproportionate, and ordered absolution from the instance.

Upheld on appeal: **Louw v Golden Arrow Bus Services (Pty) Ltd (2001) 22 ILJ 2628 (LAC)**

SELECTED ARTICLES

A Study in Deference: Labour Court Deference to CCMA Arbitration Awards (2008) 29 ILJ 1613

The article analyses "the role of the reasonable decision maker test which broadly requires a court of review to show a measure of deference to decisions by an administrative decision maker."

"The various judgments delivered by the constitutional Court in the *Sidumo* case accept that the CCMA is the primary decision maker in regard to disputes over which it has jurisdiction even though the decisions of the CCMA are subject to review upon certain grounds. ... The judgments also emphasize that the test of review is not whether the award is correct (although this is perhaps too broadly stated) but whether it is fair and reasonable..." (page 1614)

The article then focuses on "the question of 'curial deference'", starting with an analysis of the history of the concept of deference, with reference to Canadian, English and South African sources. It sets out to define the term 'deference, making reference to the *Sidumo* judgment, as well as English and Irish sources, and identifies the term as "one usually used to describe the attitude of a court to another decision maker or lawmaker under review." The author goes on to argue that "[t]he type of deference concerned here relates to a decision maker such as an administrative organ and similar bodies exercising ... what may be described as judicial or quasi-judicial functions. The standard of deference extended to executive decisions and that of a legislature differs and is not generally applicable here."

The rationale for deference is then considered. Mention is made of issues of practicality, as well as the argument that "the decision maker, under review, has more expertise about the subject-matter than courts of law. " However, [t]his does not wash in the context of the CCMA and the LC for the LC is itself an expert body". The author then considers arguments that the rule "is... intended to

acknowledge and buttress the separation of powers and separation of functions. ... The rationale for the obligation to defer to decisions of the CCMA is to be found, I infer, in those judgments of the CC which characterise the dispute-resolution functioning of the CCMA commissioners, as 'administrative acts' in the constitutional principle of the separation of powers and in the rule of law." (pages 1615-1616)

The author identifies the basis of the separation of powers argument in this context as being that the CCMA is an "independent and impartial tribunal" in terms of section 34 of the Constitution, and proceeds to consider further the source of the rule of judicial deference:

"Is judicial deference to another decision maker on review to be regarded as a rule or principle or doctrine or is it merely an attitude which courts adopt? There are some indications that courts have adopted a policy or attitude to such reviews. But the better view must be that this policy or attitude has a lawful and legitimate basis and that it is more than a rule of convenience. ... The concept of deference has sometimes been ascribed to the distinction between appeals and reviews. But this is not necessarily so". (page 1616)

"An important indication of the scope of the rule stems from the fact that it is especially recognized (although sometimes in the breach) that labour disputes should be resolved quickly and with the minimum of formality. The legislature decided to entrust this function to the CCMA and elected not to confer a right of appeal to the LC. The endorsement in *Sidumo's* case ... that the emphasis must be one speedy and cheap resolution of labour disputes which come before the CCMA and that awards need not be impeccable is a clear signal that a large degree of deference is required to be shown to awards of commissioners." (page 1618)

Fair Labour Practices – The Wiehahn Legacy (2004) 25 ILJ 805

The article examines the concept of fair labour practices and its reception from the United States into South African Law.

"The phraseology ... found its way into South African labour legislation, at a crucial moment in our political development. ... In the 1970s when industrial action by emerging or black trade unions, as a force for political enfranchisement, began strangling the economy. Professor Nic Wiehahn persuaded the government of the day to establish a commission to investigate labour legislation with specific reference to 'the methods and means by which a foundation for the creation and expansion of sound labour relations may be laid for the future of South Africa'. ... [T]he majority of the commission recommended that the Minister of Manpower be empowered to reinstate employees or restore their terms and conditions of employment in the case of disputes between employers and employees including 'irregular or undesirable labour practices'." (pages 805-806)

The article then proceeds to analyse the history of the definition of fair labour practices in South African labour legislation, including a discussion of the impact of the Constitution:

"The Bill of Rights in the new Constitution had a special place for labour rights. The Bill provided that 'Everyone has the right to fair labour practices'. This right was carried through to the present

Constitution. It is this right to a fair labour practice which will keep the torch burning. The constitutional right to fair labour practices is driving current developments in labour law." (page 807)

The article then examines how "[t]he concept of an unfair labour practice has influenced our common law regarding the contract of employment without apparent or express reliance on the Constitution", and discusses a series of cases in that regard. The author concludes that:
"The unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, by conventional and unconventional means, as long as lawful, unilateral action is regarded by the courts, in their capacity as custodians of industrial justice, as unfair and inequitable. This is the legacy of the Wiehahn Commission." (page 812).

Selected Judgments

JAFTA V EZEMVELO KZN WILDLIFE (2009) 30 ILJ 131 (LC)

This case raised questions of whether an offer of employment sent by e-mail or SMS could result in a valid contract. Applicant had been offered a position by Respondent, and had wanted to accept the offer but with a different start date. Just before the deadline for his acceptance, Applicant e-mailed acceptance of the offer to a representative of the Respondent (a Ms Phakathi), but Respondent denied having received the e-mail. Applicant then received an SMS from Phakathi, indicating that if Applicant did not confirm his acceptance, another candidate would be appointed. Applicant responded by SMS that he had "responded to the affirmative" via e-mail. Receipt of the SMS was admitted, but there was dispute as to the use of the word "affirmative".

"Wildlife does not dispute that e-mailing an acceptance of its offer was an acceptable form of concluding the contract. It denies, however, that it received Jafta's e-mail. Even if it had received Jafta's e-mail, it contends that his response was not a clear and unequivocal acceptance that corresponded with its offer. It denied that the SMS was an unequivocal acceptance of the offer, that Phakathi was authorized to conclude a contract via SMS and that an SMS was an appropriate mode of communicating acceptance of an offer. Wildlife acknowledged that if the court finds that the parties had concluded a contract, Wildlife repudiated the contract." (page 138)

Pillay J then analysed the evidence and found that Applicant's SMS amounted to an unequivocal acceptance of the offer, and that both his e-mail and SMS corresponded with the offer. Pillay J then turned to deal with two remaining issues: whether Respondent had received the e-mailed acceptance, and whether acceptance by SMS was an appropriate mode of concluding a contract. In doing so, Pillay J embarked on a detailed comparative law analysis, which was explained as follows:

"Neither party referred the court to international or foreign law during their final submissions. Being ubiquitous, electronic communication renders electronic commerce and transactions borderless. As a technical matter devoid of ethical, political, social or other value-laden considerations, electronic communication calls out to be regulated by universal principles. ...

Internationalization of electronic communications law means that it has to apply harmoniously and uniformly to alternatives to paper-free communication systems. Harmonization is the process through which states modify domestic laws to enhance predictability in cross-border commercial transactions. Unification occurs when states adopt common legal standards...

Even though this case was not transnational ... the court was concerned nevertheless that if it ignored international and foreign law, it might take a parochial approach to solve a local dispute thereby losing sight of the broader objectives of the ECT Act. Justice O'Regan warned against parochialism in *NK v Minister of Safety & Security*... and urged practitioners to seek guidance, positive or negative, from other legal systems struggling with similar issues." (page 142)

"Usually, comparing foreign laws is risky. ... These risks are minimized somewhat in the information age when the law regulating electronic communication is itself freely available electronically and ubiquitously. Furthermore, many of the impediments to unification such as geographical, cultural, religious, economic, social and political differences are non-existent in e-commerce law." (page 143)

Pillay J then analysed the United Nations Commission on International Trade Law's Model Law and Electronic Commerce (UNICITRAL), and compared it to South Africa's Electronic communications and Transactions Act (ECT), as well as to the legislation of other implementing states. Pillay J further discussed case law and legislation from several countries, including Singapore, the United States, Canada, England and India, noting that "[t]he test for receipt of data messages in South Africa is ... higher than the international standard." (page 150).

Applying the provisions of the ECT in light of this analysis:

"[T]he court finds that as between Jafta, the originator, and Wildlife, the addressee of the SMS, Jafta's SMS was an electronic communication. As such Jafta's acceptance by SMS was not without legal force and effect merely on the grounds that it was in the form of an SMS.

[T]he court finds therefore that Jafta did not communicate his e-mail accepting the offer to Wildlife [having found that the e-mail had not been received by the respondent] . He did communicate his acceptance via SMS. An SMS is as effective a mode of communication as an e-mail or a written document. In view of these findings, the court concludes that a contract of employment came into existence." (page 154)

STANDARD BANK OF SA V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION & OTHERS (2008) 29 ILJ 1239 (LC)

Third Respondent (Ferreira) had suffered injuries in a motor accident in a motor accident, leaving her with severe back pain. After working in various alternative positions after the accident, the bank dismissed Ferreira for incapacity resulting in high absenteeism and low productivity. The case concerned what steps the bank was expect to take in order to reasonably accommodate Ferreira, and in what circumstances the dismissal of such an employee would be fair.

"The origin of the test for fairness of the dismissal of an employee with disabilities is the Constitution. Various foreign and international human rights and labour instruments seek to re-enforce the protection of people with disabilities and prevent discrimination against them. The overarching policy underpinning the protection of disabled people is to give effect to human rights. In a claim based on an incapacity dismissal, the intersecting constitutional rights are rights to equality, human dignity, the right to choose a trade, occupation or profession freely and to fair labour practices."

"The Constitution, several statutes including the EEA and the LRA and codes of practice protect employees with disabilities as a vulnerable group because they are a minority with attributes different from mainstream society." (page 1253) Pillay J then analysed Canadian law on the protection of disabled people in terms of equality provisions.

"Dignity, for employees with disabilities, is about being independent socially, and most of all, economically, about managing their normal day-to-day activities..." (page 1255)
"The first question to ask in an incapacity investigation is: Is the employee a person with disabilities in that she has a long-term recurring physical or mental impairment which substantially limits her

prospects of entry into or advancement in employment? ... This enquiry is usually factual but can become legal if interpretation disputes arise. To cast the interpretive net widely, Australia and Canada define 'disability' to include respectively 'imputed' and 'perceived' impairment." (page 1256).

Pillay J then set out the requirements for an incapacity dismissal, and noted that:
" Many jurisdictions require employers to use reasonable accommodation to achieve substantive equality and prevent discrimination against people with disabilities", and after analysing the Employment Equity Act and code, concluded that "[c]onsequently, if an employer fails reasonably to accommodate an employee with disabilities, the dismissal of that employee is not merely unfair, but automatically unfair." (page 1259).

Pillay J then analysed discrimination cases involving disability in the United Kingdom and Germany, before continuing:
"Because it protects against automatically unfair dismissal, reasonable accommodation is more onerous than a general obligation to implement affirmative action. Although reasonable accommodation is sometimes used synonymously with affirmation action, in relation to accommodating people with disabilities to avoid dismissal it is a term of art with most jurisdictions defining it similarly. Reasonable accommodation of people with disabilities is also more onerous than accommodating religious and cultural beliefs. ... Hence the jurisprudence on reasonable accommodation for religious and cultural beliefs and possibly other vulnerable groups may not apply to disability." (page 1260)

"What the modification or adjustment should be calls for a pragmatic commonsense approach to explore, perhaps even experiment, to establish what will work best in the particular circumstance of the employee, the nature of her post and the configuration of the workplace." (pages 1260-1261)
Following an analysis of Canadian and English cases, Pillay J noted that:

" Unjustifiable hardship is the threshold at which employers are relieved of their obligation to accommodate disabled employees. ... Unjustifiable hardship means '[m]ore than mere negligible effort'. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. ... No hard and fast rule can be set as to what constitutes undue hardship. Each case has to be determined on its own facts." (page 1264)

Pillay J then analysed the banks refusal to accommodate Ferreira in light of United States and Canadian case law, cautioning that "one should take care to observe this distinction between pre- and post-ADA [Americans with Disabilities Act] cases and between the different historical developments between South African disability discrimination law and the law of other jurisdictions."(page 1265)

" Quite simply, the bank had a legal obligation G to accommodate Ferreira to ensure that she could continue to work. It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment. ... [I]t emerges that the bank did encourage her to leave." (pages 1267-1268)

"Having regard to Ferreira's disability, the bank could not rationally or fairly measure her performance on the same standard as other employees. That is precisely what the bank did." (page 1269)

"In the circumstances the bank failed reasonably to accommodate Ferreira, thereby making it difficult for her to continue to work. Instead, it compelled and encouraged her to terminate her employment by seeking early retirement. When this failed, it dismissed her." (page 1272)

After noting that the bank had not raised a defence of undue hardship in accommodating Ferreira, Pillay J decided on the issue of discrimination:

"All five jurisdictions discussed in this judgment have adopted in varying ways the push-pull dynamic of the right of an employee to reasonable accommodation and the protection of an employer against unjustified hardship. This model is the principal means of not only balancing the economic rights of the parties but also of avoiding discrimination.

Having failed to accommodate Ferreira and discharge the onus of proving ... unjustified hardship, the court finds that the bank discriminated against Ferreira. ... The bank also dismissed Ferreira in bad faith." (page 1273)

PFG BUILDING GLASS)PTY) LTD V CEPPAWU & OTHERS [2003] 5 BLLR 475 (LC)

This case dealt with the making of orders under section 7(2) of the Employment Equity Act, which prohibits the testing of an employee to determine their HIV status, unless the testing as determined to be justifiable by the Labour Court.

Pillay J began by identifying the approach to interpretation of constitutional rights and limitations as "a "two-stage" approach which requires, on the one hand, that a broad rather than a narrow interpretation be given to the fundamental rights and, on the other hand, that limitations be justified." (pages 474-475)

Pillay J then held that "[c]ompliance with the Constitution when interpreting section 7(2) of the EEA begins by identifying the fundamental rights that may be affected", and found that the core rights affected were the rights to physical and bodily integrity, which included the right to security and control over a person's own body, and the right not to be subjected to medical or scientific experiments without informed consent. Pillay J found that:

"the exercise of the right to security in and control over one's body is also an exercise of one's inherent right to dignity. Human dignity, it has been held, informs constitutional adjudication and interpretation at a range of levels. It is a "foundational value" that informs the interpretation of possibly all other rights."

"The right to privacy deserves more than superficial treatment in the context of HIV testing. There is a plethora of publications and reports about the prejudice endured by those living with HIV/AIDS." (pages 474-475)

"No right is absolute. As mentioned above, rights may be limited not only by a law of general application, but also by other competing fundamental rights ... Unlike socio-economic rights, the nature of the rights in section 12(2)(b) and (c) are so personal and subjective that a person is less likely to encroach on the rights of others by exercising them." (page 481)

"It emerges that the primary purpose of prohibiting HIV testing, unless authorised by the Labour Court, is to prevent unfair discrimination. ... The purpose of section 7(2)of the EEA is entirely in sync with the constitutional right to equality. It contextualises that right insofar as it relates to HIV testing in employment."

"However, the section simultaneously imposes a limitation on the rights under section 12(2)(b) and (c) of the Constitution by permitting testing that is regarded as justifiable by the Labour Court. ... Because the purpose of the EEA is to achieve equity in the workplace, the testing may not in any way be discriminatory. However, the justifiability of testing for HIV is not limited to determining whether it is equitable or not. Nor is section 7(1)(b) of the EEA the springboard for determining justifiability for such tests. To the extent that my learned brothers Landman J and Rogers AJ have relied on it as such, I respectfully disagree."

"In my respectful opinion, the starting point for determining justifiability in terms of section 7(2) of the EEA is the same as for the limitation of any fundamental right; that is, it must be constitutional. ... Simultaneously, the constitutionality of the testing must be assessed in terms of the specific criteria identified in section 7(1)(b) for medical testing generally." (page 483)

"The importance of the purpose of the limitation of the section 12 rights depends on the reason for the testing. Whatever the reason for the testing may be, its purpose or effect cannot be unfairly discriminatory."

Pillay J discussed the Constitutional Court judgment in *Hoffman* and continued:

"Usually the purpose of testing is to obtain data to enable, eg the employer to better manage the workforce needs of the enterprise, or for stakeholders ... to better manage the provision of employee benefits." (page 484)

"To determine the nature and extent of the limitation, the court must enquire into the entire process of testing ... Viewed objectively, there is a direct, rational connection between HIV testing and the purpose thereof ... However, if the purpose of the testing is to establish whether a particular employee is HIV positive, the Labour Court will have to be more circumspect as the potential for unfair discrimination, invasion of privacy, unfair labour practices and infringements of fundamental rights increase." (page 485)

Pillay J noted that no evidence had been put forward concerning less restrictive means of testing, and emphasised the importance of the relevance of the data sought and the confidentiality and anonymity of the testing, before analysing the code of Good Practice on Key aspects of HIV/AIDS and Employment.

"[C]lause 7.1.4 is misleading insofar as it might suggest that testing for HIV can occur without regard to the constitutional imperatives. ... Clause 7.1.4 implies that Labour Court authorisation is required even if employees consent. It ignores the right of everyone to control their own body. ... [T]here is

no basis on which the Labour Court can interfere once the employees have given informed consent to HIV testing, that is, when they have exercised their constitutional right in terms of section 12(2)(b).” (pages 488-489)

“The constitutional requirement is that the consent must be informed. Consent must obviously also be voluntary. ... In my respectful view however, once employees give informed consent to testing they also consent to the terms and conditions of such testing and the basis on which they choose to exercise their rights in terms of section 12(2) of the Constitution. The Labour Court cannot interfere in the exercise by employees of, not only their constitutional right, but also in this instance, the freedom of the parties to contract on terms that are not in conflict with constitutional values.” (page 489)

Pillay J then referred to international legal instruments, as well as to the law in Canada, the United States, Ireland and Namibia, and found these instruments to be consistent with the interpretation to be given to section 7(2) of the EEA (pages 490 – 492)

Pillay J then rejected a literal interpretation of section 7(2) of the EEA, which would require a Labour court order even for testing done voluntarily and with the consent of employees. (page 492)

“Section 7(2) is not a limitation on the right of employees to exercise control over their bodies in terms of section 12(2)(b) and to be subjected to experiment in terms of section 12(2)(c), if they voluntarily give informed consent to HIV testing, even if such testing is at the instance of the employer.

By choosing to submit to testing they exercise these very rights ... Consequently, if employees consent to HIV testing, it is not open to the Labour Court to interfere with such employees’ exercise of control over their own bodies.”

“The only material fact in this case is that the employees have given their informed consent to being tested for HIV. Once there is consent, there is no limitation of the right. If there is no limitation, there is no constitutional challenge. There is also no infringement of the EEA. That is the end of the matter.” (page 493)

SELECTED ARTICLES

PAJA V LABOUR LAW (2005) 20 (2) SAPR/PL 413

This article discusses the debate about the link between administrative law and labour law. It begins by looking at the history of labour legislation in South Africa.

“In 1979 amendments to the Labour Relations Act ... introduced an unfair labour practice jurisdiction to the Industrial Court ... Until the amendment, administrative law principles had no application to private contracts of employment ... The erstwhile Industrial Court seized the opportunity ... to apply principles of natural justice to hold that employers had an obligation to give employees a hearing”. (page 413)

"Inspired by the developments in the private sector and the prevailing trend at the time of creating political space for democratic values by challenging state authority through the courts, a spate of cases in the public service ensued. Administrative law principles were tweaked and twisted to secure gains for public employees."

The author notes that that constitutional entrenchment of a fair labour practice clause is unique, and that it is also unusual to constitutionalise the right to administrative action. "Not many constitutions have it probably because it is regarded as superfluous as the very purpose of a constitution is to regulate the exercise of power by the state or other public authority" (citing the *Bato Star* decision). (page 414)

The author then examines Labour law under the constitution, beginning with an examination of the purpose of labour laws, arguing that this is "to give effect to and regulate the fundamental rights to fair labour practices" in the Constitution. To do so, rights and procedures are codified in detail. Labour laws "represent a delicate balance between what each of the social partners considered acceptable to meet the socio-economic challenges of the new democracy." (page 415)

"Labour rights and protections have been accessed from the Constitution directly. The right is available to 'everyone' ... Thus where the LRA has excluded certain categories of workers ... or disputes ... from the application of labour laws, the Constitutional Court has extended the constitutional right to them". The author notes criticisms of these cases, on the basis that they "encourage parallel jurisprudence; one under the Constitution and the other under the LRA." (page 416)

The article then deals with conflict between labour law and administrative law in relation to decisions of the CCMA.

"The reference to 'award' in the definition of 'decision' cannot be a reference to labour arbitration awards issued by the CCMA and bargaining councils. Nor can acts and omissions of any person or body performing any functions in terms of the LRA be regulated by PAJA. I say so because their exclusion from the application of PAJA is implicit from sections 145 and 158(1)(g) of the LRAwhich already provide for the review of such awards and functions. If PAJA did apply there would be a duplication of legislation."

"If PAJA applies to labour law decisions the rigidity of section 6(2) of PAJA will clash with the flexibility of the grounds of review in sections 145 and 158(1)(g) of the LRA." (page 419)

The author argues further that the standard of review of CCMA and bargaining council decisions "would widen and become more complicated if consideration were also to be given to PAJA", and further blur the distinction between appeal and review. (page 420)

The article goes on to suggest that PAJA and the LRA also conflict in respect of review of purely administrative or ministerial acts, particularly in relation to the registration of organisations.

"Promoting freedom of association and collective bargaining are not set as objectives of PAJA. They could be easily missed if the PAJA grounds of review were to apply to the registration of organisations." It is argued further that, in this respect, PAJA and the LRA a;so conflict regarding their procedures and remedies.

Finally, the issue of public employment is discussed. The author argues that proceedings to challenge action by a public employer against its employee may be brought under either PAJA or the LRA, with resulting duplication of processes, cost and inefficiency.

"The LRA's objective of effective dispute resolution could therefore be defeated by its own provisions. The labour courts are established as courts of law and equity ... The High Court which has powers arising from PAJA, is not a court of equity. Labour disputes should be heard in the labour courts." (page 424)

The author goes on to discuss possible conflicts with other statutory systems.

"Overlapping legislation is disastrous for public administration in general and dispute resolution in particular. ... Under the current dispensation public employees are more privileged than private employees. ... The objective of equality between public and private employees is thwarted." (page 425)

GIVING MEANING TO WORKPLACE EQUITY: THE ROLE OF THE COURTS (2003) 24 ILJ 55

The article begins with a historical analysis of the concept of equity in labour jurisprudence, starting with an analysis of the 1979 amendments to the previous Labour Relations Act. The article then deals with the changes brought by the new constitutional dispensation, starting with a consideration of judicial interpretation under the new constitution.

"The intention of the Constitutional Assembly was to place some matters exclusively within the control of the judiciary. ... Section 39 of the Constitution structures judicial discretion precisely. Whereas in the pre-constitutional era adjudicators had to strain the interpretation of the law for egalitarian effect, our Constitution now directs that the interpretation must be based on values. Such values must also be those that underlie an open and democratic society based on human dignity, equality and freedom. The concept of values embraces equity as one of many universally desired ideals. ... Adjudication is dynamic and adjudicators fulfil a transformative role. The Constitution therefore provides the legal basis for the judiciary to make law in certain circumstances." (page 57)

The author goes on to discuss how courts have developed jurisprudence on judicial interpretation:

"A 'narrow, artificial rigid or pedantic' interpretation should yield in favour of an interpretation that is 'purposive' having regard to 'contemporary norms, aspirations, expectations and sensitivities of the population as expressed in the Constitution'. ... Judicial interpretation, however, must begin with an interpretation of the express language of the written text. Otherwise the law may come to have whatever meaning one wants it to have. Adjudicators have a duty to develop jurisprudence based on principle." (page 58).

"Commissioners and judges must apply the law and follow relevant and binding precedents. However, insofar as there arises a novel question of law, or if the law is ambiguous, vague or otherwise unclear, or if there is no precedent, or if there are conflicting authorities, or if the precedent predates the Constitution or legislation and is inconsistent with these instruments, then

adjudicators may create law by exercising their discretion consistently with the Constitution, legislation, the common law and customary law". (page 59)

The author then considers the approach of the Labour Courts and CCMA commissioners to the concept of equity:

"I wish now to look at some extracts from reported decisions of commissioners to illustrate the inappropriate use of the word or concept of equity. I distinguish between the use of the word and the concept of equity because in some situations the word is used merely as a convenient catch-all to mean whatever the commissioner wants it to mean without reflecting the conceptual depth that the word acquires in a constitutional context. The purpose of the exercise is not to embarrass commissioners or the parties but to learn from the mistakes made." (page 60)

After discussing a series of awards, the author remarks that:

"Dissent amongst adjudicators is predictable. Controversy and dissenting judgments are a reminder of our plurality and a demonstration of our democracy in action. They attract public participation to the discourse about rights. This reinforces the dialogue that is constitutionally structured, on the one hand, by the interpretation clause insofar as it extends a law-making function to adjudicators and which, on the other hand, is limited by the principle of the separation of powers. This tension triggers the dialogue."

The article concludes by discussing cases to illustrate these observations about judicial interpretation.

No Judgements which fell within the parameters of this report could be found in respect of Advocate Mushasha.

SELECTED JUDGMENTS:

ALAN GEORGE FARNDELL NO V SOUTHERN ERA RESOURCES LIMITED, CASE NO 10283/2005

8 December 2006

Applicant claimed payment from Respondent arising from an agreement in terms of which Applicant sold certain mineral rights to the Respondent.

"It was common cause between the parties that the required Master's consent to the sale of the mineral rights became a (suspensive) condition of the agreement." (page 4)

"On 21 April 2004, the Master consented to the sale of the mineral rights...On 1 May 2004 the Mineral and Petroleum Resources Development Act, 2002 (Act no. 28 of 2002) -"MPRDA" became law. The aforesaid Act changed the law with the effect that all mineral rights, as from that day on, ceased to exist." (pages 4-5)

"The Respondent...submitted that it is the Respondent's contention that as a result of the amending Act, "MPRDA", taking effect on 1 May 2004, it became impossible, as from that date on, to register the cession of mineral rights on the basis that mineral rights ceased to exist, and the Respondent was accordingly unable to perform in terms of the contract. Mr. Gautschi SC...submitted that on 22 April 2004, the date the Respondent was notified of the consent of the Master, the agreement between the parties became unconditional and accordingly on that date the contract also became *perfecta*, with the result that the risk of the destruction of the mineral rights which were sold, passed to the Respondent." (pages 6-7)

The case then cites authority on when a contract of sale becomes *perfecta*.

"I am of the opinion that Mr. Gautschi SC is correct that the so-called conditions Mr. Bruinders SC referred me to...are but nothing more than terms of the contract between the parties. It therefore follows that I find that the agreement became unconditional on 22 April 2004, being the date the Respondent was informed of the Master's consent." (pg. 11)

Upheld on appeal.

No Judgements which fell within the parameters of this report could be found in respect of Advocate De Vos SC. Some judgments were found, but it could not be established with certainty whether they had been written by Advocate De Vos SC or by another acting judge of the same surname.

The judgment written in Afrikaans which is annexed to Advocate De Vos' application form could not be properly translated due to time constraints.

SELECTED JUDGMENTS:

KHAN V KHAN 2005 (2) SA 272 (T)

Case heard 29 May 2004; Judgment delivered 26 June 2004

This case considered Constitutional Court, Supreme Court and Local Division Authorities as well as the Constitution and other legislation. It has also considered English authority.

The case involved an appeal against the ruling of the maintenance court where it was found that the appellant was liable to pay maintenance to the respondent.

"The question for consideration and decision by this Court is whether a polygamous Muslim marriage has the result that the one spouse (in this case the appellant) has a legal enforceable duty to support the respondent."

"The further question (according to the respondent) which has to be decided is that if we find that the said s 2(1) of the Act cannot be interpreted so as to include the appellant' owing a duty of maintenance towards the respondent, then we should declare s2(1) of the Act as being constitutionally invalid and in any event dismiss the appellant's appeal with costs."(paragraph 1)

"It is common cause between the parties that appellant and respondent were never married in accordance with the provisions of the civil law." (paragraph 3.10)

"The court a quo found that although the parties were married according to Islamic rites, the parties will be kept to it and it will be regarded as a legal marriage. The court a quo therefore came to the decision that the parties entered into a marriage 'in community of property' and accumulated a joint estate for the benefit of both parties." (paragraph 4.5)

"In the last instance, our Constitution provides that every citizen is entitled to due and fair legal process. It would be a grave injustice to the respondent if the appellant is allowed to unilaterally (over which she has no say) dissolve the Moslem union. One can only imagine to what injustice it would led if a Moslem husband, upon receipt of a subpoena to appear in the maintenance court files a notification of the Islamic divorce and is thereby allowed to escape scot-free from maintaining his wife, especially if they have been married (like in this instance) for more than 24 years." (paragraph 6.6)

"There can be no doubt that the learned magistrate erred in making this finding (that the marriage was a 'marriage in community of property') in that she had no jurisdiction to come to such a conclusion, neither was it justified upon the facts. I therefore find that this finding should be set aside."(paragraph 7)

"The common-law duty of support is a flexible concept that has been developed and extended over time by our Courts to cover a wide range of relationships...The questions that Courts consider in determining whether a particular relationship gives rise to a duty of support include: 1) Does the complainant require financial aid 2) Does the relationship between the two parties create a duty to maintain? The second leg must take account of the time and society in which we live." (paragraph 10.1 – 10.2)

“Despite the lack of a formal marriage, the Constitutional Court has found duties of support to exist based on factors including, but not limited to, how others perceive the couple, the sharing of family responsibilities, and whether they provide for one another upon death.” (paragraph 10.4)

“In any event, the purpose of the Act would be frustrated rather than furthered if partners to a polygamous marriage were to be excluded from the protection the Act offers, just because the legal form of their relationship is not consistent with the Marriage Act. I am therefore of the opinion that partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance and thus fall within the ambit of the Act” (paragraphs 11.12-11.13)

The application was dismissed with costs (De Vos J concurring).

SELECTED JUDGMENTS:

TRAVERS V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS [2006] 4 ALL SA 504 (T)

This case discusses the principle of the independence of the judiciary. Ismail AJ cites Constitutional authorities as well as foreign authorities such as judgements from Canada and Australia.

"The core dispute in this matter are three decisions by the first, second and third respondents to prevent any new matters to be heard by the applicant. They justify their decision based on the productivity and performance of the applicant as a magistrate." (Paragraph 3)

"The apt starting point is section 165 of the Constitution." (Paragraph 20)

"When dealing with the functions of a magistrate or judge the level at which cases are finalised might be important. However, it is not the sole factor which plays a role in the equation. The speed at which cases are finalised cannot be regarded as the sole criteria in determining productivity in dispensing of justice... The duration of the trial will vary depending on the magnitude, novelty and complexity of the issues and the number of witnesses involved and the nature and substance of argument." (Paragraph 26)

"Finalisation of cases and judicial decision-making depends on variable factor. Thus, the prosecuting authority is not competent to dictate to the presiding officer how quickly a case should be finalised." (Paragraph 28)

"[R]espondents submitted that the reason for not referring new matters to the applicant had nothing to with forum shopping or the interference with the independence of the judiciary. The decisions taken were taken in order to ensure that the accused received a speedy trial. I disagree with [the] submission that the Prosecuting Authority, being part of the executive branch of government could exercise this right. Their dissatisfaction with the applicant's work rate or productivity in the finalisation of matters ought to have been taken up with the relevant body, namely the Magistrate's Commission." (Paragraph 40)

"Objectively seen the allocation of cases to magistrates by the prosecution would be perceived by accused persons and any reasonable person as interference in the judiciary as the prosecution would be perceived by accused persons and any reasonable person as interference in the judiciary as the prosecution could manipulate the outcome of a trial by choosing certain presiding officers instead of others. In the apartheid era political matters were given to certain magistrates who were hand-chosen to hear these cases. South Africa is no longer regarded as pariah state as is well regarded in the international community of nations. For this reason despite Mr. Dorfling's argument that the system in place has been in operation for many years and for that reason should not be altered is not a persuasive one. The allocation of cases to presiding officers should follow international trends such as in Canada and Australia." (Paragraph 41)

LAZARIDES V CHAIRMAN OF FIREARMS APPEAL BOARD AND OTHERS [2006] 1 ALL SA 396

In this case the Ismail AJ made reference to local division authority as well as Constitutional Court authority.

This case deals with Administrative Action. The applicant sought an order setting aside a decision made by the First Respondent.

"The applicant submitted that he suffered prejudice as a result of the refusal of the licence being granted. The firearm was a "collectors piece" and the fifth respondent's reasons for declining the licence was that "does not fit into my collection" lacked sufficient motivation for refusing the firearm. Mr *Snyman* submitted that the refusal did not make sense particularly in view of the fifth respondent approving and granting a licence for the .55 anti-tank rifle which was more powerful than the firearm applied for. This suggestion that the applicant was granted a more powerful firearm than the one applied for in my view does not hold any credence. On this logic it would imply that the Commissioner therefore is duty bound to issue every licence the applicant would apply for in view of him having been given a licence for a greater calibre firearm. Logic and common sense suggest that the Commissioner must apply his discretion to each *and every application* made by a person whether that person applies for a license for his first gun or his 74th licence."

"In light of *Davies*'s case above, a court of review does not have to consider the correctness of the decision of the Appeal Board. A review court "will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official."

The applicant submits that the Promotion of Administrative Justice Act... is applicable to these proceedings. O'Regan J, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*2 2004 (4) SA 490 (CC) at 513 stated:

> *"In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference he cited with approval Prof Hoexter's account as follows:*
>
> > *'(A) judicial willingness to appreciate the legitimate and conditionally ordained province of administrative agencies, to admit the expertise of those agencies in policy-laden or polycentric issues to accord the interpretation of fact and law due respect and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and the refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by carefully weighing up the need for – and consequences of – judicial intervention.*
>
> *Above all it ought to be shaped by conscious determination not to usurp the functions of administrative agencies, not to cross over from review to appeal.'"*

Schutz JA continues to say that "(j)udicial deference does not imply timidity or unreadiness to perform the judicial function?" I agree, the use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the needs for Courts to treat decision- makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.

In my view the application should be dismissed with cost. Accordingly, I make such an order."

S V VORSTER [2005] JOL 15038 (T) (UNREPORTED)

This case cites the Constitution as well as Local Division Authorities.

This case deals with the rights set out in section 35(3) of the Constitution. In a review in terms of section 304 (4) of the Criminal Procedure Act, it was held that the accused were not advised of their right to representation and to have the hearing conducted in a language of their choice.

“The failure to have an interpreter at the outset of the proceedings coupled with subsequently obtaining an interpreter who interpreted "poorly" is a serious violation of the accused's fundamental rights to a fair trial. For this reason the proceedings should be set aside.” (page5)

VAN WYK V S [2006] JOL 17492 (T) **(UNREPORTED)**

The case cites local division, Supreme Court of Appeal as well as Constitutional Court authority when handing down judgement in this case. It also makes reference to the Constitution.

The applicant makes an application to be released on bail.

“In order for the applicant to succeed he has to convince the Court that exceptional circumstances exist which in the interest of justice would permit his release.” (Paragraph 3)

“The applicant testified that he would attend his trial on each occasion as ordered by the court, His personal circumstances are on record and need not be repeated in any great detail. The truth of the matter is that he does not possess any fixed property in the country and his business is in a financial downturn. Apart from his wife, parents and brother living in Pretoria, he has no family abroad. Major Vreugdenburg was of the view that the applicant is a well trained soldier who would have no difficulty in crossing the country's borders and that he did not own fixed property that binds him to the country.” (Paragraph 19)

“The question of "exceptional circumstance" was discussed in numerous cases...The trier of fact would have to determine in each individual case whether the applicant has shown that there are exceptional circumstances which warrant in the interest of justice his or her release on bail. These cases are guidelines which would assist him in determining whether the applicant should be released on bail or not.”(Paragraph 22)

“I have also examined the factors set out in section 60(9) of the Act and viewed these factors in conjunction of section 60(4). Bearing all these factors in mind and weighing them up against each other, I am of the view that the applicant has not discharged the *onus* upon him to show that exceptional circumstances exist, which in the interest of justice, would permit his release on bail.” (Paragraph 23)

Upheld by the Supreme Court of Appeal in *S v Van Wyk 2005 (1) SACR 41 (SCA)*

SELECTED JUDGMENTS:

THE ROAD ACCIDENT FUND V RAMALEBANA MOSES (UNREPORTED – CASE NO: A5019/09, FULL BENCH DECISION, BORUCHOWITZ J AND LAMONT J CONCURRING)

Case heard on 17 May 2010; Judgment delivered 25 June 2010

This case considered Local Division cases, a number of Supreme Court of Appeal decisions, as well as a Constitutional Court judgement.

The case dealt with an application for the reinstatement of a lapsed appeal. The applicant had been the unsuccessful defendant in an action for damages, brought by the respondent against it, for injuries sustained by the respondent's minor child who was a victim of a motor vehicle collision. The applicant was granted for leave to appeal on 22 May 2009. The applicant delivered its notice of appeal on 22 June 2009, but failed to make written application to the Registrar for a date for the hearing of the appeal within 60 days of delivery of the notice of appeal, and the appeal lapsed on 15 September 2009. The applicant also failed to furnish a proper record as well as heads of argument within the required time frame. Furthermore, the Fund's averments as to its prospects of success were solely that the Fund "has an excellent prospect of success on appeal". Kathree-Setiloane, AJ held that:

"...culpable inactivity or ignorance of the rules by an attorney has been held, by our court, to be insufficient ground for either the grant of condonation or reinstatement."

"Our courts have often said that in cases of flagrant breaches of the Rules, particularly where there is no acceptable explanation for such non-compliance, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney."

Although it was unnecessary to make an assessment of the applicant's prospects of success on appeal, the court did so in order to "illustrate that the appeal served as no other purpose that to frustrate the legitimate claim of the plaintiff to compensation for wrongful injury, to his minor child, caused by the driver of the insured vehicle."

"... the applicant has sought to appeal the judgment of Coetzee AJ on grounds that are frivolous and directed as frustrating the legitimate claim of the plaintiff. Not only does conduct of this nature lead to a waste of public funds, but it is also inconsistent with the applicant's constitutional obligations to act diligently, and in a manner that ensures that the rights of the respondent...are realised without delay."

SELECTED ARTICLES

***Convention on the Elimination of all Forms of Discrimination against Women and Implications for South Africa*, published in the *South African Journal of Human Rights*, 1995, (2) Part 3, 421.**

This article discusses the Convention on the Elimination of all Forms of Discrimination against Women (also known as the Women's Convention). It describes the objectives of particular clauses set out in the Convention, presents the author's own observations on them and details the possible shortfalls that may exist. The article briefly describes the functions of the CEDAW committee and illustrates the problem that reservations can create, particularly because it could result in countries not properly applying the Convention. The final section of the article provides an explanation of the implications the Convention has on South Africa, while suggesting that he Convention could have more influence than it has currently to further progress the status of women as equal.

"The main thrust of the obligation in Art 2 is therefore in the legislative sphere – that State parties undertake to embody the principle of non-discrimination in their constitution and other legislation and to ensure practical implementation of these principles. In the non-legislative sphere State Parties undertake to refrain from practising discrimination against women and to ensure that all public authorities and institutions similarly do so." (page 423)

"Article 5 is remarkable for its strength of language. Gone are the caveats about the need to protect the family at the expense of women's rights and gone too are the exemption clauses which allows states to provide exceptions to the principle of non-discrimination in the family." (page 424)

"The Convention is not concerned with formal equality of women with men. Its focus lies in according to women substantive equality. The provisions of the Convention take into account the significant differences in the characteristics and circumstances of men and women so as to avoid unfair, gender-related outcomes."

"The Women's Convention, like other human rights treaties, lays down human rights norms which are worded in abstract terms. These treaties are often negotiated during protracted and conflictual inter-Governmental meetings. The difficulties of drafting the Woman's Convention were exasperated by the fact that the text had to be applicable to societies of different cultural characteristics and traditions. Discrimination against women does not manifest itself in a uniform way – it varies from one culture to another. It is precisely for these reasons that it could be said that the Women's Convention represented a 'constructive compromise'." (page 428)

"The Women's Convention envisages a situation of substantive equality. It requires us to examine the actual social and economic conditions of women's equality with men. It recognises the entrenched structural inequalities in society that affect the status of women and makes provision for its elimination." (page 436)

"There is a call from South African women that customary law be reformed. The interim Constitution … implicitly recognises customary law, which has at is core the oppression of women. Lobolo, polygamy, levirate and sororate, and child betrothal are only of but a few of the customary practices that are discriminatory to women. Other practises that preserve the systematic discrimination of

women include the inability of women to acquire or dispose of rights in property; to contract or litigate without the assistance of a guardian; and her ability to end her own customary marriage. This long list of discriminatory practises is clearly irreconcilable with the obligations of State Parties as is required under the Convention." (page 437)

"*Public Interest Law: Its Continuing Role in South Africa*", published in *Advocate*, December 2002.

This article deals with the role of Public Interest Law in South Africa and its ever-increasing necessity. It outlines the significance of lawyers who take on cases which would otherwise go unheard, and demonstrates the useful influence is has on decision makers. It provides examples of Public Interest cases and defines "Public Interest Law", while illustrating how the role of the public interest lawyers is "complimentary to economic growth development and the resultant alleviation of poverty". It also explains the role and effectiveness of impact litigation often used to define constitutional rights, while also describing its limitations.

"Public interest lawyers in South Africa have increased society's recognition of the rights of minorities, women, consumers, poor people and other disadvantaged segments of society. They have played a significant role in the evolution of laws protecting, inter alia, the environment, rights of women and workers' rights. By fighting to make Government more accountable and business more responsible, public interest law in South Africa has carved out a niche for itself in the system of checks and balances that underlie our society." (pages 32-33)

"The alleviation of poverty and the social and economic transformation of the lives of the poor and marginalised masses in South Africa is dependent, to a great extent, upon the realization of socio-economic rights. Enforcement of socio-economic rights must take place through judicial and other means. Human rights and public interest organizations involved primarily in litigation see judicial enforcement as the crucial weapon in the arsenal against poverty. In this regard, litigation still remains the sine qua non of public interest law." (page 33)

"Public interest litigation can spur recalcitrant regulatory agencies, public institutions or businesses into action. It can enforce existing laws and regulations, even when those responsible for their implementation would rather ignore them. By raising constitutional issues, litigation can extend rights to different population groups and establish constitutional norms. Litigation can restructure public institutions by obtaining judicial decrees that demand protection or better care for prisoners, the mentally challenged, and other institutionalized populations. In a complex society, like South Africa where many interests compete, the courtroom provides a forum in which disputes may be compromised or settled fairly. Public interest litigation empowers disadvantaged groups. It provides a community with a way to say "No" to a proposed project - a hazardous chemical plant or a motorway - that it does not like. A court case can strengthen a community and bring concerned parties together and greatly aid in consolidating organisational efforts." (page 34)

"*Rich Man, Poor Man: it shouldn't really matter, costs awards in constitutional litigation*", published in *Without Prejudice*, July 2009.

This article briefly discusses the case of *The Trustees for the Time Being of the Biowatch Trust v The Registrar, Genetic Resources and Others, CCT 80/08 [2009] ZACC 14*, which centred around the question of costs.

"The sole issue for determination revolved around the proper judicial approach to determining costs awards in constitutional litigation. Costs awards ordinarily come at the tail-end of judgements as appendages to decisions on the merits, but in Biowatch they occupied centre-stage" (page 5)

"Following this approach, the Constitutional Court in Biowatch found that the high court had misdirected itself when it held that Biowatch should pay costs in favour of Monsanto, as it did not take account of the fact that the litigation was essentially constitutional in nature; that the state's conduct had provoked the litigation in the first place; and that Bio-watch had succeeded in its claim against Genetic Resources by obtaining the requisite information." (page 6)

"Though the practical implications of this case are 'undoubtedly wide-ranging', it is of particular significance to public interest organisations, which are dependent on support from international donors. Had the approach to adopted by the High Court and the full court been allowed to stand, public interest litigation would have forever been jeopardised by the severe financial penalty such negative costs orders would have imposed on their capacity to initiate litigation in defence of constitutional rights." (page 7)

***"The Duty to Exhaust Internal Remedies"*, published in *Without Prejudice*, October 2009.**

This article briefly deals with the requirement set out in PAJA that all internal remedies should be exhausted prior to judicial review. Its cites Constitutional Court judgements that confirm this and provides that "the purpose and rationale of internal remedies is to provide for immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms in order to rectify irregularities before aggrieved parties resort to litigation."

"Accordingly, review is prohibited unless an internal remedy provided for in any other law has been exhausted. A court will turn away an applicant if it is not satisfied that internal remedies have been exhausted, and may grant exemption from the duty only in exceptional circumstances where it is in the interests of justice to do so."

SELECTED JUDGMENTS

EMERGENCY CARE TRAINING ASSOCIATION V THE MINISTER OF HEALTH AND OTHERS, CASE NO 35280/2009.

Case heard 26 April 2010; Judgment delivered 4 June 2010

Applicant sought to review and set aside a 'decision' made by the 3rd and 4th respondents . The decision includes the closure of the registers of Basic Ambulance Assistant (BAA), the Critical Care Assistant (CCA) as well as the Ambulance Emergency Assistant (AEA). The respondents opposed the relief sought on various grounds. The judgement, however, focused only on the challenge to the locus standi of the applicant.

"There can hardly be opposition to the proposition that in constitutional matters a broad approach to standing, both in relation to interest as well as capacity, is not only justifiable but is also necessary to give full effect to the spirit of the Constitution."

"A question critical to and central in the determination of these proceedings is whether the broad and expansive approach to standing with which I associate myself is authority for the proposition that in Constitutional matters the common law requirements of standing in so far as they pertain to voluntary associations have been rendered obsolete or indeed that the departure from them is justifiable under any or all circumstances. I do not interpret and understand that to be the case. An analysis of the dicta in both the Highveldridge and Rail Commuter Action Group matters suggests that the facts and circumstances of each matter weighed heavily in the decision as to whether a departure from the common law requirements was justified."

"In the present matter apart from failing to attach its Constitution to its founding papers the applicant offers no explanation for its failure to do so or indeed fails to set out any facts from which the court could possibly conclude that it has the necessary capacity to bring these proceedings."

"In my view the position of the applicant as well as the nature of the relief it seeks...distinguish it from the instances where the courts have regarded departures from the common law requirements justifiable and consistent with the spirit of the constitution. Accordingly I am not convinced that the applicant has made out a case why on the facts of the present matter such a departure is warranted."

IAN GORDON MURREL AND ANOTHER V MINISTER OF SAFETY AND SECURITY, CASE NO 24152/2008

This case was an action for damages for wrongful arrest and detention brought by the Plaintiffs against the Defendant arising out of the arrest and detention of the Plaintiffs by members of the South African Police Services acting in the course and scope of their employment with the Defendant. Kollapen AJ held:

"It is clear that the test of reasonableness contemplates a thorough and critical assessment and evaluation of all the relevant and available information by the arresting officer. That this is so is both understandable and justifiable. Our new Constitutional order place a high premium on individual freedom and liberty. From the founding provisions and beyond, the commitment to freedom and dignity resonates powerfully in the architecture of the Constitution both as values as well as fundamental and justifiable rights."

"It was argued for the Defendant that the information from the SAPS Circulation System reflecting the vehicle as stolen, the confirmation by Inspector Botha that the vehicle was indeed still on the stolen list and the denial by Lotz about the vehicle being stolen was sufficient to found a reasonable suspicion. I am unable to agree with this contention and it is certainly not sustainable. In making the determination of reasonableness, all the relevant information should be considered. This cannot be a selective process where reliance is placed on some factors while other which do not support the stance taken are ignored. It must therefore follow...that the Defendant has failed on the probabilities to prove that the arrest and subsequent detention of the Plaintiffs was justified and that the requirements of Section 40(1)(b) of the Criminal Procedure Act ... was satisfied."

As to the quantification of damages, Kollapen AJ held:

"There is little doubt that the Plaintiffs experience was traumatic and distressing. At one point they were carefree holiday makers exploring the beauty and experiencing the splendour of a remarkable country and within an hour they were rendered criminals and confined to cells where the conditions fell shockingly short of the constitutional imperative found in Section 35(2)(e) of the Bill of Rights that every detained person be held under conditions consistent with human dignity. They were alone with no access to family, friends or a lawyer and until their release were totally uncertain about how the matter of their arrest and detention would unfold. It is accordingly necessary that the award of damages must recognise both the significance of the values of freedom and dignity that we are enjoined to uphold as well as respond to the human trauma and the anguish the Plaintiffs had to undergo under circumstances that were not of their making and were easily avoidable."

"Of course one must guard against the danger of a mechanical approach to awards in these matters where freedom and liberty are computed by reference purely to time and an hourly rate for such deprivation begins to root. Freedom and liberty are germane to the identity and the very existence of the individual and when they are undermined without justification Courts should through their award reaffirm the primacy of such value and rights."

S V B DE NATION CASE NO. CC194/09, 28 June 2010

The accused was charged with two counts of attempted murder, one count of murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. Two witnesses were called in respect of the first count of attempted murder.

With respect to the second count of attempted murder, Kollapen AJ held that the since the "complainant was not called and in light of that was the evidence of a single witness, hardly clear and satisfactory in every material aspect, an application for the discharge of the accused in terms of

section 174 of the Criminal Procedure Act was successfully launched and the accused was acquitted" (pg12).

With respect to the final three charges, two witnesses were called. "Our courts have expressed caution in dealing with discrepancies between police statements and oral evidence given the often generic nature of the former and the possibility that in taken them there is often room for miscommunication or a lack of detail. In any event, it can hardly be said that even if there are discrepancies in the statement and the oral evidence, that they are material of significant."(page 14)

The accused then testified in his own defence. "While I am mindful that an accused is under no duty to prove his alibi, the alibi evidence must be considered with all the other evidence in determining whether the State has proved its case beyond reasonable doubt and whether the version of the accused can be said to be reasonably true."(page 18)

"The danger, obviously, is one cannot view the accused's evidence in isolation. It has to be viewed with regard to the totality of all the evidence."(page22)

"I have considered the evidence of the accused...I am accordingly of the view that on all the evidence before me, the reasonable possibility that the accused is innocent is excluded and may I say, convincingly so." (page 23)

S V B DE NATION CASE NO. CC194/09: SENTENCING, 28 June 2010

"The crafting an appropriate sentence is perhaps one of the most difficult tasks that a judicial officer has...Balancing competing and conflicting interests, blending justice with a measure of mercy may be easy to articulate as an academic concept but in practice it becomes difficult when one is dealing with real people and real communities."(page 1)

"It was, in our view, simply a viciously violent expression of authority from someone who was in possession of a shotgun...[the complainant] is entitled to enjoy the fullness of her life. No person can just randomly take advantage of another in such a brutal manner...I am of the view that in respect of [the first count] a sentence of 5 years would be an appropriate sentence."(page 2)

As to the count of murder Kollapen AJ held: "We live in a constitutional democracy where the right to life is important. It is in our constitution and this society is about ensuring respect for the right to life. We also live in a rules based society where we must expect conduct, especially from young people that accords with the values of equality of human dignity and respect for life."(page 3)

"...in my view sentencing you to life imprisonment would be severe. It would be harsh and I do not think that would be appropriate. I do believe that the following considerations must cause me to find that there are substantial and compelling circumstances. Your age, that you were 18 years old when this offence was committed; the fact that you spent 20 months in custody; the fact that you are first offender and the fact that gang activity may have had a role to play. All of these, in my view, justify a departure from the minimum sentence that the legislature has decreed."(page 7)

SELECTED ARTICLES

***Paper on the Protection of Rights of Older Persons in Africa commissioned by Help Age International*, 2008**

This paper focuses on the rights of the elderly on the African continent. It illustrates the ongoing violation of their human rights and how African human rights instruments, while significant, do not sufficiently protect them. Problems faced by the elderly include age discrimination, abuse, and failure to provide them with basic social and economic rights. Furthermore, the spread of the HIV/Aids pandemic and of globalisation contributes to a situation where elderly people are no longer taken care of by the younger generation.

"While in traditional African societies older persons were generally supported and cared for by their children or extended family, the changing societal dynamic brought about by among other factors, globalisation, urbanisation and the HIV/AIDS pandemic has impacted negatively on the cohesion of the family and its ability to create a nurturing and enabling environment for the protection of older persons. Under these circumstances there is clearly a need for increased state intervention in support of the elderly based on universal human rights norms and standards. While the African Charter provides a broad normative rights framework, there may be merit in developing a specific treaty that articulates both clear and concise human rights standards for older persons and provides a mechanism for implementation and accountability, both of which are lacking." (Page 1)

"A number of international policy documents have been adopted to strengthen the protection of older persons. The 1982 Vienna International Plan of Action on Ageing and the 1991 United Nations Principles for Older Persons were reinforced in 2002 through the Madrid International Plan of Action on Ageing at the global level, and the African Union Policy Framework and Plan of Action on Ageing at the regional level. Underlying these plans are the five 'areas of concern for older persons' as expressed in the 1991 UN principles: independence, participation, care, self-fulfilment and dignity." (Page 2)

"In 2007 the African Commission on Human and Peoples' Rights (African Commission) decided to establish a Focal Point on the Rights of Older Persons in Africa with the view to initially consider developing a declaration to be followed by a treaty dealing with the rights and welfare of older persons in Africa. The African Commission held a consultative meeting on the rights of older persons in Mauritius at the beginning of October 2008. " (page 2)

"Only a few countries in Africa have specific legislation dealing with older persons. Mauritius adopted The Protection of Elderly Persons Act in 2005 and South Africa adopted the Older Persons Act in 2006. In most countries legislation dealing specifically with older persons is limited to issues dealing with pension funds for civil servants or those in other formal employment. National policies or plan of actions on ageing have been adopted in a few African countries. Other legislation and policies have an impact on older persons. Ghana's country report on the implementation of the Madrid Plan of Action on Ageing notes the importance of the National Population Policy, the National Social Protection Strategy, the National Disability Policy and the National Health Insurance Scheme. " (page 4)

"The African Charter on Human and Peoples' Rights does not explicitly prohibit discrimination on the grounds of age, but it could be argued that such discrimination would fall under the prohibition of discrimination on the grounds of 'other status'. Such an interpretation is reinforced by the Protocol on the Rights of Women. Measures to improve access to employment for older persons is included in some national development plans, but as noted below the vast number of Africans work in the informal sector"(page 5)

"While human rights have become an important medium through which we can advocate and advance the idea of a more just and caring society, the reality is that in the complexity of things human rights norms and standards cannot in themselves always change social reality. What they do however is to provide a universal framework for the type of standards we wish to achieve, serve as a basis by which public opinion can be mobilised and hopefully contribute to changing the consciousness of society and ultimately become the common basis by which States agree to hold each other accountable to commonly agreed norms and standards." (page 9)

"The lack of an effective response to the various violations of rights of older persons constitutes a violation of the African Charter on Human and Peoples' Rights. It is therefore imperative that the rights of older persons take on a more important role in monitoring compliance with the African Charter and other human rights treaties. NGOs active in the field of the rights of older persons should be encouraged to submit shadow reports to monitoring bodies and make use of the complaints procedure under the African Charter. It may well be that an African Declaration, followed by a treaty would provide the necessary specificity and serve as a vehicle through which there can be a greater mobilisation of opinion and resources to effectively address the legitimate rights demands of older persons." (pages 9-10)

SELECTED JUDGMENTS:

RAYNETH V S [2005] JOL 15481 (W) (UNREPORTED)

Case heard 11 March 2005; Judgment delivered 15 March 2005

This case refers the Constitution, various Local Division decisions as well as Supreme Court of Appeal decisions. It is an appeal against a Magistrate's Court decision deals with criminal procedure, the splitting of charges and the right to a fair trial. Bashall AJJ concurred with his decision to uphold the appeal.

"Section 35(3) of the Constitution of the Republic of South Africa, 108 of 1996 provides that "every accused person has a right to a fair trial". Fifteen rights are then tabulated which are included in the overarching concept of a fair trial. Section 35(3)(m), the thirteenth right, is the right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted". There is no specific right not to be convicted more than once in the same proceedings of an offence in respect of the same act or omission. The Constitution thus expressly prohibits serial double jeopardy but is silent on parallel double jeopardy. The question is whether parallel double jeopardy can be brought to bear under the general fair trial provision." (Paragraph 14)

"To my mind there is a constitutional dimension to the test for the splitting of charges. There is, as I pointed out above, a constitutional imperative to ensure that the accused person had the benefit of a fair trial. It is no longer simply a matter for common sense to determine whether one or more convictions are in order. An accused person is entitled to demand that convictions are not multiplied. The problem should be approached within this context." (Paragraph 20)

What must be guarded against is to punish one act more than once merely because it has different facets, each of which reflect a different crime or constituent element of a crime. Quite distinguishable from this type of case is the class where the accused person committed more than one act as part of a series and interconnected number of unlawful acts committed with one purpose. In this type of case the reported judgments tell us that the emphasis must fall on the *intent* of the accused person. If it appears that all the different unlawful acts were committed as part of one over-arching intent, it could be unfair to convict the accused of all the different crimes. Although the prosecutor may throw the proverbial book at the accused, it is the duty of the court to ensure that justice is fairness, and not pettiness. For example, A and B are involved in some sort of altercation. B is fully clothed and he sports an expensive cashmere coat. A produces a firearm, aims it at B and shoots him in the chest. On its way to B's heart where the bullet ends B's life, it passes through the coat. A clearly had the intent required to damage the coat of the hapless B, but the intent required for the crime of malicious injury to property would be an adjunct to the intention to kill B." (Para 25)

"The appellant's constitutional right to a fair trial was infringed by the three convictions. In my view, he was guilty of rape. The elements of the other two crimes may be discerned from the evidence, but I think that it would be an injustice to punish the appellant separately for those crimes." (Para 42-43)

SELECTED CASES:

M W LEGOTLO V NORTH WEST UNIVERSITY AND ANOTHER, CAE 1137/08

Case heard 5 December 2008; Judgment delivered 26 March 2009

On 5 September 2007 the applicant and the First respondent entered into an early retirement agreement. On or during 2 October 2007 the applicant was issue with a disciplinary notification for 9 October 2007. The issues between the parties were (1) the dismissal of the applicant (2) the non payment of accrued leave (3) the stripping of the title.

"The evaluation of the submission must be done in light of the real issues between the parties. In my view, the real issue between the parties is whether the First Respondent was entitled and correct to alter the terms of the contract of termination of employment on the basis of an early retirement and the age. The second issue is whether the matter should be determined or adjudicated upon this Court or in the labour court." (page 5)

"The main argument of the Applicant is breach of the valid agreement of termination of employment relationship by the First Respondent. The Respondents did not seriously contend the validity of the agreement of 5 September 2007. The thrust of their argument is that the Applicant's attorney agreed to the postponement to a date beyond the date of retirement and accordingly such conduct should be construed as a tacit consent by the Applicant to the extension of the period of early retirement. The argument of extension is misplaced. It is only the parties to the early retirement contract or their duly appointed representative that can extend it...The submissions by the Respondents that the presence of the Applicant's attorney at earlier sitting of the enquiry must be construed to have consented to the extension is not supported by the facts. It is only the Applicant who can validly agree to any changes and nobody else." (pages 6-7)

"The fact that the Applicant faced a disciplinary hearing which was not concluded prior to the effective date of retirement does not assist the Respondents." (page 7)

"The alleged stripping of the title of professorship is the end product of the disciplinary hearing which commenced and terminated after the Applicant has ceased to be an employee. However, the Applicant has sought an order declaring the alleged withdrawal of this professorship to be unlawful. The Applicant has not provided any cogent reasons for such an order. It is not clear whether but for the disciplinary hearing the Applicant would have been allowed to continue the use of the title of professor." (page 8)

"The purported extension of the Applicant was invalid. On the 31 October 2007 the Applicant was entitled to be paid all his entitlement, including his accrued leave..." (pg. 9)

The extension of the termination of the date of employment was held to be unlawful, any action taken against the Applicant after 31 October 2008 was unlawful and the First Respondent was ordered to pay all proven leave up to 31 October 2008.

SELECTED ARTICLES:

'Idle and undesirable: Some revelations on the part of the Riekert Commission and Judiciary, South African Law Journal, vol 97, page 143, 1980

This article deals with the Blacks (Urban Areas) Consolidation Act 25 of 1945, which prescribed "the 'manner of dealing with idle or undesirable blacks'". (page 142).It authorised officers who had reason to believe that a black person was "idle or undesirable" to arrest them. If the arrested person could not "give a satisfactory account of himself, the officer can then declare such a person as idle and undesirable and impose a detention order." The order, however, was subject to automatic review. The order is administrative in nature, and the paper discusses the Riekert Commission (Report of the Commission of Inquiry into Legislation Affecting the Utilization of Manpower), which described the nature of such enquiries.

"'some officers who are concerned in some way or other with the application of s29, adopt a fairly negative view of the requirements set out by the higher courts charged with the review of orders in terms of s29 as regards the law of evidence and the orders that can be made by commissioners. It is clear that the nature of an s29 enquiry is sometimes confused with that of criminal proceedings'". (page 144)

"According to Mr C Uys (NP) , the aim of s29 is 'a sincere attempt to solve the problems of idleness in townships'. But the effect is very different...'although the object of the detention order is not to provide criminal punishment it is punitive in its effect'." (page 144)

"It is in effect a crime to be unemployed in South Africa as a result of the punitive effects of the order that can be made in terms of s29(7). The amendment to s29 introduced by s3 of the Black Laws Amendment Act 12 of 1978 defines an idle person more strictly and emphasizes that unemployment amounts to criminal conduct by defining idleness more carefully in terms of unemployment." (pages 144-145)

"While Whites, Coloureds and Indians may remain unemployed as long as they wish and live on the proceeds of their investments, Blacks are, on the contrary, denied this right regardless of their means." (page 146)

"In light of the recommendations of the Riekert Commission and recent judicial decisions, the time has surely come to remove s29 from the statute book." (page 146)

SELECTED JUDGMENTS:

PRETORIA TIMBER TREATERS CC V MOSUNKUTO NO 2009 JDR 0953 (GNP)

Case heard 31 August 2009; Judgment delivered 22 September 2009

The applicant sought an order reviewing and setting aside an administrative fine imposed by the MEC of Agriculture, Conservation and the Environment (the respondent).

"It is common cause that the activity in which the applicant was involved is a listed activity, which has been identified by the Minister in terms of Section 24 and Section 24(D) of NEMA, as having a detrimental effect on the environment and which may not be commenced without prior written authorisation from the competent authority." (Paragraph 8)

"The applicant considers the fine to be excessive and feels that the respondent did not apply its mind to the representation it had made, was unreasonable and acted arbitrarily. This resulted in the present application for an order seeking review and setting aside of the fine imposed." (Paragraph 12).

"The applicant did not file a reply to the respondent's answering affidavit. The respondent's averments therefore stand uncontested." (Paragraph 16)

"A record of proceedings was delivered but the applicant did not file a supplementary affidavit. I raise this matter as I notice that in its founding affidavit, the applicant makes an allegation in support of its grounds for review, amongst others, that the respondent failed to supply adequate reasons for its decision and on request, failed to make available to the applicant the penalty calculator in how it arrive at the fine it did. Notwithstanding the fact that the respondent made available such information in terms of records of proceedings as well as an annexure to the answering affidavit of such document, the applicant failed to deal with these averments, amplifying its ground for review, either in a supplementary affidavit or at the very least, in a replying affidavit to the respondent's answering affidavit."[Paragraphs 18- 19)

"Failure by the applicant to file a replying affidavit to the respondent's answering affidavit, leaves the allegations unchallenged. The failure to reply brings the application within the ambit of the rule formulated in the seminal case of Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)." (Paragraph 22).

"The application seeks a final and not interim relief. Consequently, in applying the rule in the Plascon Evans case, I come to the conclusion that the applicant failed to make out a case to support its contentions and accordingly, its application cannot succeed." (Paragraph 30).

SELECTED JUDGMENTS:

MARUMO, ISAAC AND ANOTHER V MINISTER OF SAFETY AND SECURITY, CASE NO 2801/98

Case heard 30 March 1999; Judgment delivered 1 April 1999

The plaintiffs instituted action against the defendant for damages allegedly suffered as a result of injuries sustained as a result of the actionS of a police officer employed by the defendant.

“Against this factual backdrop the plaintiffs found their cause of action, either on Twala's unlawful conduct, having been committed by him in the course and scope of this employment by the defendant, or on Mochologi or Moleli having breached a duty of care owed to the plaintiffs.” (page 11)

“It is trite that a master is liable for the wrongs of his servant committed in the course and scope of his employment. It is equally trite that when a servant commits an act solely for his own interests and purposes, this is not done in the course of his employment and the master is not liable. The difficulty arises from the concepts “solely”.(page 11)

“Against the backdrop of these considerations, the pragmatic approach espoused by Hefer JA in Viljoen commends itself, with respect, to me. That approach, as I understand it, is simply that whether in given circumstances the servant was still acting in the course and scope of his employment, is determined by enquiring whether the servant's deviation from his master's work is so great in respect of space and time that he can no longer reasonably be held to have been about the activities for which he had been appointed.” (page 17)

“Consequently the method I propose to adopt is to determine the number and quality of the factors which kept connecting Twala to his employment, to weigh them against the number and quality of the factors which divorced Twala from his employment, and then to ask myself whether Twala, who started out his day in the conduct of his master's duties, could no long reasonably be held to have been about his master's duties at the time of the shooting.” (page 18)

“I do not make any factual finding as to whether in fact the attack on the house was a retaliation on Twala in his capacity as policeman, and whether consequently in turn of his shooting of the plaintiffs was but a further act of retaliation by a policeman in that capacity. Instead I refer to this evidence to how that there is, at least, a real possibility that the entire affair was in fact very directly related to Twala being a policeman, and that his motive in shooting the children in the van was far more complex than simply retaliation for damaged goods.” (page 22)

“In these circumstances I am not persuaded that a factual finding can be made that Twala's motives were solely the function of the damage to his property and completely unconnected with his capacity as a policeman...On these facts the actions of Twala at the time of the shooting were in my view more connected with the affairs of the employer than not, and I conclude that he was acting in his capacity as a policeman and within the course and scope of his authority as such.” (page 22)

SELECTED JUDGEMENTS:

AHARONI, SVI ITAMAR V CITY OF JOHANNESBURG AND ANOTHER, CASE NO 05/2486, 15 June 2006

Plaintiff instituted action against the defendants pursuant to an incident that occurred when the vehicle driven by the plaintiffs minor son overturned. The plaintiff's minor son was injured in the incident.

"It is also common cause that there is a statutory duty upon the First Defendant to maintain roads within its municipal area and in particular to maintain traffic signals, signs and markings on public roads. It is further common cause that an agreement was in place between the First and Second Defendants in terms whereof the Second Defendant undertook the duty to maintain traffic signs and road markings for the First Defendant." (pages 2-3)

"...I am satisfied that there was negligence on the part of the Second Defendant's servants who failed to ensure that clear warning and other signs were in place at this dangerous curve in order to warn a road user thereof." (pages 5-6)

"The next question that arises...is whether the Plaintiff established a causal link between the incident and the absence of the road signage." (page6)

"It was contended that the absence of the signage was only one of a number of inferences and that inference that the absence of the signage led to the incident was no more likely than any one of numerous other inferences. I do not agree. Firstly, the objective fact is that the vehicle travelled down an unlit road at approximately midnight. Secondly, there were no proper warnings signs of a 90 degree curve ahead. The inference that the driver of the vehicle did not observe the curve as a result of the absence of proper signage to indicate the sudden curve, is irresistible. The probabilities are overwhelming that has a warning sign...been placed at a proper distance from the curve and had a chevron been properly aligned directly ahead of the driver in Riley Road, such driver would have observed the signs and would have been alerted to the danger and would have reacted accordingly." (page7)

"I am consequently of the view that the servants of the Second Defendant were negligent in that they failed to maintain the road signs in a proper manner and that the incident wherein the plaintiffs minor son was injured was as a result of the negligence of the Second Defendant's servants." (page7)

"I have thus far referred to the Second Defendant's liability as a result of the argument raised by counsel on behalf of the Defendant's that the First Defendant cannot be held liable by virtue of the agreement between the First Defendant and Second Defendant in terms of which Second Defendant undertook the obligation to maintain the road signage." (page 7)

"The statutory duty to ensure that road signs and signage are installed and properly maintained rests with the First Defendant. The fact that it entered into an agreement with the Second Defendant to perform the duty to maintain signage cannot absolve the First Defendant merely by virtue of entering into such an agreement...The First Defendant cannot expect that by the conclusion

of the agreement a magic wand was waived and that it was absolved from liability as far as its statutory duties are concerned" (pages 9-10)

"In my view, the failure to erect the signs was a failure of the First Defendant whiles the failure to maintain the signs was a failure of the Second Defendant."(page 10)

SELECTED JUDGEMENTS

HENDRICK MAKGOPA V S, CASE NO CA 119/2006

Case heard 16 February 2007; Judgment delivered 1 March 2007.

In an appeal against the decision to refuse bail made by the Magistrate Court:

"Section 60(11) of the Criminal Procedure Act provides that when an accused is charged with an offence referred to in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release. The appellant is charged with a schedule 6 offence and in deciding whether the appellant discharged his onus of providing on a balance of probabilities that there are exceptional circumstances, I refer to the comments of Comrie J in S v Mohammed 1999 (2) SACR 507 (C) 515d wherein he remarked that the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case to warrant the applicant's release." (page 9)

"In S v H 1999 (1) SACR 72 (W) it was held that what a court is called upon to do is to examine all the relevant considerations as a whole in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under s60(11)(a)." (page9)

The court took the relevant circumstances into account, including the interests of justice, and held that the application should be dismissed.

SELECTED JUDGMENTS:

PHILLEMON MOLELEKENG AND OTHERS V E H J ENGELBRECHT AND ANOTHER, CASE NO 1144/09

Case heard 28 May 2009; Judgment delivered 18 June 2009.

This was a review of an eviction order made by the Magistrate's court. The application was granted by the Magistrate's court as a result of a consent agreement. The applicant, due to fact that he was uneducated, was unaware of the agreement and was simply told that he and the other occupiers would need to vacate the property. The issues raised were whether an eviction order could be said to have been given with consent, whether the procedures set out in the Prevention of Illegal Eviction From and Unlawful Eviction of Land Act were followed. The court cites cases that refer to the intention of the legislature when drafting the Act and the procedure that has to be followed when making use of it.

"From the authorities referred to above, it is clear that when one adjudicates on an application brought in terms of PIE, one should do so with a view to promoting the spirit, purport and objectives of the Bill of Rights...the presiding officer is mandated to enquire as to whether any order of eviction is just and equitable." (pages 10-11)

"Section 4(7) of PIE also provides that if an unlawful occupier has occupied the land in question for more than six months at a time when the proceedings are initiated a court may grant an order for eviction if it is in the opinion that it is just and equitable to do so. It is the court in this instance that has to form an opinion. It cannot rely solely on the say so of the parties. The court forms its opinion by considering several factors listed in the Act, namely the rights and needs of the elderly, children, disabled persons and households headed by women. The court has to consider whether any other land has been made available by the municipality, or another organ of State or another land owner for the relocation of the evictees. Self-evidently this is intended to avoid rendering people homeless as this would undermine the very foundation of PIE underpinned by our Constitution which jealously protects and guarantees the right of all citizens to adequate housing." (pages 13-14)

"In my view any material deviation from the clear and peremptory provisions of PIE should not be countenanced, particularly where it holds potential prejudice to the people to be evicted, failing which the ideals striven for by PIE and ESTA, fully supported by the Constitution, would be rendered illusory." (page 14)

"It is clear in this matter that the applicant was not afforded the guaranteed protections that he was entitled to in terms of the Constitution, PIE and ESTA."

MOKGELE KENNETH MOLEFI V S, CASE NO CA 54/08

Case heard 5 September 2008; Judgment delivered 2 October 2008.

The accused were convicted of robbery with aggravating circumstances. In an appeal against the sentence, Matlapeng AJ noted that in such cases, the legislature had prescribed a minimum

sentence of 15 years imprisonment. Deviation from this minimum sentence was permissible if the court is of the opinion that there are substantial and compelling circumstances to justify departing from it.

"... it is the court that has to make a determination as to whether there are substantial and compelling circumstances. This the court can only do if adequate evidence is placed before it in a given case. Should an accused either in person or through his legal representative not raise the issue, I am of the view that the court should mero motu pertinently point out to the accused or his legal representative the need to address it on such issue. Failure to do so will result in the court not being able to make a proper determination with the result that the accused may get a much more severe sentence than would ordinarily be the case." (page 8)

The court then went to cite various judgements which give guidance on what substantial and compelling reasons were. The appeal against the sentence was upheld and substituted with a lesser sentence.

Hendricks J concurred.

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF EDUCATION, NORTH WEST V K C PRODUCTIONS CC, CASE NO CA 14/2007

Case heard 7 November 2008; Judgment delivered on 5 March 2009.

This case dealt with the question of "whether a decision by the appellant to cancel a contract arising out of an award of a tender is an administrative action which is subject to the requirements of administrative fairness as laid down in s 3 of the Promotion of Administrative Justice Act". (page3)

"A careful reading of our authorities reveals that there is no definitive definition of what constitutes an administrative action. This is not because administrative action defies definition but because one has to make a determination in order to reach a conclusion of whether an act constitutes administrative action or not. This will, logically differ from case to case. This is amply demonstrated by various dicta from our courts, particularly the Supreme Court of Appeal (SCA) and the Constitutional Court (CC)." (page 4)

"However, it should be clear that the starting point is the Constitution of the Republic of South Africa." (page 6)

"It should be clear from s 1 of PAJA that administrative action can only be described in general terms. To my mind, it refers as has been aptly put to "the whole bureaucracy in the performance of its daily function of the state". From the authorities traversed above, one is in a position to determine whether a conduct amount to administrative action. To qualify as such it has to be an exercise of public power or performance of public function in terms of legislation which adversely affects the rights of any person and which has a direct external legal effect. The question of who is exercising that is, in my view, not decisive. The important factor is the exercise of public power or performance of legislation itself." (page 7)

"It is clear to me that from the time the contract was awarded the appellant acted in an insalubrious manner towards the respondent. Its conduct cannot but attract opprobrium. It does not take a savant to see that the appellant did, right from March 2002, not intend to honour the terms of the contract it had concluded with the respondent. As I have alluded to above, the respondent was entitled to a lawful, reasonable and procedurally fair conduct from the appellant. The appellant, in its exercise of public power, when it took a decision to cancel the contract was duty bound to have regard to the basic precepts of administrative justice."

Mogoeng J and Gura J concurred.

SELECTED JUDGMENTS

S V LEON TARENTAAL, CASE NO B98/2010

7 June 2010

This case was a special review from the Magistrate's Court. Evidence in mitigation of sentence was led before the magistrate, a Mr. Potgieter who postponed the matter for a probation officers report. The matter was then reconvened, only this time with a different Magistrate. The subsequent Magistrate, a Mr. Mzamo, interfered with Mr. Potgieter's sentencing proceedings. The case discusses the procedural aspects of a review. It also deals with procedural irregularities of that court and mentions the right to a fair trial as envisioned by the Constitution.

"The courts are enjoined by section 39(2) of the Constitution to promote the spirit, purport and objectives of the Bill of Rights. Section 35(3) of the Constitution guarantees that every accused person is entitled to a fair trial which includes the right of appeal to, or review by a higher court."(page 8)

"There is no doubt that the step taken my Mr. Mzamo, the second Magistrate, was irregular and the proceedings before him were obviously not in accordance with justice and are a nullity. Clearly, there was prejudice to the accused resulting from the gross irregularity in the proceedings." (page 9)

Ndita J concurred.

BENJAMIN ALEXANDER FICK AND OTHERS V OMAR W M AHMMAD DOUGLAS NO AND OTHERS, CASE NO 6375/2008

Applicants brought an urgent application seeking an interim interdict against the defendant's pending the application and finalization of a review.

The issue of locus standi was raised: Defendants claimed that only those who were directly affected by a decision had any standing. The court noted that with the inception of the Constitution, the previously foreign concept of class actions was now acknowledged.

"In a class action the applicant must merely show that a right enshrined in the Bill of Rights was infringed or threatened. Relevant for the purposes of the instant application is section 38(a), (c) & (d) of the Constitution..."(page 7)

The applicant's, therefore, had the necessary standing to institute proceedings despite not personally suffering any financial loss as a result of the conduct of the defendant's in question.

The case also deals with the constitutional right to just administrative action as envisioned in section 33. Applicants had failed to exhaust their internal remedies before approaching the court for the review of the defendant's decision. Ngewu AJ found that, except for cases where exceptional circumstances exist, the Promotion of Administrative Justice Act clearly states that unless all internal remedies have been exhausted, a court may not intervene:

“PAJA does not define 'exceptional circumstances. These must be circumstances that are out of the ordinary and that render it inappropriate for the court to require the s7 (2) (c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy.” (Page 12)

SELECTED JUDGMENTS:

MISELO V S [2001] JOL 8074 (C)(UNREPORTED)

Case heard on 23 March 2001; Judgment delivered on 23 March 2001

This case dealt with bail appeals and the time limits in launching such an appeal. Bail was denied to the applicant five months prior to bringing the application for an appeal, and it was found that:

"no statutory period is prescribed within which bail appeals must be brought, and no authority was cited to me by either Counsel as to what the approach of an Appeal Court should be where there has been a delay" (page 2)

In cases where there is a delay in making an appeal:

"The court must exercise a judicial discretion, taking into consideration all the relevant circumstances, in particular the important fact that the liberty of a subject is in issue and that the delay has in most cases prejudiced the appellant only. Among other circumstances to be taken into account would be the furnishing of a satisfactory explanation by an appellant and the absence of prejudice to the State...In passing, I would venture to suggest that it is only in extremely rare cases that an Appeal Court would refuse to hear a bail appeal because of an unreasonable delay which has taken place" (page3)

The remainder of the judgement dealt with the actual bail application, and Pincus AJ found that:

"...the circumstances of this matter are exceptional, having regard to what took place over a lengthy period of time in the Western Cape. I further take the view that there exists likelihood that if I were to uphold this appeal and release the appellant pending his trial, such release would "*disturb the public order or undermine the public peace or security*". It is clear that the nature of the offence which the appellant is alleged to have committed and the circumstances under which the firing at two allegedly innocent people took place, is likely to induce a sense of shock or outrage in the community where this offence was committed. Right minded people were aghast, in my view, at what took place in the Western Cape, and how callous the perpetrators were to achieve their unlawful goals. I also find that the release of the appellant, at this stage, will certainly undermine or jeopardise the public confidence in the criminal justice system. This is a further factor which section 60(8A) of the Act enjoins me to take into account, which I have done." (pg.10)

BEZUIDENHOUT V BEZUIDENHOUT [2003] 3 ALL SA 82

Heard April 14, 2003 ; April 15, 2003 ; April 16, 2003 ; April 17, 2003 ; April 22, 2003 ; April 23, 2003 ; April 24, 2003 ; April 29, 2003 ; April 30, 2003 ; May 2, 2003. Judgment delivered 9 May 2003.

This case cites English and Canadian authorities. It is also influenced by the Constitution, decisions of the then Appellate Division and Local Division authorities.

The issue before the court was the redistribution of assets in a fair and equitable manner as required by section 7(3) of the Divorce Act 70 of 1979. In making such a determination, the court considers notion of equality and protection from unfair discrimination as set out in section 39(1) and (2) of the Constitution.

"Section 7(3) of the Act provides that the court may...make such an asset redistribution order as appears to be *equitable and just*. Accordingly, a redistribution order is not to be granted unless the court is satisfied that it is *equitable* and *just* to do so, and furthermore that the court is also satisfied that the person who seeks the redistribution order has contributed directly or indirectly to the maintenance or increase of the estate of the other party, by the rendering of services or the saving of expenses. It accordingly follows that, if the party seeking a redistribution order did not contribute in the manner set out above, then such an order cannot be made." (page 90, paragraph 20)

"In determining whether to make a redistribution order and, if so, the extent of such order, I am required to interpret section 7 of the Act. Section 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") provides that "when interpreting any legislation, and when developing the common law, every court ... must promote the spirit, purport and objects of the Bill of Rights". Section 39 (1) thereof provides that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law. I have already referred to the English authorities where the issue of discrimination is discussed. Section 9(1) of the Bill of Rights provides that everyone is equal before the law and has the right to equal protection and benefit of the law, and section 9(4) provides that no person may unfairly discriminate directly or indirectly against anyone and that legislation must be enacted to prevent unfair discrimination. Finally, section 9(5) provides that discrimination on the grounds of, *inter alia,* gender, sex, pregnancy or marital status, is unfair unless it is established that the discrimination is fair. Such legislation was enacted and I refer to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which Act was enacted to give effect to section 9 of the Bill of Rights so as to prevent and prohibit unfair discrimination."(page 94,paragraph 41)

"In my view, provided that the "Jurisdictional pre-conditions to the exercise of the discretion conferred on the Court" have been established (see the *Kritzinger* case*(supra)* at 83C–D), the objectives of the section are in the main to achieve a just and equitable distribution of the proceeds of the marriage, having regard, whilst so doing, to the factors enumerated in the Act, one of such factors being the means and obligations of the parties. At the same time, the constitutional imperatives set out above require me to avoid any gender discrimination in weighing up the respective contributions made to the marriage by the plaintiff and the defendant."

"In my view, the only way that justice can be done in this matter is by splitting the proceeds of the marriage on a 50/50 basis." (page 98)

The judgment was overturned and the order varied on appeal by the Supreme Court of Appeal: **2005 (2) SA 187 (SCA)**

GODFREY AND OTHERS V CAMPBELL 1997 (1) SA 570 (C)

Case heard 30 August 1998, Judgment delivered 18 September 1996

This case cites English and American authority, Appellate Division and Local Division authority as well as various articles and books.

The case concerned an appeal against a Magistrate's Court Decision to award the plaintiff money for damages suffered as a result of an adulterous affair between her husband and the first defendant. While the issue turned on the action for damages, the court briefly looked at the issue of *locus standi* of the plaintiff "as there was no allegation in the summons or in the evidence as to her marital capacity." (page 399)

"Counsel referred the Court to the Matrimonial Property Act 88 of 1984, as amended. Sections 11 and 12 of the said Act read as follows:

> '11. Abolition of marital power.
>
> (1) The common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby repealed.
>
> (2) Any marital power which a husband has over the person and property of his wife immediately prior to the date of coming into operation of this subsection is hereby abolished.
>
> (3) The provisions of Chapter III shall apply to every marriage in community of property irrespective of the date on which such marriage was entered into.
>
> (4) The abolition of the marital power by subsection (2) shall not affect the legal consequences of any act done or omission or fact existing before such abolition.
>
> 12 . Effect of abolition of marital power. Subject to the provisions of this Act, the effect of the abolition of the marital power is to do away with the restrictions which the marital power places on the capacity of a wife to contract and to litigate'. (The underlining is my own.)

Accordingly, even if the plaintiff is married in community of property to her husband, any restriction on her capacity to litigate has been removed by the said Act." (pg. 399)

Farlam J concurred with the judgement given by Pincus AJ.

SELECTED JUDGMENTS:

S V PHILLIP CORNELIUS AND ANOTHER 2008 (1) SACR 96 (C)

Case heard 16 April 2007, Judgment delivered 28 June 2007

The case was referred to the High Court by the Magistrate's Court for determination of sentence as the conviction carried a sentence that fell outside the jurisdiction of the Magistrate's Court. One of the issues that arose was whether:

" ii) there was a constitutional duty on the part of the presiding officer to one more time explain in detail accused's constitutional rights to legal representation; iii) the Presiding officer had a duty not only to explain accused's constitutional rights but also to encourage the accused to seek legal representation, especially in serious cases where life imprisonment could be imposed; iv) the Presiding officer is expected to assist the unrepresented accused in conducting their trial." (page 2)

The judgment cites section 35 (3) of the Constitution which provides that every person has the right to a fair trial.

"In this matter, both accused were not given enough time to find legal representatives. I am of the view that three (3) days was too short a time for the accused to obtain legal representation. This is even more so, as the accused person was going to engage the services of a privately paid legal representative. Taking into consideration the known poor socio-economic background of the accused persons, they ordinarily would have to auction whatever assets they possessed." (page 6-7)

"In summary the right to legal representation has three (3) separate and distinct forms, namely a) the right to a legal practitioner of one's choice b) the right to a legal practitioner assigned to one at the state expense; c) the right to legal practitioner furnished by the Legal Aid Board." (page 7)

"The first two are recognised and entrenched in the Constitution...The third is based upon common law...The second and third forms are generally confused by Magistrate's and the Legal Aid Board. After the adoption of the Constitution, no mechanisms were put in place to make it possible for the accused persons to invoke and assert their right to legal representation at the state expense. Instead the Legal Aid Board was used a vehicle for providing legal representation at the state expense...It is significant to note that two distinct tests apply in determining whether a person is entitled to legal representation under common law or at state expense. Under common law, one must be indigent and the board has its assessment criteria to determine whether indeed the person is poor and qualifies for legal aid assistance...There is only a single test for an accused person to qualify for legal representation at the state expense. Every accused person is entitled to legal representation at state expense if substantial injustice would occur, if the trial is conducted without him being legally represented." (page 8- 9)

"Although the constitution does not define "substantial injustice", our courts have construed the phrase to include instances where direct imprisonment is the likely punishment to be imposed." (page 9)

"...when an accused is person is advised of his/her rights to legal representation , the distinction between the three forms of the said right should be clearly made in order for the accused to

understand them. Indeed the Constitution does not only confer the right to a legal representation but it also requires, in preemptory terms, that the accused be informed promptly of the said right." (page 9)

Samela AJ notes that in certain circumstances an accused person may opt not to have legal representation at all and while this is a decision that the accused may make, it is often based on a misunderstanding of the "system relating to free legal representation." (page 10) The Magistrate must then make an extra effort to determine the reasoning behind the accused's decision not to make use of legal representation, failing which would result in defeating the constitutional rights of an accused person. The court held that not only did the Magistrate fail to explain to the accused their constitutional rights, but she also failed to encourage them to seek legal representation and further failed to assist them in conducting their own trial.

"These were irregularities, which, in my judgement , are incapable of being condoned." (pg. 13)

The convictions were set aside.

GODFREY OWIES AND ANOTHER V S, CASE NO A89/2006

This case also deals with the constitutional obligation to explain an accused person his/her rights to legal representation, and the duty of the magistrate to encourage the accused to obtain legal representation, and the duty of the magistrate to assist the accused throughout the trial. It considers a further issue: whether the "questioning of the Presiding officer amounted to descending into the trial arena, and in doing so whether he committed an irregularity." (page 3)

"In this matter there are several examples whether the Magistrate took over from the prosecution and cross-examined the witnesses. The Magistrate immediately after the state witness had testified, took over the questioning prior any cross-examination by the defence team...In my view the Magistrate surely descended into the arena and assumed and played the role of a prosecutor and a judicial officer." (page 9)

"It is now established that a thorough explanation of accused constitutional rights is the thrust of a fair trial...Such failures by the Judicial Officer to tender such explanation may result in an irregularity which may vitiate the proceeding, especially where the accused would be prejudiced by such failures...The Magistrate unfortunately and seriously transgressed the well known limitations to questioning by a judicial officer. Consequently, he indeed committed an irregularity which could vitiate the proceedings."

The convictions were set aside.

THEMBILE LIVINGSTONE MALO AND ANOTHER V BUZEKA SISANWA AND ANOTHER (AND ALL PERSONS CLAIMING THE RIGHT OF OCCUPATION THROUGH OR UNDER THEM)

An appeal against a Magistrates Court application for an eviction order in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act.

“The Magistrate dismissed the application for eviction and found for the Respondents on the ground that the executrix did not have authority to sell the property, and at that time the executrix got married to the deceased, the deceased's marriage to the First Respondent was still in existence.” (page 3)

“...She pointed out that the First Respondent was validly married to the deceased in accordance with customary law in 1986. She argued that the executrix married the deceased in 1993 whilst the marriage between the First Respondent and the deceased was still in existence.” (page 6)

The court then cites the Recognition of Customary Marriages Act 120 of 1998 and holds that “the marriage between the deceased and the First Respondent was not dissolved by court and therefore the deceased's marriage to the executrix was null and void.” (page 7)

The court then continues by referring to the rule of primogeniture which was dealt with in the Constitutional Court Case of Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC).

“I am of the view that the Magistrate's approach in arriving at his decision was correct. The customary rule of primogeniture was partly applicable in this matter. In my view, there were two enquiries to be made, firstly, the validity of the executrix's marriage to the deceased, and secondly, whether or not the Appellants are the owners of the property. One cannot entertain the first enquiry without having decided on the first.” (page 9)

“After Bhe's ruling the situation was as follows: the customary rule of primogeniture was declared invalid and unconstitutional to the extent it excludes women, children and extra-marital children from inheriting. In accordance with the court's ruling, First and Second Respondents jointly become the owners of the property. At the time the executrix applied for a letter of authority … the Respondent’s were already the owners of the property.” (page 11)

“In conclusion, I would like to express my displeasure in the manner some Respondents are cited in this matter. It is apposite to the remarks made by the learned Judge Sachs in Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at 239 E where it is stated: '[t]hus , those seeking evictions should be encouraged not only to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her own dignity.' I associate myself with the views expressed in this matter.” (page 12)