



**SUBMISSION AND RESEARCH REPORT
ON THE JUDICIAL RECORDS OF
NOMINEES FOR THE JSC SITTING IN
APRIL 2021**

**VOLUME 1: CONSTITUTIONAL COURT
AND SUPREME COURT OF APPEAL**

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INTRODUCTION

1. The Democratic Governance and Rights Unit (“DGRU”) is an applied research unit based in the Department of Public Law at the University of Cape Town. DGRU’s vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by conducting applied and comparative research; supporting the development of an independent, accountable and progressive judiciary; promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and enabling scholarship, advocacy and online access to legal information. The DGRU has established itself as one of South Africa’s leading research centres in the area of judicial governance
2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU’s focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, observing and commenting on the interviews of candidates for judicial appointment.¹ Such reports have been compiled for the JSC interviews in September 2009, and for all further JSC interviews from October 2010 onwards.
3. The intention of these reports is to assist the JSC by providing an impartial insight into the judicial records of the short-listed candidates. The reports are also intended to provide civil society and other interested stakeholders with an objective basis on which to assess candidates’ suitability for appointment to the bench.
4. In this submission, we will repeat many of the submission made in our report for the cancelled April 2020 interviews, as well as making some new submissions in relation to specific circumstances arising in respect of the April 2021 and subsequent sittings.
5. Because of the very large number of candidates being interviewed at this sitting of the JSC, it has been necessary to divide this report into two volumes. Volume 1 sets out the records of candidates for the Constitutional Court and Supreme Court of Appeal. Volume 2 covers candidates for the High Court and Labour Court. This submission is also applicable to volume 2, although it is note included in the volume.

THE DGRU’S WORK ON JUDICIAL APPOINTMENTS

6. The DGRU’s belief in the importance of the judiciary will be apparent from our vision and mission, as described in the previous section. Over the years, our focus on the judiciary has expanded beyond South Africa. We are recognised as a resource partner of the Southern African Chief Justices’ Forum and are involved with the UNODC’s Global Judicial Integrity

¹ The reports are available at <http://www.dgru.uct.ac.za/reports-candidates-jsc-hearings> and <http://www.dgru.uct.ac.za/research-reports-0>

Network.² We believe that these interactions have allowed us to develop a broader perspective on the appointment of judges, which we attempt to share with the JSC and other interested stakeholders as best as we can.

7. In South Africa, one of the major and most persistent issues that is raised regarding the appointment of judges concerns the transformation of the judiciary. The constitution requires that the judiciary be transformed. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered by the JSC when it recommends appointment to the Bench. We submit that the transformation imperative does not relate only to numbers but must also include an examination of issues such as the judicial philosophy and life experience of candidates, to ensure that those who are appointed as judges are committed to the social and economic transformation of South Africa.
8. The Constitution also requires the appointment of judges who are appropriately qualified and fit and proper. We believe that the following criteria are relevant to determining whether a candidate is fit and proper:
 - A commitment to the Constitution's underlying values of human dignity, freedom and equality;
 - Independence of mind – the courage and disposition to act independently, free from partisan political influence and private interests;
 - The disposition to act fairly, impartially and without fear, favour or prejudice;
 - High standards of ethics and honesty;
 - A judicial temperament, which includes qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.
9. To determine whether a candidate is appropriately qualified, we believe this includes a consideration of a candidate's formal qualifications, experience and potential. Constitutional Court judges must be qualified not only in respect of the general body of law, but they must be equipped to give meaning to constitutional values – indeed, it may well be argued that this applies to all judges.
10. Our research reports consist of summaries of judgements written by candidates who are to be interviewed by the JSC during the meeting in question, as well as other material such as summaries of academic articles or public speeches by the candidates. Further details of the methodology employed in compiling the reports are set out in the next section. We believe that one of the most effective ways of assessing a candidate's suitability for judicial office is to scrutinise how they have dealt with issues they would come across were they to be appointed as judges.
11. To this end, our reports present a sample of judgements which we have summarised, in order to show why and how they have arrived at a particular decision. As we make clear, we do not try to advocate for the appointment or non-appointment of any individual candidate. We hope that the members of the JSC will be able to use this research to identify issues that might

² See <https://sacjforum.org/> and <https://www.unodc.org/ji/> for more information about these organisations.

be relevant to the suitability of candidates for judicial office, and to ask questions to establish that suitability.

12. We also comment on aspects of the process by which the interviews are conducted. A fair, as well as transparent, interview process is, we submit, essential for the legitimacy of the appointment and to public confidence in the judiciary. Based on our observations of the JSC interviews over a long period of time, our intention is to offer constructive suggestions which we hope can assist the JSC in performing its crucial constitutional role as well as possible.
13. We will briefly mention some of our observations of what we think are particularly important issues in ensuring a fair interview process.

- Questions tracking publicly available criteria.

We suggest that the criteria provided in sections 174(1) and (2) of the Constitution are quite broad, and it would be valuable for the JSC to agree and publicise supplementary criteria that would amplify the criteria found in the Constitution.³ These criteria could allow for sufficient flexibility, and could be revisited by the JSC from time to time. We think that undertaking this exercise would be particularly important for two reasons: first, it may assist commissioners in focusing their questions on the specific criteria that are being sought. This may well assist with some of the other issues we identify below. Second, if these criteria are published, potential candidates a clearer sense of what the JSC is looking for, and whether they fulfil those criteria.

- Timing of interviews

We have frequently observed significant inconsistencies in the length of interviews, with some candidates for the same position being interviewed for very different lengths of time. Of course, sometimes circumstances will dictate that one candidate may need to be interviewed for longer than another. But as a general principle, we think it is advisable out of fairness to the candidates and for the credibility of the process that candidates being interviewed for the same or a similar position should be interviewed for a broadly similar time. Interviews that take place long after they are scheduled to, and run late into the night, are likely to disadvantage both the candidates and the commissioners.

- Substantively even questioning of candidates.

This issue is closely linked to the question of timing. We have on occasions noted instances where candidates who are from similar professional backgrounds and applying for the same position, are interviewed much more or less rigorously than the

³ This process has been done before. For the supplementary criteria published in 2010, see <https://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments/>

other. Again, it is certainly true that the JSC must have flexibility and be able to respond to different issues that may be unique to certain candidates. But the effect should be that all candidates are subject to rigorous but fair scrutiny, in order to ensure that suitable appointments are made to the judiciary.

14. We observe and comment on these and other aspects of the process out of a hope that we will provide a reflection on the JSC's process that may be informative and helpful. It is never our intention to criticise for the sake of it.
15. For the April 2011 interviews, the Office of the Chief Justice provided us with some funding to assist in the production of our report. Since then, however, we have been entirely self-funded, and our work is supported by donors who recognise its importance for constitutional governance in South Africa.
16. With that background in mind, we now turn to discuss the methodology followed in compiling this report.

METHODOLOGY OF THE REPORT

17. We have experimented with various structures and approaches to compiling these reports over the years. The format currently used is intended to present a more comprehensive overview of a candidate's track record than earlier reports, which were limited to presenting simple summaries of judgments and academic articles candidates have written.
18. We do not attempt to summarise all of a candidate's judgments. To do so would make the reports far too long, and we are conscious of feedback we have received which emphasises the value of keeping the reports as concise and accessible as possible. This is never an easy task, as selecting what material to include and what to leave out is seldom an exact science. We try to select judgments and other material that seem to the researchers to provide the most useful insights into candidates' mindsets, outlook, jurisprudential approach and general attitudes and experience. We provide citations and links so that interested readers are able to follow up and read the complete judgments and articles we have summarised.
19. In order to make the summaries of judgments easier to navigate, we group them under the following thematic headings:
 - Private Law;
 - Commercial Law;
 - Civil and Political Rights;
 - Socio-Economic Rights;
 - Administrative Justice;
 - Constitutional and Statutory interpretation;
 - Environmental Law;
 - Labour Law;
 - Civil Procedure;

- Criminal Justice;
- Children's Rights
- Customary Law; and
- Administration of Justice.

20. This is the full list we utilise, and it is possible that not all categories will be used in any particular report.
21. In the course of watching JSC interviews over the years, it has become clear to us that traversing candidates' written judgments alone does not necessarily capture the full range of issues that may be canvassed with them during an interview. In order to try to give a more holistic picture of a candidate, we have begun to include media coverage of candidates, based on simple desktop research.
22. We generally do not include media reports on judgments, since these will be covered by our selection and summaries of judgments. The intention is to capture material such as speeches or interviews which may give additional insight into issues such as a candidate's personal background or mindset, which may be relevant to their suitability for judicial appointment.
23. We obviously are not able to confirm the veracity or otherwise of media reports, and as with judgments, we aim simply to present the results of the research we undertake. We do not include material in order to implicitly advocate for or against candidates. It is our intention to provide an overview of key aspects of a candidate's track record, which can guide members of the JSC in developing questions to ask candidates and which can assist other interested stakeholders in commenting on the suitability of particular candidates, should they wish to do so.
24. We do not provide our own analysis or criticism of the judgments summarised, but we do try to integrate academic comment on judgments into the report, where this is available. Again, we present the results of what we have found in the course of our research. A strong academic critique of a particular judgment provides an opportunity to engage on matters such as a candidate's judicial philosophy and approach to legal reasoning but does not necessarily render a candidate unsuitable for appointment.

A RECAP OF OUR APRIL 2020 SUBMISSION: COMMENTS ON THE OCTOBER 2019 INTERVIEWS

25. Several issues we have highlighted in previous submissions on the JSC's interview process emerged during the October 2019 interviews. We discuss these briefly.

UNEVEN SCRUTINY OF CANDIDATES

26. We have raised concerns about candidates being treated unequally in terms of the duration of interviews and the intensity of questioning to which similarly – placed candidates have been subjected. The issue of the time allocated to interviews came to the fore starkly in the October

2019 round of interviews. One candidate was interviewed for around 3 minutes – the shortest ever interview in the time we have been observing the JSC interviews.⁴ Other interviews lasted for far longer.

27. Whilst acknowledging that the candidate in the three minute had been interviewed by the JSC before, we think there is a real danger that such a perfunctory interview could create mistrust in the interview process, and might lead to the very unfortunate perception of decisions being predetermined before the interviews even take place. We believe that there is value in using the interview process to test candidates rigorously and fairly against clear and transparent criteria. Even if a candidate has been interviewed before, they will not have been evaluated against the same group of fellow candidates.
28. We would therefore urge the commission to conduct interviews that engage with candidate's suitability for the position, in a focused and respectful manner. Such interviews need not be very long, but they should avoid giving the impression that appointment decisions are a foregone conclusion.

CRITERIA FOR APPOINTMENT

29. We have long argued that it is necessary for the JSC to identify and articulate further criteria to supplement those found in the Constitution. We believe that this is an important element of the transparency of the judicial appointment process, and it would also be of assistance in determining the scope of questioning that should be allowed to be asked during interviews.
30. In the October 2019 interviews, one of the candidates for the Electoral Court was asked a question about the recommendations of the Van Zyl Slabbert report on electoral reform. Another commissioner intervened and suggested that the question was not appropriate. The commissioner who originally asked the question maintained the question was relevant.⁵ Some debate among commissioners about whether questions are appropriate is clearly appropriate. But from observing this exchange, it appeared that there was no shared frame of reference among the commissioners as to the basis on which the question could be said to be appropriate or inappropriate.
31. We would respectfully suggest that the exchange shows the value in the JSC working to develop criteria to supplement those found in the Constitution, and in ensuring that questions asked during the interviews are directed towards testing whether candidates meet such criteria.

⁴ See <https://www.judgesmatter.co.za/interviews/october-2019-interviews/jsc-candidates-oct-2019/ms-shanaaz-mia/>

⁵ An unofficial transcript of the interview may be read here: <https://www.judgesmatter.co.za/wp-content/uploads/2020/02/SA-Electoral-Court-JSC-Interview-of-Ms-S-C-Lushaba-Judges-Matter-October-2019V2.pdf>. The exchange highlighted is found at pages 10 and 11.

CRITERIA FOR CONSTITUTIONAL COURT CANDIDATES

32. As the Constitutional Court is the highest court in the country, the appointment of candidates to this court is of particular importance. We have previously suggested some criteria that may be taken into account in selecting judges for the Constitutional Court, and we take the opportunity to repeat them. These criteria are:
- a. 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;
 - b. Independence of mind: judges must have the courage and disposition to act independently and free from partisan political influence and private interests;
 - c. A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice;
 - d. High standards of ethics and honesty;
 - e. Judicial temperament, encompassing qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness;
 - f. As well as being qualified in respect of the general body of law, Constitutional court judges must also have expertise in constitutional law, and be equipped to give meaning to constitutional values.
33. These are suggestions to contribute to what we hope will be a rigorous engagement by the JSC with the question of the criteria on which candidates will be recommended to the President for appointment. We do not suggest that this list is exhaustive – it would in any event be read together with the Constitutional requirements found in sections 174(1) and (2), namely that a judge be fit and proper, appropriately qualified, and that the need for the judiciary to reflect broadly the racial and gender composition of the country must be considered.

COMMENTS ON THE APRIL 2021 SITTING

34. The April 2021 sitting presents a unique set of circumstances, as it effectively combines two rounds of interviews – the postponed April 2020 interviews, and the separate vacancies advertised for the April 2021 sitting.
35. This presents a challenge for the JSC in respect of the Constitutional Court vacancies. One vacancy was advertised for April 2020, and a second vacancy was advertised for the April 2021 interviews. Section 174(4)(a) of the Constitution provides that the JSC must furnish the President with a list of nominees “with three names more than the number of appointments

to be made". It is not clear to us whether this means the JSC should submit one list of five candidates (being three more than the two vacancies), or two lists of four candidates each.

36. The situation is complicated by there being significant, but not complete, overlapping of candidates for the two vacancies. The JSC will obviously be keen to avoid any unfairness to candidates. On reflection, we think that the text of the Constitution would lead to one shortlist of five candidates being submitted, since there are two vacancies to be filled, regardless of the fact that one of them is "rolled over" from 2020.
37. A second unusual situation is presented by the position of Deputy Judge President Ledwaba on both the Constitutional Court and Supreme Court of Appeal lists of candidates. The challenge this presents relates to the different ways in which judges are appointed to these two courts. Whilst the President appoints Constitutional Court judges from the list prepared by the JSC, SCA judges are appointed on the advice of the JSC (section 174(6) of the Constitution), with no choice being made from a list of options. As there is usually an inevitable time lag on Constitutional Court appointments while the President's decision is being made, it will presumably not be possible for the JSC to be aware of the outcome of that decision when the SCA appointments are considered.
38. It is therefore possible to imagine some anomalous situations arising in the case of DJP Ledwaba. He might be placed on the JSC's list to be sent to the President, and on that basis not appointed to the SCA. However, if he were then not appointed by the President, it would seem perverse for him to have been excluded on that basis. On the other hand, if he were included on the Constitutional Court shortlist, and then recommended for appointment to the SCA, this would create a problematic situation of conflicting appointments. We wish to highlight this issue so that the JSC can factor these practicalities into their decision-making process in respect of these two courts.
39. Finally, in addition to the two Constitutional Court vacancies being considered in April 2020, we understand that there will be three more vacancies on the Constitutional Court before the end of 2021, as the tenure of Chief Justice Mogoeng and Justices Jafta and Khampepe come to an end. The appointment of the Chief Justice is a distinct process under section 174(3) of the Constitution, and we appreciate that the JSC will only be in a position to fulfil its role once the President has put forward a candidate or candidates. If the other two vacancies are only advertised for the JSC's usual sitting in October, we anticipate that there will in all likelihood be a significant time period between the two Justices' tenures coming to an end, and the President making a decision on their replacements. We submit that the lack of permanent Justices on the court is undesirable and should be avoided as far as possible.
40. We further note that there are other significant position in the judiciary which are either about to become vacant or have already stood vacant for some time, such as the position of Judge President of the Competition Appeal Court and the Deputy Judge President of the Labour Court. In these circumstances, we urge the JSC to give serious consideration to holding a special sitting in the middle of 2021, to ensure that these vacancies are filled as promptly as possible.

ACKNOWLEDGEMENTS

41. The sheer scale of this research report presented some serious challenges for the research team, and a combination of the sheer volume of work required and external factors beyond our control caused a significant delay in finalising the report. This also impacted, in respect of some candidates, on how fully we were able to research media coverage and academic commentary in respect of the candidates. We can only apologise to the JSC for the delay, and hope that the report can still be of use.
42. The research was conducted by Chris Oxtoby, DGRU senior researcher, and Amma Sarfo - Adomah, Hanani Hlomani, Kimberly Rimber, and Yakubu Nagu, DGRU research assistants.
43. We are grateful for the financial support of the Open Society Foundation and the Raith Foundation for making this project possible.

DGRU, MARCH 2021

ADVOCATE ALAN DODSON SC

BIOGRAPHICAL DETAILS

Born: 10 July 1960.

BComm, University of KwaZulu – Natal (1982)

LLB (cum laude), University of KwaZulu – Natal (1984)

LLM, University of Cambridge (1988)

Post – graduate Diploma in Tax Law, University of Cape Town (1992)

CAREER PATH

Acting Judge

Gauteng High Court, Johannesburg Local Division (2012, 2014, 2015, 2018)

Land Claims Court (2017)

Labour Court (2012)

Independent Regulatory Board for Auditors Disciplinary Committee

Chairperson (2011 -)

Vice chairperson (2006 – 2011)

Director of litigation, Legal Resources Centre (2004 – 2006)

Advocate, Johannesburg Bar (2001 onwards, appointed senior counsel 2011)

Chairperson, UN Housing and Property Claims Commission (2000 – 2007)

Judge, Land Claims Court (1995 – 2000)

Mallinicks Inc (1988 – 1995)

Head of Public Interest Law Department (1988)

Director / Partner (1992)

Articled clerk / professional assistant, Mallinick, Ress, Richman & Closenbergs Attorneys (1985 – 1987)

Member, Minister of Justice’s Reference Group on Land Justice (2019 -)

Member, Higher Education Parents Dialogue (2016)

Member, Progressive Lawyers Organisation / NADEL (1985 – 1995)

Member, African National Congress (approximately 1992 – 1995)

SELECTED JUDGMENTS**COMMERCIAL LAW****FIRST NATIONAL BANK, A DIVISION OF FIRST RAND BANK LTD V FRANSCH (17347/2011) [2012] ZAGPJHC 277 (29 NOVEMBER 2012)****Case heard 3 - 4 October 2012, Judgment delivered 29 November 2012**

This case dealt with the issue of a bank's right to foreclose on a mortgage bond where the loan had been subject to a debt rearrangement under the National Credit Act (NCA), and the bond holder had defaulted on their obligations in terms of the rearrangement.

Dodson AJ first considered the defendant's argument that the rearrangement order would first have to be rescinded. [Paragraph 28]. Dodson AJ rejected this argument, holding that a rearrangement order only amended the repayment terms of the credit transaction, and did not prohibit legal proceedings against the consumer. [Paragraph 31].

Defendant argued that the plaintiff was obliged to give prior written notice before commencing proceedings. Dodson AJ applied the Supreme Court of Appeal judgment in *Collett v FirstRand Bank Ltd*, and held that the debt review process had been completed when the rearrangement order was made. Hence, there was no need or obligation for the debt review process to be terminated by written notice. [Paragraph 44]. Dodson AJ rejected an argument by the defendant that further debt relief should be ordered in terms of section 85 of the NCA. [Paragraphs 51 – 55].

Dodson AJ then considered whether the right to housing precluded relief being granted. After considering the Constitutional Court judgments in *Jaftha v Schoeman* and *Gundwana v Steko Development*, Dodson AJ found that "one is dealing here with neither a trifling debt nor an indigent defendant" [paragraph 58], and that as the defendant had been in default of his obligations when the initial summons was issued, the commencement of proceedings had not been breach of section 88(3) of the NCA, nor did it amount to an abuse of court process in terms of the *Jaftha* decision. [Paragraph 67].

Judgment was granted for the plaintiff, and the immovable property declared executable.

CIVIL AND POLITICAL RIGHTS**FNM V THE REFUGEE APPEAL BOARD AND OTHERS (71738/2016) [2018] ZAGPPHC 532; [2018] 4 ALL SA 228 (GP); 2019 (1) SA 468 (GP) (12 JULY 2018)****Case heard 10 May 2018, Judgment delivered 12 July 2018.**

Applicant, a citizen of the Democratic Republic of Congo, sought to review a decision of the Refugee Appeal Board (RAB) which upheld the rejection of applicant's claim for refugee status by a Refugee Status Determination Officer. Applicant claimed to have been forcefully conscripted into the DRC army, to have deserted, and to have been captured by rebels. [Paragraphs 2 – 10]. Applicant asserted that he feared for his life if he returned to the DRC, as he would be punished for desertion. [Paragraph 26]. The RAB determined that applicant would be safe if he returned to the DRC. [Paragraph 40].

Dodson AJ found that the RAB had acted in a procedurally unfair manner in placing the burden of proof on the applicant, and making "no reference to the required inquisitorial and facilitative approach." [Paragraph 48]. Dodson AJ then found that, before relying on new country of origin

information, the RAB should have obtained a response from the applicant to the information, but had failed to do so. [Paragraphs 53 – 54]. Dodson AJ found that the RAB had failed to consider section 3(a) of the Refugees Act, relating to fear of persecution and disruption of public order, as a basis for refugee status. [Paragraphs 57 - 58].

On the question of whether it would have been safe for the applicant to return home, Dodson AJ held that the RAB had made “no attempt to conduct any rational analysis of the country of origin information as against the provisions of section 3(b) and the applicant's particular circumstances. The RAB jumped to a conclusion.” [Paragraph 69].

The decision of the RAB thus stood to be reviewed and set aside. [Paragraph 73]. Dodson AJ found that the applicant qualified for refugee status. [Paragraph 91]. Dodson AJ held that there had in addition been “serious delays in the decision-making process”, and that:

“[t]he RAB also displayed incompetence. The quality of its written decision is poor. It is internally contradictory, unclear, indicative of a lack of understanding of the governing legislation and lacking in reasoned analysis of the information available to it. This should not be the case when the RAB is meant to represent the apex of the administrative decision-making process.” [Paragraph 93]. An order of substitution was granted, declaring that the applicant qualified as a refugee. [Paragraph 98].

SOCIO – ECONOMIC RIGHTS

ASHANTI WINE AND COUNTRY ESTATE (PTY) LIMITED V SMITH AND OTHERS (LCC245/2016, LCC251/2016, LCC246/2016, LCC252/2016, LCC236/2016, LCC253/2016) [2017] ZALCC 8; [2017] 3 ALL SA 709 (LCC) (28 FEBRUARY 2017)

Case heard 31 January 2017, Judgment delivered 28 February 2017.

This was an appeal against the Magistrates’ court’s dismissal of eviction applications brought under the Extension of Security of Tenure Act (ESTA). Respondents had occupied cottages on a farm in terms of their employment, which was lawfully terminated [paragraph 6].

Dodson AJ (Canca AJ concurring) considered the requirements for termination of the right of residence under ESTA [paragraph 21 ff], and dealt with the question of whether the termination of the rights of residence was just and equitable. [Paragraph 32]. Dodson AJ held that, “[g]iven the particular hardships for the respondents that would flow from an eviction”, there ought to have been an effective opportunity to make representations before the decision was taken to terminate their right of residence. Appellants had failed to provide sufficient information to allow the court to assess whether there had been an effective opportunity to make representations. The appellant failed to prove that a fair procedure had been followed in terminating the right of residence. [Paragraph 45].

Dodson AJ concluded that whilst “the magistrate’s reasoning was flawed in several respects”, the order dismissing the application had been correctly made. [Paragraph 72]. The court further encouraged “the parties, along with the municipality and the Department of Rural Development and Land Reform, actively continue to seek a long term solution to the problem of the respondents’ accommodation as well as the problem relating to sanitation.” [Paragraph 74]. The appeal was dismissed.

ADMINISTRATIVE JUSTICE**UMSO CONSTRUCTION (PTY) LIMITED V CITY OF JOHANNESBURG AND ANOTHER (2018/17263)
[2018] ZAGPJHC 522; [2018] 4 ALL SA 507 (GJ) (31 MAY 2018)**

Case heard 22 May 2018, Judgment delivered 31 May 2018.

This was an urgent application to restrain the first respondent from proceeding with a tender process for the construction of civil engineering infrastructure and low cost housing in Soweto. The tender related to essentially the same work which had been the subject of an earlier tender in 2015. Applicant was part of a joint venture which submitted a bid for the 2015 tender, but was unsuccessful. Applicant sought to interdict the new tender from being processed, pending judicial review of the City's decision not to proceed with the 2015 tender. [Paragraphs 1 – 3].

Dodson AJ dismissed points in limine regarding the applicant's standing [paragraphs 65 – 76] and non-joinder of other unsuccessful parties to the initial bid [paragraphs 77 – 89]. Dodson AJ then turned to consider whether the applicant had show a prima facie right. Dodson AJ found that applicant had never been given the opportunity to respond to allegations of fraud and invalidity in relation to its tax clearance certificates. It was a well established principle that "before a public authority takes a decision on the basis of which the affected party was unaware, that authority must inform the party of that information and the affected party must be given the opportunity to be heard in relation to that information." [Paragraphs 94 – 95]. Dodson AJ found further that the city's decision making regarding the withdrawal of one of the joint venture members was, on the face of it, "dealt with in a similarly procedurally unfair manner", and that the minutes of a committee meeting demonstrated that the applicant had "a number of further potential grounds for a review of the City's decision-making." [Paragraphs 97 – 98]. The applicant established that it had a prima facie right [paragraph 115].

Dodson AJ found that the applicant faced irreparable financial hard if the relief was not granted, since the award of a new tender would render the review of the earlier tender moot [paragraphs 116 – 118]. Dodson AJ held that the balance of convenience favoured the applicant. The delay for the City in resolving who would carry out the project work was primarily caused by the City's own conduct in dealing with the initial tender, and in delaying providing the record in the review proceedings. [Paragraphs 119 – 125]. Dodson AJ found that there was no other satisfactory remedy [paragraphs 126 – 129], and that the matter was urgent [paragraphs 130 – 135]. On urgency, Dodson AJ found that one of the decisive factors was:

"that each of the parties makes serious allegations of corruption or fraud against the other. The City's allegation in this regard is, at this stage, a flimsy one. The applicant, by contrast, has put up sufficient evidence to raise real concerns ... If interdictory relief is not granted because the matter is found not to be urgent and the review proceedings are allowed to become moot, there is a risk that the alleged malfeasance will never receive judicial scrutiny. Moreover, in a society that has been brought to its knees by corruption, allegations of corrupt activity that have a reasonable measure of substantiation lend weight to an argument that the matter should be heard on an urgent basis." [Paragraph 134].

The application succeeded.

AIRPORTS COMPANY SOUTH AFRICA LIMITED V AIRPORT BOOKSHOPS (PTY) LTD T/A EXCLUSIVE BOOKS (31580/2014) [2015] ZAGPJHC 154; 2016 (1) SA 473 (GJ); [2015] 3 ALL SA 561 (GJ) (3 JULY 2015)

Case heard 11 May 2015, Judgment delivered 3 July 2015.

This was an application to evict the respondent from a shop in the international departures terminal of OR Tambo airport, applicant having selected a new tenant following a competitive tender process. Respondent claimed to be entitled to remain until the determination of its judicial review of the tender process. [Paragraphs 1 – 2]. The parties had entered into an extension agreement which was renewed on a month by month basis. [Paragraph 4]. Applicant argued that this gave them the right to terminate the lease on one month’s notice. [Paragraph 15]. Respondent argued that the extension agreement included a tacit term that that neither party could terminate the agreement until the completion of a valid and lawful tender process to identify a new tenant. [Paragraph 25].

Dodson AJ considered the law relating to tacit terms [paragraphs 26 – 40]. Dodson AJ analysed the facts to determine whether the tacit term could be implied, and examined whether section 217 of the Constitution, relating to procurement, was applicable. [Paragraphs 41 – 51]. At issue was whether the phrase “contracts for goods or services” in section 217(1) of the Constitution applied only to the acquisition of goods and services, or whether it also extended to the disposal of goods, such as (in this case) the sale or letting of state-owned immovable property. [Paragraph 56]. Dodson AJ held that:

“Whilst the letting of the shop involves the disposal by way of letting of a state asset, the effect of the contract is to provide a service for those members of the public making use of the departures area at the airport. Absent a private bookstore operator ... ACSA would be expected to provide a similar service itself. In my view that falls within the concept of “*contracting for goods and services*”, particularly on the purposive approach that I am bound to adopt in the interpretation of the Constitution.” [Paragraph 63].

Dodson AJ held that the constitutional and statutory framework for contracting by an organ of state applied to the extension agreement. [Paragraphs 65 – 67]. On the balance of probabilities, the tacit term contended for by the respondents was necessary [paragraph 74], and was capable of clear and precise formulation [paragraphs 76 – 81]. Dodson AJ held that the only way the respondent could resist eviction was if it was entitled and able to show that applicant had failed to comply with the lawfulness requirement of the tacit term. [[Paragraph 86]. Whether the lawfulness point could be raised depended on whether respondent was entitled to bring a collateral challenge to the validity of the tender process. [Paragraph 87].

Dodson AJ held that the respondent was entitled to bring such a challenge [paragraph 101], and analysed the grounds of the challenge [paragraphs 107 ff]. Dodson AJ held that the ground that the respondent’s bid had been rejected due to failure to provide a tax clearance certificate was arbitrary and not rationally connected to the available information. [Paragraph 114]. Furthermore, relevant information regarding minimum rental turnover was not considered. [Paragraph 124]. Furthermore, information to which the successful bidder was privy had not been disclosed to the respondent, which distorted the competitive bidding process [paragraphs 134 – 135].

Applicant thus failed to show that it had completed a lawful tender process. [Paragraph 137]. The application was dismissed. An appeal to the SCA was dismissed by a 4 – 1 majority in **Airports Company South Africa Soc Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books (945/2015) [2016] ZASCA 129; [2016] 4 All SA 665 (SCA); 2017 (3) SA 128 (SCA) (27 September 2016)**.

LABOUR LAW**HENRED FRUEHAUF (PTY) LTD V HLONGWANE NO AND OTHERS (JR1982/2009) [2012] ZALCJHB 82 (8 AUGUST 2012)****Case heard 12 July 2010, Judgment delivered 8 August 2012**

This was an application to review and set aside an arbitration award which had found the dismissal of the three shop stewards to be unfair, and ordering their reinstatement. The shop stewards who had been dismissed for failing to honour a picketing agreement. At issue was whether the dismissals were substantively fair. [Paragraph 37].

Dodson AJ considered the factual background and the award given by the arbitrator, and then analysed the reasonableness of the decision in terms of the code of Good Practice for dismissal in the Labour Relations Act. [Note: this section of the judgment repeats paragraph references, so these are not given].

Dodson AJ considered whether a rule or standard regulating conduct in the workplace had been contravened. Dodson AJ held that the arbitrator had failed “to conduct any weighing up whatsoever of the competing evidence and contentions advanced”, and erred in finding that there was no evidence that the shop stewards had done nothing when strikers had acted violently. Dodson AJ found that:

“Having regard to the detailed evidence that was given about the various incidents of violence that took place, a reasonable decision-maker could hardly have concluded on this basis that there was a continuous and on-going effort by the shop stewards to dissuade their members from unlawful action.”

Dodson AJ held further that there was “no logical path setting out the first respondent’s reasoning” in finding that the picketing crowd was uncontrollably angry due to the non-payment of wages. Dodson AJ found that the arbitrator’s finding that, since the police had been unable to control the strikers the shop stewards could not have been expected to, was “an uncritical and unexamined acceptance of a contention advanced by the respondents.”

Dodson AJ concluded that the award stood to be reviewed and set aside. On the appropriate remedy, Dodson AJ considered the Constitutional Court judgment in *Sidumo*, and found that in the circumstances it was appropriate for the court to substitute its decision for that of the arbitrator. The arbitration award was set aside, and substituted with an order that the dismissal was fair.

DU PREEZ V L.S. PRESSINGS CC AND ANOTHER (J861/11) [2012] ZALCJHB 74; (2013) 34 ILJ 634 (LC) (26 JULY 2012)**Case heard 10 July 2012, Judgment delivered 26 July 2012.**

This was an application for the joinder of the second respondent to the proceedings. Applicant had been dismissed by the first respondent “on the alleged basis that it was going into liquidation” [paragraph 4], and obtained a default arbitration award from the CCMA declaring the dismissal to be previously and substantively unfair. [Paragraph 5]. First respondent did not honour the award, and in the course of trying to enforce the award, applicant discovered that the second respondent was carrying on the work of the first respondent. [Paragraph 6]. Applicant argued that there had been a

transfer of business from the first to the second respondent, and sought to join the second respondent as a party to proceedings. [Paragraphs 8, 10].

Dodson AJ held that “[u]nfortunately, whilst I have great sympathy for the predicament in which the applicant finds himself, there are two fundamental difficulties with the joinder”. [Paragraph 11]. The first was that there were no proceedings in the Labour Court between the applicant and first respondent to which the second respondent could be joined. First respondent’s default arbitration award was not an order of the Labour Court, but an award that could be enforced by the Labour Court as if it was such an order. [Paragraphs 12 – 14].

Second, the proceedings before the CCMA were complete and the commissioner was functus officio, which precluded joinder. Dodson AJ found that:

“The effect of joining the second respondent to the proceedings in which there is already a default award, without any prior rescission of the award, and of seeking to hold the second respondent liable on the basis of the award, would be to allow judgment to be taken and enforced against the second respondent without its ever having been heard.” [Paragraph 18].

The application for joinder was dismissed, with no order as to costs.

CIVIL PROCEDURE

KGOMO AND ANOTHER V STANDARD BANK OF SOUTH AFRICA AND OTHERS (47272/12) [2015] ZAGPPHC 1126; 2016 (2) SA 184 (GP) (15 JUNE 2015)

Case heard 4 May 2015, Judgment delivered 10 June 2015.

This was an application for rescission of a default judgment, following the applicants’ default on their mortgage loan. Applicants argued that the default judgment had been wrongly granted as the bank had failed to comply with the National Credit Act (NCA) by not giving notice before commencing legal proceedings. Dodson AJ noted that the case was “unusual in that the parties rely on seemingly conflicting judgments of the Constitutional Court in seeking and resisting rescission respectively.” [Paragraph 1].

Dodson AJ analysed the Constitutional Court decisions in *Sebola v Standard Bank*, where it was held that sending notification with the correct address via the post office did not constitute sufficient compliance with the delivery of notice requirement [paragraphs 16 – 22]; *Ferris v FirstRand Bank Ltd*, which held that the bank was entitled to enforce a loan without further notice where a debt restructuring order had been breached [paragraphs 23 – 28] and *Kubyana v Standard Bank*, where the *Sebola* judgment was qualified but affirmed [paragraphs 29 – 33].

The applicants relief on the *Sebola* decision to argue the rescission should be granted. The bank relief on the *Ferris* decision to defend the granting of default judgment. Dodson AJ held that the Constitutional Court authority in *Sebola* and *Kubyana* required strict compliance with the notice provisions of the NCA [paragraphs 38 – 41]. Dodson AJ held that it was not necessary to reconcile the *Sebola* judgment with an apparently contradictory dictum in the *Ferris* judgment, since the *Ferris* dictum was *obiter dictum*, and this case was distinguishable from *Ferris* as the cases dealt with notice under different sections of the act. [Paragraphs 49 – 52].

Strict compliance with the applicable notice provision was therefore required, and on the facts of the case the applicants were entitled to rescission of the default judgment [paragraphs 54 – 58].

SELECTED PUBLICATIONS

“THE NATIVES LAND ACT OF 1913 AND ITS LEGACY”, *ADVOCATE* APRIL 2013, 29 – 32.

The article examines the circumstances leading up to and during the passing of the Act, the impact of the Act and “the efforts during the constitutional era to address its pernicious legacy.” [Page 29].

The article notes that “[w]ide – scale dispossession of land from the indigenous community of South Africa was, of course, not a phenomenon which only began in 1913.” [Page 29]. The effect of the Act is described as being “to outlaw at least two of the forms of tenancy which had been practised on such a wide scale by African farmers – rental tenancy and share cropping”, leading to displacement “on a massive scale.” The article also discusses Sol Plaatjie’s efforts to lobby against the Act. [Page 30].

The article further discusses the impact of the *Native Trust and Land Act* [pages 30 – 31] and argues that the two Acts “directly and indirectly, formed the basis for a massive and intensified campaign of forced removals by the apartheid government during the period from 1960 to 1983, when more than 3.4 million people were forcibly removed.” [Page 31].

The article then considers the constitutional era reform process:

“The call to afford property rights constitutional protection was met with a corresponding demand to address the fate of those whose property rights had been trampled on during the colonial and apartheid eras. Understandably there were demands to remedy dispossession going back to the earliest stages of colonisation. However, the constitution-making process was one of compromise.” [Page 31].

The article discusses the *Restitution of Land Rights Act* of 1994, and challenges experienced in the land restitution process [pages 31 – 32].

“Soon after the commencement of the restitution process a view was taken that the settlement of claims in preference to their adjudication through the Land Claims Court would speed up the process. The court’s powers of scrutiny over land claim settlements were largely removed and the commission took upon itself the role of attempting to finalise claims in this way. This policy is what the government terms the ‘willing seller – willing buyer’ policy. Unfortunately this may have been a costly mistake as the statistical evidence suggests that the price of land acquired through the restitution process has proven excessive. ... Realisation of the flawed nature of the existing approach has been signaled by recent government announcements that it is abandoning the ‘willing seller–willing buyer’ policy.” [Page 32].

The article concludes that:

“The legacy of the Natives Land Act has proven to be a pernicious and enduring one. Remedies to address that legacy effectively have proven elusive. But the sheer scale of the injustice done demands that the endeavor to find just solutions must continue.” [Page 32].

MEDIA COVERAGE

Interview for Legal Resources Centre Oral History Project, 23 July 2008 [available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AG3298/AG3298-1-038-text.pdf].

"I suppose that my sense of social justice probably comes from growing up in a fairly liberal family. Although I wouldn't, as a child, have perceived of myself as having a sense of social justice. ... [H]aving a sense of social justice I think, certainly in my case, was something that really emerged at university. And it was at university that I became far more aware than in the context of school or my childhood, of the inequalities in South African society. And also of the brutality of the apartheid state. " [Page 1].

"[The Constitutional Court has] proved to be a highly successful court, it's proved a willingness to be innovative, it's proved a willingness to be open to listen to cases that are brought by poor and disempowered people, it hasn't developed a jurisdiction which has the effect of excluding people who lack resources. So, it's also, and also very importantly it's made the development of its socio-economic rights jurisprudence a very important part of its work. And it's gone about it in a careful and creative way." [Page 19].

JUDGE FAYEEZA KATHREE - SETILOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 19 August 1965

BA, University of Natal (1988)

LLB, University of Natal (1991)

LLM, Georgetown University Law School, Washington DC (1993)

CAREER PATH

Acting Judge of Appeal, Competition Appeal Court (January – December 2018; January – December 2019; January – December 2020)

Acting Judge of Appeal, Labour Appeal Court (June – December 2014, December 2016 – May 2017, July 2018 – December 2018; July – December 2019; July – December 2020)

Acting Justice, Constitutional Court (July 2017 – December 2017)

Acting Justice, Supreme Court of Appeal (December 2015 – May 2016)

Judge, High Court, Gauteng Local and Provincial Divisions (Pretoria and Johannesburg) (2010 – present)

Acting Judge, South Gauteng High Court (February – October 2010)

Director, Werksmans Advisory Services (Pty) Ltd (2006 - 2010)

Practising Advocate, Johannesburg Bar (1997 – 2006)

Advocate, Constitutional Litigation Unity, Legal Resources Centre (1996 – 1997)

Law Researcher to Justice Mokgoro, Constitutional Court (1995 – 1995)

Lecturer, University of the Western Cape (1994 – 1995)

Senior Research Fellow, Gender Project, Community Law Centre, UWC (1994 – 1995)

Election Administrator, Independent Electoral Commission, Northern Cape Provincial Office (1994)

Lecturer, University of Maryland School of Law, Baltimore, USA (1993 – 1993)

Fellow, Legal Resources Centre, Durban (1991 – 1992)

Board Member, Centre for the Study of Violence and Reconciliation (2009 – 2020)

Board Member, Institute of Directors Southern Africa (2015 – 2020)

Alternate Director to Board of Directors, ProBono.org (2008 – 2009)

Board Member, AGENDA Feminist Media Project and Journal (2005 – 2007)

Deputy Chairperson, Broadcasting, Monitoring and Complaints Committee of ICASA (2005 – 2006)

SELECTED JUDGMENTS**COMMERCIAL LAW****S.O.S SUPPORT PUBLIC BROADCASTING COALITION AND OTHERS V SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED AND OTHERS 2019 (1) SA 370 (CC) (28 SEPTEMBER 2018)****Case heard 23 November 2017, Judgment delivered 28 September 2018**

This case concerned the interpretation the Competition Appeal Court gave to its own order, concerning the powers of the Competition Commission. The underlying issue related to the Commission's powers regarding a controversial agreement between the SABC and MultiChoice. The application arose in the context of a pending, court-sanctioned investigation by the Commission into whether their agreement constituted a notifiable merger, and the main issue in the case related to the ambit of the powers of the Commission to investigate whether the agreement constituted a notifiable merger. The SABC and Multichoice argued that the Commission was limited to a “desktop study” of the documents provided and was excluded from exercising any powers of investigation. The Applicants and the Commission argued that the Commission was permitted to make use of a range of standard investigative powers as set out in the Competition Act, and that those powers were necessary to ensure the Commission was suitably equipped to undertake its court-mandated task of investigating whether the said agreement amounted to a notifiable merger.

Kathree – Setiloane AJ (Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring) first considered the issue of whether the powers under part B, chapter 5 of the Competition Act were available to the Commission to determine whether the agreement constituted a notifiable merger, and held that:

“What would it mean to merger regulation if the Competition Act is construed as not permitting the Commission to investigate transactions that may constitute notifiable mergers, or are suspected of being so but are implemented without notification? In a compulsory 'self-notification' statutory regime, where parties to a transaction fail or refuse to notify the Commission of a merger, the Commission would be powerless to investigate whether it is notifiable or not. This would effectively leave the Commission at the mercy of parties to a transaction. If those parties notify the Commission of a merger, then it has the full range of investigative powers. But if they refuse to notify the Commission, even intentionally, the Commission is powerless to investigate.” [Paragraph 44]

Kathree – Setiloane AJ held that the need to summons relevant information and documents from persons believed to be in possession or control thereof, as well as the need to summons persons with knowledge of relevant facts, was crucial to the powers of the Commission to investigate mergers and transactions that may give rise to a merger.

“Any contrary interpretation would defeat the purpose of merger regulation under the Competition Act which is to maintain competitive market structure by ensuring 'that transactions which are likely to substantially . . . lessen competition should be carefully examined by the competition authorities'”. [Paragraph 49].

Kathree – Setiloane AJ held that the Commission’s investigative powers were legislatively mandated by the Competition Act, and unless the court order specifically prohibited the Commission’s use of its coercive and non-coercive statutory powers in carrying out its mandate, the Commission’s powers remained intact.

AFRICAN BANKING CORPORATION OF BOTSWANA LTD V KARIBA FURNITURE MANUFACTURERS (PTY) LTD AND OTHERS [2013] 4 ALL SA 432 (GNP)

Case heard 3 - 4 June 2013, Judgment delivered 29 August 2013

Applicant sought relief relating to business rescue proceedings of the first respondent. At issue was the meaning and constitutionality of the “binding offer” provision in section 153(1)(b)(ii) of the new Companies Act. The term was not defined in the Act and was argued by the Bank to mean that that an offer was binding on the offeror only and that the offeree was free to accept or reject it. The respondent contended that the offer was binding on both the offeror and the offeree. [Paragraph 22].

Kathree – Setiloane J held that a “binding offer” in the Act was not an ‘option’ or ‘agreement’ in the contractual sense, but was a set of statutory rights and obligations, from which neither party may resale. This was to ensure compliance with the procedure to revive a business rescue and enforce a revised business rescue plan. [Paragraph 29] Therefore, the proper interpretation of the section was that a ‘binding offer’ is binding on both the offeror and offeree once made. [Paragraph 36].

The bank contended that such an interpretation was a violation of their constitutional rights to property, access to court and equality. Regarding property rights, the bank argued that a right to claim payment from a debtor and the right to vote in a statutory meeting convened for voting on a business rescue plan constituted “property” within the meaning of the Constitution. Kathree – Setiloane J accepted that these rights constituted property but found that there was no disproportion between the means adopted in the Act and the end which it sought to achieve. Furthermore, the section served a “compelling and legitimate governmental purpose”, and the deprivation of the voting interest in the company accompanied by compensation, was not arbitrary. The challenge in terms of s 25 of the Constitution thus failed.

Insofar as the right to access to court is concerned, Kathree – Setiloane J held that whilst it was “arguable” that the right was limited, such limitation was justifiable in terms of s36 of the Constitution. [Paragraph 49]. Regarding the equality argument, it was held that no one person was accorded preference over another in the Act.

“Accordingly, s 153(1)(b)(ii) of the Act is not unconstitutional as it does not differentiate between people, and categories of people, in violation of s 9(1) of the Constitution.” [Paragraph 55].

The decision was overturned in the SCA in **AFRICAN BANKING CORPORATION OF BOTSWANA LTD v KARIBA FURNITURE MANUFACTURERS (PTY) LTD AND OTHERS 2015 (5) SA 192 (SCA)**. The SCA found that the term “binding offer” was predominantly similar in nature to the common law offer, though it may not be withdrawn by the offeror until the offeree responds. Thus, in this case a binding offer was never made, and consequent resolutions made were null and void.

CIVIL AND POLITICAL RIGHTS

**MOTSWANA AND OTHERS V AFRICAN NATIONAL CONGRESS AND OTHERS (35398/18) [2019]
ZAGPJHC 4 (6 FEBRUARY 2019)**

Case heard 30 January 2019, Judgment delivered 6 February 2019

This was an application to declare the decision of the National Executive Committee of the African National Congress to disband or dissolve the North West Province Executive Committee, to be unlawful. The application was based on procedural fairness and substantive irrationality, in that the branches and regions were not notified of the impending decision, nor were they consulted or give proper reasons for the decision. Further, in relation to the substantive legality argument, applicants argued that the NEC had failed to comply with the requirements set out in the ANC Constitution, and failed to demonstrate the necessity of dissolving the PEC. Central to the relief sought was whether the decision to disband the PEC violated the applicant’s rights in terms of s19 of the Constitution.

Kathree – Setiloane J rejected an argument that the relief sought was moot, holding that resolution of the issue was “of paramount importance to the larger public as well as to the general ANC membership, and that determination of the question would provide certainty for the future. [Paragraph 20].

Regarding the issue of procedural fairness, Kathree – Setiloane J held that the ANC Constitution stipulated that the powers of the NEC to dissolve or disband a PEC were constrained by the requirements of necessity and procedural fairness. [Paragraph 38]. The branches in the four regions were entitled, as a matter of law, to be notified and consulted prior to any decision by the NEC to dissolve the PEC [Paragraph 40]. Kathree – Setiloane J held that the purported consultative meetings were not meetings with the NEC, but rather with the NWC, which had no power to dissolve the PEC. The purpose of the meeting was said to be an assessment of the state of the organisation for its readiness for the general elections.

“This means that Branch members who attended the purported consultative meetings had absolutely no clue that the PEC would be dissolved. Under any interpretation, these meetings do not equate to consultative meetings with the Branches on the question of whether the PEC should be dissolved.” [Paragraph 43].

It was held that the consultative meetings did not meet the standard of procedural fairness, as they had not been properly convened. [Paragraph 45]. The decision of the NEC to dissolve the PEC was set aside, and it was ordered that the disbanded PEC be reinstated. [Paragraph 56].

**NOVA PROPERTY GROUP HOLDING LTD AND OTHERS V COBETT AND ANOTHER 2016 (4) SA 317
(SCA)**

Case heard 1 March 2016, Judgment delivered 12 May 2016

This case concerned interpretation of s26(2) of the Companies Act, which regulates access to securities registers. First respondent was a financial journalist, who had been commissioned by second respondent, a financial-media company, to investigate the shareholding structures of the appellant companies to establish their links to a controversial property-syndication scheme. The companies argued that the right conferred in the Companies Act was qualified, and based on the motive of the seeker. Respondents contend that it was an unqualified right, and that if motive was a factor, it could significantly impact investigative journalism and the public’s right to know.

Kathree – Setiloane AJA (Maya AP, Majiedt and Mbha JJA and Plasket AJA concurring) held that there was no requirement that section 26(2) be exercised in accordance with PAIA, and corrected the ‘unfortunate’ obiter statement in a previous SCA judgment, *La Lucia Sands*. [Paragraph 25].

“PAIA is a general statute. It regulates access to innumerable types of information held by a wide range of bodies, with various different types of interests at stake. Parliament, therefore, had to lay down general rules to balance the competing interests at stake by means of threshold requirements, grounds of refusal and public-interest overrides. By contrast, s 26(2) confers a specific right in respect of one type of information only — securities registers and directors registers.” [Paragraph 21]

Kathree – Setiloane AJA held that Section 26(2) conferred an unqualified right on members of the public and the media to obtain access to share registers. Thus, the motive for seeking the register was irrelevant. [Paragraph 28]. It was held that “[a]n unqualified right of access to a company's securities register is ... essential for effective journalism and an informed citizenry.” [Paragraph 38]. The appellant was unhappy with the potential for further negative reporting, but this could not provide a basis for limiting the exercise of rights under section 26(2) to access the securities register. “The media cannot be precluded from accessing information because the subject of the likely reportage considers that the reportage will be unfavourable and unfair.” Kathree – Setiloane AJA held that such an approach would be inconsistent with well-established legal principles; first that access to accurate information was critical for the right of freedom of expression, and that courts will rarely grant prior restraints on expression. [Paragraphs 43 – 45].

The appeal was dismissed. The Constitutional Court refused leave to appeal.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MCBRIDE V MINISTER OF POLICE AND ANOTHER [2016] 1 ALL SA 811 (GP)

Case heard 27 August 2015, Judgment delivered 4 December 2015

This case concerns the independence of the Independent Police Investigative Directorate (IPID) and whether the authorising legislation afforded it the independence required by the s206(6) of Constitution. Applicant, the Executive Director of IPID, was suspended by the first respondent for alleged misconduct, and sought an order declaring relevant sections of the IPID Act and Regulations, the Public Service Act and the ‘SMS handbook’ to be unconstitutional.

Kathree-Setiloane J found that the independence of IPID was expressly guaranteed under section 206(6) of the Constitution, and “the effect of the constitutional entrenchment of the independence of IPID is that the operational and structural independence of IPID must be at least as strongly protected as that of the DPCI - if not stronger”, since, unlike IPID, there was no express entrenchment of the independence of the DPCI in the Constitution. [Paragraphs 15, 17]. Kathree – Setiloane J held that the Constitutional Court’s recognition in the *Glenister II* judgment of the necessity of an independent corruption – fighting unit for the protection of rights in the Bill of Rights and to meet South Africa’s international obligations, applied with equal force to IPID [Paragraph 19].

Kathree – Setiloane J held that it was “necessary to ensure that both the Directorate and its Executive Director are clothed with adequate independence to avoid 'political interference' from the Police Minister” [Paragraph 27], and turned to determine whether IPID was adequately independent:

“[T]he "overriding consideration" is whether the autonomy-protecting features in the IPID Act enable the members of the investigative unit to carry out their duties vigorously, and without any inhibitions or fear of reprisals. Further, the appearance or perception of independence plays an important role in evaluating whether independence in fact exists.” [Paragraph 29].

Kathree – Setiloane J analysed the impugned provisions [paragraph 38 ff] and found that it was “imperative” that the suspension and removal from office of the Executive Director be subject to parliamentary oversight through a veto power:

“The Minister's power to unilaterally suspend or remove the Executive Director poses substantial risks to the independence of IPID and its ability to investigate corruption and other abuses of power within the police service. An Executive Director who constantly fears for his or her job will be less inclined to carry out these responsibilities where this threatens to embarrass or expose the Minister or other high-ranking politicians.” [Paragraph 55].

Thus, insofar as the impugned provisions purported to authorise the Minister to unilaterally suspend, discipline and remove from office the Executive Director, and did not provide for any parliamentary oversight, it was held that those provisions were unconstitutional and invalid. The resultant decision to remove the Executive Director was unlawful and invalid. [Paragraphs 59 – 60]. A temporary reading in was ordered.

The declaration of invalidity was confirmed by the Constitutional Court in **McBride v Minister of Police and Another (CCT255/15) [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016)**. The Court held:

“The High Court gave adequate consideration to what a just and equitable remedy should be as required by section 172 of the Constitution. Its conclusion was well-reasoned and fully supported by the facts of the case. Accordingly, I confirm the orders of the High Court.” [Paragraph 56].

LABOUR LAW

PHARMACO DISTRIBUTION (PTY) LTD V WEIDEMAN [2017] ZALCJHB 258 (4 JULY 2017)

Case heard 23 February, Judgment delivered 4 July 2017

This was an appeal against a decision of the Labour Court which found the dismissal of the respondent by the applicant to be automatically unfair, the respondent having been singled out to undergo a psychiatric assessment, as she suffered from bipolar disorder. The Labour Court also found the dismissal to be an act of unfair discrimination under the Employment Equity Act.

In the Labour Appeal Court, Kathree – Setiloane AJA (Davis and Jappie AJJA concurring) found that the Employment Equity Act prohibited medical testing, except in limited, defined circumstances. [Paragraph 22]. The evidence showed that the appellant had not required members of its sales staff to undergo medical tests prior to taking up employment, and that the nature of the job was not intrinsically stressful [Paragraph 24]. Kathree – Setiloane AJA found that the Labour Court had been correct to declare the contract provision requiring medical testing to be of no force and effect. [Paragraph 26].

Kathree – Setiloane AJA further held that:

“It is manifestly clear ... that the appellant had discriminated against the respondent because of her bipolar disorder. Crucially, on the appellant’s version, its primary concern was the respondent’s bipolar disorder and the perceived dangers associated with it. On this account, no matter her exceptional performance reviews, and no matter the legitimacy of her grievance, the mere fact that she suffered from bipolar disorder was a matter of such grave concern to the appellant, that she had to be subjected to a psychiatric assessment. So grave did the appellant consider her condition to be, that her refusal to undergo a psychiatric assessment resulted in her dismissal. There was, as a result, a direct causal connection between the respondent’s bipolar disorder and her dismissal. Simply put, but for her medical condition, the appellant would not have dismissed her.” [Paragraph 32]

This was held to amount to unfair discrimination in terms of both the Labour Relations Act and the Employment Equity Act. The decision of the Labour Court on the merits was thus upheld. [Paragraph 34]. A cross-appeal relating to the award of compensation and damages was upheld, increasing the compensation from R220 000 to R285 000 for the automatically unfair dismissal. [Paragraphs 37 – 44]. However, the award for general damages was set aside, as the court found that awarding non-patrimonial damages and compensation for the same wrongful act would not be equitable, as it would be seen as penalising the employer twice. [Paragraphs 45 – 49].

CRIMINAL JUSTICE

S V LIESCHING AND OTHERS 2019 (1) SACR 178 (CC)

Case heard 24 August 2017, Judgment delivered 29 August 2018

This case dealt with the question of whether a post – trial recantation by a material witness in the subsequent trial of a co – accused may constitute an exceptional circumstance in terms of section 17(2)(f) of the Superior Courts Act, which allowed the President of the SCA to refer a decision refusing leave to appeal to the court for reconsideration or variation.

For the majority, Theron J (Zondo DCJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring) held that the nature and justiciability of such an appeal required more detailed argument and thought. Assuming the court had jurisdiction, Theron J held that the President of the SCA had not yet exercised her discretion, and that in any event exceptional circumstances were not present.

Kathree – Setiloane AJ dissented. The judgment considered the meaning of ‘exceptional circumstance’:

“Construed strictly, I consider the words 'rare', 'extraordinary', 'unique', 'novel', 'atypical', 'unprecedented', and 'markedly unusual' to more fittingly exemplify the meaning of the phrase contemplated by s 17(2)(f) of the Superior Courts Act. What we must remain mindful of, though, is that what is exceptional must be determined on the merits of each case. It is a factual inquiry.” [Paragraph 51].

Kathree – Setiloane AJ found that the President of the SCA had erred in not providing reasons for dismissing the section 17(2)(f) application. [Paragraph 63], and that there was a reasonable prospect that the SCA would find that the recantation was true. [Paragraph 91]

“I am of the view that there is a reasonable prospect of the SCA finding, on reconsideration, that it is probable that the new evidence will result in a materially different outcome of the applicants' trial in the High Court — as the new evidence has a direct bearing on the truthfulness of both Mr Abrahams and Mr Arries' testimonies, which were instrumental in sustaining the applicants' convictions.” [Paragraph 99].

SELECTED ARTICLES AND SPEECHES

“Moseneke and Economic Justice” 2017 *Acta Juridica* 205.

This article reflects on issues of economic justice, inspired by the “My own liberator”, the biography of former Deputy Chief Justice Dikgang Moseneke. The article includes reflections on the need for economic restricting, and for it to be balanced against the certainty of property rights, and the role of the judiciary in striking that balance. [Page 216]

“Do we ... accept that the role of the judiciary is limited to making sure that the political outcomes are grounded in law? To my mind there is more that the judiciary can, and should, do.

Firstly ... institutions matter. Economists may haggle over the institutions which matter most for development, but it is almost universally agreed that the enforceability of contracts, the certainty of property rights and the maintenance of the rule of law feature prominently. Each of these requires a strong, independent and active judiciary.

Secondly, economic justice cannot be separated from other aspects of justice and freedom which sit uncontroversially within the domain of the judiciary. ... They [civil and political rights, and socio-economic rights] are interdependent, they reinforce each other, and they are correspondingly important to the transformative mission of attaining social and economic justice. The interpretative role that judges assume, when interpreting and giving content to these rights, will have obvious consequences for the attainment of economic justice. ...” [Pages 216 – 217]

The article highlights the Constitutional Court’s judgments in *Sebola* and *Nkata*, which “have been lauded for creating greater equality between credit market participants”, are also important for showing “that the 'constitutionalisation' of existing law in pursuit of socio-economic ends need not undermine the certainty and confidence on which markets rely.” [Page 218].

“Rich Man, Poor Man: it shouldn't really matter, costs awards in constitutional litigation”, *Without Prejudice*, July 2009.

This article discusses the case of *The Trustees for the Time Being of Biowatch Trust v The Registrar, Genetic Resources and Others*, a Constitutional Court case involving the proper judicial approach to determining costs awards in constitutional litigation. The article notes that Sachs J points out that the primary consideration in constitutional litigation is whether a costs order would hinder or promote the advancement of constitutional justice, not the status of the parties. The *Affordable Medicines* case is cited, which states the irrelevance of the financial ability of a party when making a decision on costs and that unsuccessful litigants cannot be spared costs simply due to a perceived inability to pay. Insofar as costs between private parties and the state is concerned, the Constitutional Court established a principle that if the government loses it should pay the costs of the other side, and if it

wins, each party is to bear its own costs. The exception, however, is that a frivolous or vexatious, or an otherwise manifestly inappropriate application, does not immunise the applicant against costs.

“The issues must be genuine and substantive and truly raise constitutional considerations relevant to the adjudication.” Where private parties are concerned, the approach is that each party is to bear its own costs. Where more than one private party is involved, however, Biowatch determined that the state should bear the costs of the litigants who have been successful against it and that cost orders should not ordinarily be made against private litigants who become involved. Thus, the court in Biowatch ordered that the government pay the costs incurred by Biowatch in the high court and in the Constitutional Court.

“Public Interest Law: Its Continuing Role in South Africa”, *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 it 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.

“Have our Efforts Paid Off? A critique of the New Constitution from a Feminist Perspective”, published in *Agenda, Journal on Women and Gender*, Issue 29, 1996.

This article was written before the Final Constitution came into force and critiqued the working draft of the new Constitution. It discusses women’s rights in general, highlighting the perceived gaps in working draft in relation to women’s rights and suggests ways in which to greater secure and entrench the rights of women. It does so by, inter alia, making reference to CEDAW (both its successes and failures) and the role of the Human Rights Commission in monitoring the fulfilment of this right.

MEDIA AND OTHER COVERAGE

Professor Balthazar, “Interesting points arise out of JSC hearings for ConCourt justices’ appointments”, *Daily Maverick* 8 April 2019 (<https://www.dailymaverick.co.za/opinionista/2019-04-08-interesting-points-arise-out-of-jsc-hearings-for-concourt-justices-appointments/>)

The article comments on various issues arising from the JSC’s April 2019 sitting, including the candidate’s omission from the list of candidates sent to the President for appointment to the Constitutional Court.

“During her interview, Judge Kathree-Setiloane was asked about poor relationships with clerks, as I understand it when she acted at the Constitutional Court. This was followed by questions concerning whether she was overbearing.

This exchange is truly saturated with irony, given the legitimate concern of members of the Judicial Service Commission ... with the issue of gender equality. Here was precisely the kind of comment that applies only to women — overbearing and over-assertive. Men, by contrast, are hardly subjected to the same characterisation, notwithstanding the number of rude men who have been judges over the decades.

One can only hope that neither this description nor the spat with clerks constituted the reason for her omission and that the decision was taken purely on merit; that is, contrary to the anecdotal evidence the JSC considered that the five proposed candidates were more qualified to be Constitutional Court justices.”

“Inequality for Women in the workplace still prevalent, says Judge Fayeeza Kathree-Setiloane”, published on the University of the Western Cape’s news page, 17 September 2018, available at <https://www.uwc.ac.za/News/Pages/Inequality-for-Women-in-the-workplace-still-prevalent,-says-Judge-Fayeeza-Kathree-Setiloane.aspx>

The article reports on an event where UWC and the Dullah Omar Institute hosted Judge Kathree-Setiloane for a conversation with postgraduate student on women’s rights, the Sustainable Development Goals and the building of an inclusive society in South Africa. Quoted as saying that women in South Africa face a great deal of sexual harassment in the workplace and most often women are unaware of workplace policies and procedures that assist them in raising the problem. She also states that it is only once gender-based violence, poverty and structural discrimination are addressed will women see true empowerment and that is it up to the citizens to take responsibility towards its achievement.

JUDGE JODY KOLLAPEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born 19 May 1957, Pretoria.

B. Proc – University of the Witwatersrand (1978)

LL.B – University of the Witwatersrand (1981)

CAREER PATH

Judge, Land Claims Court (October – December 2018)

Acting Justice, Constitutional Court (July – December 2017)

Chairperson, South African Law Reform Commission (April 2013 – July 2018; October 2018 -)

Judge of the High Court (North Gauteng) (2011 to date)

Acting Judge, North Gauteng High Court (2010 – 2011)

Chairperson, South African Human Rights Commission (2002 – 2009)

Deputy Chairperson, South African Human Rights Commission (2001 – 2002)

Commissioner, South African Human Rights Commission (1996 – 2001)

Lawyers for Human Rights (1992 – 1996)

N Kollapen (Attorney) (1982 – 1983; 1988 – 1992)

Moosa Omar and Kollapen (Partner) (1984 – 1987)

Trustee, Legal Resources Centre (2000 to date)

Pretoria Child and Welfare Society (2001 to date)

Laudium Care Services for the Aged (2000 to date)

SELECTED JUDGMENTS**PRIVATE LAW****WILSNACH N.O V M[....] AND OTHERS (22553/2019) [2020] ZAGPPHC 756; [2021] 1 ALL SA 600 (GP) (16 NOVEMBER 2020)****Case heard 13 October 2020, Judgment delivered 16 November 2020.**

This case dealt with the definition of the term “parent” in the Intestate Succession Act. Applicant, the executor of the deceased estate, sought an order to determine who should be regarded as the beneficiaries of the estate. [Paragraphs 1 – 3]. There were claims to inherit from the father, mother and maternal grandmother of the deceased. The deceased had resided with his grandmother, who had been his caregiver. [Paragraphs 6 – 8]. The parents had not been married and had not cohabited. The father was not present at the birth and had “never factually assumed any parental responsibilities”. [Paragraph 12]. Just before the deceased passed away, a court order granted the second and third respondents full parental responsibilities and rights of the deceased, including with regard to guardianship, while the first respondent’s parental rights were terminated. [Paragraph 30]

Kollapen J held that:

“while biological parenthood may well be the starting point of parenthood in all instances, the role and place of a parent beyond birth becomes much more than simply a matter of biology. It often happens that the biological parent ceases to play any further role in the life of the child ...” [Paragraph 40]

Kollapen J found that “parent” was a wide term capable of encompassing different meanings depending on the context, particular factual circumstances and the extent to which the law might regulate the relationship between a child and the person playing the role of parent. [Paragraph 42]. Kollapen J held that the Intestate Succession Act referred to parents in the wide sense, and while it was possible to interpret “parents” as including a biological parent, it must also be possible to interpret “parent” as a parent other than a biological parent “given the lack of specificity in the language used” [Paragraph 58].

Kollapen J found that the father had chosen not to have anything to do with his child “largely on account of the disability that the child was born with”, and that this stood in “stark contrast” with the approach the Constitution and the Children’s Act sought to advance in how children are treated.[Paragraph 63].

Kollapen J held that limiting the definition of “parent” to the biological or natural parent was “simply untenable, will not make sense, will not accord with the understanding of what a parent is and will lead to absurd results.” These results included the first respondent being regarded as a parent for the purposes of the Intestate Succession Act, but not the children’s Act. It would also mean that “someone who has severed all links with the child and who has made a conscious election not to be a parent, will nevertheless retain parenthood for the sole purpose of succession.” [Paragraph 65].

Kollapen J thus held that the first respondent was not a parent as contemplated by the Act, since he did not “meet the factual nor the legal requirements of parenthood and his biological link ... was simply a biological fact that carried no legal consequence.” [Paragraph 68].

The second and third respondents were declared to be parents of the deceased in terms of the Intestate Succession Act.

CIVIL AND POLITICAL RIGHTS

RAHUBE V RAHUBE AND OTHERS 2018 (1) SA 638 (GP)

Case heard 26 September 2017, Judgment delivered 26 September 2017.

In proceedings where applicant sought to claim ownership of property based on the Restitution of Land Rights Act, applicant also argued that section 2(1) of the Upgrading Act was unconstitutional and invalid to the extent that it deprived the occupants of property, who were not holders of a certificate of occupation or a deed of grant, from claiming ownership of the property. The exclusion from holding a certificate of occupation or a deed of grant was argued to be based on gender discrimination. [Paragraph 20].

Kollapen J held that the Upgrading Act “may have been a well-intentioned legislative intervention”, aimed as it was at providing full ownership rights to those whose tenure rights fell short of ownership. [Paragraph 48]. However, the Act effectively vested all ownership rights in the property in the first respondent, while divesting the applicant and potentially others similarly situated, of any entitlement to the property, without affording the applicant or others affected an opportunity to be heard and present a claim for entitlements to the property. [Paragraph 55]. Kollapen J found that the Act’s automatic conversion mechanism, particularly the lack of notice of the conversion and the absence of a procedure to raise issues with the conversion, violated the *audi alteram partem* principle, and was “not reconcilable with the purport and spirit of our Constitution and democracy based on human dignity and equality, not to mention the right to adequate housing.” [Paragraphs 59 – 60].

“In particular, I find s 2(1) is unconstitutional in that it violates s 9 (right to equality) and s 34 (right to access to courts). ... The violation of the applicant's right to equality flows from the Upgrading Act's automatic conversion of the land tenure rights which has a disproportionate and discriminatory impact on the applicant due to her gender.” [Paragraphs 62 - 63]

Kollapen J then considered the scope of the declaration of invalidity necessary, and found that this “may need to be restricted in terms of the time frame of application and the categories of individuals to which it applies.” This court had to provide an adequate remedy not just to the applicant but also to other similarly situated individuals whose constitutional rights had been infringed. [Paragraph 68]. Kollapen J found that compelling circumstances existed to justify an order of retrospectivity [paragraph 73], and that the declaration of invalidity should apply from the date that the Interim Constitution came into effect [paragraph 77]. Kollapen J further held that he was:

“mindful that an open-ended order of retrospectivity may well have serious and far-reaching consequences for persons who in good faith ... relied on and acted upon the ownership rights they would have acquired upon automatic conversion by the Upgrading Act.” [Paragraph 78]

Retrospectivity was limited to instances where the property had been sold to a third party, or inherited by a third party in terms of the law of succession, where the estate was finalised, or where a party to the transfer was on legal notice that the underlying property was the subject of a dispute. [Paragraphs 80 – 81]. The declaration of invalidity was suspended for 18 months.

The declaration of invalidity was confirmed by the Constitutional Court in **RAHUBE v RAHUBE AND OTHERS 2019 (2) SA 54 (CC)**, with variations to the order.

AFRIFORUM AND ANOTHER V CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF PRETORIA AND OTHERS [2017] 1 ALL SA 832 (GP).

Case heard 1 December 2016; Judgment delivered 15 December 2016.

This was an application to review and set aside decisions of the university senate and council to change university language policy, to provide for English as the main language of learning and teaching. Kollapen J (Baqwa and Mabuse JJ concurring) held that Section 29(2) of the Constitution provided that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. However, the exercise of the right to receive education in the language of one's choice cannot negate considerations of race and equity.

"[I]t could hardly be said that UP failed to be responsive to the constitutional rights of Afrikaans students seeking instruction in the language of Afrikaans. Being responsive can hardly equate to having to positively respond to the request made. What it requires is ... to consider the request and determine whether the request is one that is reasonably practicable as contemplated in Section 29(2). I have demonstrated that this exercise, as required, was undertaken with a high level of engagement, thoroughness and transparency and the ultimate conclusion that it would not be reasonably practicable was reached after a proper consideration of all the necessary and relevant factors in a context-sensitive understanding within which the claim was located." [Paragraph 47]

ADMINISTRATIVE JUSTICE

ESKOM HOLDINGS SOC LIMITED V NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND OTHERS (74870/2019) [2020] ZAGPPHC 2 (10 FEBRUARY 2020)

Case heard 15 January 2020, Judgment delivered 10 February 2020

This was an urgent application to allow the applicant to, inter alia, increase various standard electrical tariffs, pending a review of the first respondent's decision in respect of an application for electricity tariff increases [paragraphs 1 – 2]. Applicant argued that the difference in the increase applied for and that granted would result in a shortfall in its revenue of R102 billion over the three financial years in question. [Paragraph 7]. The only issue in this stage of the application related to how respondent had dealt with an annual government equity injection of R23 billion per year in calculating respondent's annual allowable revenue. [Paragraph 8].

Kollapen J considered the requirements for the granting of an interdict. On the question of whether the applicant had shown irreparable harm, Kollapen J found that even if the applicant's version, that it would face dire consequences if interim relief were not granted, were accepted, it was "not clear what the political response to that situation may be." [Paragraph 62]. The financial health and survival of the applicant was ultimately:

"a matter that falls squarely within the remit of the political sphere of government, influenced by the prevailing economic realities as well as the legitimate demands of the developmental state. It cannot be that a tariff determination for effectively a single year should be elevated to determining the survival or the demise of a significant state owned entity and nor is it desirable to leave that determination to a Court." [Paragraph 63].

Kollapen J held further that considering the “myriad of considerations that must ultimately be brought to bear on the operations and the future of Eskom”, it could be said that there was well-grounded apprehension of irreparable harm if the interim relief were not granted. [Paragraph 64].

On the issue of the balance of convenience, Kollapen J noted that if the relief sought were granted, an effective electricity increase of close to 17% in the coming financial year, as opposed to the 8.1% the respondent had approved, would result. Kollapen J found that separation of powers considerations militated “strongly against the Court responding to such an invitation to set a tariff”, and that the court was in any event “also not equipped to make the kind of determinations” required of it. [Paragraphs 69 – 70]. The balance of convenience thus did not favour the granting of the interdict [paragraph 73]. The application was thus dismissed.

NATIONAL COUNCIL OF THE SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS V MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS [2019] 4 ALL SA 193 (GP)

This was an application to have decisions of the first respondent, setting the annual export quotas for lion bones and skeletons, reviewed and declared unlawful and unconstitutional.

Kollapen J dealt first with an argument regarding mootness, holding that even though the impugned export quotas had already been given effect to, in that permits had been issued and the process of exporting bones had been completed, issues raised by the litigation remained alive and it was in the public interest for the court to deal with them. [Paragraphs 40 - 42].

Kollapen J then found that the setting of the quotas constituted administrative action, as it was an action carried out in terms of statute, and which had a direct, external legal effect. [Paragraphs 44 – 50]. Kollapen J found further that the applicant had not been excluded from the consultation process prior to the setting of the quotas. [Paragraphs 51 – 56]. Kollapen J then considered the question of whether welfare considerations relating to Lions in captivity were relevant to the determination of the quotas. [Paragraph 57 ff]. Kollapen J referred to the right to have the environment protected in section 24 of the Constitution, and to the Constitutional Court’s judgment in *National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*, which “speaks to the kind of custodial care we are enjoined to show to the environment for the benefit of this and future generations.” [Paragraph 65].

Kollapen J held that the Minister had erred in concluding that since she did not have the welfare mandate for lions in captivity, she was not obliged to consider welfare issues relating to lions in captivity (if relevant) when determining the quota. [Paragraph 67]. Kollapen J suggested that it was in any event doubtful that the question of welfare fell entirely outside the Minister’s remit. [Paragraph 68]. Kollapen J held further that considering the connection between the welfare interests of animals and conservation, as reflected in judgments of the Supreme Court of Appeal and the Constitutional Court, it was “inconceivable that the State respondents could have ignored welfare considerations of lions in captivity in setting the annual export quota.” [Paragraph 74].

The application was granted, and the quotas were declared to be unlawful and constitutionally invalid.

CIVIL PROCEDURE**HELEN SUZMAN FOUNDATION v JUDICIAL SERVICE COMMISSION 2018 (4) SA 1 (CC)****Case heard 24 April 2018, Judgment delivered 24 April 2018**

The issue in this case was whether the private deliberations of the JSC, in the execution of its mandate to advise the President on the appointment of judges, could be disclosed under rule 53(1)(b) of the Uniform Rules of Court as part of the record of its proceedings? The High Court held that they could not. On appeal, the SCA held that while they were not necessarily excluded from the record, in the circumstances of this case they should not be included in the record.

The majority of the Constitutional Court (Madlanga J, with Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurring) held that there were no reasons to exclude deliberations, as a class of information, from the rule 53 record. The JSC's concerns about confidentiality were overstated, and did not entitle it to refuse to disclose the recordings of the deliberations. The appeal was upheld. Jata J dissented, holding that the word 'record' in rule 53 did not incorporate the JSCs deliberations.

Kollapen AJ (Zondi AJ concurring) wrote a separate dissenting judgment. Kollapen J observed that "[i]n the wide sense," the case "may have relevance for the judiciary — its independence, integrity, efficacy and, in particular, the calibre of those who constitute it." [Paragraph 155].

"Openness is also double-sided. It is imperative that what is constitutionally necessary is seen and heard. However, in order to ventilate what must be seen and heard and to preserve certain core constitutional values, there also has to be an environment in which open and uncensored debate flourishes. In some instances, confidentiality is necessary to ensure such an environment exists, so that what must be shown and said is brought into the light, to factor into constitutionally necessary debates." [Paragraph 160].

Kollapen AJ found that the JSC's deliberations were relevant to the decision under review, and should therefore be included in the record, unless there was a legal justification for their exclusion. [Paragraph 168]. Kollapen AJ held that:

"even in a jurisdiction such as ours, that places a high premium on openness and transparency, policy and the law recognise that, in given situations, even deliberations that meet the threshold of relevance may well be justifiably excluded from a record ... for a variety of reasons, including the dignity and privacy interests of individuals, the integrity of the administration of justice, and the independence of the judiciary." [Paragraph 184]

Kollapen AJ found that maintaining the confidentiality of JSC deliberations was "not only constitutionally sustainable but also necessary to protect multiple constitutional values housed in the Bill of Rights", considering the interests of the candidates, members of the JSC, and the JSC as an institution. [Paragraphs 191 - 204].

CRIMINAL JUSTICE**P V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (66090/18) [2021] ZAGPPHC 77 (4 MARCH 2021)**

The applicant sought an order relating to the conditions of his imprisonment, particularly in relation to visits, including conjugal visits, with his spouse. He also sought the use of a mobile telephone to communicate with his spouse and relatives. [Paragraph 1] Applicant had been imprisoned for treason and related crimes in 2014 and married in 2017. [Paragraphs 4 – 5].

Kollapen J held that a prisoner “even on entry into the prison system retains a residuum of rights”, particularly “those rights that are not necessarily inconsistent with the institution of imprisonment.” Furthermore, section 35(2) of the Constitution guaranteed rights to ensure conditions of detention consistent with human dignity. The question was whether rights the applicant sought were “necessarily inconsistent with his incarceration”, and whether his rights under s 35(2) had been infringed. [Paragraph 35].

Kollapen J considered a range of international legal instruments, [paragraphs 35 – 52] and found that the applicant’s current situation of being permitted three contact visits per month did not constitute a limitation of applicant’s rights to contact visits. [Paragraphs 56 – 59]. The relief sought for extended contact and non-contact visits therefore failed. [Paragraph 60] The claim to access a cellular phone was also rejected. [Paragraphs 61 – 63].

Regarding the claim for conjugal visits, Kollapen J held that:

“while both international human rights law as well as South Africa’s own human rights framework ... provides for the right of prisoners to have contact with a spouse partner or next of kin, there appears to be no express self-standing right of prisoners to conjugal visits.” [Paragraph 68].

Kollapen J found that the contact rights under section 35 of the Constitution did not include a right to conjugal visits. The policy of the Department to prohibit conjugal visits did not constitute a limitation of the right to contact, and even if it did, it was a justifiable limitation. [Paragraphs 71 – 73] Kollapen J did note that the question of whether conjugal visits should be a feature of the correctional system was a question that would “require debate and the weighing of diverse, complex and contested issues.” [Paragraph 81].

The application was dismissed.

RODRIGUES V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2019 (2) SACR 251 (GJ)

Case heard 28 & 29 March 2019, Judgment delivered 3 June 2019.

This was an application for a permanent stay of prosecution. Applicant was a former security policeman charged with the murder of anti-apartheid activist Ahmed Timol (“Timol), who died in police custody in 1971. Following a second inquest into Timol’s death in 2017, applicant was charged, in 2018, with his murder.

Kollapen J (Moshidi and Opperman JJ concurring) began by setting out background information on the life and death of Timol, including the two inquests held in 1972 and 2017, and discussed the TRC process. [Paragraphs 10 – 23]. Kollapen J found that there had been “what can only be described as

high-level executive interference in investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017.” [Paragraph 23].

Kollapen J identified the factors to be taken into account in determining a permanent stay of prosecution, namely the length of the delay; the reasons given by the government to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused. [Paragraph 37].

On the question of the delay of some 47 years since Timol’s death in 1971, Kollapen J found that the time period from 1971 – 1994 should not count towards the delay due to the prevailing political circumstances [paragraphs 42 – 45]. To the extent that the period between 1994 – 2002, which was characterised by the establishment of the TRC and the opportunity to apply for amnesty, constituted a delay, it:

“was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism — flawed, but the product of an historical compromise — to seek and find closure.” [Paragraph 52].

Kollapen J then considered the period between 2003 – 2017, where the applicant located claims of political interference in the prosecution. [Paragraph 55 ff]. Kollapen J found that political interference had resulted in TRC cases not receiving the necessary attention [paragraph 55], and that the NPA “had a duty to assert its authority and independence and resist political interference.” [Paragraph 60]. Kollapen J criticised the manner in which the NPA had disclosed the acts of political interference, finding that “[t]he suggestion that it was deliberately withheld from this court is difficult to refute”. [Paragraph 68].

Kollapen J held that the 2003 - 2017 delay constituted “a substantial period of time”, and that the delay could not be justified by political interference. [Paragraph 74]. Based on the Constitutional Court judgment in *Bothma v Els*, Kollapen J identified the test to be applied as whether the delay would inevitably and irremediably taint the overall substantive fairness of the trial. [Paragraph 77]. Relying on South African and foreign case law, Kollapen J held that the applicant’s old age and infirmity were not grounds that could be relied on as a form of prejudice. Whilst the delay had caused some degree of prejudice, it could not be said to have tainted the fairness of the trial. [Paragraphs 88 – 89].

Kollapen J dismissed the unreasonable delay challenge [paragraphs 97 – 99] and held that there were no grounds to suggest the prosecution had been advanced for an improper purpose [Paragraphs 100 – 105]. The application was dismissed, with no party seeking an order for costs [106].

SELECTED PUBLICATIONS

“Not only the business of the state, but also a business of all: State reporting in South Africa and popular participation”, *Journal of Law, Democracy and Development*, Volume 15 (2011).

This article discusses issues arising from South Africa’s state reporting regarding international human rights law.

“While reporting is primarily a state obligation, what is contained in the report is not exclusively the business of state. It is the business of everybody else in the country inasmuch as they have an interest and stake in it. Similar reasoning applies in the case of entities like the United Nations (UN) and African Union (AU). Although they are inter-governmental organisations, their work is the concern of all humanity, and therefore everybody has an interest in what happens within these structures and in the reports that are submitted to them. In other words, given the existence of a gap between international standard - setting and compliance therewith, it is vital that citizens participate in the processes around state reporting, both at country and intergovernmental levels.” [Page 516]

“We have a constitution that is committed to public participation at virtually every level of governance: the level of policy making, the level of law making and the level of service delivery. The notion of public participation is the golden thread running through the Constitution; by implication, that notion applies as well to the processes by which government discharges its international human rights obligations.” [Page 518]

“Prisoners' Rights Under the Constitution Act No. 200 of 1993”, *Centre for the Study of Violence and Reconciliation Seminar No. 5, 1994* (<http://www.csvr.org.za/wits/papers/papkolpn.htm>)

“In recent times we have seen high levels of unrest in our prisons and while not condoning some of the actions taken, some of the underlying causes of such unrest appear to be legitimate. It might very well be argued that prisoners who all have a common interest should have the freedom to associate and any law which makes inroads on such freedoms would be unconstitutional. If one was able to successfully argue the freedom of association, the notion of prisoner organisations operating within prisons could become a reality, and if this is so, on what basis could one possibly argue against the right of such prisoners who belong to such associations, to assemble, demonstrate and present petitions. These questions pose interesting challenges not only to the administration of prisons but to the notion that we in society have regarding prisons and prisoners' rights. If prisoners were allowed to associate, to assemble and to present petitions, could it still be argued that such conduct was objectionable, or would someone seeking to outlaw such conduct have difficulty in presenting an argument to the effect that a limitation of such rights complied with the criteria set out in Section 33 of the Constitution. It would certainly appear that the Constitution, far from providing definite answers, brings up interesting questions.”

MEDIA COVERAGE AND ADDITIONAL INFORMATION

Media report of keynote address at 2014 Public Interest Law Gathering
(<http://www.publicinterestlawgathering.com/media-report-on-keynote-by-judge-jody-kollapen/>)

“... [H]e said, if the question was have we done enough to transform our society, the answer would have to be decisively no.

Kollapen cautioned against the judicialisation of politics, saying there was a critical role for public interest lawyers, but also a need for the awareness of the limits of that role. He said that despite their best intentions, public interest lawyers should be strategic about the kinds of cases they took up.”

Quoted discussing higher education’s role in human rights and transformation, at UNISA
(<http://www.unisa.ac.za/news/index.php/2014/09/higher-educations-role-in-transformation/>)

“A university in advancing, defending and embracing academic freedom and institutional autonomy cannot do so without accepting the responsibility of changing society. Universities need to decolonise and deracialise higher education and some of the more practical ways (they) can do that is to be aware of their service providers, their human rights and transformation track record, how they work ...”

Complainant in the Equality Court case of **Kollapen v Du Preez (EC 001/03) [2005] ZAEQC 1 (29 March 2005)**, which was settled with the respondent acknowledging that hairdressing salons under his control had unfairly discriminated on the basis of race by turning people away.

Described as “a very moderate person [who] treats all practitioners with the uttermost respect. His colleagues on the bench only have the utmost respect for him, both as a person and a jurist.”

- Zelda Venter, “Colleagues hail Kollapen as top class”, *Pretoria News* 6 April 2017.

DEPUTY JUDGE PRESIDENT AUBREY LEDWABA

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth:

BProc, University of Limpopo (1984)

CAREER PATH

Acting Justice, Supreme Court of Appeal (December 2019 – to date)

Acting Justice, Constitutional Court (February – May 2019)

Deputy Judge President, Gauteng High Court (Pretoria) (2013 – to date)

Judge, Gauteng High Court (2005 – to date)

Director, A.P. Ledwaba Inc (1997 – 2005)

Partner, Lephoko – Ledwaba Attorneys (1989 – 1997)

Candidate attorney & Professional Assistant, J.M. Weiman & Partners (1984 – 1988)

State prosecutor (1983 – 1984)

Magistrates Commission

Chairperson (2019 – to date)

Member (2003 – 2005)

Chairperson, Attorneys Dispute Resolution Advisory Committee, South African Law Society (2018 – to date)

Member, Judiciary Case Flow Management Committee (2013 – to date)

Chairperson, Interpreters Capacitation Committee (2014 – 2016)

Vice Chairperson, National Council for Correctional Services (2010 – 2013)

Member, International Association of Refugee Law Judges (2009 – to date)

Commissioner, Small Claims Court (2003 – 2005)

Council member, Law Society of the Northern Provinces (1999 – 2005)

Member, NADEL (1987 – 2005)

Board member, Mamelodi Hospital (2004 – 2005)

SELECTED JUDGMENTS

PRIVATE LAW

PATEL v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2018 (2) SACR 420 (KZD)

Case heard 5 – 9 December 2016, 3 – 7 April 2017, Judgment delivered 13 June 2018.

Plaintiff, the former Judge President of the KwaZulu – Natal High Court, instituted a claim for damages for malicious prosecution. The underlying issue related to a dispute with the 3rd defendant (Ms Nxele) over the supply of stationary which led to an argument in the plaintiff's chambers. On the background dispute, Ledwaba DJP commented that:

“In assessing the situation in the meeting held in the plaintiff's chambers it seems clear that emotions were running high, in particular on the part of the plaintiff and Ms Nxele. In addition it is also clear that the word 'rubbish' was used by the plaintiff. What is in dispute is the context within which the word was used. I am also mindful in a society such as ours, with a diversity of languages, there is always scope for misunderstanding and misinterpreting language. That being the case, it does appear that the plaintiff was angry, and I do think that his questioning of Ms Nxele's ability to speak English was unwarranted, in that it unnecessarily called into question her competence and ability to do her work.” [Paragraph 4.1.8]

3rd defendant later laid a charge of *crimen injuria* against the plaintiff. [Paragraph 4.1.10] A decision was taken to prosecute, and the summons was effected on the Plaintiff on Diwali. Plaintiff alleged that this was done to humiliate him as a member of the Hindu religion. [Paragraphs 4.2.5, 4.2.9]

Ledwaba DJP found contradictions in the evidence of the witnesses, [paragraph 4.2.6] and after considering the applicable law, he evaluated the evidence:

“[W]hen Ms Nxele testified ... she insisted that the alleged utterance impaired her dignity, but she told the prosecution team that the alleged words uttered by plaintiff did not have an impact on her dignity. Furthermore, Adv Noko insisted that Ms Nxele wanted the matter to go to court but Ms Nxele testified that she wanted to have a face-to-face discussion with the plaintiff. As I indicated, in the meeting held in the plaintiff's chambers emotions ran high and in my view Adv Noko should have considered this aspect before taking a decision to prosecute. It is not surprising that there are material contradictions in the versions of Ms Nxele.” [Paragraph 11].

Ledwaba DJP found that considering the evidence that was before the first and second defendants before the decision to prosecute was taken, “there must have been considerable doubt with regard to the version and understanding of Ms Nxele with regard to what was said.” Ms Nxele would have been a single witness and they would have had to be satisfied that her evidence would be satisfactory in all material respects. However, “there would clearly have been doubt” about the strength of that evidence, which would raise doubts about whether there was reasonable and probable cause to prosecute. [Paragraph 27]

Plaintiff's claim was successful, and he was awarded R900 000 in damages.

COMMERCIAL LAW**GUPTA v KNOOP NO AND OTHERS 2020 (4) SA 218 (GP)****Case heard 13 December 2019, Judgment delivered 13 December 2019**

This was an application to remove the first and second respondents as business rescue practitioners (BRPs) of a company known as Islandsite Investments, which formed part of the so - called Oakbay group of companies. [Paragraphs 1 – 2] The removal of the BRPs was sought on various grounds, including that their conduct had not been in good faith; that they had failed to perform the duties of a business rescue practitioner as contemplated by the Act; that they had failed to exercise the proper degree of care in performing their functions; that they had shown a conflict of interest or lack of independence; and that they had not conducted themselves as officers of the court as contemplated by the Act. [Paragraph 20].

Ledwaba DJP (Janse van Nieuwenhuizen J and Senyatsi AJ concurring) held that the as officers of the court, it was “an uncompromising requirement that a BRP execute his/her duties in good faith”, which implied that a BRP was required to exercise his/her duties “with the utmost trust, confidence and loyalty to the benefit of all stakeholders in the business rescue process.” [Paragraph 26]. Ledwaba DJP found that the BRPs conduct in this case failed to meet this standard, and that their argument that they had overseen the sale of numerous properties belong to the companies was “untenable”:

“It cannot be that the first and second respondents can unabatedly continue to sell off the assets of the respective companies and earn fees and commissions without having a plan regarding how the respective businesses are going to operate moving forward once the creditors have been paid. Business rescue proceedings are not intended to continue indefinitely. ...” [Paragraph 27]

Ledwaba DJP held that the first and second respondents' continual earning of fees and commissions, despite not timeously concluding the business rescue proceedings, was “wholly at odds with their mandate”. Furthermore, beyond stating that the companies were rescuable, BRPS had “failed to make out a cogent case” that there were reasonable prospects of rescue. [Paragraphs 28 – 29]

Ledwaba DJP found that the BRPs lack of good faith was further demonstrated by their contention that there was “an element of criminal unlawfulness” in how the board and shareholders had conducted the companies’ affairs, as they bore the onus of reporting these suspicions:

“Their failure to do so ... is dispositive. Not only does this mean that the first and second respondents' investigation into the affairs of the companies has been tainted as a result of their potential failure to be forthcoming regarding any dubious activities on the part of the board and shareholders, the first and second respondents' failure to report their findings to the relevant authorities in turn also taints their impartiality as officers of the court.” [Paragraph 30]

Ledwaba DJP dealt with an argument by the BRPs that while “the initial reason for the commencement of business rescue proceedings was the un-banking of the Gupta-linked companies”, it had emerged “that the entire group was in financial turmoil due to the gross and reckless mismanagement of the affairs of the companies.” The court found “the unsubstantiated nature” of these allegations “particularly vexing”:

“[I]f the first and second respondents were so aggrieved at the alleged mismanagement of the companies and the unsavoury and criminal activities that the companies were being subjected

to at the hands of the board and shareholders, as an integral part of their judicial duty the first and second respondents could have and should have reported their findings to the appropriate authorities. Raising such allegations at this stage appears to be a grossly disingenuous litigation tactic that again does not put the first and second respondents' conduct as officers of the court in the best of light." [Paragraph 31]

The application to remove the BRPs was granted.

The decision was overturned by the Supreme Court of Appeal in **Knoop and Another NNO v Gupta (Tayob Intervening) (116/2020) [2020] ZASCA 163; [2021] 1 All SA 726 (SCA) (9 December 2020)**. The SCA found that "the judgment under appeal contains no analysis of the factual case made by Mrs Gupta and no factual findings in respect of the alleged conduct of the BRPs" [Paragraph 13]. The SCA further held that "the judgment did not deal with the evidence and whether it was sufficient to discharge the onus resting on Mrs Gupta. Instead it contains a number of general statements and adverse findings concerning the BRPs without reference to the evidence. This was not the correct approach." [Paragraph 112].

LABOUR LAW

AMCU AND OTHERS v ROYAL BAFOKENG PLATINUM LTD AND OTHERS 2020 (3) SA 1 (CC)

Case heard 23 January 2020, Judgment delivered 23 January 2020.

Applicants challenged their retrenchments on the basis that they had not been able to consult with their employer prior to their dismissal. A collective agreement between the employer and two other unions represented at the mine excluded the applicants from the consultation process. [Paragraph 4]. At issue was whether the right to fair labour practices in section 23(1) of the Constitution permitted such exclusion. [Paragraph 7] The core issue was whether the right to fair labour practices required an employer to consult with an employee facing dismissal for operational requirements, or their representatives, when that employee or representative was not party to a collective agreement governing consultation. [Paragraph 28]

Ledwaba AJ (Mogoeng CJ, Jafta and Madlanga JJ concurring) considered the provisions of section 189(1) of the Labour Relations Act (LRA), finding that the provision created a "hierarchy of obligations" which gave primacy to collective agreements such that "if there is a collective agreement which requires consultation with any persons, then an employer is required to consult with only those persons to the exclusion of everyone else." [Paragraph 31]. Ledwaba AJ discussed a range of decisions in the Labour Courts which had shown divergent views as to whether section 189(1) allowed for the inclusive consultation requirement sought by the appellants, prior to the question being settled by the Labour Appeal Court in the case of *Aunde*. [Paragraphs 32 – 46].

Ledwaba AJ found that the applicants did hold a right that created a duty on the employer to consult, when a dismissal for operational requirements was contemplated, as the applicants' did not challenge the fairness of the dismissal per se, but focused on whether the consultative process leading to the dismissal was "fair in the constitutional sense."

"At first blush these two statements might seem identical. However, there is a pivotal yet fine distinction between them. ... What is at stake in this matter is whether this procedure is truly fair, in light of the Constitution and the object and purpose of the LRA. In other words: has the legislature given adequate expression to the right itself?" [Paragraph 49].

Ledwaba AJ discussed the Constitutional right to fair labour practices, [paragraph 50 - ff] finding that the nature and history of the right showed “that what is required is a flexible definition.” [Paragraph 51] Ledwaba AJ found that the distinction drawn by the respondents between individual and collective standards of fairness was a “red herring”, as while retrenchments occur on a collective scale, in that every employee was potentially affected, that did not make “the process singularly a collective one.”

“It makes little sense to tag the right as either 'individual' or 'collective', and so suggest that a group of individuals could come together and, by virtue of that process, have a right conferred upon them de novo (anew).” [Paragraphs 57 – 58]

Ledwaba AJ held further that an employee had a “powerful interest” not to be dismissed unfairly, and it could not be said that collective action would necessarily vindicate that right.

“It is entirely plausible that a minority union or a grouping of non-unionised employees might comprise a specialised or special interest group within a workplace. It might be impossible for the majority union to provide the employer with any meaningful information on whether the dismissal of these employees could be avoided or the effects of their dismissal mitigated. This would render the objectives in s 189(2) nugatory. In turn, those employees' right to fair labour practices would fail to be vindicated.” [Paragraph 59].

Ledwaba AJ accordingly found that section 189(1) limited the right to fair labour practices by creating a statutory regime which excluded certain employees from that consultation process. [Paragraph 65]. This limitation could not be justified under section 36 of the Constitution. [Paragraphs 66 – 85]. A challenge to the constitutionality of section 23(1)(d) of the LRA was dismissed. [Paragraphs 86 – 93].

For the majority of the court, Froneman J (Cameron, Khampepe, Mhlantla and Theron JJ concurring) dismissed the challenge to the constitutionality of section 189(1), whilst agreeing that the challenge to section 21(1)(d) should be dismissed. Jafta J wrote a separate judgment concurring in the judgment of Ledwaba AJ. Theron J wrote a separate judgment concurring in the judgment of Froneman J.

CIVIL PROCEDURE

LIBERTY GROUP LIMITED T/A LIBERTY LIFE V K & D TELEMARKETING AND OTHERS (1290/18) [2020] ZASCA 41 (20 APRIL 2020)

Case heard 11 March 2020, Judgment delivered 20 April 2020.

The issue in this case was whether, after an order of absolution from the instance was granted at the end of a trial, the appellant was entitled to reopen its case to pursue its original claim on the same pleadings, in an attempt to thwart a plea of prescription. The court *a quo* had dismissed the appellant's application to reopen its case. [Paragraph 1]

Ledwaba AJA (Navsa and van der Merwe JJA concurring) held that the Appellate Division judgment of *Steytler* was authority for the “established practise that a decision of absolution from the instance in a trial has the effect of a definitive sentence.” A decision on the sufficiency of evidence led through an order of absolution from the instance had a definitive effect and could be appealed. The court was *functus officio* and had no power or jurisdiction to hear any further evidence. Ledwaba AJA found that to hold otherwise, and sustain the appellant's argument:

“would have the effect of litigants being left in a state of uncertainty, in that actions would remain susceptible to resuscitation indefinitely. This offends against the principle of finality in litigation.” [Paragraph 14].

Ledwaba AJA further rejected an argument that the common law should be developed to allow the appellant to re-open its case, based on the constitutional right of access to the courts:

“Liberty had its day in court. That it provided insufficient evidence to sustain its case is entirely its own fault. There is no systemic failure here. ...” [Paragraph 15].

The appeal was dismissed.

CRIMINAL JUSTICE

S v DOOREWAARD AND ANOTHER 2021 (1) SACR 235 (SCA)

Case heard 17 August 2020, Judgment delivered 27 November 2020

The appellants had been convicted in the North-West High court of murder, kidnapping, theft, and pointing a firearm. The incident giving rise to the charges was the death of a 15 – year old boy at Coligny.

Ledwaba AJA found that there were two mutually destructive versions of the victim’s death, with the state alleging that the appellants had assaulted the victim and thrown him out of a moving bakkie. The appellants claimed that the victim must have jumped from the moving bakkie, and denied having been in the company of the relevant state witness (Mr Pakisi) at the time of the incident. [Paragraph 2]

Ledwaba AJA analysed several inconsistencies in the evidence [paragraphs 25 ff] These included that the vehicle tested for blood samples by the police was not identified by the relevant witnesses as the bakkie that was driven by the appellants when the incident was alleged to have occurred. Furthermore, the results of tests for human blood in the loading bin of the vehicle were negative. Ledwaba AJA found that, assuming that the vehicle that was tested was in the bakkie that was used to transport the victim, who Mr Pakisi testified was bleeding profusely, the results of the test “cast serious doubt on the testimony and credibility of Mr Pakisi, who is a single witness.” [Paragraphs 32 – 33]

Ledwaba AJA found that Mr Pakisi had stated on affidavit that the deceased had been thrown from the bakkie on three occasions, but when testifying in court, “he said that he saw the boy being thrown from the bakkie once, and that he was not sure about the other two incidents.” Ledwaba AJA disagreed with the trial court that this discrepancy was not material.

“[S]ave for the evidence of Mr Pakisi, there was no direct or satisfactory evidence that the boy was thrown from the bakkie. In my view, there are material discrepancies in the evidence of Mr Pakisi. He is a single witness and there is no corroboration to his evidence.” [Paragraph 38].

Ledwaba AJA found further that the appellant’s evidence, as well as evidence relating to the time of cellular telephone calls made, as to the time and distance travelled by the appellants on the day of the incident was to be preferred to the version of Mr Pakisi. [Paragraphs 39 – 40]. Ledwaba AJA held that the state had not proved its case beyond reasonable doubt and that the appellants should be acquitted.

Molemela JA agreed that the convictions should be set aside, but found that the first appellant should have been convicted of culpable homicide. Ponnar JA wrote a judgment concurring in the judgment of Ledwaba AJA and disagreeing with Molemela JA's conclusion on conviction for culpable homicide. The appeal was therefore upheld.

MOYO AND ANOTHER v MINISTER OF POLICE AND OTHERS 2020 (1) SACR 373 (CC)

Case heard 19 February 2019, Judgment delivered 22 October 2019

This was a consolidated challenge to the constitutionality of sections of the Intimidation Act. The first application sought to overturn a decision of the SCA and have section 1(1)(b) of the Act declared invalid. The second application was for confirmation of an order of the SCA declaring s 1(2) of the Act invalid. [Paragraphs 1 – 3].

Writing for a unanimous court, Ledwaba AJ found that s 1(1)(b) aimed to criminalise conduct and expressive acts which violated the rights to dignity, personal freedom and security. "Intimidatory conduct that negates these rights has no place in an open and democratic society that promotes democratic values, social justice and fundamental human rights." [Paragraph 25]. It was necessary, however, for rights of dignity and security to be balanced with the right to freedom of expression. [Paragraph 26].

Regarding the challenge to s 1(2), which provided that the onus of proving the existence of a "lawful reason" fell on the accused, Ledwaba AJ held that the subsection clearly:

"absolves the state from proving all the elements of the crime ... This is an obvious and impermissible infringement of the right to be presumed innocent, to remain silent and the right not to be compelled to give self-incriminating evidence ..." [Paragraph 36]

Ledwaba AJ further disagreed with the majority of the SCA that the subsection only created an evidentiary burden:

"The text of the section refers to 'the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused'. It is unclear how this can be interpreted in any way other than creating a reverse onus by absolving the state from proving an element of the crime. In so doing, the section allows for an accused to be convicted in circumstances where there exists a reasonable doubt as to the unlawfulness of their conduct." [Paragraph 37]

Regarding the challenge to s1(1)(b), Ledwaba AJ identified the central issue as being whether the subsection unjustifiably criminalised expressive conduct that is protected by s 16(1) of the Constitution (freedom of expression). [Paragraph 41] Whilst the subsection appeared unconstitutional on a literal reading, the question was whether it could be interpreted in a manner consistent with the Constitution, as had been held by the majority of the SCA. [Paragraphs 42 – 45]. Under the interpretation adopted by the SCA, intimidation would only occur where there was incitement of imminent violence or hate speech. [Paragraph 64]. Ledwaba AJ found that this definition:

"does not equate with the 'incitement of imminent violence' under s 16(2)(b) of the Constitution. This is not the same as intimidation because (a) intimidation may incite harm that is distinct from violence (particularly with regard to property); and (b) intimidation may not 'incite' any violence or harm because incitement assumes the participation or presence of a third party. Instead, intimidation can threaten violence by the intimidator, without inciting

a third party to cause imminent harm. ... The difficulty with the imminent-harm qualification is that it appears neither in the text nor context of the Act. ..." [Paragraphs 66 - 67]

Both the impugned sections were thus also held to be constitutionally invalid.

ADMINISTRATION OF JUSTICE

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

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

Applicant had been appointed as an administrator of many estates in terms of section 74 of the Magistrates' Court Act. Applicant and one Haarhof formed a close corporation (the second respondent) to manage the estates, and subsequently entered into a sale agreement with the respondent, whereby their rights, title and interest in the administration applications were ceded. First respondent was appointed as administrator. Applicant continued to be an employee of the second respondent, but personal problems developed between the applicant and first respondent, resulting in first respondent issuing summons against the applicant to compel signature of documents to substitute the first respondent as the administrator. [Paragraph 33].

Ledwaba J found that the matter was urgent, as there was an amount of R5 million in the second respondent's trust account which was at risk, and the appointed administrator had no control over this money. [Paragraph 15]. Ledwaba J held that the Act required that the appointment of an administrator was done by the court. If a person was to be relieved of their appointment, "it is the court that must sanction same, and the new appointment or substitution should be done by the court." [Paragraphs 18 – 20] Ledwaba J expressed:

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

Ledwaba J held that the applicant and first respondent had "dealt with the files of the debtors under administration matter, as if they were their personal assets, without the approval of the court", giving preference to their interests over the interests of debtors and creditors:

"There is now a credit balance of about R5 million in the trust account, and distribution to the creditors has not taken place since September 2010. This matter needs urgent attention." [Paragraphs 24 - 26]

Ledwaba J held that it was the applicant who had been appointed as administrator and who bore the responsibility of complying with the Act. One of the duties of an administrator was to take expeditious steps to distribute monies, and by allowing the trust account to be controlled by another person, the

applicant had acted contrary to her duties and responsibilities as an administrator. [Paragraphs 28,30]

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

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

MEDIA AND OTHER COVERAGE

“Black law practitioners have more potential in this age – Deputy Judge President”, *University of Limpopo* 17 October 2019. (Available at https://www.ul.ac.za/index.php?Entity=c_news&TheS=492).

Reports a speech given at the University of Limpopo:

“Deputy Judge President of the North Gauteng Division of the High Court Aubrey Ledwaba says unlike being discriminated against in the past, the current generation of black law students have various prospects to succeed in the legal fraternity. ... Ledwaba told the students that in the past there were no excess of career paths for black lawyers because like his generation in the 1980s, was considered incompetent. ...

He says now black lawyers can climb the legal ladder to reach their highest potential unlike in the past. “We studied when black lawyers and attorneys were not highly regarded. We did not have black judges and black magistrates, and one had learn [sic] English and Afrikaans to find their way.”

He also hinted challenges that aspiring black law practitioners ought to gear up for, including having to work extra hard to prove themselves. “Historically black people usually have to work twice as hard, competency is always perceived to be a challenge among them. In many cases, we see white advocates appearing in our courts and we look forward to seeing black competent appearing too. However, as a judge, it breaks my heart to see a black incompetent/unprepared practitioner.”

He says the current generation is fortunate because they use their native languages in court. “Accounting and Latin were compulsory modules that we needed to take. Had I left B. Proc due to the perception of Latin being hard, I would not be where I am today.””

JUSTICE RAMMAKA MATHOPO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 28 January 1963.

B. Proc, University of the North (1985)

CAREER PATH

Acting Justice, Constitutional Court (no dates given)

Justice of Appeal, Supreme Court of Appeal (2015 – to date)

Acting Justice of Appeal, Supreme Court of Appeal (2013 – 2014)

Judge, Gauteng High Court, Johannesburg Local Division (2006 – 2015)

Acting Judge of the High Court, North and South Gauteng Divisions (2005)

Director, Mathopo Attorneys (1989 – 2006)

Candidate Attorney and Professional Assistant, S.C. Mhinga Attorneys (1986 – 1989)

Member, Gauteng Law Council (2003 – 2005)

Member, Law Society (1989 – 2005)

Member, Black Lawyers' Association (1986 – 2005)

Member, Rhema South (1992 -)

SELECTED JUDGMENTS**PRIVATE LAW****MOHAMED'S LEISURE HOLDINGS (PTY) LTD V SOUTHERN SUN HOTEL INTERESTS (PTY) LTD (183/17) [2017] ZASCA 176; 2018 (2) SA 314 (SCA) (1 DECEMBER 2017)****Case heard 21 November 2017, Judgment delivered 1 December 2017**

Applicant had sought to evict respondent from certain immovable property. The high court had refused on the basis that the implementation of the cancellation clause would have been manifestly unreasonable, unfair, and have offended public policy. It concluded that the common law principle of *pacta sunt servanda* should be developed by importing or infusing the principles of *ubuntu* and fairness into the law of contract. [Paragraph 1].

Mathopo JA (Shongwe AP, Willis JA and Meyer and Ploos van Amstel AJA concurring) considered a range of case law on the issue, and found that as the terms of the contract were not on their face inconsistent with public policy; the relative position of the parties was of bargaining equality; and timeously performance had not been impossible, it was not against public policy to apply the principle of *pacta sunt servanda* in this case. [Paragraph 28]. There was no complaint that the impugned clause was objectively unconscionable. [Paragraph 29].

Mathopo JA held further that:

“The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party’s relative power is an issue. There is no evidence that the respondent’s constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the term or clause in question.” [Paragraph 30].

The appeal was upheld.

PAIXAO AND ANOTHER V ROAD ACCIDENT FUND (05692/10) [2011] ZAGPJHC 68**Case heard 19 May 2011, Judgment delivered 01 July 2011**

The first plaintiff was in a relationship with the deceased, Mr Gomes, and they lived together unmarried. The plaintiff also lived with her daughter from a previous union, and there was no formal adoption of the daughter by Gomes. Upon Gomes’ death, the plaintiff claimed for loss of support.

Mathopo J had to determine whether it would be appropriate to allow the applicants to claim for loss of support given that she was not married to the deceased. The issues were whether the deceased was under a duty to support the plaintiff while she was still alive, and whether that duty was enforceable against third parties. [Paragraph 9].

Mathopo J held that the Constitutional Court had left the position of heterosexual unmarried life partners open in the *Satchwell* case. [Paragraph 20]. Mathopo J found that the fact that first plaintiff’s evidence that Gomes had promised to take care of her and her child was unchallenged, was not necessarily sufficient to discharge the onus of proof. [Paragraph 27]. Mathopo J held that:

“The mere fact that the parties motivated by love and support for each other made certain promises cannot be extended to a legal obligation either on the basis of a contract or otherwise. ...” [Paragraph 28]

Mathopo J held that even if there had been an agreement, a mere contractual right to support on its own was insufficient to give rise to a claim for loss of support. [Paragraph 30]. Mathopo J held that the promise made by the deceased “was not only vague, but one akin to an offer made within a family in circumstances which negative an intention to be legally bound.” [Paragraph 31].

Mathopo J consequently concluded that the plaintiffs had failed to discharge the onus, and their actions were dismissed with costs.

This decision was overturned on appeal by the SCA in **Paixao and Another v Road Accident Fund 2012 (6) SA 377 (SCA)**, holding that the dependant’s action ought now to be extended to heterosexual permanent life partnerships where the partners agree to reciprocal duties of support.

ADMINISTRATIVE JUSTICE

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER V SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION AND OTHERS (693/15) [2016] ZASCA 196; [2017] 1 ALL SA 331 (SCA); 2017 (3) SA 95 (SCA) (2 DECEMBER 2016)

Case heard 13 September 2016, Judgment delivered 2 December 2016.

This case dealt with a challenge to the constitutionality of a policy to regulate the appointment of insolvency practitioners, which had the objective of promoting “fairness, transparency and the achievement of equality for person previously disadvantaged by unfair discrimination”, and was intended to provide the basis for the transformation of the insolvency industry. [Paragraphs 1, 11]. The policy provided that every Master’s List of insolvency practitioners had to be divided into various categories in terms of race and gender, with a division between senior and junior practitioners. [Paragraph 12]. Practitioners would then be appointed consecutively in terms of a ratio, from the list. [Paragraph 13]. In declaring the policy unconstitutional, the high court found that the policy turned the Master into a “rubberstamp”, constituted and unlawful fettering of discretion, and that there was insufficient evidence to support the argument that the policy was likely to transform the industry. [Paragraph 20].

Mathopo JA (Mpati P, Wallis, Swain and van der Merwe JJA concurring) held that remedial measures had to operate “in a progressive manner” to assist those who had previously been deprived of the chance to practise in the insolvency profession. They must however not “encroach, in an unjustifiable manner, upon the human dignity of those affected by them.” [Paragraph 32]. Mathopo JA held that the clause of the policy relating to allocations contained “none of the flexibility and all of the rigidity that the Constitutional Court has said is impermissible”, and required the Master “to make an appointment in accordance with a rigid quota.” [Paragraphs 33 – 34].

Mathopo JA held further that the prescribed appointment process was arbitrary and capricious, as it had “been formulated with no reference to its impact when applied in reality.” Both white men and practitioners of every race and gender born after 27 April 1994 would have their “turn” to be allocated come around “but rarely. The prejudice to young Black men and women who have recently completed their studies, are well qualified and wishing to enter practice as an insolvency practitioner, is obvious. There is no evidence either that this was considered by the Minister when formulating the policy.” [Paragraph 36]. There was also no allowance for a practitioner to refuse and appointment and what steps the Master would take in those circumstances. [Paragraphs 36 – 37].

Mathopo JA held that the policy was thus unconstitutional, and proceeded to making findings regarding the other grounds on which the policy was challenged, holding that the Mater's powers were not improperly fettered [paragraphs 39 – 45], and that the policy was irrational. [Paragraphs 46 – 50].

The appeal was dismissed. Wallis JA (Mpati P, Swain and Mathopo JA concurring) wrote a separate concurring judgment finding that the publication of the policy had infringed the principle of legality.

DEMOCRATIC ALLIANCE V ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS (19577/09) [2013] ZAGPPHC 242; [2013] 4 ALL SA 610 (GNP)

Case heard 24 July 2013, Judgment delivered 16 August 2013

The then Acting National Director of Public Prosecutions (ANDPP), Mr Mpshe, had withdrawn criminal charges against Mr Jacob Zuma (the third respondent). Subsequent to a High Court application for the release of records upon which the ANDPP claimed to have based his decision, the Supreme Court of Appeal ruled that a telephonic recording and transcript, as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and or transcript, except “the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching the representations (the reduced record), be released”. A reduced record was produced, and this application was to compel the ANDPP to release the complete said records as per the order of the SCA, after he failed to produce the records within the period set in the SCA order, and after the applicant requested the records. The applicant also sought to have the first respondent held in contempt of the SCA order for failing to produce the complete said reports. The third respondent (Zuma) argued that the disputed material did not form part of the qualified record, and that the production of transcripts and written and oral representations was protected by confidentiality. [Paragraph 12].

Mathopo J held that “[i]t should have been obvious to the third respondent” that “more was required to clarify his position instead of taking refuge on a point of law”, and that no cogent explanation had been put up as to why he was entitled to confidentiality. [Paragraph 22]. Mathopo J further rejected an argument that Mpshe had breached the confidentiality or privilege of the third respondent by releasing the transcripts during his public address. [Paragraph 24]. Mathopo J found that it was “desirable that the transcripts be produced to test and properly contextualise whether the decision of Mpshe was based on rational grounds or not.” [Paragraph 25]. Mathopo J thus found that a proper construction of the SCA order, confidentiality did not extend to the transcripts. [Paragraphs 26 -27].

Mathopo J held further that it would be inappropriate for the court “to have its powers limited by the ipse dixit of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical.” The third respondent had failed to show that the representations were confidential. In the absence of any concerns being raised by the third respondent, first respondent had “no right to independently edit the record. It must produce everything. To the extent that the third respondent claims confidentiality, he must set out the relevant facts why he is entitled to confidentiality. ... In my view none has been shown to exist.” [Paragraph 29].

Mathopo J further rejected an argument that the transcripts formed an inextricable part of the entire representation, as well as an argument that producing the transcripts would infringe the third respondent's

right to a fair trial. [Paragraphs 30 – 31]. Mathopo J held that the first respondent, as an organ of state, had a duty to prosecute without fear, favour or prejudice. It was also a constitutional body with a public interest duty, whose officials were required to act with transparency and accountability. In this context, it had a duty to explain the dropping of the charges. The documents sought would “assist in enquiring into the rationality of the decision”, and it could not be said that all documents submitted were covered by privilege. [Paragraph 40]. Mathopo J concluded that the SCA order had not envisaged a blanket prohibition on disclosure, but on excluded matter the third respondent may have considered confidential or privileged. In the absence of any specific identification of protected material by the third respondent, he could not rely on the SCA order. [Paragraph 41].

Regarding the question of contempt, Mathopo J found that the first respondent had been required to afford the third respondent an opportunity to indicate objections, and thus had not been deliberately or wilfully non – compliant with the order. The contempt application was therefore dismissed. An order was made for the First Respondent to comply with the order of the Supreme Court of Appeal within five days. The order was upheld by the SCA in ***Zuma v DA (836/2013) [2014] ZASCA 101 (28 August 2014)***.

CIVIL PROCEDURE

AMRICH 159 PROPERTY HOLDING CC v VAN WESEMBEECK 2010 (1) SA 117 (GSJ)

Case heard 29 June 2009, Judgment delivered August 21, 2009

The applicant creditor made an ex parte application for the arrest of the respondent debtor *tanquam suspectus de fuga*. The respondent was then arrested and detailed. An application to dismiss the order for arrest was dismissed. This case dealt with the confirmation of the rule nisi originally granted for the arrest and detention of the respondent.

Mathopo J held that there were not sufficient grounds for arrest, the respondent having made arrangements to depart from South Africa long before the summons was served on him. [Paragraph 14]. Mathopo J held that a distinction had to be drawn between an intention to evade or delay payment of a debt, and an innocent departure. [Paragraph 16]. Mathopo J found that the applicant had failed to prove that the respondent had made arrangements to depart with the intention of evading or delaying payment of his debts, and that the respondent lacked the intention to depart from South Africa permanently and evading or delaying payment of his debts. [Paragraph 18].

Mathopo J held that a further reason why the application fell to be dismissed was the constitutionality of the arrest [paragraph 19], noting that no other country at the time utilised arrest as a prerequisite for exercising civil jurisdiction. [Paragraph 26]. Mathopo J found that there was no post – 1994 authority justifying the arrest of an individual pending the provision of security:

“To order the arrest of the respondent on the basis that he is unable to give security, would in my view offend his right to dignity, equality and freedom of movement as enshrined in the Bill of Rights. The continued arrest in such circumstances would be tantamount to coercing security or payment, especially where it is manifestly clear that his liability has still not been established and is disputed.” [Paragraph 28]

Mathopo J commented that a creditor in the position of the applicant wished to protect its position regarding a person leaving the countries, it had to use other remedies which did not violate the personal freedom of the debtor. [Paragraph 33]. To the extent that the common law was at odds with the

Constitution, it needed to be developed, as an arrest in such circumstances “cannot pass the limitations test in s 36, as it is contrary to the spirit, purport and objects of the Bill of Rights.” However, since the parties had not argued the constitutionality point extensively, Mathopo J declined to make an express finding on the issue. [Paragraph 35].

The application was dismissed. The decision was later endorsed by the Constitutional Court in *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC), with the court holding that arrest *tanquam suspectus de fuga* does not constitute just cause for infringing on the constitutional right to freedom and security of person and amounts to unlawful deprivation of liberty.

CRIMINAL JUSTICE

TSHABALALA V S; NTULI V S (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC) (11 DECEMBER 2019)

Case heard 22 August 2019, Judgment delivered 11 December 2019

The issues for determination in this case were whether the doctrine of common purpose applied to the common law crime of rape, and if not, whether there was any rational basis for a distinction between the common law crime of rape and other crimes to which the doctrine applied. Appellants argued that under the common law, the crime of rape was an instrumentality offence which could only be committed by a male using his own genitalia, and not by an individual who was present and by his conduct promoted, encouraged or facilitated the commission of the offence. The appellants had been convicted by the High Court. [Paragraphs 2 – 3].

Mathopo AJ (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Theron J and Victor AJ concurring) noted conflicting case law among different divisions of the high court on the application of the common purpose doctrine to the crime of rape [Paragraphs 22 – 29]. In light of these divergent decisions and uncertainty as to the law, the Court had jurisdiction as it was an arguable point of law. [Paragraph 30]. Mathopo AJ held further that “[g]iven the scourge of rape in this country, in particular group rape, a resolution of this issue will have an impact beyond the present litigation and will not only affect the immediate parties, but it will give decisive direction to cases of a similar nature and is therefore a matter of general public importance.” The court therefore had jurisdiction to hear the case. [Paragraphs 31 – 32].

On the merits, Mathopo AJ discussed the submissions of the parties and the doctrine of common purpose. Mathopo AJ held that it could not be suggested that the rapes in question were “unexpected, sudden or independent acts of one or more of the perpetrators which the others neither expected nor were aware of even after it happened.” Nor was it probable that the accused were unaware of what was happening or about to happen. Mathopo AJ held further that:

“It is necessary that the relationship between rape and power must be considered when analysing whether the doctrine applies to the common law crime of rape. To characterise it simply as an act of a man inserting his genitalia into a female’s genitalia without her consent is unsustainable. In instances of group rape, as in this case, the mere presence of a group of men results in power and dominance being exerted over women victims.” [Paragraph 51].

Mathopo AJ held further that the appellants had shown a “cavalier attitude” that demonstrated callousness. To jettison the common purpose doctrine “would do a grave injustice to direct and indirect victims of gender-based violence. This would give power to men or perpetrators who have raped women with impunity in the knowledge that the doctrine would not apply to them.” [Paragraph 52].

Mathopo AJ rejected the instrumentality argument for perpetuating gender equality and promoting discrimination. There was no reason why the use of one's body should be determinative in the case of rape, but not in other offences. [Paragraphs 53 - 54]. Mathopo AJ further rejected an argument based on the absence of causation, holding that:

“The object and purpose of the doctrine is to overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from criminal liability and replacing it, in appropriate circumstances, with imputing the deed ... which caused the death (or other crime) to all the co-perpetrators. By parity of reasoning, there is no reason why the doctrine cannot apply with equal force to the common law crime of rape. ... The applicants knowingly and with the requisite intention participated in the activities of the group and fully associated themselves with its criminal designs. It is disingenuous to now contend that because they did not physically penetrate the complainants they should not be found guilty on the basis of the doctrine.” [Paragraphs 56 – 57].

Mathopo AJ concluded that the doctrine of common purpose applied to the crime of rape, and dismissed the appeal. Khampepe J and Victor AJ wrote separate concurring judgments.

PRINSLOO V S (534/13) [2014] ZASCA 96 (15 JULY 2014)

Case heard 29 May 2014, Judgment delivered 15 July 2014

The accused, a white male, had been convicted by the Magistrate's Court for two counts of *crimen injuria* and assault for an altercation over parking that occurred at the University of Free State. The accused physically assaulted the complainant and uttered racially offensive words to her. The accused had also said to the complainant that she did not have a driver's licence because she was black. The counts were taken together for sentencing and the accused was sentenced to a fine of R6 000 or twelve months imprisonment, conditionally suspended for five years. The accused appealed unsuccessfully to the high court against his conviction only, and then to the SCA.

Mathopo AJA (Bosielo and Saldulker JJA concurring) held:

“In a direct response to a question about how [the complainant] felt when the words in the foregoing paragraphs were used, she responded that she felt naked, worthless, belittled, dirty and that she felt like something had been taken away from her. ... What incensed and humiliated her most was the fact that the appellant uttered those words in the presence of her two daughters and other members of the public.” [Paragraph 6]

Mathopo AJA rejected an argument that the magistrate had misdirected herself by failing to specifically mention that she had considered the credibility of the witnesses. Mathopo AJ held that although the magistrate had not explicitly state that she had considered credibility, it was clear from the judgment as a whole that this had been considered, and a proper assessment of the evidence had been made by weighing the strengths and weakness of the state's case in relation to the appellant, including the probabilities and improbabilities of both versions. [Paragraph 14]. Mathopo AJA further rejected a challenge to the evidence of the complainant's daughter, on the basis that the alleged discrepancies were not material. [Paragraph 15].

Mathopo AJA found that several aspects of the evidence were destructive of the credibility and reliability of the appellant [paragraph 17], and that the magistrate had “delivered a well-reasoned judgment which

accounted for all the proven facts.” [Paragraph 19]. Regarding the conduct of the accused, Mathopo AJA found:

“... I have no doubt that the appellant behaved in a high-handed and cantankerous manner, and further that he uttered the words attributed to him. The word kaffir is racially abusive and offensive and was used in its injurious sense. This was an unlawful aggression upon the dignity of the complainants. ... It is trite that in this country, its use is not only prohibited but is actionable as well. In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants. ... [S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms.” [Paragraph 20]

The appeal was dismissed.

TOFIE V THE STATE (104/2014) [2014] ZASCA 159 (1 OCTOBER 2014)

Case heard 11 September 2014, Judgment delivered 1 October 2014.

The appellant was convicted of raping a 15 year old girl, and sentenced to an effective 20 years imprisonment by the Regional Court. An appeal to the Western Cape High Court had resulted in the sentence being increased to life imprisonment. The accused then appealed to the SCA against both conviction and sentence.

Mathopo AJA (Lewis JA and Gorven AJA concurring) found that the statement of the complainant had been “riddled with inconsistencies”, but that both the trial court and the appeal court had been satisfied that the discrepancies were not material, and the evidence understandable and acceptable in the circumstances. [Paragraph 11].

Mathopo AJA noted that the complainant was a single witness regarding the rapes, and as such her evidence had to be approached “with the necessary caution.” [Paragraph 16]. Mathopo AJA held that the courts below had been wrong to find the complainant’s evidence to be true and reliable, “notwithstanding the glaring contradictions if not blatant lies, in her evidence.” [Paragraph 17]. Mathopo AJA accepted that the appellant had also been an unsatisfactory witness [paragraph 18], but noted that there was no obligation on the accused to prove his innocence. [Paragraph 19]. In this case, the unreliability of the evidence as to rape was such that the State had not proved its case beyond a reasonable doubt. [Paragraph 22].

The appeal was upheld and the convictions and sentences were set aside.

ACTING JUDGE PRESIDENT SHENAZ MEER

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 28 June 1955.

BA, University of Durban, Westville (1975)

LLB, University of Cape Town (1979)

LLM, University of Warwick, United Kingdom (1982)

CAREER PATH

Acting Judge President, Land Claims Court (2012 – to date)

Acting Justice, Supreme Court of Appeal (2011)

Judge, Western Cape High Court (2003 – to date)

Judge, Land Claims Court (1996 – to date)

Legal Resources Centre

Acting National Director (1996)

Deputy National Director (1994 – 1996)

Attorney (1983 – 1993)

Articled Clerk, Omar & Co Attorneys (1981 – 1983)

Extraordinary Professor, University of Stellenbosch (2017 – to date)

Western Cape Chairperson, Rhodes Scholarship Selection Committee (2006 – 2010)

Member, International Association of Women Judges (2005 – to date)

Member, NADEL (mid 1980's – 1996)

SELECTED JUDGMENTS**CIVIL AND POLITICAL RIGHTS****MY VOTE COUNTS NPC v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2017 (6) SA 501 (WCC)****Case heard 27 September 2017, Judgment delivered 27 September 2017**

This was an application for a declaration that information about the private funding of political parties was reasonably required for the effective exercise of the right to vote, as well as a declaration that the Promotion of Access to Information Act (PAIA) was inconsistent with the Constitution and invalid, insofar as it did not allow for the continuous and systematic recordal and disclosure of private funding information of political parties. [Paragraph 1]. The application was a successor to an earlier application which had sought to compel Parliament to enact to regulate the disclosure of private funding information. The Constitutional Court held that it was necessary to bring a “frontal challenge” to PAIA. This application sought to do so. [Paragraphs 4 – 6].

Meer J began by considering whether the Constitution required the disclosure of private funding of political parties, [Paragraph 12 ff] and rejected an argument by the Minister that the political rights in section 19 of the Constitution should be read separately from the right of access to information in section 32: [Paragraph 21]

“The Minister's arguments cannot be sustained, precisely because of the interdependency of s 32(1)(b) on other rights. Whilst ss 19 and 32 obviously do not overlap in every respect, it is clear from the wording of s 32(1)(b) that the relevant information must be accessed for the purpose of exercising any rights, including those contained in s 19, to give effect to other rights in the Bill of Rights. ... The Minister's contentions ... are also contrary to the purposive, contextual and holistic consideration of the Bill of Rights by our courts when interpreting and giving effect to those rights.” [Paragraph 22]

Meer J endorsed the reasoning of the minority judgment in the preceding Constitutional Court case to the effect that that information about political parties' private funding was required for the exercise of an informed right to vote, which “accord with a weight of jurisprudence regarding the right of access to information and the right to vote.” [Paragraphs 29 - 30]

Meer J accepted an argument that sections 7(2) and 1(d) of the Constitution reinforced the need for disclosure of private funding information, since s 7(2) required the state to respect, protect, promote and fulfil the rights in the Bill of Rights, including the right of universal suffrage in s 1(d). Applicant argued that the ability of the state to discharge these obligations was weakened “by the insidious effects of corruption”, and that the Constitution required “that effective preventative measures be put in place to safeguard against corruption.” [Paragraphs 34 – 35, 42].

Meer J then considered whether PAIA provided for a right to access information about the private funding of political parties. Meer J found that it was “somewhat problematic” to try to bring political parties within PAIA's definition of “private bodies”, [paragraph 52] and that the PAIA regime did not cater for “the continuous disclosure of private funding information flowing from the rights in s 32(1) read with those in s 19(1).” Citizens could not be expected “to incur the expense and effort of compiling detailed requests, which may not be met”, as the fees involved “would impose an onerous and unwarranted burden on citizens”. [Paragraph 55].

Meer J concluded that PAIA's limitation of sections 32 and 19 was not reasonable nor justifiable in an open and democratic society, and granted an order declaring that PAIA was inconsistent with the Constitution and invalid insofar as it did not allow for the recordal and disclosure of private funding information. The declaration of invalidity was suspended for 18 months. [Paragraph 75]. The decision was confirmed by the Constitutional Court in **My Vote Counts NPC v Minister of Justice and Correctional Services and Another 2018 (5) SA 380 (CC)**.

DAVIS V CLUTCHCO (PTY) LTD 2004 (1) SA 75 (C)

Case heard 8 May 2003, Judgment delivered 10 June 2003.

Applicant owned 30% of the shares in the respondent, a private company, and sought certain company books of account to determine the value of his shares. The respondent refused, leading the applicant to bring proceedings under the Promotion of Access to Information Act (PAIA). [Page 78]. At issue was whether the records requested were required for the exercise or protection of any rights in terms of section 50(1)(a) of PAIA, and whether respondent's refusal of the applicant's request for information was valid in terms of section 68 of PAIA. [Page 83].

Meer J considered an argument by the respondent that the applicant did not have an "antecedent legal right", as a shareholder, to inspect the books of record of the company, and that the Companies Act provided sufficient protection for shareholders wishing to establish the financial position of the company." [Page 84]. Meer J held that the rights afforded to shareholders by the Companies Act fell "short by far" of the constitutional right of access to any information and section 50(1)(a) of PAIA:

"The effect of [the] submissions is that the Companies Act would take precedence over, and limit the fundamental right of access to information at section 32 of the Constitution, and mirrored in the Act. This would be contrary to the constitutional imperative against legislation limiting rights entrenched in the Bill of Rights, as well as the imperative that legislation must be interpreted to give effect to the Bill of Rights. ...

"The Companies Act cannot, contrary to section 36(2) of the Constitution, limit the right of access to information at section 32 of the Constitution, and mirrored in the Act, nor can it be interpreted to exclude such right, which would thus be contrary to the spirit of the Bill of Rights. To the extent that the Companies Act does not provide for access to information, section 32 of the Constitution, and the Act, must be read into the Companies Act. It could never have been the intention of the legislature that a shareholder aggrieved by financial statements, as in this case, should be barred from access to the information required..." [Pages 85 – 86]

The applicant had thus established that the records requested were reasonably required for the exercise and protection of his rights as a shareholder, and that the records would assist him in the exercise and protection of the rights. Denying the records "would go against the principles of accountability and transparency inherent in the Act and Constitution." [Page 86].

Meer J found further that the refusal of the applicant's request had not complied with the requirements of PAIA. [Pages 86 – 88] Respondent was ordered to furnish the applicant with specified documents. [Page 89].

The decision was overturned by the Supreme Court of Appeal in **Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA)**. The court held that the applicant had failed to show that the access he sought was

required for the exercise or protection of the rights asserted, as legislation and the common law provided shareholders with sufficient protections.

SOCIO-ECONOMIC RIGHTS

SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS V CITY OF CAPE TOWN AND OTHERS (8631/2020) [2020] ZAWCHC 84 (25 AUGUST 2020)

Case heard 20 – 21 August 2020, Judgment delivered 25 August 2020.

This was an application for an urgent interdict to restrain the first respondent, its Anti-Land Invasion Unit (ALIU) and any private contractors from evicting persons from and demolishing any informal dwellings while the state of disaster remained in force, except in terms of an order of court. Where an eviction or demolition did occur in terms of a court order, this was to be done in a way that was lawful, and respected and upheld the dignity of the evicted person. [Paragraph 2].

Meer J (Allie J concurring) detailed various demolition operations carried out by the ALIU during Alert levels 3 and 4 of the national state of disaster [paragraphs 10 – 36] and rejected the City’s argument that evictions were not carried out from unoccupied structures. [Paragraphs 41 – 44]. Meer J held that the applicants had established “a *prima facie*, if not a clear right” to the interdict in respect of occupied structures. [Paragraph 45].

Regarding the unoccupied structures, Meer J accepted the applicants’ argument that the PIE Act required that if there was any doubt about whether a structure was occupied for residential purposes, or whether it was complete or fully built, a court order had to be obtained before a person could be evicted from it, or the structure could be demolished. Meer J held that this interpretation ensured “that the occupier’s constitutional rights to dignity, housing, safety and security of the person and life” were protected. [Paragraphs 46 – 47].

Regarding the applicants’ challenge to how the ALIU determined which structures were unoccupied, Meer J held that the City had:

“in my view not provided a substantial response to the charge ... that ALIU determines which dwellings are unoccupied and singled out for demolition in an arbitrary, capricious and unfettered manner. The City has failed to point to any policy, rule, or legislation that sheds light on how it determines what is occupied and unoccupied. [Counsel] for the City was not able to point me to any evidence which indicated any policy employed by the ALIU, let alone one that was not arbitrary.” [Paragraph 50].

Meer J found that the judicial oversight sought by the Applicants was justified, notwithstanding the “[b]udgetary and ... many housing challenges the City faces”. This was bolstered by “the characterisation of the right in section 26(3) as a negative right – being a right which would simply require the actor to refrain from an unlawful action.” Meer J rejected an argument that the City would suffer prejudice due to land incursions if court orders had to be obtained for demolitions of and evictions from unoccupied structures:

“Land invasions or incursions do not occur because of court orders or judicial oversight. Land invasions are driven by homelessness, poverty and desperation.” [Paragraph 54].

The interdicts were granted.

**PHILLIPS V MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND ANOTHER (LCC76/2010)
[2013] ZALCC 13**

Judgement delivered: 30 July 2013

The claimant, a white farmer, had been forced to sell his farm to the state for incorporation into the Ciskei, and lodged a claim for restitution of rights in land, on the basis that he had been dispossessed of rights in land as a result of a past racial law, namely the Development Trust and Land Act of 1936. Defendants argued that the plaintiff had received just and equitable compensation, and then in an amendment, contended that the plaintiff had voluntarily sold the farm, and that he “did not fall within the category of people whose human rights were violated”.

Meer AJP noted that “palpable emotion” shown by the plaintiff when describing having to leave his farms, and that the plaintiff testified that the fact that he had not protested against the acquisition of the properties “did not indicate he was a willing seller”, but that he accepted there was nothing he could do. [Paragraph 12]. Meer AJP held that whilst it was “undoubtedly so that Black African people bore the brunt of injustice under repressive apartheid legislation” and that their human rights and dignity were “violated incomparably with any other group”:

“... [N]owhere in the Constitution or the Restitution Act is it stated that any category of persons is to be excluded from the ambit of restitution. On the contrary the Constitution and the Restitution Act are inclusive documents imbued respectively with the ethos of humanity, morality and restorative justice, documents whose purview in seeking to move beyond a racially divisive past, are inclusive of all South Africans. Their spirit emphasise [sic] a shift from confrontation to reconciliation. ...” [Paragraphs 25 - 26]

Meer AJP held that she could not adopt an interpretation that would require her to “traverse into the realm of the Legislature” and “legislate the exclusion of White persons and indeed other categories of persons who were not victims of the 1913 Land Act, under the guise of purposive legal interpretation.” To do so would infringe on the doctrine of separation of powers. [Paragraph 29].

Meer AJP then considered a series of judgements by the Land Claims Court which established that a deprivation of ownership prompted by a racial law, or which had as its root cause a racial law, constituted a forced sale and consequently a dispossession. [Paragraph 33] Accordingly, the Plaintiff had been dispossessed of a right in land as contemplated by the Restitution Act. [Paragraph 36].

Meer AJP then dealt with the question of costs, and noted that the court was presented with “the astonishing explanation” for different approaches by the defendant in similar cases, that these were due to instructions from different regional Commissioners. Meer AJP remarked:

“I express my concern that there exist such regional divergences which can advantage one claimant in one province and disadvantage a similar claimant with almost identical claim in another province, with regard to legal precedent. Such an approach flies in the face of the guarantee at Section 9(1) of the Constitution to equality before the law ...” [Paragraph 39].

Meer AJP found that the defendant’s continued opposition in the issue of dispossession was unworthy”, and in persisting with an argument “in total disregard of precedent to the contrary”, had run the risk of a punitive costs order. [Paragraph 40]. Meer AJP found that the plaintiff had been disposed of rights in land under the Act and ordered the first and second defendants to pay the plaintiff’s costs in respect of the hearing on dispossession on the attorney and client scale.

An appeal relating to the amount of compensation payable was dismissed by the Supreme Court of Appeal in **Minister of Rural Development and Land Reform and Another v Phillips (52/2016) [2017] ZASCA 1; [2017] 2 All SA 33 (SCA) (22 February 2017)**.

HLATSHWAYO AND OTHERS v HEIN 1999 (2) SA 834 (LCC)

Case heard 27 September 1997, Judgment delivered 27 September 1997

This case was an appeal to the Land Claims Court against a summary judgment granted by a Magistrate’s Court for the eviction of the appellants (defendants) from the respondent’s (plaintiff’s) farm. The respondents disputed the jurisdiction of the LCC on two grounds: (a) Section 13 of the Land Reform (Labour Tenants) Act only granted appellate jurisdiction to the Land Claims Court in respect of proceedings that were pending at the commencement of the Act on 22 March 1996, thereby excluding the present case, which commenced on 29 May 1996; and (b) it had not been found that the defendants were labour tenants.

Meer J held considered the issue of jurisdiction, and found that it was clear that the Legislature had expressly intended to grant appellate powers to the Land Claims Court, however:

“The maxim *expressio unius est exclusio alterius* suggests that the framers of s 13 intended to give this Court appellate jurisdiction only in respect of eviction cases which were pending when the Act came into effect ... and intended to exclude appellate jurisdiction over all eviction cases, pending or not, in references to jurisdiction elsewhere in the Act.” [Paragraph 7]

Meer J found that the summons in question has not ought to evict labour tenants, but instead ordinary persons unlawfully occupying the farm, and the magistrate had not made a finding that they were labour tenants. The requirements of section 13 of the Act had thus not been met, and Meer J found that the Land Claims court did not have jurisdiction to hear the appeal. [Paragraph 8]. Meer J held further that:

“I am of the view that, where appellate jurisdiction over eviction proceedings is expressly conferred by a specific section of the Act, reference to jurisdiction elsewhere in the Act must exclude appellate jurisdiction in such cases and is a reference to ordinary jurisdiction as a Court of first instance. I do not believe that one can simply read 'appellate' jurisdiction into s 33(2) or any other section of the Act where such jurisdiction is not expressly provided for, as the appellant's legal representative would have us do.” [Paragraph 10].

Furthermore, the jurisdiction conferred under the Land Reform (Labour Tenants) Act and the Restitution of Land Rights Act did not include appellate jurisdiction. [Paragraph 11]. Meer J acknowledged that it was “indeed an anomalous situation” that the Court lacked appellate jurisdiction in this case, *inter alia* because the proceedings had not been pending when the Act had commenced, since “the Land Claims Court is the obvious forum to decide whether defendants are labour tenants or not.” Meer J observed that even in situations where people facing evictions were labour tenants, landowners would be unlikely to concede that they were labour tenants, since that would trigger “the significant protections afforded to labour tenants under the Act.” Meer J observed that:

“Indeed to bring an eviction claim in the Land Claims Court they [land owners] will have to allege and prove that defendants are labour tenants. They are far more likely to bring their actions as ordinary eviction proceedings in the magistrates' courts. This is regrettable, but it

is up to the Legislature to amend the Act so as to give the Land Claims Court power consistent with its purposes. ..." [Paragraph 14]

The appeal was dismissed. Dodson J concurred and wrote a separate concurring judgement.

DULABH AND ANOTHER v DEPARTMENT OF LAND AFFAIRS 1997 (4) SA 1108 (LCC)

Case heard 3 February 1997, Judgment delivered 16 April 1997

Applicants claimed financial loss suffered because of their grandmother's dispossession and being unable to inherit family property due to being legally compelled to sell the property to a white person in terms of the Group Areas Act. Of particular importance was the interpretation of "dispossession" in section 121(2) of the Interim Constitution.

Meer J (Gildenhuys J concurring) described the claim as "interesting" and "unusual", since the claimants and their family had not physically moved off the property after it was declared to be a white group area. [Paragraph 8]. The court had to determine whether a dispossession of a right in terms of section 121(2)(a) of the Interim Constitution had occurred. [Paragraph 28]. Meer J noted that neither the Act nor the Interim Constitution defined the concept of dispossession:

"The literature on dispossession pertaining to the context of land reform tends to contemplate dispossession in relation to ethnic groups that have suffered a particular kind of deprivation: the confiscation and denigration of their resources and culture under imperialism and colonial exploitation." [Paragraph 29]

Meer J identified the issue as being concerned with concepts of restoration, restitution and compensation. It raised the question of whether a claim for restitution of a right in land by compensation could be allowed "where physical restoration of the land has already been acquired by the claimants through their own means". [Paragraph 32]. Meer J held that, in order to fully establish the ambit of the term restitution:

"[O]ne should reach beyond the immediate linguistic context ... to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation, but also to the sense, spirit, ethos, morality and fundamental principles of the Interim Constitution and the Act." [Paragraph 46].

Meer J held that to adopt a narrow meaning of restitution and exclude a claim such as this would be "prejudicial precisely to those people whom the Interim Constitution and the Act seek to protect from the past injustices of discriminatory legislation" and would exclude the claimants merely because they had "through their own initiative" bought back property from which they had been unfairly dispossessed. Such an approach "would take no cognisance of the hardship and unfair discrimination foisted upon them by law." [Paragraph 46]. Meer J concluded that denying the claim would be absurd, and amount to "punishing [the claimants] twice." It would make a mockery of the spirit of the Interim Constitution and the Land Restitution Act. [Paragraph 60]. Given the meaning of restitution, nothing precluded the applicants from claiming compensation.

SELECTED ARTICLES

'LITIGATING FUNDAMENTAL RIGHTS: RIGHTS LITIGATION AND SOCIAL ACTION LITIGATION IN INDIA: A LESSON FOR SOUTH AFRICA', 9 South African Journal on Human Rights 358 (1993)

The article deals with the litigation of rights in the Supreme Court on India. It focuses on the creativity of judges and how that same judicial activism can be applied in the South African context, particularly in 'social action' litigation cases.

"This paper attempts to examine some aspects of public interest litigation/social action litigation in India, some of the major cases as illustrations of rights litigation in the Indian Supreme Court, and attempts an assessment and evaluation based on my experience and research during September and October 1991 in India."

"This paper is prompted also by the belief that India's rights litigation and the creative measures it has adopted in distributing justice through public interest litigation/social action litigation is of significance to a South Africa poised on the brink of a new order and yet to embark on a bill of rights." (Page 359)

"None of the reactions to social action litigation in India have been quite as extreme [compared to criticism by United States legal academics], and an examination of some of the critiques reveals that no one has condemned this development outright. However, predictably the unconventional and unorthodox nature of social action litigation has been the cause of considerable concern and some important criticisms have been articulated."

"The most oft heard criticism is that the courts are taking over the function of the administration and involving themselves in policy determination, an arena best left to the executive. They are not justified in taking over the administration in the guise of correcting governmental error or excesses." (Page 369)

"Judicial activism and creativity, a constitution enshrining fundamental rights and a socially active society imbued with a heightened sense of rights awareness and a culture of resistance to oppression, have assisted the process of distributing justice in India, despite the harsh socioeconomic realities, poverty and misery." (Pages 371 - 372)

"The similarities between India and South Africa - the diversities of race, religion, language and culture, the contrasts between wealth and massive poverty, as well as the vibrant freedom struggles which characterize both societies, make the Indian social action litigation model all the more compelling and relevant."

"The experience of human rights litigation within the framework of a bill of rights will be a new and very different one, given that thus far we have enforced rights in the absence of entrenched fundamental rights." (Page 372)

JUSTICE MAHUBE MOLEMELA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 March 1965

BA, University of Fort Hare (1986)

B Proc, University of Fort Hare (1992)

Advanced Diploma in Labour Law, University of Johannesburg (1998)

LLB, University of the Free State (2000)

LLM (Mercantile Law), University of Free State (2002)

Certificate in Advanced Military Law, Thaba Tshwane College, SANDF (2003)

CAREER PATH

Justice of Appeal, Supreme Court of Appeal (2018 – to date)

Acting Justice, Supreme Court of Appeal (December 2016 – September 2017)

Acting Justice, Constitutional Court (January – May 2015)

Judge President, Free State Division of the High Court (2015 – 2018)

Judge of Appeal, Labour Appeal Court (2014 –)

Acting Judge, Competition Appeal Court (2012 – 2014)

Acting Judge, Labour Appeal Court (2012 – 2014)

Judge, Free State Division of the High Court (2008 – 2018)

Acting Judge, Gauteng Local Division of the High Court, Johannesburg (2007 – 2008)

Acting Judge, Free State Division of the High Court (2005, 2006, 2007)

Military Judge (2004)

Director, Smith Tabatha Buchanan Boyes (2005 – 2007)

Director, Claude Reid Inc (2003 – 2004)

Part-time lecturer, University of Free State (2001 – 2003)

Arbitrator, CCMA (1999 – 2004)

Partner, Kubushi Molemela Attorneys (1997 – 1999)

Sole practitioner, M B Molemela & Partners (1995 – 1997)

Admitted as a Notary (1996)

Admitted as a Conveyancer (1996)

Candidate attorney and attorney, Peete, Jake Moloi & Partners (1989 – 1995. Admitted as attorney 1993)

Prosecutor, Thaba Nchu Magistrates Court (1987)

Member, International Association of Women Judges (2009 – present)

Member, Black Lawyers Association (1997 – 1999)

Councillor, Law Society of the Free State (1987 – 2008)

Central University of Technology

Chancellor (2016 –)

Council member (2013 – 2015)

Member, Catholic Women's League (2016)

Council Member, St Rose Parish Church Council (2004)

SELECTED JUDGMENTS**CIVIL PROCEDURE****GOLD CIRCLE (PTY) LTD V MAHARAJ (1313/17) [2019] ZASCA 93 (3 JUNE 2019)****Case heard 6 May 2019, Judgment delivered 3 June 2019**

Respondent, a professional racehorse trainer, had instituted proceedings under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), claiming that the applicant had discriminated against him on racial grounds. The Equality Court upheld a special plea of *res judicata* in the form of issue estoppel. The high court overturned that decision and remitted the case to be heard before another magistrate. [Paragraphs 1 – 2]. The respondent had in 2008 brought a claim against the applicant in the Equality Court, complaining of unfair discrimination. A second claim in 2013 was dismissed by the Equality Court for lack of jurisdiction. [Paragraphs 5 – 8].

Molemela JA (Majiedt, Wallis, Saldulker JJA and Weiner AJA concurring) found that new evidence had been placed before the Equality Court which had not been adduced in the 2008 case. This related particularly to anger management treatment undertaken by the respondent, which he wished to use to show that applicant's reasons for its decision to refuse him stabling facilities were a sham. Molemela JA noted that it was not for the SCA to determine whether the evidence did so, but the respondent was entitled to seek to use the evidence in this way. [Paragraphs 22 - 23]. The Equality Court had therefore erred in making the finding of issue estoppel. Since no evidence had been led on the merits of the most recent claim, the high court had been correct to remit the case to the equality court. [Paragraph 24].

Molemela JA then turned to consider whether remarks by the high court had shown “a lack of judicial restraint”, and noted that while judges may have to express critical views about litigants and witnesses, this required circumspection, “and must be supported by all the facts.”

“Given its unfortunate history of structured racism, South Africa is still a racially charged society. ... These cases [in which accusations of racism were made] attest to the far-reaching consequences that a mere accusation of racism may bring. Courts must therefore be alive to the sensitivity of disputes involving racial connotations. Circumspection is required not only in relation to the order that is ultimately made but also in relation to remarks made *en passant*. ...” [Paragraph 25].

“[G]iven that the allegations of racism had not been tested by cross-examination and that Gold Circle had countered the allegations of its lack of transformation by presenting names of black people who had allegedly benefitted from transformation policies of Gold Circle, there was simply no basis for the court a quo to have made remarks from which it could be implied that Gold Circle is racist. The court a quo seems to have made findings pertaining to the very nub of the case based on unproved facts. This is contrary to established legal principles which dictate that inferences be drawn only if they are justified by proven facts. Moreover, since there were disputes of facts on that very aspect, it was impermissible for the court a quo to make the remarks it made on the basis of averments made by just one party. “[Paragraph 26].

Molemela JA found that the high court had also been unjustified in commenting on the magistrate's readiness to proceed with the matter. There was no reason why the magistrate should be precluded from presiding over the new hearing of the matter. [Paragraph 27].

The appeal was dismissed, save for the matter being remitted to the Equality Court for a new hearing before any presiding officer. [Paragraph 29].

HARRIELALL V UNIVERSITY OF KWAZULU-NATAL [2017] ZASCA 25 (27 MARCH 2017)

Case heard 16 February 2017, Judgment delivered 27 March 2017

Appellant had sought an order directing the respondent to admit her into the first year of study for the MBChB degree, for the academic year of 2016. On appeal, appellant abandoned the previous grounds relied upon, and a new ground was advanced for the first time on appeal which had not been contained in the founding affidavit. The majority, per Swain JA and Mbatha AJA (Cachalia JA and Gorven AJA concurring), held that the appeal was dismissed with costs.

Molemela AJA agreed that the appeal must fail, and whilst agreeing that the Biowatch principle was not applicable, disagreed on the costs order:

“...The nature of the right the appellant was seeking to protect is another important consideration. Her litigation was not in pursuit of a commercial interest; rather it was in a bona fide pursuit of admission to her preferred field of study. In the broader scheme of things, her litigation was about access to education. Moreover, it was not based on spurious grounds, as the respondent had previously admitted under-graduates on the strength of the provisions of clause 3a of Annexure D.” [Paragraph 26]

“Having considered all the facts of this case, I am of the view that mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent’s policy on other grounds. This may have an unintended chilling effect on access to justice. Such an order would militate against the ‘just and equitable’ remedy envisaged in Section 8(1)(f) of the Promotion of Administration Justice Act 3 of 2000, which dictates that costs be determined in a manner that is fair to both parties. For all the reasons alluded to above, I am of the view that there are special circumstances that justify a departure from the general rule that costs must follow the event. I would therefore make no order as to the costs of the appeal. » [Paragraph 29]

Swain JA wrote a separate judgment responding to the judgment of Molemela AJA :

“I disagree with the conclusion that ‘mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent's policy on other grounds. This may have an unintended chilling effect on access to justice’. No other grounds were raised by the appellant as a basis for challenging the respondent's policy. The concern raised is not based on any evidence and amounts to unjustified speculation.” [Paragraph 37]

An appeal on costs was upheld by the Constitutional Court in **Harriellall v University of KwaZulu-Natal (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017)**. The court held that the Biowatch principle should have been applied in determining costs and criticised the High Court and the SCA for departing from the Biowatch principle [paragraphs 10 – 11]. No order as to costs was accordingly made.

CRIMINAL JUSTICE**S V DOOREWAARD AND ANOTHER 2021 (1) SACR 235 (SCA)****CASE HEARD 17 AUGUST 2020, JUDGMENT DELIVERED 27 NOVEMBER 2020**

The appellants had been convicted in the North-West High court of murder, kidnapping, theft, and pointing a firearm. The incident giving rise to the charges was the death of a 15 – year old boy at Coligny.

Ledwaba AJA found that held that the state had not proved its case beyond reasonable doubt and that the appellants should be acquitted.

Molemela JA dissented. Molemela JA agreed that “the criminal investigation in this matter was bungled” [paragraph 45], and that the evidence of Mr Pakisi did not pass muster [paragraph 51], and that the convictions should be set aside. [Paragraph 53]. Molemela JA then considered whether the appellants were guilty on the competent verdict of culpable homicide and found that the “totality of the facts of this case justify an inference of gross negligence.” [Paragraph 59].

“Notably, there was no attempt to summon the police to the scene. It bears mentioning that, in the normal course, an arrestee is transported by the police in a bakkie with a canopy, which at least ensures that the arrestee does not fall out in the normal operation of the vehicle, and thus excludes the risk of the arrestee being ejected from it. It is axiomatic that a bakkie without a canopy cannot offer the same protection. ...” [Paragraph 62]

Molemela JA found that by deciding to arrest the deceased, the appellants assumed a duty of care to ensure that he was safely transported to the police station. [Paragraph 63]. On the appellants' own version, they were travelling on an uneven gravel road, yet the appellants had not expressed misgivings about the victim “sitting alone and unrestrained in the loading bin of the bakkie.” Molemela JA found that the appellants “must have had a full appreciation of the risk” of the deceased, “being ejected from the moving bakkie that was travelling on a bumpy road,” but had not taken steps to ensure that this did not occur. Molemela JA held that the appellants had “created a potentially dangerous situation for the deceased”, and that a reasonable person in the position of the first appellant, as driver of the bakkie, “would have foreseen that conveying the deceased at the back of a bakkie without a canopy presented certain risks” [paragraphs 64 – 65].

Molemela JA found that it could not be gainsaid “that the deceased's death resulted from the serious injuries he sustained from falling off the appellants' moving bakkie, regardless of how exactly that happened”, and that causal negligence had been established beyond a reasonable doubt. [Paragraphs 72 - 73] Molemela JA would thus have set aside the first appellant's conviction on the charge of murder and replace it with a conviction on culpable homicide. [Paragraph 74].

Ponnan JA wrote a judgment concurring in the judgment of Ledwaba AJA and disagreeing with Molemela JA's conclusion on conviction for culpable homicide. The appeal was therefore upheld.

Y V S (537/2018) [2020] ZASCA 42 (21 APRIL 2020)**Case heard 18 February 2020, Judgment delivered 21 April 2020**

The applicant had been convicted in the Regional Court on one count of sexual assault and two counts of rape. He was sentenced to five years' imprisonment for sexual assault and life imprisonment for rape. [Paragraph 1] An appeal to the full bench of the high court failed. The complainant was 13½ years old at the time the trial commenced. The applicant was her stepfather. [Paragraph 5].

On appeal to the SCA, Mbatha JA (Navsa and Dambuza JJA concurring) found that the evidence of the complainant, who was a single witness, was contradictory, inconsistent, and generally unsatisfactory, and upheld the appeal.

Molemela JA dissented, disagreeing with the majority judgment for setting aside the decision of the trial court “without having engaged with the credibility findings it made. This flies in the face of the well-established principle that courts of appeal will not tamper lightly with the trial court’s credibility findings.” Molemela JA found that the credibility findings of the trial court were “beyond reproach.” [Paragraph 79].

Molemela JA examined the evidence of the complainant, in order to evaluate the credibility findings against her. [Paragraph 80]. Whilst agreeing that the prosecutor had adduced the complainant’s evidence “in a haphazard fashion, constantly interrupting her ...”, Molemela JA cautioned “we need to be careful not to, in the process of determining whether the requisite standard of proof has been met, throw the proverbial baby of credible evidence out with the bathwater.” [Paragraph 82] Molemela JA found that despite its imperfections, the complainant’s testimony held together despite not having been led in a strict sequence. Molemela JA could not “identify any deficiency in her version that could warrant its outright rejection.” [Paragraph 87]

Molemela JA endorsed the position of the SCA in *S v Shilakwe*, that “once a detailed and critical examination of all the components of evidence” had been completed, the court must:

“step back and observe the mosaic of evidence as a whole. Acknowledging that doubts about one aspect of the evidence led in the trial may arise when that aspect of evidence is viewed in isolation ... such doubts may be set at rest when that aspect of evidence is evaluated again together with all the other available evidence. ...” [Paragraph 89]

Molemela JA found that the exercise of caution in approaching the evidence of a single witness “should not be allowed to displace common sense.” Differing from the majority, Molemela JA found that the trial court had been mindful of the cautionary rule and had dealt with contradictions between the evidence of the complainant and other witnesses. [Paragraph 92] Molemela JA concluded that:

“Having considered all the circumstances of this case, I am of the respectful view that the majority judgment’s harsh criticism of the complainant’s evidence arises from viewing bits and pieces of evidence in isolation despite the trite principle that a court’s conclusion must account for all the evidence.” [Paragraph 135].

Dambuza JA (Navsa JA concurring) wrote a separate judgment concurring with the judgment of Mbatha JA, remarking that “[r]eferences to dicta in which appeal courts have deferred to a trial court’s assessment of evidence are unhelpful when the evidence on record in an instant case, or lack of it, militates against the conclusions reached by a trial court.” [Paragraph 77]

SALZMANN V S (755/18) [2019] ZASCA 145; [2020] 1 ALL SA 361 (SCA) (13 NOVEMBER 2019)

Case heard 19 August 2019, Judgment delivered 13 November 2019

Appellant was charged with a cyber attack on a mobile telephone network. The trial began in 2005, and appellant was convicted in 2015, and sentenced to a fine or 12 months’ imprisonment on one count, and three years’ imprisonment on another . An appeal to the high court was dismissed in 2017. In 2018, the high court granted leave to appeal. [Paragraphs 1 – 4]. This raised an issue in that the Superior Courts Act of 2013 had come into effect while the trial was ongoing. Prior to this, the high court hearing an appeal from a lower court was empowered to grant leave to appeal further to the SCA if it dismissed the appeal. Following the introduction of the Act, the high court was no longer competent to grant such leave.

[Paragraphs 5 – 6]. The issue to be determined was which system of appeal applied to this case. [Paragraph 8].

Leach and Mokgohloa JJA (Saldulker JA concurring) held that proceedings were no longer “pending” in terms of the Superior Courts Act once judgment had been given, and any subsequent step, such an appeal, did not constitute a pending proceeding. The high court accordingly did not have jurisdiction to grant special leave to appeal to the SCA. There were no grounds to grant special leave to appeal to the SCA. [Paragraph 38].

Molemela JA agreed with the findings on conviction, but dissented on sentence, holding that the sentence was “far too severe and has been vitiated by several instances of material misdirection.” [Paragraphs 46 – 47]. Molemela JA found that the trial court had not considered the cumulative effect of the sentences imposed [paragraph 48]; had failed to consider “the offender’s particular crime and its seriousness, as opposed to following a rigid approach that the maximum sentence set out in the penalty clause is in itself indicative of the seriousness of that crime” [paragraph 49]; had taken into account “the fallacious consideration of the maximum sentence as being inadequate” in imposing sentence [paragraphs 50 – 51]; and had paid “insufficient regard” to the “inordinate delay” in finalising the trial. Molemela JA disagreed with the majority’s reasoning that the appellant had “really only himself to blame” for the delays, finding that this paid insufficient regard to the constitutional right to a trial without unreasonable delay. [Paragraphs 52 -53].

Molemela JA held further that:

“While a plea of guilty may, in appropriate circumstances, be regarded as indicative of remorse, this court has acknowledged that a lack of remorse is not an aggravating factor. I am not aware of any judgment of this court that has held to the contrary. An offender cannot be penalised simply because they wish to challenge allegations made by the State against them.” [Paragraph 59].

Molemela JA expressed concern over “unjustified and startling remarks” made by the trial court in determining sentence, [Paragraphs 61 – 62]. Whilst the trial court’s incorrect approach to sentencing “should not detract from the seriousness of the offence” [paragraph 67], the trial court had not exercised its sentencing discretion judicially, and Molemela JA would have granted special leave to appeal, and suspended the sentence of 3 years; imprisonment. [Paragraphs 68 - 69].

Mbatha JA wrote a separate dissenting judgment, concurring in the order proposed by Molemela JA.

CUSTOMARY LAW

RASELLO V CHALI AND OTHERS, CHALI AND OTHERS V RASELLO AND OTHERS (A69/2012, 683/2011) [2013] ZAFSHC 182

Case heard 16 September 2013, Judgment delivered 24 October 2013

The first to fifth respondents, applicants in the court a quo, sought an order setting aside an alleged customary marriage entered into on the 19th March 2005 between the late David Masakale Chali, who died on the 23rd of May 2005, and the appellant. They further sought an order for the removal of the 6th respondent as executor of the deceased estate. The first respondent was the mother of the deceased and the third, fourth and fifth respondents the children of the deceased. The second respondent was previously married to the deceased, but they were divorced on the 20th May 2002. Her interest in the application

related to the unfinalised administration of the joint estate which subsisted between her and the deceased prior to their divorce. The appellant, first respondent in the court a quo, together with the executrix of the estate (7th respondent) opposed the application on the basis that she and the deceased had entered into a valid customary union.

Molemela J (Ebrahim and Van Zyl JJ concurring) held:

“For a union to be regarded as a customary marriage, it must be concluded in accordance with custom. One of the important elements that distinguish a customary marriage from a common law marriage is that the former establishes marital bonds between the family of the bride and the family of the groom whereas the latter establishes bonds of marriage between the groom and the bride only. The ceremony referred to by the appellant, having taken place before payment of lobola and without the involvement of the appellant’s family, is in my view not in conformity with custom and does not enjoy customary recognition. In *Fanti v Boto* ... the court found, correctly in my view, that “it is totally inconceivable and in fact impossible for only one side of the two families to be involved in these ceremonies”.” [Paragraph 16]

“... [T]he appellant made no averments whatsoever to counter the respondent’s contention that there was no delivery of the bride as required by custom. In my view, the appeal could thus be dismissed on this basis alone. To the extent that the ceremony that allegedly took place in Lesotho may be regarded as some challenge to the respondent’s averments pertaining to the delivery of the bride, then that challenge was on the basis of clearly untenable and far-fetched assertions that warranted rejection on the papers. This view is based on the fact that on the appellant’s own version, the ceremony in question occurred in April 2002, approximately a year before lobola was allegedly paid. As lobola had not yet been paid, logic dictates that there could not have been any makoti (bride) to talk about at that stage, let alone to deliver or to “introduce”. A ceremony held before payment of lobola thus cannot constitute delivery of the bride as this is not in conformity with custom.” [Paragraphs 17]

The appeal was dismissed with costs.

JUDGE DHAYA PILLAY

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born : 5 January 1958

BProc, UNISA (1982)

LLM, University of Natal (Durban) (1993)

Certificate in Constitutional Law, University of Natal (Durban) (1994)

LLB, UNISA (2002)

LLD, University of Pretoria (2020)

CAREER PATH

Acting Justice, Constitutional Court (2021)

Judge, Independent Electoral Commission (2018 -)

Acting Justice of Appeal, Supreme Court of Appeal (January – June 2018)

Judge, KwaZulu – Natal High Court (2010 -)

Acting Judge, KwaZulu – Natal High Court (2003, 2005)

Judge, Labour Court (2000 – 2010)

Yunus Mahomed and Associates

Partner (1987 – 2000)

Professional Assistant (1985 – 1987)

Professional Assistant, David & Company (1984 – 1985)

MC Moodliar and Co

Professional assistant (1983 – 1984)

Articled clerk (1979 – 1982)

Arbitrator, Arbitration Foundation of South Africa (1997 – 1999)

Independent Mediation Services of South Africa Panels

Dispute Resolution Systems Design (1996)

Labour Relations Act training (1995)

Trainer (1995)

Mediator (1994)

Arbitrator (1992)

Academic

Visiting scholar, Harvard Law School (September 2018 – January 2019)

Extra-ordinary Professor, University of Pretoria (2010 - 2012, 2013 – 2015, 2016 – 2019)

Honorary Research Fellow, University of KwaZulu – Natal (2013 – 2016)

Visiting fellow, Pembroke College, Oxford University; Oxford Human Rights Hub (2014)

Adjunct Professor, Seattle University School of Law (2004, 2006)

Member and executive member, Durban branch, NADEL (1984 – 1987)

Member, Democratic Lawyers' association (1979 – 1984)

Member, African National Congress (1994 – 2000)

Non – executive Director, CANSA (2020 – to date)

SELECTED JUDGMENTS

PRIVATE LAW

HANEKOM V ZUMA (D6316/2019) [2019] ZAKZDHC 16 (6 SEPTEMBER 2019)**Case heard 23 August 2019, Judgment delivered 6 September 2019**

Applicant sought to interdict respondent from publishing a statement on applicant's twitter account to the effect that applicant was "a known enemy agent." Applicant contended that the tweet implied that he was an apartheid spy, and was defamatory [Paragraphs 1 – 2].

Pillay J identified the core issue in dispute as being the meaning of the tweet in context. [Paragraphs 11 - 12]. After setting out the political context in which the litigation took place, as set out in the parties' affidavits [paragraphs 14 - 27], Pillay J described the dispute as part of a "larger conflict" internal to the ANC following the recall of the respondent as President, with the litigation serving as "a proxy for the internal conflict within the ANC." [Paragraphs 28 - 29]. Pillay J described the litigation as a "conflict aggravator" [paragraph 33] and noted that "neither litigant seems inclined to engage bilaterally or within the political structures of the ANC to find a negotiated solution." [Paragraph 34].

Pillay J analysed the meaning of the phrase "known enemy agent", and found that "to the reasonable reader, the historical connection to apartheid spies is the most obvious." [Paragraph 43]. Pillay J found that the respondent had no evidence to justify the assertion, other than the applicant's admission that he had met with members of the EFF and ANC members who "also wanted Mr Zuma removed as head of State". [Paragraph 45]. Pillay J found that:

"[N]othing from Mr Hanekom's admission lays a basis for Mr Zuma to label him as a 'known enemy agent' or apartheid spy. Dishonesty and duplicity embedded in the phrase makes it automatically defamatory. That Mr Zuma links his tweet to Mr Hanekom's admission and role in removing him as President is odd. The decision to remove Mr Zuma as President was that of the NEC. ..."
[Paragraph 46].

Pillay J held further that reference in the tweet to respondent's testimony before the Zondo Commission of Inquiry meant that:

"Reasonable readers would interpret the link in the tweet to the Commission to mean that Mr Hanekom is part of that plan in which apartheid spies and agents conspired with two big countries to 'deal with Zuma'. In other words, Mr Hanekom's plans to have him removed from leadership in the ANC, dovetails with the apartheid agents' plans." [Paragraph 51].

This interpretation was supported by the contents of the respondent's answering affidavit. [Paragraphs 52 – 54]. Pillay J found that the tweet was defamatory and false.

Pillay J then undertook an analysis of "a few material inconsistencies, misconceptions and distortions" which, due to the "public interest nature" of the case, "could be peddled as truths" if left unchecked. [Paragraphs 55 – 81]. Pillay J found that a reasonable reader would infer that the respondent's tweet implied that the applicant was an apartheid spy. Respondent was ordered to apologise, remove the tweet and pay damages, the determination of which was referred to oral evidence. [Paragraphs 85 – 86].

COMMERCIAL LAW**STANDARD BANK OF SOUTH AFRICA LTD v DLAMINI 2013 (1) SA 219 (KZD)****Case heard 6 August 2012; 14 August 2012, Judgment delivered 23 October 2012**

The case concerned the purchase of a motor vehicle by Mr Dlamini, through a dealership acting as an agent for Standard Bank. Mr Dlamini returned the vehicle after 4 days due to the serious defects and demanded a refund of his deposit. The bank issued summons against Mr Dlamini, contending that he had not elected to cancel the agreement in the prescribed manner. The main issue was whether Mr Dlamini understood the material terms of the credit agreement, and whether the bank had taken reasonable steps to ensure that he understood.

Pillay J held that Mr Dlamini was “functionally illiterate”, did not understand English, and had completed schooling until standard one only. He was “unsophisticated” and had struggled to engage with documents while testifying. [Paragraph 23].

“His illiteracy, lack of sophistication and general discomfort at being in a courtroom rather than deliberate mendacity caused him to lapse into the easy option of simply denying everything.” [Paragraph 24]

Pillay J noted that the Constitution recognised past injustices and committed to “to healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens.” [Paragraph 28]. The purposes of the National Credit Act (NCA) included “promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers”. [Paragraph 34].

On the cancellation procedure employed by the bank, Pillay J held that it:

“... makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund.” [Paragraph 44]

Pillay J held that the Bank should have had better measures in place “to ensure that its historically disadvantaged customers are aware of their rights and responsibilities.” The NCA placed an onus on credit providers to inform consumers about their rights and responsibilities. [Paragraph 49].

The rescission of the credit agreement was held to be valid, and Standard Bank was ordered to pay the costs of the action.

CIVIL AND POLITICAL RIGHTS**MAKWICKANA v ETHEKWINI MUNICIPALITY AND OTHERS 2015 (3) SA 165 (KZD)****Case heard 26 November 2014, Judgment delivered 17 February 2015**

The Durban Metropolitan Police conducted raids and impounded the goods of street traders found without trading permits. One such trader, Mr Makwickana, challenged the constitutionality of certain provisions of the municipal bylaws regulating informal trading.

Pillay J held that the requirement that nobody other than a permit holder could trade on the street “inconvenienced the applicant and other street traders seriously”, as they were unable to leave their stock unattended. [Paragraph 11]. Whilst provisions of the bylaws relating to impoundment may be necessary in respect of some contraventions, not all infringements harmed the public to the extent that impoundment was required.

“Section 35(1) [of the bylaw] is overbroad in that it permits impoundment for all contraventions without differentiating between serious absolute contraventions and less serious, formal non-compliances, such as trading without producing proof of a permit, that do not pose a threat to the public ” [Paragraph 81]

Pillay J held that the prejudice of removing a street traders' property without a hearing was compounded by the power to sell, destroy or dispose of foodstuffs or perishable goods. [Paragraph 82]. Pillay J noted that the "luxury of litigation" was not an option for every street trader whose property was impounded [paragraph 85] and found that the right of access to courts was "theoretical and illusory for street traders generally." [Paragraph 88]. Pillay J thus found that s 35 of the bylaw limited the right of access to courts under s 34 of the Constitution and proceeded to consider the issue of deprivation of property in terms of s 25 of the Constitution. Pillay J found that the deprivation of property was so invasive that it impacted on the welfare "of the street traders and their large families. For most, the impounded goods were their only assets. Deprivation also impacted "on their identity and dignity as people with property, however little that is." [Paragraph 98]. Pillay J held further that the arbitrary deprivation of street traders' property also impaired their right to trade. [Paragraph 102].

Pillay J then turned to deal with the argument that Mr Makwickana's right to equality was infringed on the basis of race and socio-economic status. Pillay J held that whilst the bylaw was facially neutral:

"... apartheid layered poverty over race. The degree of coincidence or intersectionality of race with socioeconomic status results in the greatest impact being on Africans. As the population group with the largest component of poor people the impact is deeper and more expansive than on any other race group. Race and socioeconomic status are cemented together tightly, though not inextricably." [Paragraph 116] The effect of the bylaw was to discriminate directly and indirectly "against poor and mainly African people." [Paragraph 125].

Pillay J held that s 35 of the bylaw constituted discrimination under s 9(3) of the Constitution, and could not be saved by the limitations clause. Pillay J held that the removal and impounding of the applicant's goods was unlawful; awarded compensation of R775 for the value of the goods, plus interest at the prescribed rate; and declared sections 35 and 39 of the Informal Trading Bylaw to be unconstitutional and invalid. [Paragraph 149].

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MOTATA V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER (52010/2016) [2016] ZAGPPHC 1063; [2017] 1 ALL SA 924 (GP) (30 DECEMBER 2016)

Applicant, a judge of the high court, was involved in a motor vehicle accident which resulted in his conviction for driving whilst under the influence of alcohol. A complaint was lodged with the Judicial Service Commission. The Judicial Conduct Committee recommended to the JSC that a Judicial Conduct Tribunal be established to investigate the applicant's conduct further. Applicant challenged numerous provisions of the JSC Act as being unconstitutional.

Pillay J dismissed a point *in limine* that Parliament should have been joined to proceedings. [Paragraphs 12 – 17]. A second point in limine, that the challenge lacked a factual basis, was upheld in respect of provisions not relating to the impeachment proceedings against the applicant. [Paragraph 25]. Pillay J then examined the constitutional scheme regulating the removal of judges from office. [Paragraphs 30 – 45]. Pillay J held that "[t]extually and contextually" the Constitution authorised the JSC Act, and Parliament had exercised its original jurisdiction in passing the Act. No question of the JSC delegating its authority to Parliament arose. [Paragraph 52].

Pillay J then surveyed international best practice on the governance of the judiciary [paragraphs 53 – 57], and found that this supported the finding that "[e]xclusion of the legislature and the executive from determining and participating the complaints process, as contended for by the applicant, is the antithesis of dialogue and counterproductive to constitutional values in South Africa and other democracies." [Paragraph 57].

Pillay J found that there was nothing which suggested that “the JSC Act was foisted on the judiciary.” [paragraph 59], and that in considering the validity of the Act, the potential for abuse of power had no bearing on constitutionality. [Paragraph 73]. The applicant’s complaint that non-JSC members were appointed to the JCC and Tribunal was rejected as unjustified. [Paragraph 77].

Pillay J held that:

“[C]onstitutional interpretation is not only about parsing the words. Both textual and contextual interpretations matter. Contextually, the JSC Act reinforces dialogical constitutionalism. It sets objective ground rules for engagement by the three actors representing the three arms of government. A certain, predictable, consistent, transparent and accountable process fortifies the separation of powers and preserves the independence of the judiciary. Without it, the JSC would have to first persuade the other two arms that it adopted a fair procedure in deciding to remove a judge and therefore they should accept its decision to remove the judge.” [Paragraph 81].

The JSC Act was held to be consistent with the Constitution. [Paragraph 84]. Pillay J rejected an argument that no costs order be made, on the basis that the applicant had not raised a genuine constitutional dispute. [Paragraph 103]. Pillay J concluded that:

“I would be failing in my duty if I did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against the applicant should be dealt with and concluded without any further delay. The events that gave rise to the complaint occurred in 2007. Nine years later, the matter has not been finalised. It is in the interests of justice that this matter be brought to finality.” [Paragraph 104].

CRIMINAL JUSTICE

S v MABASO 2014 (1) SACR 299 (KZP)

Case heard 6 February 2013, Judgment delivered 10 May 2013

This was an appeal against the sentence imposed by the high court, where the accused was sentenced to life imprisonment for the two counts of rape and to 15 years imprisonment for robbery with aggravating circumstances. On appeal, the main issue was whether the trial court’s reliance on provisions of the Criminal Law Amendment Act were appropriate given the nature of the notification to the appellant that those provisions were to be applied. For the majority, Koen J (Ploos van Amstel J concurring) held that it was not to be assumed that, because an accused had been represented, the provisions of the Act had been pertinently brought to his attention and that the accused must from the outset know what the implications and consequences of the charges were. As there had been no indication in the charge-sheet or at the beginning of proceedings that the state might seek to invoke the provisions of the Act in respect of the count of robbery with aggravating circumstances, the court a quo had erred in proceeding on the premise that the prescribed minimum sentence should follow. The majority imposed an effective sentence of 20 year’s imprisonment.

Pillay J dissented, holding that whilst sentencing could not amount to “inflexible rubber-stamping”, it could not undermine the legislative intent to impose tougher sentences. [Paragraph 25]. Pillay J held:

“In this case the complainant was raped because she was female. Rape is inherently and automatically sex and gender discrimination. Gender and sex are the recognised grounds of discrimination because of the prevalence of rape by men of women.” [Paragraph 35]

Pillay J noted further the propensity of rape victims to become suicidal, and that “[f]ew crimes are as dignity- and soul- destroying as rape is.” [Paragraph 36]. Whilst the appellant and complainant were

entitled to the rights to human dignity, equality and freedom, “once the appellant has infringed these rights of the complainant he cannot expect to enjoy them to the same extent as she is entitled to or in the same way he did before his conviction. His rights must yield in favour of her rights.” [Paragraph 40].

Pillay J held that the appellant had had a fair trial, and would have sentenced the appellant to 25 years imprisonment on the two counts of rape, and 8 years imprisonment on the count of assault, to run concurrently [Paragraph 64]

NDWANDWE V THE STATE (AR99/12) [2012] ZAKZPHC 47

Case heard 28 June 2012, Judgment delivered 6 August 2012

This was an appeal against conviction and sentence in a rape case. The proceedings in the trial court were marred with many irregularities. The main question on appeal was whether those irregularities were sufficiently serious to allow the appeal.

Pillay J (Mbatha J concurring) dealt first with the trial court’s failure to apply s 170A of the Criminal Procedure Act (CPA), which allowed a witness under eighteen to give evidence through an intermediary. Pillay J noted that the Constitutional Court had held that this procedure ought to be followed in all matters involving child complainants in sexual offence cases. [Paragraph 4]. This “should have been fresh in the minds of the learned magistrate and prosecutor ... when this trial commenced”, but neither section 170A nor the judgment had featured during proceedings. [Paragraphs 4 – 5].

On the failure by the trial court to apply s 153(5) of the CPA [allowing for in camera proceedings when witnesses under eighteen testify], Pillay J held that the magistrate had “muddled the requirements” for in camera proceedings, and “aggravated their mental stress and suffering already accompanying the daunting atmosphere of a court by exposing them to not only the accused but also his family to the exclusion of their own.” [Paragraph 7]

Pillay J held that child witnesses had been sworn in without the presiding officer first determining their competence to testify. [Paragraph 14]. Pillay J noted that:

“... [T]he proceedings were conducted by an all-male team of magistrate, prosecutor and defence attorney. It is not clear from the record whether the interpreter was also a male. If he was, this would have aggravated the child witnesses’ ability in communicating effectively. ... Rape victims, adults and children alike have great difficulty in expressing their experiences dispassionately and coherently. The role of the interpreter to communicate empathetically in such cases is vital. ...” [Paragraph 17]

The conviction and sentence were set aside, and it was ordered that the prosecution serve the judgment on the magistrate and prosecutor involved in the trial.

SELECTED PUBLICATIONS**PAJA V LABOUR LAW (2005) 20 (2) SAPR/PL 413**

This article discusses the debate over 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”. (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 ... 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 author 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 LRA which 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 also conflict regarding their procedures and remedies.

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 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 the 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).

The author considers what are argued to be inappropriate uses of the concept of equity in reported CCMA decisions.

“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.

JUDGE DAVID UNTERHALTER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 18 November 1958

BA, Cambridge (1980)

LLB, University of Witwatersrand (1984)

BCL, Oxford (1985)

MA, Cambridge (1987)

CAREER PATH

Acting Justice, Supreme Court of Appeal (June – November 2020; December 2020 – May 2021)

Acting Judge of Appeal, Competition Appeal Court (2018 – to date)

Judge, Gauteng High Court (2018 – to date)

Acting Judge, Gauteng High Court (2013, 2014, 2016, 2017)

Advocate

Johannesburg Bar (1990 – 2017)

Senior Counsel (2002)

English Bar (2009)

Professor of Law, University of Cape Town (2014 – 2017)

Visiting Professor of Law, National University of Singapore (2015)

Professor of Law, University of Witwatersrand (2007 - 2013)

Member of Appellate Body, World Trade Organisation (2006 - 2013)

Visiting Professor, Columbia Law School, New York (2008)

Director, Mandela Institute & Professor of Law, University of Witwatersrand (2000 - 2006)

Director, Centre for Applied Legal Studies (CALS) and Professor of Law, University of Witwatersrand (1997 - 2000)

Senior Lecturer in Law, University of Witwatersrand (1990 - 1997)

Legal Advisor, Small business corporation (1988-1989)

Lecturer in Law, University of Witwatersrand (1988-1989)

Lecturer in Law, University College, Oxford (1985-1987)

Lecturer in Law, University of Witwatersrand, (1984)

Executive Member, South African Jewish Board of Deputies (2020)

Tribunal Member, International Arbitration Centre (SIAC) (Shenzhen) (2017 –)

Executive Member, AFSA (2016 –)

Tribunal Member, International Centre for Settlement of Investment Disputes (ICSID) (2016 –)

Tribunal Member, China-Africa Joint Arbitration Centre (CAJAC) (2016 –)

Tribunal Member, International Chamber of Commerce (2014 –)

Member, Johannesburg Bar Council (2004)

Advocacy training, General Council of the Bar (2002 – 2017)

Member, Various Committees, Johannesburg Bar Council (1996 – 2017)

Trustee, Helen Suzman Foundation (1994 – 2017)

Executive Member, Lawyers for Human Rights (1990 - 1996)

Chair, Johannesburg Chapter, Society for the Abolition of the Death Penalty in SA (1990 - 1995)

Chair Johannesburg, National Institute for Crime Prevention (NICRO) (1989 - 1995)

Member, Democratic Party (1989 - 1994)

SELECTED JUDGMENTS**COMMERCIAL LAW****POTGIETER V OLIVIER AND ANOTHER (15456/2011) [2014] ZAGPPHC 829; 2016 (6) SA 272 (GP) (16 OCTOBER 2014)****Case heard 13 October 2014, Judgment delivered 16 October 2014**

Plaintiff sold his property to the Defendants in terms of a written agreement. The purchase price agreed upon was R1 million, payable either in cash or by payments of R10 000 per month. The issue was whether the agreement of sale was void on the basis that the agreement of sale was a credit transaction in terms of section 8(4)(f) of the National Credit Act and that the plaintiff was obliged, as a credit provider, to register in terms of section 40(1)(b) of the Credit Act.

Unterhalter AJ held:

“... [I]t seems to me that, on a proper construction ... of the agreement of sale, there is indeed a deferral of payment. [...] The agreement is one that permits the purchasers to discharge the purchase price by way of monthly instalments over a lengthy period, as an alternative to the payment of cash on registration of title. This constitutes a deferral of the payment of the purchase price. It is this deferral of payment that then attracts the concomitant obligation to pay interest. These seem to me to be the hallmarks of the grant of credit, as defined in the Credit Act.” [Paragraph 11]

“... In paragraph [15] of the judgment in Friend [Friend v Sendal Case No 973/2010, unreported, 3 August 2012, full bench], a finding is made that the Respondent is not a credit provider as defined in the Credit Act. But no reasons are provided for this finding. As the concluding sentence of paragraph [15] makes plain, those reasons are to be found in what follows. And what follows is the Court’s interpretation of Section 40(1)(b) and the application of that interpretation to the position of the Respondent. This reasoning is necessary to explain the conclusion reached by the Court in paragraph [15] and thus cannot be considered as obiter dicta. It follows that the interpretation of Section 40(1)(b) constitutes the ratio of the decision, and is binding upon me.” [Paragraph 22]

“It follows that I am bound by the holding in Friend and must apply it in this case. Here too, there is a single credit transaction. ...” [Paragraph 28]

“I should nevertheless add that, if Friend were not binding upon me, I should be disinclined to follow it. In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), the Supreme Court of Appeal has provided an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose.” [Paragraph 30]

“That the principal debt is expressed by reference to “outstanding credit agreements” is not an indication that a single credit agreement is not implicated in the legislative language. ...” [Paragraph 32]

The declaratory relief sought was dismissed, and the Plaintiff’s remaining claims and the second defendant’s counterclaim postponed sine die.

ADMINISTRATIVE JUSTICE

NDORO AND ANOTHER v SOUTH AFRICAN FOOTBALL ASSOCIATION AND OTHERS 2018 (5) SA 630 (GJ)**Case heard 24 April 2018, Judgment delivered 24 April 2018.**

Applicant, a professional football player, was registered with Ajax Cape Town, the second respondent. During the 2017 – 2018 season, applicant was registered with three different clubs, the last being Ajax. The National Soccer League (NSL), a special member of the first respondent which administered the league in which Ajax competed, took the view that FIFA regulations, whilst allowing the registration of a player with three clubs in a season, precluded a player from playing for more than two clubs in a season. The NSL therefore advised Ajax not to play the applicant in competitive matches. Applicant and Ajax successfully challenged this decision before the Dispute Resolution Committee (DRC) of the NSL, but the NSL successfully reviewed the decision before the SAFA arbitration tribunal. [Paragraphs 1 – 10]

Unterhalter J began by considering whether the decision of the arbitrator was reviewable. Applicants sought to review the decision under the common law as a private power exercised by a voluntary association, alternatively under the Promotion of Administrative Justice Act (PAJA), alternatively under the principle of legality. Applicants expressly disavowed any reliance upon a review in terms of s 33 of the Arbitration Act. Respondents argued that the arbitration was a private arbitration, and that without reliance on the Arbitration Act, the applicant's case must fail. [Paragraphs 15 – 16]. Unterhalter J noted that the courts had taken different positions on whether sporting bodies that regulated a sport without statutory authority could still be characterised as private bodies exercising public powers capable of review under PAJA [paragraphs 18 – 22]. From these cases it could be established that private entities could exercise public functions through recourse to powers which did not have a statutory source, and these powers could be classified as public powers. Actions flowing from these powers may constitute administrative action. Furthermore, while a private entity might exercise public powers, this did not mean that all its conduct flowed from the exercise of a public power. Finally, merely because a private entity was powerful and could do things that were of interest to the public did not mean that it discharged a public power or function. [Paragraph 23].

Unterhalter J found that FIFA, SAFA and the NSL constituted an “institutional framework”, and whilst each entity was a private organisation, with relationships with their members founded on contract, it was “hard to escape the conclusion that what these bodies do and the objects they strive after are public in nature.” [Paragraphs 29 – 30] Unterhalter J found that “private associations that regulate football exercise public functions because they oversee a public good, and do not simply regulate private interests”, noting that this was “precisely how Fifa and Safa see themselves.” [Paragraph 31]. Unterhalter J thus found that:

“Fifa, Safa and the NSL, though private associations, enjoy regulatory powers that discharge public functions. And when they do so, their actions amount to administrative action undertaken by juristic persons in terms of the empowering provisions of their statutes and regulations. This renders such actions open to scrutiny by way of judicial review under PAJA.” [Paragraph 33].

Unterhalter J then considered whether the decision of the Arbitration Tribunal was reviewable [paragraphs 34 ff] and found that the Tribunal was an “appellate dispute settlement body forming part of the regulatory scheme to enforce the rules of that scheme. The fundamental features of private arbitration are lacking.” [Paragraph 41]. Unterhalter J held that the arbitrator's decision constituted administrative action and was susceptible to review under PAJA. [Paragraph 48]. However, the arbitrator had correctly found that the DRC had lacked jurisdiction over the complaint. [Paragraph 79]. The application was therefore dismissed.

ZAMANI MARKETING AND MANAGEMENT CONSULTANTS PROPRIETARY LIMITED AND ANOTHER V HCI INVEST 15 HOLDCO PROPRIETARY LIMITED AND OTHERS (32026/2019) [2020] ZAGPJHC 5 (11 FEBRUARY 2020)

Case heard 30 January 2020, Judgment delivered 11 February 2020

Applicant sought to set aside an award made by three arbitrators, all retired judges. An interlocutory application was brought to compel two of the three arbitrators to deliver documents containing manuscript notes which appeared on their copies of the pleadings and the combined discovery bundle. [Paragraphs 1 – 2]. The arbitrators submitted that Rule 53, under which the documents were sought, was not applicable to the applicant’s review under section 33 of the Arbitration Act, and that the notes did not in any event form part of the record. [Paragraph 3]

Unterhalter J found that Rule 53 was not confined to reviews of the exercise of public powers. [Paragraph 13] Rule 53 was applicable to an arbitration review [paragraph 16], as (1) an application under section 33 of the Arbitration Act was a review proceeding in which “a court applies legislative and hence public standards to a tribunal that adjudicates a dispute”; (2) case law had applied Rule 53 to arbitration reviews or analogous proceedings; (3) the *Midkon* case cited by the arbitrators was not authority for the proposition that Rule 53 did not apply to arbitration reviews; and (4) the fact that Rule 53 applied to the review of executive and administrative action did not mean it was confined to these types of reviews. [Paragraphs 17 – 22].

Unterhalter J then considered whether the documents sought formed part of the record. Unterhalter J noted that historically the courts had interpreted the record of proceedings under Rule 53 widely, but excluded the deliberations of the decision-maker from the record. This position has changed in light of the Constitutional Court’s judgment in *Helen Suzman Foundation* case, which held that there was no general exclusion of the deliberations of the decision-maker from the Rule 53 record. [Paragraph 29]. Unterhalter J found that the Court had distinguished the deliberations of a decision-maker and the notes made by a decision-maker and had left open the question of whether notes contained in the equivalent of a judge’s “bench book” were excluded from the record. [Paragraphs 32 – 33]. Unterhalter J distinguished between the JSC’s deliberations and the arbitrators’ notes, finding that the JSC’s practice was for the Chief Justice to distill reasons from the deliberations. An arbitration award, by contrast, provided “dispositive and authoritative reasons” for an award. The arbitrators’ notes did not necessarily bear a relationship to the award, since they “may be fragmentary, provisional, exploratory, and subject to discard or revision”, and “do nothing more than show what an arbitrator was thinking at a point in time in the proceedings.” [Paragraphs 35 – 36].

Unterhalter J concluded that:

“Without the freedom to take notes ... I apprehend that the adjudicative function would be compromised. The prospect of unmeritorious litigants dissecting an arbitrator’s notes for some fragment to support a claim of irregularity would incentivize arbitrators either not to take notes at all or to take them in such a way that stultified the freedom of thought and enquiry that should be encouraged to secure sound adjudication. ... An arbitrator should be at liberty to experiment in thinking about the case, without the ultimate burden of having to justify or explain why a note was made, how it might have influenced the ultimate decision, or why it was discarded. ... The raw materials of adjudicative reflection should be produced under conditions of utmost freedom. That freedom would be curtailed if disclosure was the price to be paid for its exercise.” [Paragraph 41].

Unterhalter J thus found that the arbitrators’ notes did not form part of the record and their disclosure could not be compelled in terms of Rule 53.

S V H AND OTHERS (2267/2015) [2016] ZAGPPHC 379 (15 APRIL 2016)/ BASSON V HUGO 2016 JDR 0802 (GP)**Case heard 16 February 2016, Judgment delivered 15 April 2016**

Dr Basson, a qualified medical practitioner, was found guilty by a professional conduct committee of unprofessional conduct relating to his participation in chemical and biological warfare research whilst in the employ of the South African Defence Force in the 1980s. It was moved that Dr Basson should be removed from the Register of Medical Practitioners, and this was endorsed by several organisations. After it came to the attention of the Applicant's counsel that the Chairman of the Committee, Professor Hugo, and also Professor Mhlanga, were members of one of the organisations that had signed the petitions, an application was made to the committee seeking their recusal. Dr Basson then approached the court seeking to review and set aside the refusal by Professors Hugo and Mhlanga to recuse themselves.

Unterhalter AJ held that the central question was whether Dr Basson could appeal the committee's refusal of the recusal application. [Paragraph 24]. Unterhalter AJ noted that the powers vested in an appeal committee constituted under the Act referenced "a finding of the professional conduct committee" [paragraph 26], and held:

"[T]he appeal committee may consider the merits of the recusal application and the ultimate finding of the committee to refuse the application. If the committee came to an incorrect finding and should have found that Professors Hugo and Mhlanga could no longer serve on the committee, then in my view the appeal committee enjoys the power to set aside the finding of the committee and correct it. The ruling of the committee dismissing the recusal application is a finding of the committee. An appeal committee is [sic] terms of Section 10(3) of the Act is given appellate powers in respect of a finding of a professional conduct committee. The committee's ruling is such a finding." [Paragraph 29]

"It follows that in my view Dr Basson is afforded a meaningful right of appeal under the Act to have the correctness of recusal finding considered once more. ..." [Paragraph 32]

"In the result I find that Dr Basson does enjoy an internal remedy of appeal under the Act. It follows that he is under a duty to exhaust this remedy in terms of Section 7 of PAJA, unless exempted from doing so. ..." [Paragraph 33]

Unterhalter AJ held that the application was premature and could not be entertained until the internal remedy of appeal had been exhausted.

SELECTED PUBLICATIONS**“EQUAL PROTECTION AND INTERPRETATIVE DEFERENCE UNDER THE CONSTITUTION, 110 *SOUTH AFRICAN LAW JOURNAL* 563 (1993).**

This article discusses the concept of interpretative deference in United States law, and considers its application to the (then pending) South African Constitution. It argues that the constitutional concepts that require interpretation in equal protection cases are not best understood in terms of interpretative deference.

“Interpretative deference says that we decide constitutional cases by having regard to the text of the Constitution, its structure and society’s traditional understanding of the text. Judges who would escape these strictures, and create new constitutional rights by imposing their own values upon the interpretation of the Constitution, usurp the democratic process whereby the people’s representatives in the legislature determine the values that govern the people.” [Page 563]

“There is every likelihood that our courts will find interpretative deference an attractive doctrine, and not least because it recommends judicial restraint. Such restraint may well be thought prudent in the light of political uncertainties, and if prudence is rendered legitimate by our own version of interpretative deference it will be all the more inviting.” [Page 564]

“But under a Bill of Rights the court may not defer to the legislature where there is a constitutional right that is infringed. It is the court’s duty to uphold constitutional rights and to protect an individual *from* the majority’s democratic decisions that infringe them. Nobody doubts this proposition, for to do so would defeat the principal reason for a Bill of Rights. This argument from deference thus appears to be empty, and I shall call it rhetorical deference. Where constitutional rights run out, of course the courts may not seek further to review legislation under the Constitution, as that would indeed be a usurpation of the legislature’s role. On the other hand, where an individual has a constitutional right, the court is bound to protect it. Talk of deference to majoritarian decision – making does not advance the court’s real task: to derive from the Constitution our constitutional rights. The claims of the majority in the legislature have no bearing upon that question. ...” [Page 568]

“PROFESSIONAL PRIVILEGE AND THE PROOF OF INNOCENCE”, 105 *SOUTH AFRICAN LAW JOURNAL* 291 (1988)

This article analyses the then – Appellate Division’s treatment of the principles of legal professional privilege and the accused’s right to prove their innocence in the case of *S v Safatsa*. In that case, counsel for the accused had gained possession of a statement made by one of the state witnesses to an attorney, and sought to cross-examine the witness on the contents of the statement, notwithstanding that it was prima facie privileged. The trial judge declined to permit cross examination, and the appeal court upheld that decision.

“This argument is most puzzling. It is hard to conceive of any case which requires more plainly a decision of principle between the competing claims of the privilege and the right of an accused to have all the evidence relevant to the proof of his innocence placed before the court. ... [H]is lordship placed a wholly exaggerated value upon legal professional privilege within our legal system, and proceeded from an unjustified premiss to legal arguments of the most doubtful justice. ...” [Page 294]

“The place of the privilege in our practice is entirely subordinate to the requirements of procedural fairness, and the role of privilege is confined to the maintenance of those aspects of procedural fairness already considered. ... We allow the privilege to exclude relevant evidence only in the cause of promoting those general features of an adversarial trial process which we believe assist truth-finding by the court.” [Page 298]

“The claim that the privilege is a fundamental right fails for two reasons. First, the conception of the privilege as a fundamental right does not fit into the structure of rules in our law dealing with the privilege, so that either the law requires significant surgery or this conception is wrong. Secondly, the principles of equality and party responsibility upheld by the privilege are only two among several principles which constitute procedural fairness in the criminal trial, and they are not even the primary ones. ...” [Page 299]

MEDIA COVERAGE

Jordan Moshe, “Unterhalter weighs up his new role as judge”, *South African Jewish Report*, 8 February 2018 (<https://www.sajr.co.za/unterhalter-weighs-up-his-new-role-as-judge/>)

““I was delighted by the opportunity but also full of trepidation over the change it would involve.

“It is the role of an advocate to present a case and his client, while a judge’s role is to be fair at all times, exercise balanced judgment and reach the best possible decision. This role carries enormous responsibility.”

“The judiciary plays a vital role in cementing the democracy of South Africa. I now have the unique opportunity to contribute to this role, but I am mindful of the importance of shifting my professional focus from that of an advocate to that of judge. Not all legal practitioners are suited for judicial life. Some make better attorneys or advocates. Self-assessment is always crucial, and time will tell if I am truly suitable for this position.”

Unterhalter is proud of South Africa’s legal system. “Our legal system is in a robust state of health. The independence of the judiciary is proven by the fact that it upholds the Constitution and democratic order. The legal professions are peopled by talented individuals, and while we haven’t solved a number of problems surrounding access to justice, the legal institutions are doing well overall.”

Antoinette Slabbert, “Advocate pitted against expert witness: Economist says conduct of Media24 papers should be viewed together”, 22 November 2013

<https://www.moneyweb.co.za/archive/advocate-pitted-against-expert-witness/>

A “verbal fencing” was reported between Advocate Unterhalter SC and economist Dr Simon Roberts at a hearing before the Competition Tribunal in which Media24 was charged for abusing its market dominance and predatory pricing in the market for community newspapers in the Free State gold fields between 2004 and 2009. Unterhalter was cross-examining Roberts in defence of Media24. Advocate Unterhalter SC reportedly told Dr Simon Roberts who was testifying for the Competition Commission that it was not his task to argue the Commission’s case against Media24 before the Competition Tribunal: “You read the record only to prove the case you want to prove. It is important that as an expert witness you should read it to see what it (really) says”.

“Phosa vs Unterhalter: Can Zuma have a fair trial?” Mail & Guardian, 06 February 2009, <https://mg.co.za/article/2009-02-06-phosa-vs-unterhalter-can-zuma-have-a-fair-trial>

ANC treasurer general Mathews Phosa, during a debate on law and politics at the University of Johannesburg, made a statement that ANC president Jacob Zuma would not have a fair trial on the corruption charges because “there is no judge in South Africa who does not have an opinion on his case”. Professor David Unterhalter disagreed with Phosa, saying Zuma would be tried fairly. He based his arguments on the fact that judges based their verdicts on the evidence presented to them: “Of course judges read newspapers, but when they go into a court room, they rely on evidence”. Unterhalter argued that the notion that Zuma could not get a fair trial because his case was much talked about was not true.

Phosa argued that the South African judiciary was not adequately transformed: “There are issues of ideology [...] certain ideologies are not going to leave us [...] people brought up on apartheid cannot just change those ideologies,” he said. But Unterhalter disagreed with this, saying that there were many judges in South Africa who were aligned to the current legislative framework. Nonetheless he conceded that many judges tended to be middle class people, and that there were instances where errors were made. “Where judges stray, the public must come down on them, like a tonne of bricks. It disturbs me to hear that we inherited apartheid judges — who are they? Let’s have it out there, to ensure that we have the best kind of judiciary,” he said.

“Hlophe’s lawyer says judge is free”, IOL, 31 August 2009,

<https://www.iol.co.za/news/politics/hlophes-lawyer-says-judge-is-free-456813>

“The JSC was split on the matter, issuing both a majority decision in the judge's favour and a minority decision calling for a hearing. Unterhalter said there was a dispute over the facts on whether there was an attempt to influence the court. In dispute over facts, the usual way of dealing with it was to hear evidence.

“The net result is that there has not been a definitive finding on the basis of all the evidence. I don't think that serves the public and particularly I don't think it serves Judge Hlophe.

“This is not exoneration; this is just the JSC divided against itself and unable to take a decision.”

This left an unsatisfactory situation. “What is very concerning is that you have the highest court in the land making serious charges against the judicial leader of a division of the high court, and we have an outcome where nobody ultimately knows where the truth lies,” said Unterhalter.”

JUDGE BASHIER VALLY

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 23 May 1959

B COM, University of Witwatersrand (1982)

BA (Hons) (Industrial Sociology), University of Witwatersrand (1983)

MA (Sociology), University of Warwick, UK (1985)

LLM (Labour Law), University of Witwatersrand (1994)

LLB, University of Witwatersrand (1996)

CAREER PATH

Judge of Appeal, Competition Appeal Court (2018 -)

Acting Judge of Appeal, Competition Appeal Court (2016 – 2018)

Judge, Gauteng High Court (2012 -)

Acting Judge, Gauteng High Court (October – December 2010)

Advocate (1996 – 2012)

Arbitrator, Independent Mediation Services of SA (1993 – 1996)

Mediator, Independent Mediation Services of SA, Self-Employed (1991 – 1996)

Junior Lecturer, Department of Sociology, University of Witwatersrand (1989 – 1990)

Organizer, Negotiator & Educator, Commercial, Catering and Allied Workers Union of South Africa
(1985 – 1986)

Member, Arbitration Panel, Education Labour Relations Council (2000 – 2009)

Essential Services Commission

Chairperson (2000 – 2006)

Member (1999 – 2006)

Senior Commission Trainer of Commissioners, CCMA (1996 – 2002)

Independent Mediation Services of SA

Member Panel (1991 – 1996)

Member of Board of Trustees (1993 -1995)

Trainer of Mediators and Arbitrators (1993 – 1996)

Advocates for Transformation

Member (2003 – 2012)

Treasurer (2010 – 2012)

Member Access to Justice Committee (2009)

Member, Black Advocates Forum (1996 – 2003)

SELECTED JUDGMENTS**COMMERCIAL LAW****CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED AND OTHERS V MULTICHOICE PROPRIETARY LIMITED AND OTHERS [2016] ZACAC3 (24 JUNE 2016)**

This matter concerned whether a ‘commercial and master channel distribution agreement’ between the South African Broadcasting Corporation (SABC) Ltd and MultiChoice (Pty) Ltd constituted a merger under section 12 of the Competition Act. The Competition Tribunal found that there was no transfer of productive capacity in the transaction, as the SABC did not transfer market share or business to MultiChoice. The main judgment of the CAC, delivered by Davis JP and Boqwana AJA, held that the information before the court could not provide a sufficient basis to conclude that a merger had taken place. However, it found that the Competition Tribunal should have more generously exercised its inquisitorial powers to extract vital information considering the notable public interest in this matter concerning the national broadcaster. The majority therefore referred the case back to the Tribunal.

Agreeing with this order but offering different reasons, Vally J held:

“Section 12(1) specifically provides that where there is a transfer of part of a business from one firm to another a merger has been effected. It is by now well established in international competition law that a transfer only of intellectual property rights in a product could result in a merger. It goes without saying though that while a transfer of part of a business or a transfer of intellectual property rights in a single product may constitute a merger the decision on whether there actually has been a merger or not is fact-specific. In our law an important consideration is whether there has been a “direct or indirect acquisition” or “direct or indirect control” over the transferred business or part of a business. The appellants’ case is fought on both fronts ...” [paragraph 42]

“There is no doubt MultiChoice is given extensive say over the material that is distributed through the entertainment channel as that channel is part of its bouquet of channels and is made available only to its subscribers. It is also possible to conceive of the entertainment channel as being a separate business that is born out of the agreement and that it involves a combination of the assets of the SABC with that of MultiChoice. There is also no doubt that the SABC is considerably constricted in its ability to re-use that material on its own channels.” [paragraph 43]

“In my view, however, on their own these two facts do not allow for a conclusion that MultiChoice has acquired control over part of the business of the SABC as contemplated in ss 12(2)(a) –(f) of the Act... I cannot agree ... that the established facts demonstrate on a balance of probabilities that the agreement has resulted in a merger of assets and that such a merger has effectively allowed MultiChoice control over parts of the business of the SABC.” [paragraph 44]

“Turning my focus then to whether MultiChoice has increased its market share at the expense of the SABC, it is obvious that MultiChoice wishes to attract the customers of the SABC who have yet to join the ranks of its five million (5m) subscribers. It can, therefore, be accepted that by virtue of it offering

the exclusive archival material of the SABC on its bouquet the attraction of its services increases. But, whether this will translate, or has translated, into an actual transfer of customers from the SABC to MultiChoice is something that cannot be, or has not been, established from the facts revealed thus far.” [Paragraph 46]

Vally J emphasised the importance of the SABC’s position on the issue of encryption. [Paragraph 48].

“Should government persist with its view that encryption should be non-compulsory then if the SABC, upon re-examination of its present stance, decides that this policy is in conflict with its duty to serve and/or act in the public interest it would have to make known its opposition to the government decision and take whatever legal steps are available to it in order to protect its role and duties as a public broadcaster. At present it is unable to re-examine its policy without risking the early termination of the agreement. To the extent that the power to bring this early termination rests wholly in the hands of MultiChoice, it can be safely inferred that MultiChoice has a significant influence over the policy of the SABC. The policy, as stated above, is of crucial import.” [paragraph 50]

“If regard is had to these aspects of the agreement then on the face of it (prima facie) the appellants have shown that the SABC and MultiChoice have constructed a merged business as contemplated in s 12 of the Act.” [Paragraph 51]

Vally J distinguished between the standard of proof on a balance of probability, which was certain and final, and the proof required to show a prima facie case, which “is one that is tentative.” The Tribunal had erred by conflating the two tests, an error “significant enough to constitute a misdirection warranting interference by this Court. It resulted in the Tribunal incorrectly refusing the alternative relief. An error refusing relief (main or alternative) when relief is due constitutes a material misdirection.” [paragraph 52]

CIVIL AND POLITICAL RIGHTS

DEMOCRATIC ALLIANCE V MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION AND OTHERS; ENGELS AND ANOTHER V MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION AND ANOTHER (58755/17) [2018] ZAGPPHC 534; [2018] 4 ALL SA 131 (GP); 2018 (6) SA 109 (GP); 2018 (2) SACR 654 (GP) (30 JULY 2018)

Case heard 10 – 11 May 2018, Judgment delivered 30 July 2018.

During a SADC ordinary summit of heads of state, the then first lady of Zimbabwe, Grace Mugabe, was alleged to have assaulted three South African women in a Sandton hotel. One of the victims, Ms Engels, laid a criminal charge. Grace Mugabe left the country two days after the alleged assault. Following a *note verbale* from the Zimbabwean Embassy, the Minister purported to bestow diplomatic immunities on Grace Mugabe. [Paragraphs 1 – 6]. Applicants sought to have the decision set aside. At issue was whether Grace Mugabe enjoyed diplomatic immunity for the alleged unlawful act by virtue of being a spouse of a head of state, and if not, whether the Minister’s decision to grant or confer immunity was constitutional and lawful. [Paragraph 13].

Vally J undertook a detailed analysis of the position of diplomatic immunity under customary international law. [Paragraphs 16 – 19]. Vally J considered the question of whether immunity *rationae personae* extended to the spouse of a head of state. After considering a wide range of cases from foreign jurisdictions, Vally J concluded that the evidence was “too contradictory to support the definitive finding ... that immunity *rationae personae* is extended to the family members of a head of a foreign state.” There was thus no customary international law norm to the effect that the spouse of a head of state was entitled to immunity from prosecution for the offence that Grace Mugabe was alleged to have committed. [Paragraphs 35 – 36].

Vally J then turned to consider the Foreign States Immunities Act (FSI), and noted that the Act provided an exception from immunity in proceedings relating to the death or injury of any person. [Paragraph 39]. Thus, as even President Mugabe would not have enjoyed immunity, there was no derivative immunity which his spouse could enjoy. [Paragraph 40]. Vally J found further that the issue was not moot. [Paragraph 40].

The application succeeded. The Minister’s decision to recognise immunity was found to be inconsistent with the Constitution, reviewed and set aside.

ADMINISTRATIVE JUSTICE

BLACK EAGLE PROJECT ROODEKRANS V MEC: DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, GAUTENG PROVINCIAL DEPARTMENT AND OTHERS (6085/07) [2019] ZAGPJHC 23; [2019] 2 ALL SA 322 (GJ) (28 FEBRUARY 2019)

Case heard 5 – 7 November 2018, Judgment delivered 28 February 2019

Applicant sought to review and set aside two decisions by the MEC. The first was to dismiss an appeal by the applicant against a decision by the second respondent HOD to authorise the development of various phases of a residential development. The second was to overturn the HOD’s decision to refuse an application for an amendment to the development. [Paragraph 1].

Vally J rejected an argument that the HOD had been *functus officio* and not empowered to make the first decision. [Paragraph 22] An argument that the HOD had not been authorised to grant the exemption underlying the first decision was rejected, as it had only been raised in heads of argument. [Paragraph 23]. The applicant further challenged the first decision on the grounds that it was irrational and/or unreasonable, and had failed to take relevant considerations into account. Vally J found that the decision could not be said to be irrational, and the fact that the Department had opposed the initial application did not detract from the rationality of the decision. [Paragraph 29].

Vally J then considered the challenge that the appeal decision was unreasonable, and considered English and South African case law on reasonableness and its relationship with rationality. [Paragraphs 30 - 38] Vally J noted that Constitutional Court case law emphasised the importance of conceptually differentiating “between reasonableness and rationality as grounds of review. [Paragraph 37]. Vally J found that the applicant had failed to put forward any facts distinct from those advanced under the rationality challenge. Vally J found that the MEC had not acted unreasonably in refusing the appeal. [Paragraph 40].

On the second decision, Vally J found that there had been no public participation process, and the MEC had provided no substantive reasons for upholding the appeal. [Paragraphs 41 – 42]. This rendered the decision irrational. [Paragraph 43].

The challenge to the appeal decision was thus dismissed, while the amendment decision was reviewed and set aside. First respondent was ordered to pay fifty percent of the costs of the applicant.

CIVIL PROCEDURE

DEMOCRATIC ALLIANCE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA [2017] 3 ALL SA 124 (GP)

Case heard 4 May 2017, Judgment delivered 9 May 2017

This interlocutory application arose from the applicant's review proceedings of President Zuma's cabinet reshuffle in March 2017. The applicant sought to bring the review of the executive action under rule 53 and opted to do so in conjunction with rule 6(12), which facilitates truncated time-periods regarding the filing of papers in urgent matters. Respondent had failed to observe the dictates of rule 53 within the shortened windows requested by the applicant as a matter of urgency, and missed further deadlines indulged by it. This application sought to obtain the reasons for and record of the reshuffle. Respondent argued that both the interlocutory and main applications were not 'urgent', and further, that his decision, made under s 91 of the Constitution, fell outside the ambit of rule 53.

Vally J held that while the power to appoint and dismiss Ministers and Deputy Ministers was wide-ranging, it was "not as unfettered as its predecessor, the royal prerogative". The executive power conferred on the office of the President was circumscribed by rationality and by the provisions of the Constitution. [Paragraph 18]. Vally J then considered an argument by the President that rule 53 did not apply to an application to review an executive decision. Vally J noted that rule 53 had been promulgated at a time when executive decisions were not subject to review, but that situation had changed with the enactment of the Constitution.

"It is true that rule 53 has not been amended to cater for this, but to decide on its applicability to a review of executive decisions it is necessary to subject it to a purpose interpretation." [Paragraph 21]

Vally J held that there was "no logical reason" not to utilise rule 53 in an application to review and set aside an executive decision, since the judicial exercise undertaken by the court in such a review was no different to that conducted in review applications covered under the rule. Vally J held that rule 53 should be covered unless it could be shown "that its application in a particular case would result in a failure of justice." [Paragraph 29]

Vally J thus held that the provisions of rule 53 applied to an application to review or set aside an executive decision, and it should be utilised in the main application, since the President had not contended that this would result in a failure of justice. [Paragraphs 30 – 31]. Vally J further rejected an argument that the decisions are subject to the doctrine of legality and therefore the applicant was entitled to the reasons for the decisions, but not to the record, as “it goes against the grain of all the authorities cited”. [Paragraph 33] Vally J held further that as the President had not indicated what documents or records exist, and which of those he objected to disclosing, the court had no choice but to order the release of the record as sought in the notice of motion. [Paragraph 35].

The application was granted. Appeals to the Supreme Court of Appeal (**The President of the Republic of South Africa v Democratic Alliance [2018] ZASCA 79**) and the Constitutional Court (**President of the Republic of South Africa v Democratic Alliance and Others (CCT159/18) [2019] ZACC 35; 2019 (11) BCLR 1403 (CC) ; 2020 (1) SA 428 (CC) (18 September 2019)**), by majority decision) were dismissed, as the dispute had become moot.

CRIMINAL JUSTICE

MASUKU V S (A261/16) [2018] ZAGPJHC 488; 2019 (1) SACR 276 (GJ) (6 SEPTEMBER 2018)

The appellant was convicted on one count of rape (and acquitted on another) and sentenced to 15 years’ imprisonment. The complainants were seven and eight years old respectively. [Paragraphs 1 – 2]. The appeal was against conviction and sentence.

Vally J (van der Linde and Keightly JJ concurring) found that there were two aspects of the trial court’s handling of the case which raised concerns. The first related to the decision to allow the naming of the two complainants and their mothers. Vally J characterised this as a failure to protect their wellbeing and dignity. [Paragraph 8]. Vally J noted that in criminal proceedings dealing with a sexual offence against a child, the court was obliged to protect a child complainant without undermining the accused’s fair trial rights. “This protection must surely mean that the identity of the child should be protected, for that would serve the best interests of the child. Identifying the child compromises the future of the child and places him/her at risk of being ridiculed or pitied and this diminishes the dignity of the child as well as that of his/her parents.” [Paragraph 10].

The second related to questions put by the appellant’s attorney during cross examination. Vally J considered the transcript of the cross examination of BK, one of the complainants:

“It is clear from this exchange that BK found the cross-examination as well as the intervention from the magistrate very distressing. She continued to cry during the adjournment and informed her parents that she did not want to continue any longer. This was conveyed to the court and the matter had to be adjourned for about two months. ... On resumption of the proceedings, the cross-examination of BK continued. Once again, the theme of how she was raped was pursued. It seems none of the main role players ... had reflected on the experience of the child at the previous sitting. They merely continued as if nothing significant had occurred.” [Paragraphs 12 – 13].

Vally J held that the questioning by the appellant's attorney "certainly crossed the line of common decency", and that the attorney had "conducted himself in a manner contrary to his ethical duty as an officer of the court." "To ask a child questions about the details of a man's anatomy, or to query her knowledge about intricate sexual matters is to show grave disrespect to the child. In my judgment it is generally wrong for a child to be subjected to such crude cross-examination. There was nothing to be gained by asking the child questions which only made the child re-live her ordeal: there was no probative value to the questions as none of them addressed any matter that was in issue ..." [Paragraph 15].

Vally J emphasised the need for legal representatives to "avoid becoming overzealous" in pursuit of their client's case, and held that the questions quoted "should never have been allowed or asked." "It is this kind of questioning that deters many rape victims from reporting their ordeal to the authorities and from seeking justice. The result is an undermining of the public interest in seeing all sexual assaults reported and prosecuted. The magistrate should not have allowed them ..." [Paragraph 16].

On the merits of the appeal, Vally J found that the state had proved beyond a reasonable doubt that the accused had raped BK, and the appellant had been correctly convicted. [Paragraph 25]. On sentence, Vally J found that the trial court had committed a "significant misdirection" in finding that the rape of BK was "not serious" due to the absence of "significant physical harm." [Paragraph 31].

The appeal against conviction was dismissed, and the sentence replaced with one of 18 years' imprisonment.

JUDGE ZEENAT CARELSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 16 October 1966

BA LLB, University of Durban, Westville (1992)

CAREER PATH

Acting Deputy Judge President, Gauteng High Court, Johannesburg (May – November 2020)

Acting Justice, Supreme Court of Appeal (October 2018 – March 2019; December 2020 – May 2021)

Judge, Gauteng High Court (2009 – to date)

Judge, Land Claims Court, (2009 – to date)

Acting Judge, Gauteng High Court (2008)

Regional Magistrate, Tembisa Magistrates Court (2004 – 2008)

District Magistrate, Johannesburg Magistrate's Court/Mitchells Plain Magistrates Court (1998 – 2004)

Public Prosecutor, Pietermaritzburg/Pinetown Magistrate's Court (1994 – 1998)

Member, Judicial Officers Association of South Africa (JOASA) (2006)

International Association of Women Judges (IAWJ)

Mentor (2009 -)

Provincial representative, Gauteng (2004 – 2005)

Member (2004 –)

Member, Gender Committee, Commonwealth Magistrates' and Judges Association (2000)

Islamic Guidance, Teacher/mentor (1982 –)

SELECTED JUDGMENTS**CDH INVEST NV v PETROTANK SOUTH AFRICA (PTY) LTD AND OTHERS 2019 (4) SA 436 (SCA)****Case heard 1 April 2019, Judgment delivered 1 April 2019**

Appellant and second respondent (Amabubesi) held all the issued shares in the first respondent (Petrotank) in a 60/40 ratio. In terms of a shareholders agreement there were 100 000 issued shares, but Petrotank's memorandum of incorporation had mistakenly recorded the number of authorised shares as 1 000. Applicant sought an order in terms of s 61(12) of the Companies Act directing the board of Petrotank to convene a shareholders' meeting to consider and pass five resolutions, to effect: (1) the removal of a director; (2) the election of a substitute director; (3) instructing the board to demand that the minority shareholder, Amabubesi, pay Petrotank R1 million; (4) instructing the board to sue Amabubesi for this amount; and (5) instructing the board to consider a pro rata rights offer. [Paragraph 2]. At issue in the appeal was the fifth resolution, as well as the court *a quo's* upholding of a counter-application by Amabubesi to invalidate a director's round robin resolution of which purported to amend its MOI by increasing the number of authorised shares from 1000 to 1 000 000.

Carelse AJA (Ponnan and Saldulker JJA and Davis and Rogers AJJA concurring) noted that the court *a quo* had found that the round robin resolution was invalid because the three Petrotank directors who had signed the resolution had violated their fiduciary duty. [Paragraph 13] On appeal, two issues were raised: whether the court *a quo's* factual findings had been based on a case that was not pleaded, and whether Appellant's directors had conducted themselves in a misleading fashion when they amended the MOI. Appellant raised in argument for the first time the issue that Amabubesi had not initially pleaded that the conduct of Appellant's directors when passing the resolution constituted a breach of their fiduciary duties or a misrepresentation. [Paragraph 14].

Carelse AJA rejected the contention that Amabubesi had only dealt with this issue in its reply, as it was common cause that the authorised shares would have had to be increased to 1 000 000 before the rights issue could be considered, and the issue of bad faith had been pleaded in relation to the rights issue. Carelse AJA found that "the two events were clearly linked and could not be separated". [Paragraphs 16 – 17]

Regarding the question of misrepresentation, Carelse AJA found that that the Appellant's directors had known at the time that the round robin resolution was contrary to the proclaimed purpose, and that it was contrary to the MOU. Nevertheless, they had signed the resolution. [Paragraph 22]. Carelse AJA found that it was "surprising" that the Appellant had never sought to explain why, "in supposedly 'correcting' the patent error in the MOI, its nominees on Petrotank's board resolved to pass a resolution to increase the authorised shares to 1 000 000 rather than 100 000." Carelse AJA found that the only inference that could be drawn was that, in passing the resolution contrary to its stated purpose, the board members had "misrepresented 'the matter to be decided' — ie the purpose they had in mind when introducing the resolution was different from that which appeared in the preamble." [Paragraph 23].

"Their conduct did not comport to the standard of good faith required of directors ... and thus raises the question as to whether they exercised their powers as directors for a proper purpose. Directors act beyond their authority when they act in breach of their duty to perform in good faith and in the interests of the company ..." [Paragraph 24]

Carelse AJA thus found that the round robin resolution was invalid and dismissed the appeal. [Paragraph 25].

SOCIO-ECONOMIC RIGHTS

EMANTANJENI COMMUNITY V COMMISSION ON RESTITUTION OF LAND RIGHTS AND OTHERS (LCC 17/2018) [2019] ZALCC 31 (8 NOVEMBER 2019)

Case heard 22 August 2019, Judgment delivered 8 November 2019

This case involved the interpretation of a consent order given in the initial restitution proceedings, which was made an order of court. The applicant had lodged a claim for restitution of rights in terms of the Restitution of Land Rights Act, seeking the restoration of land as opposed to financial compensation. After a site visit was conducted, applicant indicated that it wished to consider financial compensation rather than restoration. An order of court was made, and it was this order that was in dispute as the applicant averred that the respondents had failed to comply with the order. The court then considered the interpretation of the court order under three categories: its text/language, its context, and “interpretation giving rise to sensible and businesslike results.” [Paragraph 15].

Carelse J found that the applicants were seeking to introduce new evidence, and the relief sought was not contemplated in the order, properly interpreted. [Paragraph 34]. Furthermore, the applicants’ approach would lead to results that were not sensible or businesslike. The Applicant’s interpretation of the order would have granted financial compensation by having regard to the current developed market value of the properties under claim, rather than the historical under-compensation of the informal land rights of which the Applicants were dispossessed. These land rights were based on subsistence agriculture, not commercial farming. [Paragraph 35].

Carelse J ordered that the applicant’s legal representatives were not be permitted to recover their legal costs under legal representation provided in terms of the Act. Carelse J held that “[w]hen public funds have been provided to litigants in terms of section 29(4) of the Act there is a fiduciary duty on the legal representatives to be responsible when instituting litigation and they must bring litigation that is fully motivated. When a legal representative fails to do so and brings unwarranted applications, there is no reason why this Court should not disallow their fees. As soon as the Applicant’s counsel’s [sic] became involved in the matter he must have realised that the application was ill-advised and there is no reason why the Commission should pay his fees.” [Paragraph 44].

The application was dismissed.

COLCHESTER ZOO SA PROPERTIES (PTY) LTD V MDAKANE & OTHERS (1108/17) [2018] ZASCA 188 (13 DECEMBER 2018)

Case heard 16 November 2018, Judgment delivered 13 December 2018

The issue before the court was whether the second respondent was an “occupier” in terms of the Extension of Security of Tenure Act (ESTA) and if not, whether he should be evicted from the farm where he resided. The second respondent, who was six years old at the time, arrived on the farm with his family sometime in 1989. He started working on the farm in 2003. In 2007 he left for Johannesburg, returning during the December holidays. In 2011, he returned to care for his sick father who did not

survive. After his burial, the second respondent left the farm. Thereafter, his visits home were infrequent. Nevertheless, the Land Claims Court found that he was an occupier in terms of ESTA and could only be evicted in accordance with the provisions of that Act. [Paragraphs 5 – 8].

Carelse AJA (Maya P, Mathopo, van der Merwe and Makgoka JJA concurring) held that whilst the respondent regarded the homestead as his ancestral home, and though both his parents were buried on the farm, the degree of his physical presence on the land was such that he “could not have ‘resided’ on the farm in terms of the definition of occupier under the provisions of ESTA. [Paragraph 12] Thus, the respondent was not an “occupier” in terms of ESTA.

Carelse AJA then turned to consider whether the second respondent could still be evicted, noting that it did “not necessarily follow, as the appellant seems to suggest, that if the respondent is not an ‘occupier’, an eviction order should be granted. As appellant was not aware of the second respondent’s whereabouts, it was not clear whether the applicable legislation was complied with. The matter was therefore referred back to the Land Claims Court to determine whether it would be just and equitable for an eviction order to be granted. [Paragraph 14].

MPUME V DRAKENSTEIN MUNICIPALITY AND ANOTHER (128/2014) [2016] ZALCC 11 (24 JUNE 2016)

This was an application for temporary emergency accommodation to be provided to the applicant and his family due to their eviction. The applicant and his family were rendered homeless as a result of the eviction. He and his wife were people with “special needs” and had three children living with them, one of which was epileptic. [Paragraph 28].

Carelse J (Yacoob AJ concurring) held that the applicant had shown a prima facie right to relief, as it would “force the Municipality to implement its housing policy in a manner consistent with the Constitution.” [Paragraph 27]. Despite the respondent’s contention that there was no evidence of a well-grounded apprehension of irreparable harm, the facts that the applicant and his family were sleeping on the street on the very first night of eviction, were elderly, had an epileptic grandchild to care for and were living at different homes for a maximum of two days at a time, all demonstrated a well-grounded apprehension of irreparable harm to their personal security and property, as well as to their human dignity. [Paragraph 28].

The main thrust of the respondent’s case, relevant to the balance of convenience, was that it lacked the resources to house the applicant and his family, a claim Carelse J rejected, noting that the Municipality had put up no evidence to support the allegation that it lacked resources to provide temporary emergency housing. Applicant had “made bald allegations without any substantiation.” [Paragraph 33]. Further, the respondent claimed that alternative remedies were available in the form of R10 000, which had been offered as relocation costs. Carelse J held that this money was indeed for relocation and not for temporary emergency housing. [Paragraphs 35 – 37].

The municipality was ordered to provide the respondent and his family emergency temporary accommodation pending finalisation of the main application.

**FLORENCE (DODGEN) V BROADCOUNT INVESTMENTS (PTY) LTD & OTHERS (LCC 148/08) [2012]
ZALCC 11 (5 JUNE 2012)**

This was a claim for restitution in terms of the Restitution of Land Rights Act by the Florence family, who had been dispossessed of their land due to discriminatory laws in 1970. Four issues came before the court: 1) The loss suffered by the plaintiff as a result of the dispossession of their rights and whether such loss would equate to just and equitable compensation, calculated at the time of dispossession, 2) the appropriate method used to calculate the value of the 1970 loss into present day value, 3) the amount of financial restitution the family should receive as solatium due to the hardship they suffered as a result of the dispossession 4) whether the second respondent (the Government) could be ordered to pay for the costs relating to the erection of a memorial plaque.

With regards to the first issue, Carelse J held that the applicant had indeed been dispossessed, and was still left to determine whether the full purchase price of the property had been paid at the date of dispossession. Carelse J held that, based on the evidence presented, that the purchase price for the property had indeed been paid in full. Carelse J found that “[i]t has been stated over and over again that when interpreting a constitutional right such as the right to restitution the interpretation should be generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefits of their constitutional rights.” [Paragraph 16] The “inescapable conclusion” was that equitable redress for the family should be the amount of their 1970 financial loss, escalated to its present day value. [Paragraph 19].

Insofar as the second issue was concerned, Carelse J referred to the *Farjas* judgment, a case which determined that the CPI adequately caters for change in the value of money over time and agreed to the use of the CPI to determine the value of the loss over time. Carelse J found that CPI was the appropriate method to convert the 1970 loss to present day value [paragraphs 20 – 21].

Regarding the third issue, of solatium, Carelse J emphasised the symbolic nature of solatium and found further that “[t]he Florence family life was disrupted and the family was split up...the Florence family suffered emotionally, financially and psychologically by the forced removal...” [Paragraph 39]. The claimants were thus awarded R10 000. On the final issue, that of the erection of a memorial plaque, Carelse J declined to award the costs of a memorial plaque, on the basis that those costs had been agreed to between the plaintiff and defendant in a private settlement agreement and that as a result it lacked the jurisdiction to make such an order. [Paragraph 43].

The matter was taken on appeal to the Supreme Court of Appeal (*Florence v Government of the Republic of South Africa [2017] JOL 37227 (SCA)*) and the Constitutional Court (*Florence v Government of the Republic of South Africa 2014 (10) BCLR 1137 (CC)*). The SCA considered the appropriateness of the CPI as a measure of the change of value of money over time and found that Carelse J had acted judiciously in the use of the CPI. The court held that “[i]t has already been found in *Farjas* that the LCC is entitled to rely upon the CPI to determine changes in the value of money, and we are bound by that decision. In these circumstances it cannot be said that the LCC misdirected itself in adopting the same approach.” [Paragraph 10]. Regarding the erection of the plaque, the SCA held that there was no basis for the conclusion that the LCC had no jurisdiction to order the state to pay those costs, and awarded R50 000 for the erection of a memorial plaque.

The majority of the Constitutional Court held that the use of the CPI as a measure for the change in monetary value over time was correct. It further concluded that the LCC was correct in its finding that it had no power to order the respondent to pay for the erection of a memorial plaque, thereby reversing that part of the SCA’s decision.

CHILDREN'S RIGHTS

NONO CYNTHIA MANANA V PRESIDING OFFICER OF CHILDREN'S COURT, KRUGERSDORP AND OTHERS 2013 (4) SA 379 (GSJ)

This was an appeal against the decision of the Commissioner of the Children's Court that the children in question were not in need of "care and protection" as stipulated in s150(1)(a) of the Children's Act. The issue was whether a caregiver who owed a legal duty of care may be appointed as a foster care parent, and whether the foster care grant may be provided by the first respondent. The children were living with their grandmother, the appellant, since birth. They had no known father and their mother had passed away. The social worker recommended that the children were, in terms of the Children's Act, indeed in need of care and protection and that a foster grant should be made available to the appellant. The Commissioner disagreed, on the basis that the children were already being taken care of by the appellant and were not in need of care and protection, resulting in the determination that no requirement existed to legalise the placement of the children with the appellant.

Carelse J (Mathopo J concurring) held that:

"[T]he findings of the Commissioner can only lead to untold hardships for the many children who are in the care of their grandparents. This is the reality of our society. To perpetuate these hardships will be to defeat the objects and spirit of our Constitution and will not be in the best interests of the children." [Paragraph 16].

Carelse J noted that grandparents do owe a common law duty of support towards their grandchildren, and it was on that basis that the respondents argued that the appellant be excluded from becoming a foster parent. Carelse J held that:

"Such a conclusion would exclude children in the care of their grandparents who are found to be abandoned or orphaned from accessing government source of support. To do so would be to distinguish and create various categories of children. ... Nowhere ... is such a distinction made. ... All orphaned children are to be treated equally before the law." [paragraph 24].

When interpreting s150(1)(a) of the Act, Carelse J held that no distinction should be made with respect to carers who owed the children a duty of support and those that did not.

The findings of the Commissioner of the Children's Court were substituted for an order declaring that the children are in need of care and protection, are to be placed in foster care with their grandmother and that a foster care grant should be paid for all three children to the foster care parent.

CRIMINAL JUSTICE

S v KHANYE 2020 (2) SACR 399 (GJ)

Case heard 13 March 2017, Judgment delivered 13 March 2017

The appellant was convicted in the regional court on charges of kidnapping, assault with intent to do grievous bodily harm; and rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. On the rape charge, the appellant was alleged "to have unlawfully and intentionally committed an act of sexual penetration with the complainant and encouraged a number of male cohorts to engage in non-consensual sexual intercourse with her." Appellant was sentenced

to an effective term of life imprisonment. [Paragraph 1]. On appeal, the issue was whether se with the complainant during the early hours of 17 November 2013 in his flat. The dispute was whether the complainant had consented to sexual intercourse with the appellant, and whether the complainant had been kidnapped and assaulted by the appellant and his cohorts, and whether she was also raped by the appellant and his cohorts. [Paragraph 4]. Appellant argued that the complainant's evidence was contradictory, unclear and inconsistent. [Paragraph 15]

Carelse J (Twala and Kubushi JJ concurring) quoted the observation of Lord Hale that: "Rape ... 'is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, tho[ugh] never so innocent'." [Paragraph 16]. Carelse J found that the appellant had the appellant materially contradicted himself regarding how he had met the complainant, and the complainant's evidence on that aspect could not be faulted. [Paragraph 17]. Carelse J found that there was undisputed evidence that the complainant was injured, and the complainant attributed this the assault by the appellant and his co-perpetrators. The appellant offered no explanation for the injuries, and attempted to rely on medical evidence on how the complainant was assaulted, to show that the complainant was not telling the truth. Carelse J found that this was "at the very least, is disingenuous", and that the complainant given an explanation which was not disputed. The only reasonable inference to be drawn from the injuries was that the complainant had not consent to sexual intercourse with the appellant and his co-perpetrators. Carelse J found that there was no basis on which to upset the factual findings of the court a quo. [Paragraph 20].

Regarding the appeal against sentence, Carelse J noted that the appellant relied on the Supreme Court of Appeal decision in *S v Mahlase*:

"I am mindful that this court is bound by the decisions of the Supreme Court of Appeal. This court is bound by the decision in *Mahlase*. I am, however, of the respectful view that the interpretation of part 1 of sch 2 to the Act in *Mahlase* loses sight of previous authority from the Supreme Court of Appeal in the case of *S v Legoa*, which remains as binding authority ..." [Paragraph 25]

"Although *Mahlase* binds this court, *Legoa* equally binds this court and continues to be referred to with approval by the Supreme Court of Appeal. *Legoa* was never considered by Pickering J in *Cock*, Thompson AJ in *Mejeni* and the Supreme Court of Appeal in *Mahlase*. I have no doubt that, had *Legoa* been considered, it may have resulted in a different finding." [Paragraph 28]

"In my view s 51(1) read with part I of sch 2, properly construed, does not mean that more than one person must be convicted to trigger the provisions of s 51(1) of the Act. The approach in *Mahlase*, with respect, reads words into the section which are not there, in conflict with the principles of contextual interpretation." [Paragraph 30]

The appeal was dismissed.

S v THOBELA 2020 (2) SACR 222 (GJ)

Case heard 12 March 2020, Judgment delivered 12 March 2020.

The accused was convicted on one count each of the common law offences of theft and malicious damage to property, as well as the statutory offence of contravening the Trespass Act. All three counts were taken together for the purposes of sentence and the accused was sentenced to an effective term

of three years' direct imprisonment without the option of a fine. [Paragraph 2]. The matter was sent to the high court on special review on the basis that on the basis that the sentence was not competent and that no enquiry was held in terms of the Firearms Control Act. [Paragraph 3].

Carelse J (Ismail J concurring) considered the question of whether taking the offences together for purposes of sentence, and the sentence of three years' imprisonment, was competent in law. Carelse J held:

“Courts have often regarded the practice of imposing globular sentences as undesirable, and it has been stated over and over again that the practice of imposing globular sentences must be reserved for exceptional circumstances. However, the mere practice thereof is not a misdirection per se warranting interference. It is desirable that each separate offence should be punished separately.” [Paragraph 8].

Carelse J found the sentence of three years' imprisonment for trespassing was not competent, as it exceeded the maximum period of two years' imprisonment prescribed by the Trespass Act. Where counts were taken together for the purposes of sentence and a court imposed a sentence that was competent on two common-law offences, but incompetent on the statutory offence, the globular sentence became a nullity. This was especially so since the three offences taken together for the purposes of sentence were subject to different sentencing regimes. [Paragraph 9]

The sentence imposed in terms of the Trespass Act was found to be a nullity and was set aside, with an order remitting the case to the magistrate for the sentence to be imposed afresh. [Paragraph 12].

Regarding the application of the Firearms Control Act, Carelse J held that:

“[O]nce an accused person is convicted of an offence involving dishonesty, for example, theft, as in the present matter, and sentenced to imprisonment without the option of a fine ... he is automatically declared unfit to possess a firearm, unless the court determines otherwise. In the present matter, the magistrate did not hold an enquiry to determine otherwise because the accused was previously declared unfit to possess a firearm.” [Paragraph 15].

The sentence was set aside and the matter remitted, with Carelse J ordering that the provisions of section 103 of the Firearms Control Act, as they may be applicable, must be complied with upon reconsideration of the sentence.

JUDGE JANNIE EKSTEEN

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 29 July 1957.

BA (Law), University of Stellenbosch (1978)

LLB, University of Stellenbosch (1980)

CAREER PATH

Acting Justice, Supreme Court of Appeal (October – November 2015; December 2018 – May 2019; December 2019 – May 2020, June – November 2020, December 2020 – May 2021).

Judge, Special Tribunal (April 2019 – to date)

Judge, Eastern Cape High Court (2010 – to date)

Acting Judge, Eastern Cape High Court (August, November 1999; October 2002; August 2006; March – April 2008; July – August 2009).

Advocate (1984 – 2009)

Appointed senior counsel (1998)

Prosecutor, Department of Justice (1981 – 1984)

Prosecutor, Department of Co-operation and Development (1981)

General Council of the Bar

Chairman (2006 – 2008)

Deputy Chairman (2004 – 2006)

Member, National Executive (2002 – 2009)

Eastern Cape Society of Advocates

Chairman (2000, 2002)

Deputy Chairman (1999, 2001)

Member, Bar Council (1995 – 2002)

Honorary Secretary (1987 – 1989)

Member (1984 – 2009)

International Bar Association

Councillor (2006 – 2008)

Member (2005 – 2009)

Member, Dutch Reformed Church.

SELECTED JUDGMENTS**COMMERCIAL LAW****FIRSTRAND BANK LTD v COLLETT 2010 (6) SA 351 (ECG)****Case heard 19 August 2010, Judgment delivered 2 September 2010**

Plaintiff brought an application for summary judgment against the defendant. Defendant alleged that she had applied for credit review in terms of the National Credit Act, and that the plaintiff had been duly notified of the debt review. After the matter had been referred to the magistrates' court for hearing, the plaintiff served a notice terminating the debt review process. The issue before the high court was whether the plaintiff could validly give notice to terminate the debt review process after the debt counsellor had lodged an application with the magistrates' court. [Paragraphs 1 – 5]

Eksteen J observed that the formulation of the Act was not “a model of clarity”, and that its provisions had led to conflicting interpretations from the courts, including on the issue before the court. [Paragraph 6]. Eksteen J discussed the conflicting case law, [paragraphs 6 – 12] and found that the role of the debt counsellor conducting debt review was “not completed by the mere reference of the matter to the magistrates' court.” [Paragraph 16] While the draftsmanship of the relevant section of the Act left “much to be desired”, the decision in the *National Credit Regulator* case established that the credit-review process continued until the magistrates' court made an order in terms of section 87 of the Act. [Paragraph 17] Eksteen J held that the credit provider's rights to give notice and to legitimately terminate the debt review process continued until the magistrates' court made an order as envisaged in section 87. [Paragraph 18]

“The purpose of the entire process is for the magistrates' court to provide judicial oversight of the debt review process. Where a notice in terms of s 86(10) terminating the process is then issued, the consumer is afforded a remedy in s 86(11). The 'Magistrate's Court hearing the matter' is required in terms of s 86(11) to exercise a discretion both in respect of whether to order the resumption of the process, and in respect of the conditions to be attached to such further process. In my view it is only the magistrates' court providing the judicial oversight to the process that would have before it all the information which the consumer was required to provide ... and which is required in order to exercise such discretion. ... I consider ... that it is only the magistrates' court exercising the judicial oversight over the debt review process that may order the process to resume as envisaged in s 86(11). This conclusion is supportive of the interpretation that the credit provider is entitled to terminate the debt review process after the matter has been referred to the magistrates' court.” [Paragraph 27].

Eksteen J found that the consumer was not prejudiced by the right of the credit provider to terminate the debt review process, since the consumer's rights were fully protected under section 86(11). Eksteen J held that the credit provider did “not have carte blanche to terminate the process without good reason.” [Paragraph 28] Once a restructuring order had been issued, a credit provider could not enforce the credit agreement until the consumer defaulted on the order. If the consumer was simultaneously in default under the credit agreement the credit provider could then enforce their right without further notice. [Paragraph 31].

Judgment was granted in favour of the Plaintiff. An appeal was dismissed by the Supreme Court of Appeal in **Collett v Firstrand Bank Ltd 2011 (4) SA 508 (SCA)**.

FIRSTRAND BANK LTD v FILLIS AND ANOTHER 2010 (6) SA 565 (ECP)**Case heard 3 August 2010, Judgment delivered 17 August 2010**

Plaintiff sought summary judgment against the defendants, who were married to each other in community of property, for a debt arising from a credit agreement secured by a mortgage bond over immovable property. [Paragraph 1] Defendants had applied for debt review, and a rearrangement order had been made. [Paragraph 2]. Plaintiff claimed that the defendants were in default of the credit agreement and have defaulted on the rearrangement order. [Paragraph 4]

Eksteen J rejected an argument that the deponent to the affidavit filed in support of the application for summary judgment lacked authority to depose to the affidavit. [Paragraphs 8 – 13] Defendants argued further that once an order was made to rearrange their debt, no legal action could be taken by the credit provider to enforce the credit agreement which was subject to the order, until the rearrangement order was rescinded. [Paragraph 6]. Eksteen J found this argument “lacking in merit”, as the Act provided “very extensive protection” to an over-indebted consumer. A rearrangement gave a consumer relief from “the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers,” and the Act also protected “against the ravaging effect of escalating interest” while in default under the agreement. If the consumer did not take this opportunity or was unable to comply with the restructured debt commitment, then the Act allowed for the common law to run its course. [Paragraph 14].

Finally, defendants argued that once the debt review process had commenced, a consumer was not required to make any payment in respect of their liability under a credit agreement, until a rearrangement order was granted or the application for credit review was rejected. “Accordingly, so it is argued, any payments made prior to the grant of the rearrangement order should, in effect, be set off against the obligations which arise subsequent to the granting of the order.” [Paragraph 19]. This argument was rejected.

“The magistrate is ... required to make a rearrangement order which finds application from the time the order is made, unless otherwise ordered. In this instance the magistrate ordered that the defendants were to make monthly payments of R2850, 'with effect from 30 November 2009'. This the defendants have failed to do. The defendants are accordingly in default of the rearrangement order.” [Paragraph 23]

Eksteen AJA found that the defendants had not provided any defence to the plaintiff’s claim. Judgment was granted for the plaintiff. The decision was cited with approval by the Constitutional Court in **Ferris and Another v Firstrand Bank Ltd 2014 (3) SA 39 (CC)**. The court held that Eksteen J had been correct in finding that once the debtor was in default, the credit provider was free to “proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement without further notice.” [Paragraph 16].

CONSTITUTIONAL AND STATUTORY INTERPRETATION**PENTREE LTD v NELSON MANDELA BAY MUNICIPALITY 2017 (4) SA 32 (ECP)****Case heard 26 October 2016, Judgment delivered 17 November 2016.**

In expropriation proceedings, defendant objected to the plaintiff adducing the evidence of a valuer (Edelson) through another valuer (Ms Flack), who was called as an expert witness in the case. [Paragraphs 1 – 7] Defendant objected that the evidence was hearsay evidence and since no

application had been brought in terms of section 3 of the Law of Evidence Amendment Act, the evidence was inadmissible. [Paragraph 8]

Eksteen J noted that the court was required:

“to deal generally with the issue of whether a party in expropriation proceedings may, through a valuer called as an expert witness, adduce evidence of statements made to the valuer by other persons in respect of matters which have influenced her valuation of the land, in circumstances where such other persons are not called as witnesses.” [Paragraph 9]

Eksteen J considered the law on what constituted hearsay evidence, citing the *Lornadown* judgment as authority for the proposition that in an expropriation regarding the amount of compensation payable:

“there is no *lis* between the parties and therefore no onus upon the plaintiff .. and the function of the court is that of a 'super valuer'; as such the court must place itself in the shoes of the notional informed seller and buyer: on this basis the court must have regard to everything which such a seller and buyer would have experienced in the open market and all the information which would have been at their disposal; the court cannot itself go into the market to gather information, but it is part of the function of an expert valuer to do so and to found his opinion thereon ... Circumstances which would have influenced the seller and the purchaser in the fixing of the purchase price are not limited solely to facts which have been properly proved, but also information which they obtained from other persons ... [A] valuer is equally entitled to base his opinion on what he had heard from other people, and to place that information before the court so that the court can judge what weight should be attached thereto and whether the valuer's opinion is founded on strong or weak grounds.” [Paragraph 19]

Eksteen J held that the introduction of the Evidence Act had not had an impact on this approach, [Paragraph 29] and considered an argument relating to the fact that the case law had been decided under the old expropriation Act. Eksteen J held that regarding the expropriation of land, the compensation provided for under the old Act was “in all material respects identical” and to be arrived at “in precisely the same manner” as under the prevailing Act. [Paragraph 33]

Finally, Eksteen J considered an argument that section 25 of the Constitution introduced a new measure of compensation, and that market value was no longer at the heart of the enquiry. [Paragraph 38]. Eksteen J held that while the Constitution provided for additional factors which could result in an adjustment to the market-based compensation to reflect a just and equitable result, market value remained “an assertive consideration.” [Paragraph 39].

Eksteen J concluded that:

“[I]n order to fix compensation in terms of s 12(1) of the Act, with regard to s 25 of the Constitution, the primary task of the court in the first instance is to determine the market value of the property. This is so not only because that is what the plaintiff has lost but also because market value is one of the few considerations set out in s 25 that is quantifiable. Once that is determined an adjustment should be made, if necessary, to reflect just and equitable compensation, having regard to the further considerations set out in s 25. In considering the market value as first step in the determination of the quantum of compensation I find that there is no *lis* between the parties and there is no onus in the ordinary sense on the plaintiff

.... The reasoning in *Lornadawn* remains equally valid in respect of the first step of the quantification of compensation. ..." [Paragraph 41]

The objection was overruled, and the evidence was admitted.

CRIMINAL JUSTICE

BILANKULU AND ANOTHER V S (188/2020) [2020] ZASCA 114 (29 SEPTEMBER 2020)

The appellants had been convicted in the high court of murder, unlawful hunting of rhinoceros, and unlawful possession of a firearm and ammunition. They were each sentenced to a total of 50 years' imprisonment, with five years conditionally suspended, and a non-parole period of 25 years. [Paragraph 1] The appeal was against conviction and sentence. A ranger had been killed in a shootout between rangers and the police, and the first appellant and his accomplice, following an attempt to ambush suspected poachers. [Paragraphs 7 - 12].

Eksteen AJA (Petse DP, Makgoka and Nicholls JJA and Mabindla – Boqwana AJA concurring) dealt first with an argument that the evidence of a Mr Khosa should have been excluded. It was argued that the commission of the offences had been facilitated by the police and/or game reserve authorities through an undercover operation, and that without the assistance and encouragement of Khosa, the appellants would not have been able to enter the reserve. It was argued that this conduct went beyond "providing the opportunity to commit the offence" and the evidence ought to have been excluded in terms of section 252A of the Criminal Procedure Act (CPA). [Paragraph 13]. Eksteen AJA discussed section 252A, which provided authority to make use of traps and undercover operations and for the admissibility of evidence obtained in those operations. [Paragraph 14]. If the trap did not "go beyond providing the opportunity to commit the offence", the evidence was automatically admissible. [Paragraph 16]. After noting that it appeared that the consent of the Director of Public Prosecutions had not been obtained, [paragraph 18] Eksteen AJA continued:

"Rhino is a specially protected animal because it is an endangered species. The decimation of the rhino population in South Africa is a matter of national and international concern, which has enjoyed such media attention over the years as to thrust it into the public eye. ... The offence ... is undoubtedly a serious one which is disturbingly prevalent ..." [Paragraph 19]

Eksteen AJA found that Khosa had done "no more than to provide the opportunity for the commission of the crime proposed to him by the second appellant." [Paragraph 21] Eksteen AJA held that, considering all the factors holistically and weighing them cumulatively, "the inevitable conclusion is that, notwithstanding the failure to obtain the prior consent of the DPP, Khosa did no more than provide an opportunity for the commission of the offence". The admission of the evidence was not detrimental to the administration of justice and did not render the trial unfair. [Paragraph 24].

Eksteen AJA then considered whether certain cellphone records had been correctly admitted. Appellants argued that appellants the admission of the records midway through the trial, having not been provided prior to the trial, infringed their right to a fair trial under section 35(3) of the Constitution. [Paragraph 26] Eksteen AJA found that the records had not initially been in the police docket, but had been held by the police's technical support unit (TSU), and had only been made available after the start of the trial. Whilst this was correctly criticised by the trial court, it did not in and of itself make the trial unfair. [Paragraphs 28 – 30]. Eksteen AJA considered the law on what constituted a fair trial, and found that there was nothing in the cell phone records which contradicted anything put to the witnesses, and that the conduct of the defence had not been compromised. The

defence had the benefit of a six-week adjournment after the records had been disclosed, the appellants had not challenged the correctness of the records or any of the evidence relating to them. The argument of trial prejudice was therefore rejected. [Paragraph 34].

On the issue of the appellants' intention, Eksteen AJA held:

“[W]ilst there is no direct evidence that the appellants knew that a confrontation with rangers was possible, on a conspectus of the evidence, I do not think that any person engaged in rhino poaching in a State reserve could not have foreseen the inherent possibility of a shoot-out with rangers in the event of confrontation. In the circumstances I consider that it was proved that the appellants had *'dolus indeterminatus'* in the sense that they in fact foresaw the possibility of a shoot-out with rangers and the concomitant possibility that anybody involved therein might be shot and killed.”

The appeal against conviction was dismissed. [Paragraph 39]. Regarding the appeal against sentence, Eksteen AJA found that the high court had not given reasons for imposing the non-parole period and had done so *mero motu* without prior warning or affording counsel for the appellants an opportunity to address it on the issue. [Paragraph 41] Eksteen AJA rejected criticism of the individual sentences imposed but found that the circumstances of the case did not justify the overall effective sentence of 45 years.

“The trial judge appears to have overlooked the impact of the cumulative effect of the various sentences. This is a misdirection which has resulted in a striking disparity between the sentence which he imposed and that which I consider appropriate.”

The effective sentence was amended to yield an effective sentence of twenty five years imprisonment. [Paragraph 52].

MINISTER OF POLICE AND ANOTHER v MULLER 2020 (1) SACR 432 (SCA)

Case heard 4 November 2019, Judgment delivered 29 November 2019.

Respondent sued the Minister for damages for unlawful arrest and his initial detention, and the Minister and the National Director of Public Prosecutions (2nd appellant) for damages for his further detention after his first court appearance. The claim was successful in the magistrates' court, and an appeal to the high court was dismissed. Respondent was arrested after being found in possession of a SAPS vest at his apartment.

Eksteen AJA (Ponnan, Plasket and Mbatha JJA and Koen AJA concurring) considered the elements of the offence for which the respondent had been arrested. Eksteen AJA found that inability to give a satisfactory account of possession was an essential element of the offence. A 'satisfactory' explanation required the possessor to state where the goods had been obtained, and it must be clear that the possession was innocent. On the facts, Eksteen AJA found that witnesses said that a third person had brought the vest to the premises. On the evidence available to the arresting officer, this was “not only reasonably possible but also probably true.” [Paragraph 19]

Eksteen AJA held that had the arresting officer weighed up this explanation “he could only have come to the conclusion that it was probably true” that the vest had been brought to the apartment.

“His own evidence that the insignia were only visible after the vest had been removed from the blue cover and opened up, lends credence to Muller's explanation that he was unaware

of the fact that the vest was SAPS property and therefore probably stolen. There could be no conceivable reason to believe that this explanation was not reasonably possibly true. It is apparent from the explanation that Muller bona fide believed that he was entitled to possess it.”

The arrest and initial detention were thus found to be unlawful. [Paragraph 21]

Regarding the further detention, Eksteen AJA found that there was no evidence of police impropriety intruding onto the prosecutorial process. [Paragraph 24]. Respondent’s core argument was that employees of the Minister had failed to secure his release when it was within their power to do so. [Paragraph 25]. Eksteen AJA set out the Constitutional rights to freedom and security of the person (section 12) and of arrested, detained and accused persons (section 35), and considered case law regarding liability for wrongful arrest and detention. [Paragraphs 26 – 34] Eksteen AJA found that:

“[T]he decision taken to prosecute Muller was taken by the screen prosecutor. She had before her all the relevant information to do so. At the first appearance the magistrate gave judicial consideration to Muller's release and remanded him in custody. That she was obliged to do in terms of s 60(11)(b) of the CPA. [Due to a prior conviction for rape] Neither the prosecutor nor the police had knowledge of Muller's previous conviction and accordingly could not have foreseen that he would be remanded in custody. ... [T]he liability of the police for the wrongful and unlawful arrest and detention was truncated, upon the remand order made at the first appearance. ...” [Paragraphs 38 – 39]

The appeal in respect of the initial arrest and detention was therefore dismissed, but the appeal against the decision in respect of the further detention was upheld. Each party was ordered to pay their own costs.

SELECTED ARTICLES

“Lawyers must create consensus about fundamental issues”, *Advocate* August 2008, page 2.

This article was a reflection on conclusion of the candidate’s term as chair of the General Council of the Bar.

“Whilst we are rightly proud of the dedication and success of all those involved in the mentoring, tutoring and training of pupils we still find that less than 30% of the new entrants to the Bar in the past two years have been black. Transformation of the composition of the membership of the constituent Bars is accordingly still slow, notwithstanding the contribution of so many in providing quality training to all entrants equally.

My personal view is that the challenge in respect of transformation for future leadership of the Bar is twofold. First, the Bar will have to find ways to make sure that intelligent young people from less privileged backgrounds, particularly black scholars, have the opportunity to see the profession at first hand when there is still time for them to choose their direction of study. Secondly, greater financial support will have to be found to assist such young entrants in the first year of practice, possibly by way of loans. This may be difficult to achieve at local level, particularly at the smaller Bars and a national project may be required.” ...

“Lawyers cannot get away from right and wrong. The law would not exist without norms. Without values and principles our profession would not exist. Norms presuppose values and values rest upon fundamental premises of right and wrong. If we cannot agree on right and wrong in our profession, if we cannot agree on when it is legitimate for office bearers in our profession to be called to account

for transgressions, if the racial fractions of the past are to disable criticism and debate, then we as lawyers and judges cannot perform our transformative function in a society which has entrusted that special role to us.”

“Rule of law and the independent judiciary”, *Advocate* December 2007, page 2

(<https://www.gcbsa.co.za/law-journals/2007/december/2007-december-vol020-no3-p02.pdf>)

This article discussed criticisms of the judiciary.

“Naturally, valid criticism of judges’ decisions is perfectly legitimate and such criticism is to be welcomed in a democratic society. Where, however, a senior government official, acting in his official capacity, utilises public funds to launch a scathing attack on a judgment which he does not agree with, and which attack is aimed at vindicating his political master, such criticism assumes a very different significance.”

“A fundamental component, perhaps the most important component, of the rule of law is a free and independent judiciary. ... [F]ormal guarantees of independence, although important, are however not enough by themselves to create a vibrant tradition of judicial independence. It requires the respect, tolerance and cooperation of the political branches of government to maintain judicial independence.”

“The rule of law is indeed foundational to the Constitution. There is, however, clearly a need for a greater understanding of what the rule of law is. ...”

JUDGE TREVOR GORVEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 21 April 1954

BA, University of KwaZulu Natal, Durban (1976)

LLB, University of KwaZulu Natal, Pietermaritzburg (1978)

Bachelor of Theology, University of South Africa (1986)

CAREER PATH

Acting Justice, Supreme Court of Appeal (June 2014 – May 2015; July – September 2015; December 2016 – September 2017; April – May 2019; October 2019 – May 2020; December 2020 – May 2021)

Judge, KwaZulu Natal High Court (November 2008 – present)

Acting Judge, High Court of South Africa, KZN Division (2006, 2007, 2008))

Senior Counsel (February 2006)

Advocate (1988 – 2008)

Pupil Advocate (1988)

General Secretary, Student YMCA, UKZN, Pietermaritzburg (1985 – 1988)

General Secretary, Student YMCA, UKZN Durban (1981 – 1985)

Assistant Secretary, Student YMCA, UKZN, Durban (1980 – 1981)

Prosecutor, Department of Justice (1978 – 1980)

Faculty Member, General Council of the Bar Intermediate Advocacy Training Course and Advanced Teacher Training Course, Stellenbosch (2018 – present; July 2017; January 2015)

Faculty Member, General Council of the Bar Regional Pupillage Advocacy Training Course, Kwa-Zulu Natal (July 2018)

Faculty Member, Advanced Appeal Advocacy Course (General Council of the Bar), (2011, 2012, 2014, 2016 and 2017).

Member, Kwa-Zulu Natal Judges' Finance Subcommittee (Jan 2014 – present)

Deputy Chair, Judiciary and Administration Information and Communication Technology Strategy Steering Committee (May 2013 – present)

Chair, Kwa-Zulu Judges' Information and Communication Technology Sub-Committee (2012 – present)

Chair, Society of Advocates of Kwa-Zulu Natal, Pietermaritzburg (2006 – 2008)

Advocacy Trainer, Society of Advocates of Kwa-Zulu Natal, Pietermaritzburg (2005 – present)

Pupillage Co-ordinator, Society of Advocates, KwaZulu Natal ((2006 – 2008)

Bar Council Member and Committee Member, Bar Council of the Society of Advocates, KwaZulu Natal (2002 – 2004)

Member of Executive, Pietermaritzburg branch, NADEL (1989 – 1990)

Member, NADEL (1998 – 2008)

Member, Society of Advocates of Kwa-Zulu Natal (1998 – 2008)

Member, Lay Preacher and Lay Minister, St Matthews Anglican Church (1985 – present)

Board Member, St Nicholas Diocesan School (1999 – 2016)

Board Member, Epworth school (2005 – 2011)

Director, Dusi UMngeni Conservation Trust (2006 – present)

SELECTED JUDGMENTS**COMMERCIAL LAW****PREMIER FOODS (PTY) LTD V MANOIM NO AND OTHERS 2016 (1) SA 445 (SCA)****Case heard 29 September 2015, Judgment delivered 4 November 2015.**

Appellant had been granted immunity in terms of the Competition Commission's corporate leniency policy (CLP). It duly gave evidence on cartel activities to the Competition Tribunal. The Tribunal made an order declaring the conduct of the appellant to be a prohibited practice in respect of its involvement in cartel activity (the declaration). Appellant argued that the Tribunal was not empowered to make the declaration, as the conduct in question was not included in the complaints referred to the Tribunal. Claimants wished to sue the cartel members for damages. To do so, they required a notice certifying that the conduct forming the basis of the claim had been found to be a prohibited practice under the Competition Act. Appellant sought an order declaring that such a notice could not be issued in respect of the appellant.

Gorven AJA (Maya ADP, Shongwe and Petse JJA and Baartman AJA concurring) held that leniency applicants did not enjoy immunity in civil actions. [Paragraph 16]. As to whether the Tribunal had the power to grant the order, Gorven AJA held that the Tribunal was a creature of statute. It had only the powers given to it by the Act and had to exercise its functions in accordance with the Act. The power of the Tribunal to determine a complaint only arose when the referral was made in terms of the Act, generally by the Commission:

"The Tribunal is only empowered to make a declaration on matters falling within terms of a referral. The Commission submits that the question 'is whether a complaint against a particular party is properly referred to and before the Tribunal when that party is not formally cited as a respondent'. ... My view is that the question goes beyond the issue of citation." [Paragraph 18]

Gorven AJA held further that the Tribunal's power was limited to those particulars referred to it by the Commission. In this case, Premier had not been cited in the complaint referrals, and no relief was sought against Premier in the referrals. It was argued that the particulars of the complaint relating to Premier nevertheless fell within the ambit of the referrals [paragraphs 19, 22]. The Commission argued that as Premier had participated in proceedings on the basis of admitted involvement in cartel activity, and order could be made against it.

"But this ignores the approach in Agri Wire and Senwes, both of which require the subject-matter of the order to fall within the ambit of the complaint referral, failing which the Tribunal has no power to make a declaration. As I have indicated, my view is that Premier's conduct is not covered by the referrals. The Tribunal thus had no power to make the declaration." [Paragraph 27]

Gorven AJA held that whilst Premier knew that other members of the cartel had been cited as respondents and that relief was sought against them, this did not mean that it should have anticipated that relief would be sought against it, since the referral told it the opposite. [Paragraph 30]. The fact that the conduct of Premier was not part of the referral to the Tribunal meant the Tribunal had no power to grant any order against it. The declaration was thus a nullity. [Paragraph 47].

The appeal was upheld with costs, and an order issued declaring that neither first or second respondent could issue a notice certifying that appellant's conduct constituted a prohibited practice.

CIVIL AND POLITICAL RIGHTS

SOUTH AFRICAN HISTORY ARCHIVE TRUST v SOUTH AFRICAN RESERVE BANK AND ANOTHER 2020 (6) SA 127 (SCA)

Case heard 29 May 2020, Judgment delivered 29 May 2020

Researchers were collecting material for a book relating to apartheid-era procurement practices and public accountability. Appellant lodged a request with the respondent under the Promotion of Access to Information Act (PAIA) seeking access to various documents, which was refused by the respondent. An application to review that decision was dismissed by the high court. [Paragraphs 1 – 4].

Gorven AJA (Cachalia, Mbha, Schippers JJA and Mojapelo AJA concurring) found that the default position under PAIA was that access to records had to be granted unless one of the grounds for refusal in chapter 4 was met. [Paragraph 6] Gorven AJA discussed the provisions of PAIA allowing for third parties affected by a request to be heard. [Paragraphs 7 – 13] In terms of section 47 of PAIA, the Information Officer (IO) was required to take “all reasonable steps” to advise the third party of the request. Section 49(1) allowed the IO to make a decision on the request if the third party had been informed or had made representations. [Paragraph 16].

Gorven AJA held further that section 49(2) empowered an IO to make a decision without the third party having had an opportunity to be heard, if all reasonable steps had been taken to notify the third party, and the third party was nevertheless not informed and had not made representations. Gorven AJA held that this exception, “as with all exceptions to the *audi alteram partem* principle, must be narrowly construed.” [Paragraphs 19 - 20] Gorven AJA found that the SARB had purported to act under section 49(2), and therefore the question was whether they had taken all reasonable steps to inform the third parties. If not, the SARB was not empowered to make a decision on the request. [Paragraph 21]

Gorven AJA analysed the steps taken. The SARB had explained that notice had not been given as the IO had formed the impression that two of the third parties had passed away and the other was incarcerated overseas. Gorven AJA found that that:

“In effect, the SARB decided to take no steps at all. It excused itself from this peremptory requirement on the basis that to require it to do so 'would be unreasonable'. By no stretch of the imagination can it be said that, without evidence of any steps taken at all, all reasonable steps were taken to inform them. ...” [Paragraph 22]

Gorven AJA found that as to whether the SARB had taken all reasonable steps to inform the third parties, “[o]n the most generous approach imaginable, the answer is a resounding 'no'.” The SARB was therefore not entitled to take a decision under section 49(2). [Paragraph 27] Gorven AJA criticised the approach of the SARB, commenting that the “answering affirmation is long on stock phrases which merely repeat parts of this chapter of PAIA” and that it fell “woefully short on fact, detail or proper application of the provisions of PAIA.” [Paragraph 36] Gorven J examined the grounds for discretionary refusal and found that SARB had made no assertions and provided no evidence to show that the requirements had been met. [Paragraphs 40 – 43].

The appeal was upheld with costs with Gorven AJA finding that:

“The blanket refusal by the SARB, on entirely spurious grounds which do not even assert the elements entitling them to withhold access, supports a costs order being made against it. That response has bordered on the obstructive and is certainly not in keeping with the purpose of PAIA in its outworking of the provisions of the Constitution to promote openness and transparency. As was submitted by the appellant, the approach was redolent of the dark days of apartheid, where secrecy was routinely weaponised against a defenceless population.” [Paragraph 48]

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MINISTER OF HOME AFFAIRS AND OTHERS v SAIDI AND OTHERS 2017 (4) SA 435 (SCA)

Case heard 30 March 2017, Judgment delivered 30 March 2017.

The issue in this case was whether section 22(3) of the Refugees Act empowered a Refugee Reception Officer (RRO) to extend permits (which allowed potential refugees to remain in the country while their applications for refugee status were determined) once internal remedies have been exhausted by an asylum seeker. A cross-appeal concerned whether, if this was the case, the high court should have directed the RRO to extend permits if an application for judicial review of the refusal of asylum was pending. It had previously been a practice for permits to be extended if judicial review proceedings had been instituted, but this was changed so that permits were no longer extended once internal remedies had been exhausted.

Gorven AJA (Maya AP, Swain and Majiedt JJA and Mbatha AJA concurring) held that there was nothing in the language of s 22(3) which limited the power to extend permits to the period prior to the exhaustion of the internal remedies. [Paragraph 12]. Gorven AJA held that:

“The purpose of the Act and the background to its promulgation clearly seek to apply the values espoused in the Constitution, including human dignity, the advancement of human rights and freedoms, and the supremacy of the Constitution and the rule of law. It also seeks to give effect to a commitment to the comity of nations and a desire to bring our legislation concerning refugees into line with the human rights and other instruments mentioned in the Act and the standards and principles of international law. ...” [Paragraph 22]

Gorven AJA noted that section 39(2) of the Constitution required courts to interpret statutes to promote the spirit, purport and objects of the Bill of Rights. [Paragraph 27] Gorven AJA held that section 22(3) was:

“at least capable of the interpretation that the RRO is empowered to extend permits after the internal remedies have been exhausted. The rights to bodily integrity, just administrative action and access to courts are immediately identifiable values which would be advanced by this interpretation. These would be placed at risk if the asylum seekers are returned for no other reason than that the internal remedies have been exhausted in circumstances where judicial review proceedings have been launched.” [Paragraph 28]

The appeal and cross-appeal were both dismissed with costs.

CIVIL PROCEDURE

WISHART AND OTHERS V BLIEDEN NO AND OTHERS 2013 (6) SA 59 (KZP)

Case heard September 28, 2012, Judgment delivered November 15, 2012

The three applicants sought to interdict the second and third respondents, who were advocates, and the fourth respondent, who was an attorney, from examining the applicants at an enquiry in terms of section 417 of the Companies Act. The basis was that the applicants were former clients of the respondents, and that the respondents were subject to conflict of interests and were privy to confidential information. In effect, however, the clients had been the companies which the applicants represented, not the applicants in their personal capacities.

Gorven J found that it was accepted that attorney-client contracts had been with the companies, not between applicants and respondents, and that the contracts related to disputes that involved the companies, not the applicants personally. The attorney-client contracts were no longer in existence, and the companies did not assert any right to confidentiality. [Paragraph 43]

Regarding standing, Gorven J considered whether the applicants had the right to protect information confidential to the companies:

“The short answer is that the applicants do not seek any such relief. They seek to protect themselves. ... [T]he applicants seem to confuse their own interests and rights with those of the companies. The application is largely concerned with confidential information of the companies or privileged communication supposedly made by the officers of the companies on their behalf. Very little is said of information personal to the applicants. The applicants are clearly not entitled to rely on the protection of information confidential to the companies in question, or privilege which vests in the companies.” [Paragraph 44]

Gorven J rejected an argument that the first applicant could be classified as an “informal client” [paragraph 48] and found that no case had been made out on the papers that any confidential information personal to the applicants was disclosed to the respondents. Gorven J held that properly construed, the right that the applicants asserted was not to be examined at the section 417 enquiry. None of the requirements to assert that right had been met. [Paragraph 50].

The application was dismissed with costs. The decision was upheld on appeal in ***Wishart and Others v Blieden N.O. and Others (659/2013) [2014] ZASCA 120 (19 September 2014)***, with the SCA holding that the refusal to restrain a lawyer from acting against a litigant where there was no misuse of confidential information was correct.

The judgment was discussed by **J Brickhill, H Corder, D Davis & G Marcus, “The Administration of Justice”, *Annual Survey of South African Law, 2013***. The authors applaud Gorven J for the “thorough, courteous and clear manner” in which he reached his various findings and decisions. They state that this is “commensurate with the best traditions of judicial impartiality and accountability, both to the parties and to the wider public, in this country.”

CRIMINAL JUSTICE

PANDAY v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2021 (1) SACR 18 (KZP)

Case heard 14 August 2020, Judgment delivered 16 September 2020.

Applicant sought to review and set aside a decision taken to prosecute him for fraud and corruption, relating to the supply of temporary accommodation to members of the SAPS during the 2010 World Cup. [Paragraphs 1, 3] An initial decision was taken by the Director of Public Prosecutions for KwaZulu – Natal

not to prosecute. This decision was later reviewed by the NDPP, and a decision take to prosecute. [Paragraph 4]

Gorven J found a decision to prosecute was not reviewable under the Promotion of Administrative Justice Act but could be reviewed only under the principle of legality. [Paragraph 9] This required that the decision maker must act within the law, and that the exercise of public power must be rationally related to the purpose for which it was given. [Paragraph 11] Applicant challenged the decision on two grounds – the NDPP had failed to consult the DPP before reviewing her decision, and therefore did not comply with the empowering provision. The second ground was based on rationality and challenged the use of intercepted communications. [Paragraphs 12 – 13]

Regarding the consultation challenge, Gorven J found that this turned on the meaning of “after consulting” in section 179(5)(d) of the Constitution and section 22(2)(c) of the National Prosecuting Authority Act. [Paragraph 15] Gorven J found that the purpose of the power was to “ensure that a decision not to prosecute is not reversed by the NDPP in ignorance of the reasons of the decision-maker.” [Paragraph 18] This meant that the views of the DPP must be given “serious regard.” [Paragraph 19] Gorven J considered the timeline of events [paragraph 20] and found that there had been adequate consultation. [Paragraphs 21 – 22]. This ground of review therefore failed.

After dismissing an application to strike out portions of the NDPP’s replying affidavit [paragraphs 23 – 31], Gorven J set out the “general approach” in such matters:

“Prosecutorial independence is a hallmark of the separation of powers. This is because a decision to prosecute or not to prosecute is specifically allotted to the prosecuting authority by s 179(2) of the Constitution. ... Courts will seldom intrude on such a decision. Apart from the separation-of-powers issue, the decision in question is a policy-laden one, requiring account to be taken of a number of factors. ...” [Paragraphs 32 – 33]

Gorven J identified the “simple question” on the second ground as being:

“[W]hether the means used by Mr Abrahams, of obtaining the reasons of Ms Noko, representations from Mr Panday, input from Ms Jiba and Mr Mzinyathi, and the docket containing the thousands of documents and the PwC report, can be said not to have related to the end of arriving at a decision to prosecute in CAS 781. ... [T]here was an ample basis for Mr Abrahams to disregard the unfounded and irrational assertions ... about the intercepted material. That being the case, it cannot be said that Mr Abrahams ought to have insisted on receiving the intercepted material prior to making the impugned decision.” [Paragraph 60]

The application was dismissed.

S v MATHE 2014 (2) SACR 298 (KZD)**Case heard 14 – 16 August 2012; 23 April 2014, Judgment delivered 24 August 2012**

The accused, a Correctional Services official, was convicted of shooting and murdering the deceased, with whom he had an intimate relationship and a child. The deceased had, shortly before the killing, terminated her relationship with the accused, and the accused was upset about the deceased's alleged infidelity. The accused shot the deceased, who was sitting at the back of a taxi, during an exchange of fire with other officers. In the process he shot another passenger in the taxi. The accused was found guilty, on his written plea of guilty and statement, of attempting to murder a fellow employee and of murdering the deceased. In mitigation, the accused claimed that he had emotionally disintegrated at the time of the shooting, and hence had diminished criminal responsibility.

In considering sentence, Gorven J held that diminished criminal responsibility was not a defence but was relevant to sentence because it reduced culpability. The question was the extent to which the circumstances reduced the powers of restraint and self-control of the accused. [Paragraph 16] Gorven J found that whilst the accused was "clearly emotional about the infidelity of the deceased" and "clearly found repugnant" the idea of the deceased establishing a romantic relationship with somebody else, no diminished criminal responsibility had been established. [Paragraph 26]

Gorven J held that little significance could be attached to the fact that the accused had pleaded guilty, as he had been caught re-handed with eyewitnesses present. However, the accused had expressed remorse, and Gorven J found that "significant character evidence" suggested that he had been "a stable, productive member of the community and engaged in uplifting actions over a long period of time." Gorven J found that the accused was a candidate for rehabilitation. [Paragraph 27] However, an aggravating factor was that he had "treated a defenceless woman as a chattel who existed purely for his benefit." [Paragraph 28]. Gorven J cited a 2012 study by the Medical Research Council, which showed that one out of every two women murdered was killed by her partner:

"This means that the proprietorial attitude of men towards women has reached extremely serious proportions in our society. This attitude makes a mockery of the right to life accorded by the Constitution." [Paragraph 29].

The accused was sentenced to 3 years imprisonment for the attempted murder count, and 10 years imprisonment for the murder count, the sentences to run concurrently.

A. Van der Merwe, "Sentencing", *South African Journal on Criminal Justice*, 2014 (3) 453 highlights the court's sensitivity to constitutional values which led to "the consideration and recognition of an aggravating factor often overlooked by courts in the past." [Page 454]

JUDGE WENDY HUGHES

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 28 February 1968

BProc, University of Durban Westville (1992)

LLB, University of Durban Westville (1995)

Advanced Diploma in Labour Law, Rand Afrikaans University (1998)

CAREER PATH

Acting Justice, Supreme Court of Appeal (December 2017 – May 2018; June – November 2019)

Acting Judge, Lesotho High Court, Constitutional Division (April 2015)

Judge, Gauteng High Court (2013 – to date)

Acting Judge

Gauteng High Court, Pretoria (2012 – 2013)

Northern Cape High Court (2010 – 2012)

KwaZulu – Natal High Court (2009)

Director, Hughes – Madondo Inc (2001 – 2013)

Director, Kruger Ngcobo Inc (1996 – 2001)

Professional Assistant, Kruger Ngcobo Inc (1995 – 1996)

Candidate Attorney, Mlaba Makhaya & Partners (1993 – 1994)

Member, South African Women Lawyers Association (2010 – 2013)

Member, Black Lawyers' Association (1995 – 2013)

Member, KwaZulu – Natal Law Society (1995 – 2013)

SELECTED JUDGMENTS**PRIVATE LAW****BOUTTELL v ROAD ACCIDENT FUND 2018 (5) SA 99 (SCA)****Case heard 31 May 2018, Judgment delivered 31 May 2018**

Appellant, described as being “very successful” as an owner and general manager of two businesses, made contributions to a retirement annuity fund from his gross income, equivalent to 15% of his gross earnings. [Paragraph 1] Appellant was involved in a motor vehicle accident and instituted a claim against the Road Accident Fund for damages. The claim was settled on all aspects except for future loss of earnings. The high court distinguished between contributions to an employer pension fund and voluntary contributions to a retirement annuity fund for purposes of calculating loss of earnings and upheld the RAF’s argument that the contributions to a retirement annuity fund were not to be taken into account in a claim for loss of earnings.

Hughes AJA (Navsa, Majiedt, and Mbha JJA and Plasket AJA concurring) noted that section 17(4) of the RAF Act imposed a cap on claims for loss of income or loss of support. [Paragraph 3] Appellant argued that claimants such as himself, who voluntarily contributed to a retirement annuity fund, were discriminated against and placed at a disadvantage by not being able to include their contributions to an annuity fund in a claim for loss of earnings. [Paragraph 6] Hughes AJA rejected an argument that a retirement annuity fund and a pension fund were one and the same thing, holding that a retirement annuity fund was a form of investment. [Paragraphs 7 – 8]

Hughes AJA endorsed the view in earlier decisions of the court that a pension could not be compared to a benefit that was 'deemed to have been purchased':

“Thus, if a claimant purchases a benefit, such as a retirement annuity in the present case, and he does so voluntarily and unconnected to an employment contract, his contributions or payments in relation to such makes it an investment or purchase of a benefit that cannot be recovered from the RAF. The reasoning, in my view, is that a negligent third party cannot be liable to compensate a claimant who voluntarily opted to attain a benefit, irrespective of whether that third party was negligent. This is so because the voluntary purchase of the benefit does not cancel out the benefit when the delict is committed.” [Paragraph 10]

Hughes AJA further rejected the claim of discrimination, holding that while the concepts of equity and discrimination were linked:

“discrimination concerns treating one person (or groups of persons) differently to another on the basis of inherent characteristics or attributes such as race, gender or the other grounds listed in s 9(3) of the Constitution. What is alleged here is a differentiation in treatment that is unrelated to any inherent characteristic or attribute having the potential to impair the dignity of a person.” [Paragraph 12]

Hughes AJA held that all employees were treated equally in that in order to determine their future loss of earnings, a court would consider their employment contract as a whole. [Paragraph 13].

The appeal was dismissed with costs.

ADMINISTRATIVE JUSTICE

FOURIEFISMER INC AND OTHERS v ROAD ACCIDENT FUND AND RELATED MATTERS 2020 (5) SA 465 (GP)**Case heard 1 June 2020, Judgment delivered 1 June 2020**

Various panel attorneys of the Road Accident Fund (RAF) sought to review and set aside decisions by the RAF calling on the panel attorneys to hand over files which had not been finalised, cancelling a tender, and dispensing with the services of the panel attorneys. [Paragraph 9] The RAF was seeking to build their internal capacity and employ attorneys directly to deal with the RAF's caseload. [Paragraph 12]

Hughes J noted that:

“[T]he RAF, as a social-security scheme, stands instead of the state to protect the freedom and security of persons and is 'obliged to afford an appropriate remedy to victims of motor vehicle accidents who suffer bodily injury as a result of someone else's negligence'.” [Paragraph 3]

Hughes J took as the starting point of analysis the moment when “the wheels started turning in order to bring the cancellation of the tender with the panel attorneys”, namely the extension of the service level agreement (SLA). [Paragraph 27]. Hughes J noted that a second amendment to the SLA reduced the notice period for the end of the agreement from four months to one month. [Paragraph 28] Hughes J held that if a:

“contract at the outset is governed by administrative characteristics, those remain, even if one seeks an extension of that very same contract. ... [T]he argument of the RAF that it was exercising its contractual rights in a private-law relationship is misplaced. The administrative characteristic still remains, as it performs its social duty for the state and, as such, it would be bound to exercise its contractual rights in a procedurally fair and lawful manner. ... [I]n the circumstances of this case, as well as the prescripts of the Constitution, the RAF's contractual rights can never trump the RAF's public social responsibility.” [Paragraph 33]

Hughes J accepted the submission that the extension of the procurement of services had to be in line with section 217 of the Constitution. [Paragraph 34] Hughes J found that the RAF had abused “its public position and authority over the panel attorneys” by threatening to recall all of its files if the attorneys did not agree to the second addendum. This was unfair to the panel attorneys as “they were coerced to sign the addendum, this addendum which was unilaterally prescribed by the RAF.” [Paragraph 35]

The second addendum was found to be invalid and unlawful. [Paragraph 38] Hughes J found further that the handover notifications had not been authorised by the board and were invalid. [Paragraphs 39 – 51] Regarding the decision to cancel the tender and dispense with the panel attorneys, Hughes J noted that the decision had been taken by the Bid Adjudication Committee (BAC) and not the Board. Hughes J held that the conduct of the Board left “much to be desired”, that the Board had been “rather docile and submissive in all the decisions discussed and taken.” [Paragraph 61] Hughes J described the notification process as a “comedy of errors”:

“The notification was not issued by the Board. The Board was yet again made aware of the notices, which culminated in the validation of the decisions being after the fact. Management already took and executed the decisions. After the fact, yet again, they seek the lawful

approval from the Board, having already concluded the process, in the face of the Board's request that management supplement, so as to confirm the decision. Nothing comes of this, as the decision has been taken and is in the pipeline to be processed, or processed already, by management, no respect for the authority of the Board or its accountability to the South African public." [Paragraph 63]

Both notices to cancel the tender were therefore invalid. [Paragraph 64] Hughes J ordered that the panel attorneys continue to serve on the RAF panel of attorneys, and that the RAF fulfil all its obligations to the attorneys in terms of the existing service level agreement. The order would operate for a period of six months. [Paragraph 88]

CIVIL PROCEDURE

CHAIRPERSON OF THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (94785/2019) [2020] ZAGPPHC 74 (24 FEBRUARY 2020)

Case heard 11 February 2020, 24 February 2020.

A court order had previously been granted an order that the President to establish the judicial commission of inquiry to investigate issues identified by the Public Protector in the State Capture report. The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State was thus established. The Commission was tasked to complete all its work within 180 days. This initial timespan proved insufficient and the applicant sought an extension to complete the work of the Commission, which was granted and spanned a period of twenty-four months from March 2018 to February 2020. In these proceedings the applicant sought a further extension, as despite extensive work since March 2018, it had not completed its work and would not have done so by the end of February 2020. An urgent application was therefore brought for a further extension for a period of ten months, from the end of February 2020 to 31 December 2020. [Paragraphs 1 – 2]

Hughes J noted the applicant's argument that "two spheres of corruption and fraud" existed, one in terms of the Public Protector's remedial action, which was equated to corruption and fraud under state capture. The other was corruption and fraud falling under the previous court order, which was described as general corruption and fraud unconnected to state capture, falling outside the scope contemplated by the Public Protector's remedial action. Applicant submitted that the latter may have to be referred to another forum or agency. [Paragraph 8]

The applicant further argued that taking into account the work still to be done by the Commission, if the Commission sought to comply with its mandate "and investigate 20 national offices, 80 provincial departments, 20 SOE's and 200 municipalities", it would need more than two years, and probably not less than four years, to complete its mandate. Applicant nevertheless submitted that there were sufficient grounds to justify an extension of ten months. Hughes J noted that "[c]ritically", the applicant acknowledged "that he should thus be asking for a much longer extension than the ten months that he seeks." [Paragraph 9] the ten month extension was sought as applicant was considering requesting the first respondent to amend the terms of reference regarding issues falling outside those contemplated by the Public Protector's remedial action. [Paragraph 10]

Hughes J noted that there was no dispute that the extension should be granted, but that some of the respondents argued that this should be the final extension. [Paragraph 19] Hughes J found that the applicant had made out a case for an extension. [Paragraph 20] Hughes J held that:

“there can be no bar in granting the applicant an extension of thirteen months at this stage taking into account the time that has lapsed since the commencement of the Commission's work and the previous extension already granted to the Commission to complete its work and present its report with findings and recommendations to the President. Thus the extension of thirteen months is appropriate in the circumstances ...” [Paragraph 23]

Regarding the extension being final, Hughes J held:

“I am mindful of the fact that it is in the interest of justice that there ought to be finality with the work of the Commission, encompassing findings and recommendations to act upon as a matter of urgency. I am further wary of the original intention of the Public Protector's state capture report and this court's order for the Commission to submit its report and recommendations to the President within 180 days. There has already been an extension of twenty-four months ... In my view, further extensions would not be warranted ... The interest of justice dictates that finality be attained with findings, recommendations and a report of the Commission. The Commission owes this to the nation as the work of the Commission is of national interest.” [Paragraph 24]

Hughes J held that the applicant and the commission would not be prejudiced if the extension was final, as the period granted for the extension “was the case made out by the applicant in his papers”, and that “[i]f the applicant had anticipated a longer period If the applicant anticipated a longer period, he would have sought same.” Hughes J further noted that the applicant had “advanced various ways to curtail and limit the scope and terms of reference of the Commission.” [Paragraph 25].

Hughes J concluded that the court had the inherent power to regulate its own processes in the interest of justice, and the circumstances required that “in order to attain justice, finality ought to be reached as this court is at liberty to prescribe any terms it seem meet in the interest of justice.” [Paragraph 26] The period for the Commission to complete its work and present its report to the President was thus extended by thirteen months, which was to be “the final extension.” [Paragraph 29]

CRIMINAL JUSTICE

DIRECTOR OF PUBLIC PROSECUTIONS, GRAHAMSTOWN v PELI 2018 (2) SACR 1 (SCA)

Case heard 16 February 2018, Judgment delivered 28 March 2018

The respondent had pleaded guilty to a charge of rape of a 6 – year – old boy. The high court found that there were substantial and compelling circumstances justifying a sentence less than the prescribed minimum sentence of life imprisonment, and imposed a sentence of ten years' imprisonment, with four years suspended on condition that he was not found guilty of the same offence during the period of suspension. The DPP sought to appeal against the sentence. [Paragraphs 1 – 2].

Hughes AJA held that:

“The fact that the respondent was a first offender and had consumed alcohol before committing the offence, which, however, did not affect his appreciation of the wrongfulness

of his conduct at the time he committed the offence, pales into insignificance when the gravity of the offence, being the rape of a 6-year-old child, is considered.”

Hughes AJA found that, for intoxication to constitute a substantial and compelling circumstance, it had to be shown that the consumption of alcohol “had impaired or affected the respondent's mental faculties or judgment and thereby diminished the respondent's moral blameworthiness”, and so the fact that the respondent had appreciated the wrongfulness of his conduct and was able to distinguish right from wrong, but nevertheless proceeded to commit the rape, meant that intoxication could not be regarded as a substantial and compelling circumstance to depart from the minimum sentence. [Paragraph 9]

Hughes AJA held that the respondent was not truly remorseful, as he had only confessed once he was arrested, four years after the offence had taken place. The plea of guilty had not arisen because of remorse, “but rather because there was overwhelming evidence against him in the form of DNA evidence”. Hughes AJA found that this was “a case of regret instead of remorse.” [Paragraph 10]

Hughes AJA found that “the High Court's characterisation of the rape of a 6-year-old child as not being severe so as to induce a sense of shock” could not be sustained. [Paragraph 11]. The appeal was upheld, and the sentence was set aside and substituted with a sentence of life imprisonment.

CENTRE FOR CHILD LAW AND OTHERS v MEDIA 24 LTD AND OTHERS 2017 (2) SACR 416 (GP)

Case heard 11 July 2017, Judgment delivered 11 July 2017.

The applicants sought an order declaring that the protections contained in section 154(3) of the Criminal Procedure Act were applicable to victims of crime under the age of 18, and that child victims, witnesses, accused and offenders did not forfeit those protections when they turned 18 years old. Alternatively, applicants sought an order that the subsection was unconstitutional. [Paragraphs 2 – 3] Section 154(3) prohibited the publication of any information which revealed or may reveal the identity of an accused or a witness under the age of eighteen years.

Hughes J noted that the applicants raised two concerns regarding the section: that it did not afford a child victim involved in criminal proceedings the same anonymity as a child accused or witness, and that the anonymity fell away when the child accused or witness turned 18. [Paragraph 9] Hughes J discussed the positions of the parties, and found that it was:

“common cause that a number of constitutional rights are at play against each other. On the one hand are the rights of the child, especially that found in s 28(2), being the child's best interests being paramount; the right to dignity found in s 10; the right to equality in s 9; the right to privacy in s 14; and the right to a fair trial found in s 35(3) of the Constitution. Whilst on the other hand are the rights of the media and the public, such as the right to freedom of expression in terms of s 16 of the Constitution, and the right to open justice in terms of s 152 of the CPA.” [Paragraph 29]

Hughes J held that Section 154 had to be read with must be read with section 153(1) of the Criminal Procedure Act and s 63(5) of the Child Justice Act. Section 63(5) provided that no person could be present at the sitting of a child justice court, unless necessary for the proceedings. [Paragraph 50]. Furthermore, Hughes J found that section 153(1) of the CPA provided for proceedings involving a child in a criminal court to be closed to the public, subject to permission from the presiding officer to hold proceedings in open court. [Paragraph 54] Hughes J read together, these sections did not differentiate

between whether the child was an accused, a witness, a complainant or a victim. [Paragraph 55] Hughes J held that:

“[T]here is sufficient ... to read into s 154(3), if one applies the purposive manner of interpretation, that the child victim is therefore covered in s 154(3). Critically, though, I find that the restriction to be found in s 154(3) in fact relates to criminal court proceedings. In my view this restriction cannot be used as a blanket clause in other legal instances, but for criminal proceedings.” [Paragraph 55]

Hughes J found that so interpreted, the section was not unconstitutional. Turning to deal with the issue of anonymity lapsing at the age of 18, Hughes J held that “there cannot be open-ended protection in favour of children, even into their adulthood”, since this would “violate the rights of other parties and the other rights of the children themselves when they are adults.”

“For example, as a child, having been involved in a crime, either as an accused, victim, complainant or witness, as an adult that child might seek to highlight awareness of their experience with others. This would not be possible, whether it was to bring awareness to others or purely to highlight the plight of such experience, as there would be a gag on such publication, if the protection is open-ended even into adulthood. This would simply amount to stifling the adult's right of freedom of expression. This in my mind takes away an individual's right as an adult. This situation results in one right, now, thumping [sic] another.” [Paragraph 67]

Hughes J declared that the protections of section 154(3) of the CPA applied to victims of crime under the age of 18 years. The “adult extension” claim was dismissed, “for it is neither permissible nor required by the Constitution.”

On appeal, a majority of the Supreme Court of Appeal held that section 154(3) was constitutionally invalid to the extent that it did not protect the anonymity of child victims, but dismissed the appeal regarding ongoing protection. ***Centre for Child Law and Others v Media 24 Ltd and Others 2018(2) SACR 696 (SCA) ([2018] ZASCA 140.***

On a further appeal to the Constitutional Court, the majority judgment confirmed the declaration of invalidity in respect of section 154(3), and further upheld the appeal regarding ongoing protection, holding that this would not present a “severe incursion” into media freedom. ***Centre for Child Law and Others v Media 24 Ltd and Others 2020 (1) SACR 469 (CC).***

S V JOBO [2011] ZANHC 24

Case heard 26 September 2011, Judgment delivered 21 October 2011

The appellant had been charged with assault, kidnapping, assault with the intent to do grievous bodily harm and rape. He was convicted on all counts in the Regional Court and was subsequently sentenced to twenty-five years imprisonment. This was an appeal against both his conviction and sentence.

Hughes-Madondo AJ (Williams J concurring) noted that a court of appeal would be reluctant to upset the findings of a trial court, “as the trial judge has the advantage of seeing and hearing the witnesses and observing their personalities and demeanour. The trial court is in a better position to draw inferences than the appeal court. ...” [Paragraph 23] Hughes – Madondo AJ found that the appellants' version in fact corroborated that of the complainant in material aspects [paragraph 24], as did

evidence of other witnesses. [Paragraphs 25 – 26, 27 - 28] Appellant’s version was therefore rejected as false. [Paragraph 29] Whilst there were minor contradictions in the evidence of the state witnesses, these were not material:

“It is expected that with the passage of time, witnesses will not have a perfect memory of every detail pertaining to the incident concerned. In fact alarm bells should ring if indeed they have a perfect memory of events or their memories of the events are exactly the same ...”
[Paragraph 30]

The appellant’s evidence was rejected as false. [Paragraphs 31 – 32]. Hughes - Madondo AJ noted that the state conceded that there had been a splitting of charges, since the other charges “were all part and parcel of achieving this objective of raping the complainant.” [Paragraph 33] The conviction in respect of rape was confirmed, while the conviction on the other charges was set aside. [Paragraphs 34-35]

Regarding the appeal on sentence, Hughes – Madondo AJ noted that the applicable minimum sentence was twenty years’ imprisonment. The state argued that the court was entitled to impose a sentence greater than the minimum, and that the sentence of twenty five years imposed by the court *a quo* below was appropriate. [Paragraph 37-39] Hughes – Madondo AJ found that the circumstances of the rape did not warrant deviating from the minimum sentence, as the circumstances did not fall within “the worst category of rape” in terms of the judgment in *S v Abrahams*. [Paragraphs 41 – 42]

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

JUDGE PETE KOEN

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 13 September 1959.

B Comm, University of Natal, Pietermaritzburg (1980)

LLB, University of Natal, Pietermaritzburg (1982)

Diploma in Arbitration, The Association of Arbitrators of South Africa (1986)

CAREER PATH

Acting Justice, Supreme Court of Appeal (December 2014 – February 2015; October – November 2019; December 2019 – March 2020; April – May 2020)

Judge, KwaZulu – Natal High Court (2006 – to date)

Advocate, KwaZulu – Natal Bar (1988 – 2006)

Senior Counsel (1997 – 2006)

Part – time lecturer, University of KwaZulu – Natal, Pietermaritzburg (1992 – 1996)

Attorney, Notary and Conveyancer, J Leslie Smith & Co Attorneys (1987 – 1988)

Candidate Attorney, J Leslie Smith & Co Attorneys (1985 – 1986)

Member, Editorial Board, South African Journal of Criminal Justice (2019 – to date)

Society of Advocates, Pietermaritzburg

Chairperson (2003 – 2004)

Vice chairperson (2001 – 2002)

Member (1988 – 2006)

Board member, University of KwaZulu – Natal law school (1996 – 1998)

Board member, Epworth School (2011 – 2015)

Member, Hilton Methodist Church (2017 – to date)

SELECTED JUDGMENTS**PRIVATE LAW****MAHLANGU AND ANOTHER V MINISTER OF POLICE 2020 (2) SACR 136 (SCA)****Case heard 18 | November 2019, Judgment delivered 21 April 2020.**

The issue in this case was the liability of the Minister for damages for the time the appellants were detained in terms of various court orders, from the time of their first court appearance following their arrest, until the charges against them were withdrawn and they were released. [Paragraph 1] Plaintiffs had been arrested without a warrant on four counts of murder. [Paragraph 2] The trial court found that the arrest and detention were unlawful. [Paragraph 7] An appeal was dismissed by a full bench of the high court. [Paragraph 12]

Koen AJA (Cachalia JA and Dolamo AJA concurring) held that every court order, including an initial order for detention:

“should be a deliberative judicial act and must consider the rights of the arrested person and weigh those in the scales of justice against the interest of the public to have persons reasonably suspected of being perpetrators of crime detained, where appropriate, pending their prosecution. A court order which simply directs the detention of an accused person without giving due consideration to these constitutional imperatives ... is liable to be impugned.” [Paragraph 17]

Koen AJA found that the police could be liable for persons being denied their freedom even when a court had ordered their detention. [Paragraph 18]. This could occur in two situations. First, when the arresting officer at the time of the unlawful arrest foresaw continued detention by the court following the first court appearance, where the post-appearance detention was sufficiently closely linked to an initial unlawful arrest. [Paragraphs 20 – 21] Second, when the police committed wrongful conduct independent of the arrest, which was “intended to influence the prosecutorial decision to request and/or the court's discretion to direct the further detention of the arrested person”. [Paragraph 22] The police would be liable for wrongful conduct subsequent to an arrest, whether the arrest was lawful or unlawful, which caused a detained person to be deprived of their liberty after the first court appearance, until the unlawfulness could be remedied. [Paragraph 25]

Koen AJA considered the pleadings in the appeal, which “were anything but a model of clarity.” [Paragraph 27] However, Koen AJA found that the “pleadings were widened by the evidence’, and that omissions in the pleadings had been cured. [Paragraph 31] Koen AJA considered whether the inclusion of an inadmissible confession in the docket at the first appearance had factually and legally caused the plaintiffs to be detained. [Paragraph 33] Koen AJA found that the confession, on probability, factually caused the order for the further detention of the plaintiffs and assumed in favour of the plaintiffs that the confession was the factual cause of the subsequent orders for the plaintiffs' detention. The key issue was “whether the plaintiffs proved legal causation, and whether the Minister should be held liable for the full period of their judicial detention.” This required consideration of whether the plaintiffs could and should have applied for release on bail, “and what limits of liability the legal convictions of the community and legal policy determine.” [Paragraphs 35 – 37]

Koen AJA found that the probability was that, had the plaintiffs applied for bail, the court hearing the application would have concluded that the confession was inadmissible, which, on the assumption it was the reason for their continued detention, would have led to the release of the plaintiffs. [Paragraph 39] Koen AJA found that:

“Public-policy considerations, determined with reference to constitutional values and the constitutional order ... limit liability for the continued judicial detention to the stage where it could reasonably be expected of the plaintiffs to have pursued a bail application to finality. ...” [Paragraph 41]

The appeal was upheld, and plaintiffs were awarded damages in the amount of R190 000 and R150 000 respectively. Van der Merwe JA and Petse DP both wrote separate dissenting judgments, and would have awarded a greater amount of damages to the plaintiffs.

SHOPRITE CHECKERS (PTY) LTD V EVERFRESH MARKET VIRGINIA (PTY) LTD T/A WILD BREAK 166 (PTY) LTD (6675/09) [2010] ZAKZPHC 34 (25 MAY 2010)

Case heard 25 May 2010, Judgment delivered 25 May 2010

Applicant sought to evict respondent from a shopping centre owned by the applicant. Applicant had purchased the property on auction, subject to existing lease agreements in force on the date of the auction sale. The lease agreement provided for a right of renewal, subject to the Lessee giving written notice of its intention to do so, which was reach the Lessor at least six calendar months before the date of termination of the lease. Respondent attempted to exercise this right, but the applicant took the position that the relevant clause was not legally binding and enforceable. [Paragraphs 1 – 6]

Koen J found that the respondent had correctly conceded that the clause did not contain “an option which by its unilateral acceptance, would give rise to a binding and enforceable lease for the renewal period”, as an option to renew a lease on terms to be agreed was invalid and unenforceable. [Paragraphs 8 - 9] Koen J found that it seemed “clear that South African law does not recognise that the obligation to pay a reasonable rental gives rise to sufficient certainty to result in a valid and enforceable agreement of lease.” [Paragraph 10]

Respondent argued that the lease gave the respondent a right to renew, with the rental to be determined by agreement between the parties. If the parties failed to reach an agreement at least three months before the date of termination of the lease, the right of renewal would become null and void. Respondent further argued that the applicant could not frustrate the right of renewal by refusing to negotiate, and that the parties were obliged to negotiate in good faith. If they failed to reach an agreement in good faith, the right of renewal would fall away. Until that time, applicant was not entitled to evict the respondent. [Paragraph 13]

Koen J held that the clause did not impose a positive obligation or duty on a party who rejected an offer to make a counter - offer. Therefore, once no agreement had been reached at least three months before the date of termination of the lease, “there was no agreement”. [Paragraphs 19 – 20]

“The terms in which the ‘right’ was conferred, did not carry the corollary of a duty in terms so wide that it required extensive offers and counter offers being exchanged, or even as little as a positive duty to actually respond to the respondent’s proposed offer of rental. Simply not responding to the offer or indicating that it was not being considered ... would result in no agreement being reached on the rental as required by the clause, and hence the alleged ‘right’ becoming null and void.” [Paragraph 21]

Koen J held further that even if this were not the case, the legal requirement that the negotiation would have to be in good faith, “without any reference to a readily ascertainable objective standard

according to which good faith could be assessed, would render the clause simply too vague to give rise to enforceable obligations.” [Paragraph 22]

The order for eviction was granted. On appeal, a majority of the Constitutional Court found that arguments presented by Everfresh on appeal, which had not been argued in the high court, showed that Everfresh had “adapted its defences ... as and when the litigation progressed to the obvious detriment of Shoprite” [paragraph 62], and rejected the application for leave to appeal: ***Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (CCT 105/10) [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (17 November 2011).***

ADMINISTRATIVE JUSTICE

KWA SANI MUNICIPALITY V UNDERBERG/HIMEVILLE COMMUNITY WATCH ASSOCIATION AND ANOTHER (415/13) [2013] ZAKZPHC 60 (30 OCTOBER 2013)

Case heard 3 September 2013, Judgment delivered 30 October 2013.

The applicant sought to set aside a written service agreement, to recover payments made to the first respondent in terms of the agreement, and to invalidate arbitration proceedings initiated by the first respondent. [Paragraph 1] In terms of the agreement, first respondent was to provide general emergency and disaster relief co-ordination services. Applicant alleged that as its circumstances changed, it no longer required these services, and it attempted to cancel the agreement. First respondent resisted the cancellation, and initiated arbitration proceedings in terms of the agreement. [Paragraphs 5 – 8]

Koen J analysed the applicable legal framework, noting that section 217 of the Constitution required an organ of state contracting for goods and services to do so in terms of a fair, equitable, competitive and cost effective system. [Paragraph 10] Koen J noted that the applicant did not have a supply chain management policy [paragraph 13] and held that this meant that the applicant did not have “carte blanche to contract in whichever way it wants” but had to follow a process “designed to ensure a transparent, cost effective and competitive tendering process in the public interest”. Furthermore, the applicant could not improve its position beyond what it would have been had there been such a policy. [Paragraph 19]

Koen J found that on the version put forward in the first respondent’s papers, which was binding on the applicant [paragraph 20], he was not persuaded that the process adopted was necessarily not compliant with the Constitutional requirements, considering the specialised nature of the services provided and the remoteness and locality of the applicant’s municipal district. [Paragraph 22] Koen J then considered whether the award of the contract constituted administrative action under PAJA, noting that it was settled law that the award of a contract for services by an organ of state such as the applicant constituted administrative action. [Paragraph 26] Koen J found that administrative action in the form of the conclusion of an agreement with an external service provider, where the external service provider was required to change its circumstances, would adversely affected the rights of the other contracting party, if the organ of state later took the view that the validity of the agreement was questionable for non-compliance with procurement requirements. [Paragraph 30]

Furthermore, the rights of the organ of state would be affected adversely. Koen J held that the conclusion of the agreement constituted administrative action for the purposes of review under PAJA, “even although it might not always fit in comfortably with some of the provisions in PAJA.” [Paragraphs 31 – 32]

Koen J found that Section 6(1) “[i]t might seem unusual and might require an amendment to the usual review process” for the reference to “any person” being able to institute review proceedings in section 6(1) of PAJA to refer to the organ of state itself, “[b]ut that *per se* is not sufficient to exclude the application of PAJA to such a situation.” [Paragraph 33] The review would then be excluded by section 7 of PAJA. [Paragraph 35]. Koen J held that even if excluded by PAJA, review was possible under the common law, based on the principle of legality. [Paragraph 36] Koen J held that under the undue delay rule at common law, “the delay before any steps were taken to impeach the agreement has been unreasonably long.” The contract had been implemented for over four years and had less than a year to run. To set aside the agreement at this stage “would be highly prejudicial and would undermine the finality of administrative decisions.” [Paragraph 43]

The application was dismissed. An appeal to the Supreme Court of Appeal was dismissed in ***Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another (180/2014) [2015] ZASCA 24; [2015] 2 All SA 657 (SCA) (20 March 2015).***

CAPE BAR COUNCIL V JUDICIAL SERVICE COMMISSION AND OTHERS (11897/2011) [2011] ZAWCHC 388; 2012 (4) BCLR 406 (WCC); [2012] 2 ALL SA 143 (WCC) (30 SEPTEMBER 2011)

Case heard 23 August 2011, Judgment delivered 30 September 2011.

Applicant sought to declare proceedings of the Judicial Service Commission (JSC) on 12 April 2011, and the JSC’s failure to fill two vacancies on the Western Cape High Court, to be unconstitutional and invalid. Neither the President nor Deputy President of the SCA had been present at the sitting on 12 April 2011. [Paragraphs 1 – 7]

Koen J (Mokgohloa J concurring) held that the JSC was enjoined by section 174 of the Constitution to make recommendations regarding the appointment of judges. This constituted the exercise of a public power:

“How that power is exercised, or not exercised, or whether it is appropriately exercised i.e. the control thereof, is always a constitutional matter. It is a principle of the rule of law which requires that the exercise of that public power may not be arbitrary but must be rational. That is the basis upon which public power may be reviewed; in accordance with the principle of legality.” [Paragraph 55]

Koen J thus held that the exercise of a public power was reviewable under the principle of legality, regardless of whether it was reviewable under the Promotion of Administrative Justice Act (PAJA). [Paragraph 58] Koen J found that the failure to fill the two vacancies did not constitute administrative action and were not reviewable under PAJA. [Paragraph 76]

Regarding the issue of the composition of the JSC, Koen J held that neither section 178 of the Constitution, governing the composition of the JSC, nor any other Constitutional provision provided “that the first respondent may be comprised and consist of only some of the persons referred to in s 178 (1).” The Constitution did not stipulate a quorum for the JSC, nor provide that the JSC may determine a quorum. [Paragraph 82] Koen J found that by making provision for alternates to the Chief Justice and the President of the SCA, the Constitution “clearly implied that at least those positions ... must be occupied either by the member named or his alternate.” [Paragraph 84] Koen J held that the membership of the JSC had been “selected for a particularly constitutionally significant purpose”, which could be thwarted if it was deprived of the services of one or more of its members. “Accordingly, there must be full attendance and participation by all members of the first respondent.” [Paragraph

90] Koen J thus held that the meeting on 12 April 2011 was “clearly not in accordance with the dictates of the Constitution and hence unlawful and constitutionally invalid.” [Paragraph 107]

Regarding the failure to fill two of the vacancies, Koen J found that it was “incumbent upon the JSC to account for its failure to have appointed at least those considered to be appropriately qualified and fit and proper candidates.” [Paragraph 117] Koen J noted that the JSC argued that no other candidate had obtained the necessary majority of votes, and no decision had been made to keep the two vacancies open. [Paragraph 118] Koen J held that this raised the question of whether the process by which the JSC recommended a candidate was “a sufficiently transparent and accountable process” and was not arbitrary or irrational. [Paragraph 119] Koen J noted that the JSC argued that the reason for the non-appointment of the unsuccessful candidates was that none of them received a majority of votes, and that it was neither possible nor legally required for the JSC to provide reasons. [Paragraph 120]

Koen J found that there was no reason why the JSC could not give reasons, since the Procedure of the Commission provided that reasons for recommending candidates for appointment to the Constitutional Court were distilled and recommended. [Paragraph 125] In the absence of such reasons, Koen J held, “the process is not transparent and appears arbitrary and irrational.” [Paragraph 126] Koen J further examined the explanations given for the voting procedures of the JSC [paragraphs 128 - 140], finding that these fluctuated between commissioners having one vote per candidate and one vote per vacancy. Koen J found that it was most likely that the system employed was that of one vote per vacancy [paragraph 133], and that this process was arbitrary and irrational as it made a candidate’s chances of appointment dependent on the number of other candidates shortlisted. [Paragraph 134] Koen J thus held that a voting procedure of one vote per vacancy, rather than one vote per candidate, was irrational as it did not ensure that decisions were taken by the majority of members. [Paragraph 139]

Koen J concluded that:

“Simply advancing as justification that the remaining two vacancies were not filled because none of the unsuccessful candidates were able to achieve the required majority, where the voting procedure adopted resulted in the failure to obtain such majority because votes per vacancy were spread over more candidates than the number of vacancies for which they compete, was irrational and failed to provide the opportunity to the majority of the members of the JSC to make a decision.” [Paragraph 141]

Finally, Koen J rejected an argument that the interviewed candidates should have been joined to proceedings. [Paragraph 164] The application was granted.

On appeal, the Supreme Court of Appeal upheld the findings in respect of joinder, quorum and failure to recommend candidates to fill the two remaining vacancies and dismissed the appeal. The SCA declined to making findings on the issue of the voting procedure, holding that the procedure was “shrouded in obscurity”, and that it was not necessary to consider a finding of constitutional invalidity “which would be both redundant and based on uncertain facts.” [Paragraph 53] ***Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)***.

CRIMINAL JUSTICE

S v CWELE AND ANOTHER 2011 (1) SACR 409 (KZP)**Case heard 21 October 2010, Judgment delivered 11 February 2011**

The accused were charged with contravening the Drugs and Drug Trafficking Act. This judgment related to the admissibility of recordings of intercepted cellphone conversations. Both cellphone numbers intercepted belonged to accused number 2. Both accused opposed the application to admit the evidence. [Paragraphs 1 – 2, 6]

Koen J noted that the interception of evidence by an illegal interception, without the authority of a direction under the governing legislation, or where a direction had been obtained, its terms were exceeded, would, “in most instances, invariably render that evidence inadmissible.” The interception of evidence by an illegal interception, without the authority of a direction, was a criminal act in terms of the Act, and evidence so obtained would be inadmissible in terms of the concept of 'systemic deterrents'. [Paragraph 7] Koen J held that, in interpreting the governing legislation, “the interpretation less onerous to the intercepted must be adopted.” [Paragraph 11]

Koen J considered an argument that, as the direction authorising the interception had referred to a “telecommunications line” and the identified numbers were cellphone numbers, the direction was “fatally flawed.” [Paragraph 16] Koen J rejected the argument:

“The direction ... clearly was for the interception and monitoring of *any* communication on the telecommunications line, and for the use of a monitoring device to monitor verbal communications *with, by or between* the suspects, *whether a telecommunications line is used* to divert the communications to a monitoring centre *or not* to divert the communications (own emphasis). The definition of 'telecommunications line' is very wide ... The direction was furthermore also expressly recorded to be one in terms of s 2(2)(b)(c), which includes particular communications 'transmitted by telephone *or in any other manner*' (own emphasis), and in ss 3 refers to conversations by or with a person, whether a telecommunications line is being used or not.” [Paragraph 17]

Koen J held that whilst cellphones and associated technology may not have been in existence when the Act was passed in 1992, “other devices not making use of traditional landline cables, existed.” In establishing the intention of the legislature, it was necessary to determine whether the wording employed authorised the interception of conversations and communications on technology which subsequently came into existence. [Paragraph 18] Koen J concluded that the direction authorising the interception and monitoring of cellphone conversations was not ultra vires the provisions of the Act. [Paragraph 20]

On the question of whether the admission of the evidence impacted on the right to a fair trial, Koen J held:

“The fundamental rights to privacy and dignity, and any other similar rights, excluding the right to life, are of course never absolute. They are subject to limitation ... The devastating effects left by drug trafficking, at both a local and international level, are extensive, widely reported on, and matters of which this court may take judicial notice. There is no basis upon which it can be said that the admission of such evidence would bring the administration of justice into disrepute. ... [T]he accused's reliance on their constitutional rights to privacy and dignity must yield to the objectives of the Act, namely the authorised interception and monitoring of the cellphone calls, as these may afford evidence of the commission of a 'serious

offence'. In the absence of an attack on the constitutionality of the relevant provisions of the Act, it would be incongruous to find that evidence, lawfully obtained and permitted in terms of the Act, was to be excluded on some other basis." [Paragraphs 25 – 26]

The evidence was held to be admissible. [Paragraph 27] The finding regarding the inclusion of cellphone communications under the Act was affirmed by the SCA in ***S v Jwara and Others 2015 (2) SACR 525 (SCA)*** [paragraph 14].

JUDGE NOLWAZI MABINDLA – BOQWANA

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 13 January 1973

B Proc, University of the Witwatersrand (1996)

LLB, University of the Witwatersrand (1998)

QUALIFICATIONS

Acting Justice of Appeal, Supreme Court of Appeal (April – May, June – November 2020; December 2020 – May 2021)

Judge of Appeal, Competition Appeal Court (2017 – to date)

Acting Judge of Appeal, Competition Appeal Court (2015 – 2017)

Judge, Western Cape High Court (2013 – to date)

Acting Judge, Western Cape High Court (January – March, April – June, July – September, October – December 2013)

Acting Judge, Labour Court (October – November 2011; July – August, October – December 2012)

Director and senior attorney, Thipa Incorporate Attorneys (2008 – 2013)

Director, Hluma Business and Labour Services (Pty) Ltd (2005 – 2007)

Director, Nolwazi Investment Holdings (Pty) Ltd t/a Lwazi Consulting (2005)

Counsel, AngloGold Ashanti Ltd (2000 – 2005)

Associate, Sampson Okes Higgins Attorneys (1998 – 1999)

Candidate Attorney, Deneys Reitz Attorneys (1997 – 1998)

South African Society for Labour Law (SASLAW)

National Committee Member (2000 – 2005)

Vice President, Gauteng Chapter (2002 – 2003)

Member, Gauteng Chapter (2002 – 2005)

Member (1999 – 2013)

Member South African Women Lawyers Association (SAWLA) (2011 – 2013)

Member, Cape Law Society (2008 – 2013)

Member, Law Society of the Northern Provinces (1998 – 2013)

Member, His People Christian Society & Church

SELECTED JUDGMENTS**CONSTITUTIONAL AND STATUTORY INTERPRETATION****WOMEN'S LEGAL CENTRE TRUST v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS
2018 (6) SA 598 (WCC)****Case heard 31 August 2018, Judgment delivered 31 August 2018.**

This case related to the recognition and regulation of marriages solemnised and celebrated under Islamic law (Muslim marriages). It was accepted that such marriages had not “been afforded legal recognition for all purposes.” The applicants in three consolidated matters argued that this non-recognition and non-regulation violated the rights of women and children, and that the state had failed in its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, in terms of section 7(2) of the Constitution. Applicants argued further that the best way to deal with this violation was through the passing of legislation. Paragraph 4] Applicants argued that that notwithstanding judicial intervention and piecemeal litigation, the law still “bears the dent of historical discrimination”, and that judicial intervention had been confined to the facts and consequences of particular cases. Piecemeal litigation was said to be undesirable, both for the individuals affected, many of whom lacked the resources to litigate, as well as the administration of justice. [Paragraph 51]

Boqwana J (Desai and Salie – Hlophe JJ concurring) considered a range of cases, noting that “the courts have on a piecemeal basis tried to ameliorate the hardships faced by women and children in Muslim marriages in a number of cases”. [Paragraph 15] Boqwana J also noted the existence of a long-standing project by the South African Law Reform Commission to investigate the legal recognition of Muslim marriages, and to draft legislation to recognise and regulate Muslim marriages in accordance with the Constitution. [Paragraph 18] After an extensive considering of the submissions from all the parties, Boqwana J dealt with the right to equality. [Paragraph 118ff] Boqwana J held that:

“The debate should not be located on whether there is differential treatment between Muslim women and women of other religions, because this analysis may lead to a skewed conclusion that, if it is found that women in other religions are in the same boat as women in Muslim marriages owing to the fact that no religious marriages are recognised per se, no discrimination has been established and hence no violation of rights. That view may be parochial as it may lose the historical context of systemic violation of the rights of Muslim women. It can also not be suggested that just because no recognition is afforded to marriages concluded in terms of religion per se as contemplated in s 15(3), Muslim marriages are not entitled to protection.” [Paragraph 123]

Boqwana J found that it was appropriate to compare women in Muslim marriages with those in civil and customary marriages, and to compare Muslim women and Muslim men. [Paragraph 124] Boqwana J found that, while the disadvantageous position of Muslim women, especially those in monogamous marriages, had been ameliorated in many respects, there was “still a gap with regard to non-recognition that affects women, not only in polygynous marriages.” [Paragraph 128] Boqwana J found that the applicants had been successful in showing discrimination, which was presumed to be unfair under section 9(5) of the Constitution. The respondents did not argue that any legitimate governmental purpose was served by the unfair discrimination, and it was “doubtful that they can.” [Paragraphs 134 – 135]

Boqwana J noted that the non - recognition of Muslim marriages had previously been held to infringe the dignity of Muslim women [paragraph 136], and that there was little if any protection for women

in Muslim marriages on the dissolution of their marriage. Despite protections provided by the courts extending consequences of different statutes to spouses in Muslim marriages, “[v]ulnerabilities still exist.” [Paragraphs 137 – 138] Boqwana J found further that children in Muslim marriages were not provided with adequate protection on the dissolution of the marriage of their parents because of divorce, compared to civil and customary marriages.

“[T]here has been, and is, an ongoing infringement of the s 34 rights [the right of access to courts] of persons in Muslim marriages, as well as the children thereof whose rights are stated in s 28 of the Constitution, to have any dispute that can be resolved by the application of law decided in a fair public hearing.” [Paragraph 140]

Boqwana J held that various Acts of parliament cited by the respondents had not been designed to address discrimination against Muslim women and children. There remained a gap in the area of divorces: “[i]t is correct that nothing prevents a Muslim woman from approaching courts for a remedy; some relief may not be competent for the courts to grant without an empowering basis to do so.” [Paragraphs 141 – 142] Boqwana J then considered the question of whether the state was obliged to enact legislation [paragraph 152 ff], and analysed a range of international conventions, finding that

“South Africa has committed itself to take appropriate and reasonable measures to eradicate discrimination against women in marriage and family relations. Some of these conventions require enactment of legislation by member states to give effect to equality rights of women and children.” [Paragraph 173]

Boqwana J found that directing the executive to draft legislation would not “pre-empt a democratic process in Parliament” but would merely require “the executive to remedy an unconstitutional position, whilst acknowledging that the members of Parliament may exercise their democratic mandate.” [Paragraph 198]

An order was made that the state was obliged to introduce legislation to recognise Muslim marriages as valid marriages and to regulate the consequences of such recognition. It was declared that the President and cabinet had failed to fulfil their constitutional obligations, and that such conduct was invalid. The President, Cabinet and Parliament were directed to rectify this failure within 24 months. If legislation was not enacted within 24 months, the order provided that a marriage in terms of Sharia law could be dissolved in accordance with the Divorce Act, until the required legislation was introduced. [Paragraph 252]

FRANSMAN V SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE AND OTHERS (13097/2014) [2016] ZAWCHC 120; [2016] 4 ALL SA 424 (WCC) (15 SEPTEMBER 2016)

This was an application to review decisions by the Western Cape Standing Committee on Public Accounts (‘SCOPA’/‘the committee’) arising from the summoning of the applicant to appear before it as a witness. [Paragraph 1]. The Auditor General had produced a report on the use of consultants by the Western Cape Provincial Government. This included the Department of Transport and Public works, where appellant had been the Provincial Minister between 2005 – 2008. [Paragraphs 3 – 5] The applicant was subpoenaed to appear before the committee. Applicant argued that this was a politically motivated move by members of the provincial majority party (the Democratic Alliance) to embarrass him. Applicant had since left the provincial government and was at the time the Deputy Minister of International Relations in national government. [Paragraph 8] Applicant was alleged to have declined to take the oath and left the meeting. [Paragraph 22]

Boqwana J considered whether the relief sought by the applicant was moot and the relief sought still had practical value and noted that the only evidence provided by the applicant to show that the relief sought would have a practical effect was a speech by the provincial Premier. There was no further indication that the current SCOPA would summons the applicant to return. [Paragraph 42]

“The question of whether the applicant should be re-summonsed would be a new issue which would have to be determined by the current committee. Relevant questions would have to be considered if and when the applicant is re-summonsed. The new members are not bound by the views of the previous committee. It is not known if the committee would grant or refuse the applicant’s requests, which the applicant seeks the court to direct. The context in which the requests might be made is also not currently determinable.” [Paragraph 43]

Boqwana J considered the applicant’s argument that the relief sought did have practical value, namely “so that the respondents are prevented from continuing the abuse of power in their regulation of SCOPA hearings.” [Paragraph 44] Boqwana J held:

“It is not the role of the judiciary to get involved in parliamentary politics, or to determine the internal arrangements, proceedings and procedures of provincial legislatures that are reserved by the Constitution for determination by those legislatures themselves. The judiciary would be impermissibly impinging on the terrain of the legislature if it were to do what the applicant wants it do. ...” [Paragraph 45]

Boqwana J found further that the second respondent [the current chairperson of SCOPA] had given the applicant undertakings should he be re-called “which more than adequately addresses the forward looking relief.” The applicant had rejected these undertakings. [Paragraph 46] Applicant argued that, as the second respondent was a member of the ACDP, the undertakings would not be followed by the (DA) majority of the committee members. [Paragraph 51] Boqwana J rejected this argument, on the basis that the second respondent was representing SCOPA and it was not suggested that he did not have authority to act on their behalf in the case. [Paragraph 52]

Regarding the argument on legal representation, Boqwana J found that the relevant standing rule “plainly does not provide for a right to legal representation”, but merely provided that legal representatives had to abide by committee rules when appearing before the committee. Boqwana J found that there was no absolute right to legal representation outside of a court, and that the second respondent had correctly asserted that the committee had a discretion regarding legal representation, and that it would not be appropriate for the court to order that the applicant was entitled to legal representation. [Paragraphs 55 – 58]

Boqwana J concluded that the applicant sought “past relief with no substantial relief attached to it”, and that the second respondent had resolved the question of future conduct. “[T]he court cannot tell parliament how to conduct its business purely on a hypothetical basis when the committee of parliament has tendered to comply with the future relief and the law.” [Paragraph 75]

The application was dismissed with costs.

CRIMINAL JUSTICE**S v LUNGISA 2021 (1) SACR 1 (SCA)****Case heard 9 September 2020, Judgment delivered 9 September 2020.**

Appellant had been convicted in the Magistrate’s Court on a charge of assault with intent to cause grievous bodily harm, and sentenced to three years’ imprisonment, with one year suspended. [Paragraphs 1 - 2] The charge arose events at a Nelson Mandela Bay Municipality Council meeting. The appellant, who was at the time the leader of the African National Congress in the council, struck a Democratic Alliance (DA) councillor with a glass jug filled with water, during a council meeting which had “descended into chaos.” [Paragraphs 4 – 5] The appeal centred on whether the sentence imposed was appropriate. [Paragraph 7]

Mabindla – Boqwana AJA (Maya P, Dambuza and Nicholls JJA and Weiner AJA concurring) found that it was not in dispute that the attack had “had adverse, long-term effects on the complainant.”, and that the trial court could not be faulted for emphasising the gravity of the offence. [Paragraph 12] Mabindla – Boqwana AJA found further that the trial court had been correct to find that the community was “entitled to expect a high level of responsible behaviour and maturity from its leaders.”

“Municipal councillors are entrusted with making decisions that profoundly affect the quality of lives and livelihoods of their communities. As the forum where these decisions are made, the council chamber is intended to provide a safe platform for the exposition of differing viewpoints, opinions and robust debates. Political-party representatives should be exemplary in their keen understanding of the values of freedom of expression and respect for the rules of engagement. The integrity and credibility of the municipal administration in the eyes of the community should not be compromised. ...” [Paragraph 13]

Mabindla – Boqwana AJA held that, as the leader of the ANC in the council, responsible for instilling discipline among his fellow councillors and a role model for aspiring political leaders the appellant “had a responsibility to lead by example” but had done the opposite and “his fellow councillors indeed took their cue from him and also threw glasses at other councillors.” [Paragraph 14] Mabindla – Boqwana AJA held that the country suffered from “uncontrolled and unacceptable levels of violence”, and that the community expected courts “to impose sentences that recognise this prevalence and show its repugnance and contempt for such conduct.” This was not to “sacrifice the appellant on the altar of deterrence, but to impose a sentence fitting the circumstances of the case. [Paragraph 15]

Mabindla – Boqwana AJA further rejected an argument that the atmosphere in the council chamber (described as “charged with anger”, with members of all political parties showing “unruly behaviour towards each other”) constituted a mitigating factor. Mabindla – Boqwana AJA noted that at the trial the appellant had not claimed to have been provoked but claimed to have acted in self-defence. Mabindla – Boqwana AJA rejected this argument, finding that the appellant’s version was contradictory, and that he had been “proved to have been the aggressor on the day of the incident.” [Paragraphs 16 - 17]. Mabindla – Boqwana AJA further held that the accused had shown no remorse for his actions and found that there were no grounds for the appeal court to interfere with the sentence imposed. [Paragraphs 18 - 19]

Mabindla – Boqwana further disagreed with the high court’s finding that the sentence imposed “was a robust one”, holding that it “meets the circumstances of this case and is in keeping with sentences that have been imposed by the courts in similar cases.” [Paragraph 19] The appeal was dismissed.

**SONKE GENDER JUSTICE NPC v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2019
(2) SACR 537 (WCC)**

Case heard 5 September 2019, Judgment delivered 5 September 2019.

Applicant challenged the constitutionality of provisions of the Correctional Services Act, relating to the establishment, structure and functionality of the Judicial Inspectorate of Correctional Services (JICS), arguing that the JICS lacked the necessary structural and operational independence. [Paragraph 4] The applicant argued that the structure of the Act meant that the JICS was “in material respects beholden, or susceptible to being beholden, to the Department.” Provisions cited included those making the Department responsible for all the expenses of the JICS, and the fact, that the National Commissioner appointed the CEO and handles disciplinary issues relating to the CEO. [Paragraph 19]

Boqwana J commented on the importance of the JICS:

“It serves a crucial function, focusing on facilitating inspection and reporting on the vulnerable (the inmates), how they are treated and the conditions they are held in. Referring to inmates, who have offended society, as the vulnerable, sounds like an oxymoron. Their vulnerability lies in the fact that they, for the most part, are at the mercy of others as to their living conditions and treatment or survival, once incarcerated. ... It is therefore imperative to have a body, independent of that which enforces correctional measures or incarceration, to 'watch over' or report on the correctional enforcer's conducting of services, so as to give effect to the Bill of Rights. Working in collaboration with the Department to achieve the constitutional goals, in my view, should not in itself be seen to fetter the independence of JICS. ...” [Paragraph 22]

Boqwana J found that, “given the scheme of the Constitution, read with the international obligations South Africa has committed itself to, and the objects of the Act” the Constitution imposed an obligation to create an adequately independent institution, as part of the duty to provide reasonable and effective mechanisms to promote human rights. [Paragraph 43] The question then arose as to whether the JICS had “the operational and structural features of independence.” Boqwana J rejected a challenge to the process of appointing the CEO of the JICS [paragraph 47], before considering a challenge to the process whereby matters relating to misconduct or incapacity on the part of the CEO were referred to the National Commissioner by the inspecting judge, in terms of section 88(4) of the Act. [Paragraph 48]. Boqwana J considered the Constitutional Court’s decision in *McBride*, and held:

“It may be argued ... that the National Commissioner does not per se initiate disciplinary matters; those are referred to him or her by the Inspecting Judge. Whilst that is so, the process of referral from the Inspectorate, which is an office that is meant to be independent, to the National Commissioner, may, in my view, undermine the independent role that the CEO has to play, not only in the actual sense, but also perceptually. ...” [Paragraph 51]

Boqwana J found that section 88(4) moved the role in disciplinary matters away from the office of the Inspecting Judge, “not to a neutral body ... but to the very body on whose conduct the Inspectorate is intended to report.” Boqwana J found section 88(4) to be constitutionally invalid. [Paragraph 53]

Boqwana J turned to consider an argument relating to the validity of sections 88A(1)(b) and 91, which made the CEO is accountable to the National Commissioner for moneys received by the Inspectorate and made the Department responsible for all expenses of the Directorate. [Paragraph 54] Boqwana J compared this to the arrangements for the financing of DCIP and IPID [paragraphs 56 – 60], and found that, based on submissions in the affidavit of the CEO of the JICS, there examples of “JICS' complete

dependence on the Department, which ... affect the effective functioning of the Inspectorate.” [Paragraph 66] Boqwana J found that these problems were:

“a result of the structure of JICS' dealing with its finances, which does not provide JICS with the necessary autonomy. It makes no sense that the head of the institution, the Inspecting Judge or the CEO has no say, let alone a final say, over the level of the Inspectorate's funding or involvement in the budgetary process. ...” [Paragraph 67]

Sections 88A(1)(b), 91 and 88A(4) were found to be inconsistent with the Constitution and declared invalid. The declaration of invalidity was suspended for 24 months to give Parliament the opportunity to remedy the defect. [Paragraph 79]

ADMINISTRATION OF JUSTICE

CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND ANOTHER V MOIPONE FLEET (PTY) LTD (57/2019) [2020] ZASCA 55 (27 MAY 2020)

This was an appeal against a finding of contempt of court made against first and second appellant in respect of an earlier order (the Davis order) which had directed the City to comply with its obligations to procure vehicles under a Public Private Partnership Agreement (the PPA) with the respondent and interdicted it from concluding an agreement to procure vehicles from any other service provider pending the final determination of the dispute. [Paragraph 1] The complaint in relation to the contempt of court application was that the city had complaint in this instance was that the City had procured light delivery vehicles from a service provider other than the respondent's fleet, in violation of an exclusivity clause (clause 39) of the PPA, as well as the Davis order.

Mabindla – Boqwana AJA (Cachalia, Zondi and Dlodlo JJA and Ledwaba AJA concurring) found that the issue before Davis J had been whether suspensive conditions in the PPA had been fulfilled. In the contempt application, the respondent raised a different issue by relying on clause 39 of the agreement. The conduct complained of was “clearly not the same as the issue that served before Davis AJ”, and the contempt application should have been dismissed on that basis alone. Mabindla – Boqwana AJA held further that “a proper interpretation of clause 39 also demonstrates conclusively that the court a quo erred in the interpretation it gave to the clause.” [Paragraphs 7 – 19]

Mabindla – Boqwana AJA held that in interpreting the clause, it was necessary to consider Request for Proposal document. This stated that co-sourcing of fleet services involved a hybrid situation where some fleet management functions were undertaken internally, while others were done through the private sector. The document contemplated the City enjoying the use and enjoyment of the vehicles, without any intention of acquiring ownership of them. Objectives for co-sourcing the City's fleet provision and management included to develop in-house capacity, ensure transport needs were met, and to divest the City of the risks and responsibilities of owning and maintaining vehicle fleets. [Paragraph 25]

Mabindla – Boqwana AJA rejected an argument by the respondent that the clause should be understood as requiring all fleet requirements to be met by the respondent, and did not how those requirements would be met:

“I am unable to agree with this contention. It is not supported by the scheme of the agreement or even by the Request for Proposal document that Moipone seems to rely on. Nothing in clause 39 read in the context of the agreement indicates that the City was prohibited from

purchasing vehicles from other suppliers. The fact that it had found co-sourcing in the form of a leasing arrangement to have been a cost effective mechanism at the time, did not mean that it could not embark on other cost effective methods to source its fleet requirements, including purchasing of its vehicles. ..." [Paragraphs 26 – 27]

Mabindla – Boqwana AJA found that the contention that the purchase of vehicles fell outside the agreement "was undoubtedly correct." The appeal was upheld, and the contempt of court application was dismissed. [Paragraphs 28, 30]

JUDGE ELIAS MATOJANE

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 9 September 1960

B Proc, University of Zululand (1986)

LLB, University of Zululand (1988)

LLM, University of Johannesburg (1995)

LLM, UNISA (2007)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (November 2018; February – March 2019; April – May, June – November 2020)

Acting Judge of Appeal, Competition Appeal Court (2020)

Acting Judge President [?] South Gauteng High Court (2019)

Acting Judge, Lesotho Constitutional Court (2017)

Acting Justice, Constitutional Court (2015)

Acting Judge President, Land Claims Court (2014)

Judge, Land Claims Court (2013)

Judge, Gauteng High Court (2009 – to date)

Acting Judge

Gauteng High Court (2009)

Western Cape High Court (2007 – 2008)

Partner, Matojane Malungana & Partners (2007 – 2009)

Partner, Ntseare Matojane & Partners (1995 – 2005)

Sole practitioner, Matojane Attorneys (1991 – 1994)

Candidate attorney, Mophosho Attorneys (1989 – 1990)

Additional member, Black Lawyers Association (2005)

Faculty member, BLA Legal Education Centre (1994 – to date)

Member, South African Chapter of the International Association of Women Judges

Member, School Governing Body, Alberview Primary School (2010)

SELECTED JUDGMENTS**PRIVATE LAW****MANUEL v ECONOMIC FREEDOM FIGHTERS AND OTHERS 2019 (5) SA 210 (GJ)****Case heard 30 May 2019, Judgment delivered 30 May 2019**

Applicant sought an order declaring that a tweet posted on the first respondent's twitter account was defamatory, false and unlawful. He further sought an order directing the respondents to remove the statement from all their media platforms and interdicting the publication of the same or similar statements in future. Applicant also sought an order that respondents publish an unconditional public retraction and apology and sought damages for injury to his reputation. [Paragraphs 1 – 7] Applicant had been appointed as chair of a panel to advise the President on the appointment of the new SARS Commissioner. The applicant recused himself from the interview of Mr Kieswetter, on the basis of the positions Mr Kieswetter had held at SARS while applicant was Minister of Finance. [Paragraph 23 – 31] The tweet stated *inter alia* that the process had been “patently nepotistic, and corrupt”, and that Mr Kieswetter was a “dodgy character”, who was “not just a relative of Trevor Manuel, but a close business associate and companion.” [Paragraph 32]

Matojane J considered whether the statement was defamatory, and found that a reasonable person of ordinary intelligence:

“would understand the tweet to mean that Mr Manuel is corrupt, nepotistic and has conducted the appointment process for a new Sars commissioner secretly in a deliberate attempt to disguise his familial relationship with Mr Kieswetter, and that he is connected to a 'white capitalist establishment' that acts contrary to the best interest of Sars.” [Paragraph 50]

Matojane J held that there was “no doubt that the statement would generally tend to lower Mr Manuel's reputation in the estimation of right-thinking members of society,” since it implied “that he was dishonest, unscrupulous and lacking in integrity.” [Paragraph 51] The tweet was therefore *per se* defamatory, and Matojane J turned to consider the defences raised by the respondent. [Paragraph 53]

Matojane J dealt with first with the defence of truth and public interest and held that the respondents had not shown that the “sting of the statement” was true. [Paragraph 56] Matojane J then considered an argument that the respondents' conduct was reasonable as it had “acted in a manner akin to a whistle-blower”, having received information for a confidential source, which accepted as being true and there was no reason to doubt it. Respondents argued that they were playing “a public-disclosure role” which would normally be played by the media. [Paragraphs 61 – 62] Matojane J found that there was no justification for limiting the defence of reasonableness to the media only, but that defence of reasonable publication did not apply, as respondents had not shown that it was “reasonable in the circumstances to publish the particular facts, in a particular way and at the particular time.” [Paragraph 68]

Matojane J then rejected a defence of fair comment, as respondents had not shown that the underlying facts on which the statement was based were true:

“The conduct of the respondents both before and after the publication of the impugned statement shows that they were actuated by malice. They published the tweet with reckless indifference as to whether it was true or false. The statement remains published online despite it being subsequently shown to be false, and the respondents refuse to take it down.

There can never be justification for the ongoing publication of a defamatory statement which has been revealed to be untrue unless the principal purpose is to injure a person because of spite or animosity.” [Paragraphs 73 – 74]

Regarding the remedy, Matojane J held that the motive and conduct of the respondents was relevant:

“They stubbornly refuse to retract, apologise or remove the impugned statement from their social-media platforms, when it is evident that they should do so. These factors collectively establish the existence of actual malice and a desire to hurt Mr Manuel in his person, and professionally, through the widespread dissemination of the defamatory statement. Such conduct warrants a punitive costs order.” [Paragraph 80]

Matojane J held that the allegations were false and defamatory, that the publication of the allegations was unlawful, and ordered the respondents to remove the statement from their media platforms with 24 hours. Respondents were further ordered to publish an unconditional retraction and apology within 24 hours and were interdicted from publishing “any statement that says or implies that the applicant is engaged in corruption and nepotism in the selection of the commissioner of the South African Revenue Service.” Respondents were ordered to pay damages of R500 000, and costs on an attorney and client scale. [Paragraph 84]

On appeal, the Supreme Court of Appeal dismissed the appeal against the findings of defamation and removal of the statement, finding that the high court’s decision on defamation and unlawfulness was “well founded”. The SCA however upheld the appeal against the quantum of damages and retraction and apology, and ordered that the determination of damages be referred to oral evidence. The SCA found that the reasoning of the high court on the quantum of damages had been “sparse, with little attention paid to how best to determine the extent of reputational loss.” [Paragraph 119] *Economic Freedom Fighters and Others v Manuel (711/2019) [2020] ZASCA 172; [2021] 1 All SA 623 (SCA) (17 December 2020)*.

SOCIO – ECONOMIC RIGHTS

KLAASE AND ANOTHER v VAN DER MERWE NO AND OTHERS 2016 (6) SA 131 (CC)

Case heard 3 September 2015, Judgment delivered 14 July 2016.

This was an appeal against decisions of the Land Claims Court. First applicant challenged the confirmation of his eviction on automatic review. Second applicant appealed against the dismissal of her applications for joinder, suspension of further proceedings and consolidation of her application with the eviction application against the first applicant. The main issue was the decision of the Land Claims Court that she was not an “occupier” in terms of the Extension of Security of Tenure Act (ESTA). [Paragraph 1] Applicants and their children had lived together in a cottage on a farm leased by the first respondent. First applicant’s employment relationship with the respondents ended when he was charged with absconding and absence from work. The dispute was settled, and first applicant was given notice to vacate the cottage. He did not do so, leading to an order for his eviction being granted in the magistrates’ court. [Paragraphs 4 – 7] The Land Claims Court found that the first applicant’s right of occupancy had been terminated by the settlement agreement and confirmed the eviction order. [Paragraphs 10 – 14] The Land Claims Court further denied the second respondent’s joinder application, holding that she was not an “occupier” in terms of ESTA. [Paragraph 19]

Writing for the majority of the Constitutional Court, Matojane AJ (Moseneke DCJ, Cameron, Madlanga and Nkabinde JJ and Wallis AJ concurring) found that the confirmation of the eviction order against the first applicant could not be faulted and dismissed that appeal. [Paragraph 42 – 44] Matojane J held that the second applicant should have been cited as a party or joined in the eviction proceedings against the first applicant. The dismissal of second applicant’s application for joinder was therefore overturned. [Paragraphs 47 – 48]

Matojane AJ then turned to the question of whether the second applicant was an occupier under ESTA. A purposive approach to interpretation required that the meaning of “occupier” be read together with the purpose set out in the preamble and other relevant provisions of ESTA. [Paragraph 50] Matojane AJ found that the Land Claims Court had relied on an overly narrow construction in finding that the second respondent was a “resident” and not an “occupier”. In the circumstances of the case, this was misconceived:

“It impermissibly construed the definition of ‘occupier’ narrowly and without regard to the mischief ESTA sought to remedy. The narrow meaning does not take into account instances ... where an occupier has lived for more than the prescribed period on the premises with the knowledge of an owner who sits back and does not seek the occupier’s eviction. There the ESTA presumption and deeming provision favour the occupier. ...” [Paragraph 54]

Similarly, the court had “restricted, impermissibly, the meaning of ‘consent’ in a manner that ignores the significance of ‘tacit’ consent.” [Paragraph 55] There was no evidence to rebut the presumption that the respondents had consented to the second applicant living on the farm. Matojane AJ found that the respondents’ failure to object to second applicant “residing on the farm for decades or taking steps to evict her” implied that they had consented to her occupancy. [Paragraph 60]

Matojane AJ found that the second applicant had established that she was an occupier in terms of ESTA and was thus entitled to the protections set out in the Act. This meant an eviction order could only be granted against her if certain conditions were met. Her right of residence had not been lawfully terminated. [Paragraph 65] Matojane AJ found further that:

“The Land Claims Court’s finding that Mrs Klaase occupied the premises ‘under her husband’ subordinates her rights to those of Mr Klaase. The phrase is demeaning and is not what is contemplated by s 10(3) of ESTA. It demeans Mrs Klaase’s rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. The construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured.” [Paragraph 66]

The second applicant’s appeal succeeded, and the order for her eviction was set aside. Zondo J (Mogoeng CJ and Van der Westhuizen J concurring) found that the non-joinder of the second respondent vitiated the eviction order against the first respondent, and that that order should be set aside and the matter be adjudicated afresh. [Paragraph 153] Jafta J wrote a separate judgment, finding that the eviction order against the first respondent was not vitiated, and that once it was determined that the second applicant should have been joined, it was unnecessary to determine whether she qualified as an occupier.

BAKGATLA-BA-KGAFELA COMMUNAL PROPERTY ASSOCIATION V MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS (LCC 80/2012) [2013] ZALCC 16

Case heard 6 March 2013, Judgment delivered 14 June 2013

Applicant approached the court to be declared a registered Communal Property Association in terms of section 8 of the Communal Property Association Act. The respondents challenged the application on various grounds, including lack of locus standi of the applicant and lack of jurisdiction by the Land Claims Court to hear the matter.

Matojane J began by considering the jurisdiction of the Land Claims Court, and found that jurisdiction could be found in the provisions of section 22(2)(c) of the Restitution Act, which granted jurisdiction over an issue not ordinarily within its jurisdiction, but which was incidental to an issue within its jurisdiction, if the court considered it in the interests of justice to decide the issue. [Paragraphs 15 - 16] Matojane J found that it was in the interests of justice to determine the issue. [Paragraph 18]

Matojane J found that the actions of a Mr Sebapi in “referring the application to himself (in his other capacity) as a Registration Officer for registration” was “null and void for absurdity.” The application that qualified for registration was therefore never registered. [Paragraph 33]

“Sebapi in referring the application to himself (in his other capacity) as a Registration Officer for registration is null and void for absurdity. Consequently, the application that qualified for registration was, in my view, never registered.” [Paragraph 33] Matojane J held further that:

“In my view, the action of Mr. Sebabi is invalid on another ground, as the Act does not give a Registration Officer the discretion to decide whether to register or not to register an association; once the registration of an association is approved by the Director General, the Registration Officer must register it as such.” [Paragraph 34]

Matojane J disagreed with a submission that the parties could validly reach an agreement with the Minister to override the recommendations by the Director-General and convert an approved application for permanent registration to a provisional one, as the Minister played no role in the registration process. [Paragraph 34] Matojane J concluded that the registration of the provincial association had not been authorised by law. Whilst the requirements for registration had been met, the Registration Officer had failed to carry out a recommendation by the Director-General to register the Association. The association could be registered. [Paragraph 40]

The applicant was declared an Association and the relevant authorities were ordered to register it. The judgement was overturned on appeal by the SCA in ***Bakgatla-Ba-Kgafela Tribal Authority v Bakgatla-Ba-Kgafela Tribal Communal Property Association (939/13) [2014] ZASCA 203 (28 November 2014)***.

ADMINISTRATIVE JUSTICE

ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD AND OTHERS V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS (7447/2012) [2012] ZAGPPHC 185

Judgement delivered: 28 August 2012.

This was an application to prevent SASSA from implementing a tender it had awarded to Cash Payment Services (“CPS”) for the distribution of social grants involving about R500 billion. Applicants alleged that the tender process was fundamentally flawed at almost every level, from the terms of reference to the procedure, to the ultimate evaluation and adjudication of the bids.

Matojane J held that whilst the applicants argued that a failure to answer certain questions was prejudicial to their bid, they were nevertheless content “to submit their bid and participate in an unfair tender process without raising an objection nor interdicting it.” Matojane J found that the conclusion was “inescapable” that applicants were raising the issue of procedural fairness at a later stage only because they were unsuccessful. [Paragraph 38] Matojane J found that it had been open to the applicants to interdict the ongoing tender process, or to apply for a further extension to amend their submission if they felt that a new requirement had been introduced in a Bidders Notice. [Paragraph 51]

Matojane J found that the duty to act fairly required an administrator to “bring to a person’s attention the critical issue on which the decision is likely to turn”, in order to give them an opportunity to deal with it. In this case, the process followed by SASSA, where the applicant’s score had been reduced, was irrational, unfair, and inconsistent with section 217 of the Constitution. [Paragraphs 57 – 58]

Matojane J found that no conflict of interest had been shown [paragraph 63], but that the failure to assess the capacity of CPS’s BEE partners to perform the percentage of work undertaken, before the tender was awarded, was unlawful, having been taken for an ulterior purpose [paragraph 65]. Matojane J then considered the appropriate remedy:

“It is not clear how long it will take for a new tender to be commenced with as applicants argues that the present tender is fundamentally flawed at every level and new bid specifications and terms of references will have to be formulated. No evidence has been placed before court as to the practicality and mechanics of there [sic] proposals. ... Applicants rely on SASSA’s version that the process of migration from Allpay to CPS can be reversed provided that it has a minimum of 60 days, this does not take into account that CPS, prior to implementation of the award, paid approximately 50 percent of the social grant beneficiaries in the country and it was therefore geared towards a takeover of all beneficiaries nationally in a relatively short period of time. It is not clear whether applicants ... ha[ve] the infrastructure to do so.” [Paragraphs 76 – 77]

Matojane J concluded that “[p]racticality and certainty” did not require the setting aside of the agreement between SASSA and CPS.” [Paragraph 78]

The tender process was thus declared illegal and invalid, but the award of the tender was not set aside. The SCA dismissed an appeal by AllPay against the refusal of the High Court to set aside the tender award, but upheld a cross-appeal by CPS against the declaratory order of illegality and invalidity (AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2013 (4) SA 557 (SCA)). The Constitutional Court set aside the decision of the SCA, declaring the award of the tender to be constitutionally invalid, and suspending the order

pending a determination of the appropriate remedy (AllPay Consolidated Investment Holding (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC)). Subsequently, the Constitutional Court ordered that SASSA initiate a new process for the payment of social grants, and that the declaration of invalidity be suspended until the decision on the awarding of the new tender was made (AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12.

ESOFRANKI PIPELINES (PTY) LTD AND ANOTHER V MOPANI DISTRICT MUNICIPALITY AND OTHERS (13480/2011,17852/2011) [2012] ZAGPPHC 194

Judgement delivered: 29 August 2012

This was an application to review and set aside of a decision by the respondent municipality to award a tender to a joint venture between Tango Consultancy and Tlong Rea Trading (the second and third respondents). The applicants argued that the Municipality was biased and acted in favour of the joint venture. The court had to decide two issues: first, an application to ensure that an interim interdict against the respondent remained in force pending an appeal by the respondent, and the costs thereof. Second, the main review applications.

Matojane J found that the Municipality had acted in accordance with the rules of court, and was entitled to proceed on the basis that the tender award had been valid, since “in our law, all administrative acts are presumed to have been done rightly until such time that the decision is set aside by a court of law.” [Paragraphs 23, 29] Matojane J then turned to consider the manner in which the applicant, “a civil engineering group with a turn over of 1.9 billion”, had conducted the litigation, and found that the first and second applicant (Cycad) “despite their protestations to the contrary are not independent.” [Paragraph 47] Matojane J held further that:

“The conclusion is inescapable that the applicants have embarked on a deliberate strategy to attack the flanks of the Municipality simultaneously in a pinching motion until it capitulates and award the contract to Esofranki.” [Paragraph 51]

Matojane J then considered the main review application, and found that the joint venture bid could not be considered acceptable as it did not comply with the specifications and conditions of the municipality’s bid document. It was accordingly irrational, arbitrary and unreasonable. [Paragraph 71]. Matojane J found that the third applicant “was only created after the invitation to tender was extended and a week before the tender was actually submitted”, and had “no employees, assets or income.” [Paragraph 75]

Matojane J held that each party should pay their own costs “because of the unreasonable and unconscionable manner in which Esofranki and its attorney including Cycad conducted this litigation.” Matojane J ordered further that the applicant and its attorneys pay the ninth respondent’s costs on a punitive scale, due to “the vexatious and unjustified attack” on him. [Paragraph 86]

The tender process was declared illegal and invalid and it was set aside. The decision was overturned on appeal in Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others (40/13) [2014] ZASCA 21.

JUDGE SELEWE MOTHLE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 24 July 1956

B Proc, University of South Africa (1979)

LLM, Georgetown University (1987)

National Institute for Trial Advocacy Diploma, Harvard University (1987)

CAREER PATH

Acting Justice, Supreme Court of Appeal (December 2017 – September 2018)

Judge of the High Court, Gauteng Division (October 2010 – present)

Acting Judge, Transvaal Provincial Division & Gauteng High Court (2008 – 2010)

Advocate, Pretoria Bar (2001-2010, admitted as an advocate May 1998). Senior counsel (2008 – 2010)

Executive Director, Independent Electoral Commission (1998 – 2000)

Chief Director of Investigation, Independent Complaints Directorate (1997 – 1998)

Special Legal Advisor, Premier Northern Province (Limpopo) (1994 -1996)

Legal Consultant and Chief Representative, International Organisation for Migration (1992 -1994)

National Director, Lawyers for Human Rights (1988 – 1992)

Partner, Mothle Matlala Mahlangu & Moabi Attorneys (1983 – 1986)

Professional Assistant, Seriti Moseneke & Mavundla (1982 – 1983)

Articled Clerk, Maluleke, Seriti & Moseneke (1980 – 1982)

Member of the National Bar Examination Board (2017 – present)

Advocates for Transformation

Member of the National Executive Committee (2005 – 2007)

Chairperson, Pretoria branch (2003 – 2005 and 2007)

Pretoria Bar Council

Representative, Pretoria Bar on the General Council of the Bar of South Africa (2007, 2008)

Member (2007 – 2009)

Member, National Association of Democratic Lawyers (NADEL) (1992 – 2003)

Co-National Director, Lawyers for Human Rights (LHR) (1988 -1992)

Co-founder and Vice President, Democratic Lawyers Congress (1984 -1986)

Member, Black Lawyer's Association (1982 – 1983)

SELECTED JUDGMENTS**COMMERCIAL LAW****ACKERMANS LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2015 (6) SA 364 (GP)****Case heard 5 - 7 November 2014, Judgment delivered 20 February 2015**

This case dealt with the jurisdiction of the High Court to review the SARS Commissioner's decision to raise an additional tax assessment. The taxpayer applied to review a number of additional assessments which the Commissioner had issued more than three years after the last assessment, and after a delay of more than six years since indicating an intention to do so. Section 79 of the Income Tax Act provided for a limitation of the period within which it was permissible to raise an additional assessment, i.e. within three years from the date of the last assessment, unless the Commissioner was satisfied that the amount assessed in the relevant additional assessment was not assessed in the last assessment due to fraud, misrepresentation or non-disclosure of material facts by the taxpayer. Among the grounds for review was that the delay rendered the decision unreasonable and was procedurally unfair administrative action under s 6 of the Promotion of Administrative Justice Act (PAJA). The Commissioner countered inter alia by taking the point in limine that the High Court did not have jurisdiction to decide the matter, because it raised complex issues requiring the expertise of the tax court.

Mothle J held that the review application under PAJA raised an issue concerning the protection of a fundamental right, and that the court had the jurisdiction to hear it. Section 105 of the Tax Administration Act specifically provided for the High Court as a '(f)orum for dispute of assessment or decision'. [Paragraphs 19 – 20] Regarding the delay, Mothle J held that it was imperative that all constitutional obligations executed by organs of state in the exercise of public power must be performed diligently and without delay; an unreasonable delay would result in a procedurally unfair administrative action which would be reviewable conduct in terms of section 6 of PAJA. [Paragraph 27]

It was not disputed that there was a delay of approximately six years in issuing the additional assessments. The question was whether this delay was unreasonable. Section 237 of the Constitution did not state what period would constitute an unreasonable delay. This was left to the courts to determine, having regard to the circumstances of each case. A determination of the reasonableness of the delay required a consideration of time periods within which it was permissible to raise additional assessments, and whether the proviso in s 79(1)(c)(i)(aa) applied. There was clearly a dispute of fact regarding the evidence required to decide whether the proviso applied. This required the expertise of a tax court to adjudicate. [Paragraphs 35 – 38]

“I am of the opinion that it would be appropriate to defer to the internal remedies in the ITA, which Ackermans may resort to by way of appeal to the tax court, should it not be satisfied with the decision on the objection.” [Paragraph 40]

The application was thus dismissed, with each party bearing their own costs.

CRIMINAL JUSTICE

THE DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE DIVISION, GRAHAMSTOWN V YOYO 2018 JDR 1284 (SCA)**Case heard 16 February 2018, Judgment delivered 20 March 2018**

This was an appeal against a sentence of six years' imprisonment, three years of which were suspended for three years, imposed on the 52-year-old accused, who had attempted to rape the 4-year-old daughter of his girlfriend.

Mothle AJA (Swain and Mbha JJA concurring) held that the sentence imposed by the High Court was disproportionate and shocking, and replaced it with a sentence of 10 years' imprisonment. Mothle AJA found that "[T]he violence and abuse perpetrated on children is a scourge which has become prevalent in South Africa. The lenient sentences imposed by some of the courts fail to deter would-be perpetrators." [Paragraph 9] Given the gravity of the offence in this case and the circumstances in which it was committed, Mothle AJA found that there was no doubt that the respondent abused the trust the complainant had in him. The offence was committed under circumstances where the complainant expected safety in the sanctity of her home and protection of her parents. That fact alone was aggravating.

"As to how the High Court imposed a sentence of 6 years for this serious and aggravating offence is not explained. What is more disturbing is that the High Court, for inexplicable reasons, suspended half of the sentence." [Paragraph 11]

Mothle AJA held that this approach constituted a misdirection "which was disturbingly disproportionate to the seriousness of the offence." The appeal was upheld.

THE RE-OPENED INQUEST INTO THE DEATH OF AHMED ESSOP TIMOL (IQ01/2017) [2017] ZAGPPHC 652 (12 OCTOBER 2017)**Judgment delivered 12 October 2017.**

This was a re-opened inquest to investigate the death of Ahmed Timol, who had died in 1971 while held in the custody of the Security Branch of the South African Police. The original inquest had found that Timol committed suicide. The re-opened inquest investigated the circumstances leading up to Timol's death in light of further evidence that had been uncovered [paragraph 1]. The proceedings were the first instance of an inquest being re-opened in South Africa. [Paragraph 6].

Mothle J dealt with the law relating to inquests [paragraphs 13 – 28], noting that "the re-opened inquest is neither an appeal nor a review of the initial inquest." [Paragraph 27]. The judgment then discussed the security legislation in force in 1971 [paragraphs 37 – 45], before summarising the evidence of both the 1972 and 2017 inquests [paragraphs 53 – 237]. Mothle J noted that "[t]he nub of the case is what really caused Timol to fall to his death." [Paragraph 241]. After evaluating the evidence, Mothle J rejected the original verdict of suicide [paragraphs 249 -250; 315]

“The evidence of assault and other forms of torture of detainees ... is so overwhelming that the denial and lack of knowledge thereof by the three former Security Branch police officers who testified is disingenuous.” [Paragraph 261]

Mothle J found that Timol’s death was brought about by having being pushed from the 10th floor of the John Vorser Square building, and that there was *prima facie* evidence implicating the surviving security policemen in causing his death. Another former policeman was implicated in concealing the crime. The record of the proceedings was submitted to the Director of Public Prosecutions [paragraphs 335 – 336]

S v SN 2012 (2) SACR 317 (GNP)

Case heard 14 December 2011, Judgment delivered 14 December 2011

During the course of a criminal trial in a magistrates' court on a charge of rape where the accused was a minor and the witnesses were also minors, the court appointed an intermediary in terms of s 170A of the Criminal Procedure Act (CPA). The role of the intermediary was to facilitate communication with the minor witnesses, including the complainant. At a later stage, the prosecution disclosed to the presiding officer that it had come to its attention that the intermediary did not have the required qualifications for an intermediary as proclaimed in the *Government Gazette*. The court noted that at the end of the proceedings the matter would be referred to the high court for special review, for a determination whether the use of the intermediary had or had not affected the conduct of the proceedings and what should be the fate of those proceedings. The trial proceeded with the intermediary's services being utilised. It appeared that the intermediary did not have the two years' experience in social work as required by para (e)(i) of Government Notice R597 of 2 July 2001, nor a qualification of a two-year course in Child and Youth Care approved by the National Association of Child Care Workers, as contemplated in para (d) of the same Notice.

Mothle J (Legodi J concurring) held that the intermediary's qualifications fell short of the requirements as stated in Government Notice R597. [Paragraphs 12, 20 - 21] Insofar as the trial itself was concerned, Mothle J held that there had been no breakdown in communication, no irregularity or breach of procedure, when the intermediary had acted. The mere lack of qualifications did not per se vitiate the proceedings. [Paragraph 26]

“[W]hen looking at the record of the proceedings in the trial, Mhlanga, even though not qualified as intermediary, successfully and competently bridged the communication gap between the minor witnesses (including the complainant) and the officials in court, which include the prosecutor and the attorney defending the accused. There appears ... no irregularity or breach in the proceedings which could be so serious as to vitiate the entire proceedings.” [Paragraph 27]

Mothle J held that the question of whether the minor witnesses had been subjected to mental stress or suffering so as to affect the admissibility of their evidence, had to be determined by the magistrate. [Paragraphs 28 – 29]. The matter was referred back to the trial court.

CHILDRENS' RIGHTS

M AND ANOTHER v MINISTER OF POLICE 2013 (5) SA 622 (GNP)**Case heard 18 April 2013, Judgment delivered 3 July 2013**

M had died as a result of an assault by detainees in a police cell. V and R, who were each the mother of a daughter with M, claimed damages on behalf of their daughters for infringement of their right to parental care under s 28(1)(b) of the Constitution. The parties settled a claim for loss of support, and presented a stated case to the court for adjudication on the question of constitutional damages.

Mothle J held that a child whose parent had died because of unlawful conduct of a third party, could claim constitutional damages for infringement of the right to parental care. Mothle J ruled that the common law loss of support/dependent child's action was no longer governed by common law, but by the Constitution and Children's Act, and any claim for damages arising out of infringement of child's rights must be based on s 28 of Constitution read with relevant provisions of Children's Act.

Mothle J found that the right of a child to family care or parental care is a constitutional right which is also expressed in the Children's Act and premised his ruling on that the principle that any party whose constitutional rights have been infringed may seek a remedy under the rubric of "appropriate relief" in section 38 of the Constitution. A child's constitutional right to family care or parental care, like all other rights, deserves constitutional protection and enforcement; its (unlawful) infringement by third parties, where it results in damages, should be compensated. The cause of action for these constitutional damages should be stated in terms of s 15 of the Children's Act, as appropriate relief, in the form of a claim for compensation arising out of the loss of parental care. [Paragraphs 52 – 54]. Defendant was found to be liable for proven constitutional damages arising from the unlawful deprivation of their father's parental care.

The judgment was criticised by **J Heaton, "Family Law", *Annual Survey of South African Law, Vol 2013***. The author questioned that the judge held that the plaintiffs "had a right to claim constitutional damages on behalf of their children for the unlawful deprivation of their father's care, even though the facts indicate that the parties had already reached a settlement about the children's claim for loss of support."

This decision was reversed on appeal in ***Minister of Police v Mboweni and Another 2014 (6) SA 256 (SCA)***, on the grounds that that the high court failed to properly analyse the right; facts proving loss of parental care had not placed before the court due to a misapplication of rule 33 on stated cases, and faced with a stated case inadequately stating the facts, the judge ought to have refused to hear it; that the court failed to consider whether the right applied to the policemen, and whether they owed a legal duty to his children to prevent an infringement of the right; that the court did not consider whether damages for loss of support was, on its own, an adequate remedy; and that parties with an interest in the decision were not given an opportunity to intervene. The SCA referred the matter to the back to the High Court.

CUSTOMARY LAW

NETSHIMBUPFE AND ANOTHER V CARTHCART AND OTHERS [2018] 3 ALL SA 397 (SCA)

Case heard 21 May 2018, Judgment delivered 4 June 2018

This case dealt with a dispute between two cousins over succession to the position of senior traditional leadership of the Tshimbupfe Traditional Community in Limpopo. The first appellant was identified for the position of senior traditional leader at a royal family meeting, while the fifth respondent was identified for the same position at a meeting of the royal council. Prior to the institution of these proceedings, the first appellant and the fifth respondent had separately approached the Premier to be recognised as senior traditional leader. At the time of the hearing of the appeal, the Premier was still seized with the separate applications for recognition. The issue before the Court was whether the application was premature and should have been left to the Premier to deal with it in terms of s 12(2) of the Limpopo Traditional Leadership and Institutions Act (the Limpopo Act).

Mothle AJA (Seriti and Mathopo JJA concurring) held that “the essence of the respondents’ contention was to put the composition of both royal structures at the centre of the dispute.” This raised the question of who should have populated each structure, and who was entitled to be present when the traditional leader was identified. Mothe AJA held that this “required a factual enquiry, whose answer should have been sought from customary law.” However, the full bench of the High Court had not done so. [Paragraph 15].

“Section 211(3) of the Constitution obligates the courts to apply customary law, when it is applicable. The full court thus erred in not applying customary law as it was applicable. It should have referred the matter forthwith to the Premier, without making any finding.” [Paragraph 16]

Mothle AJA held that the notion that customary institutions must take precedence in the resolution of disputes concerning customary law does not mean that the jurisdiction of the courts is ousted. On the contrary, the Constitution recognises that parties may approach the courts and as such, it obligates the courts, in such instance, to apply customary law.

“In this instance, until the Premier had made a decision in terms of s 12(2) of Limpopo Act, it would be premature for parties to approach court for a resolution of the dispute before exhausting the statutory prescribed dispute resolution mechanism, internal to customary law, custom and processes.” [Paragraph 21]

What distinguished this case from the others that served in this and other courts was that this case was launched after the Premier had been approached for recognition of the person identified in terms of s 12(1) but has not yet made a definitive decision. The Premier had not had an opportunity to use his or her discretion in consulting the provincial and local houses of traditional leaders or cause this dispute to be referred to the royal family as envisaged in the Limpopo Act.

“This review application effectively invited the High Court, the full court and this Court on appeal, to encroach, in breach of the doctrine of separation of powers, onto the terrain of the exercise of the Premier’s statutory executive authority and functions.” [Paragraph 23]

The appeal was thus dismissed. Dambuza and Van der Merwe JJA wrote a separate concurring judgment.

ADMINISTRATION OF JUSTICE

GRAHAM AND ANOTHER V LAW SOCIETY, NORTHERN PROVINCES AND OTHERS (ROAD ACCIDENT FUND INTERVENING) 2014 (4) SA 229 (GP)

Case heard 27-28 January 2014, Judgment delivered 15 April 2014

Applicants lodged a complaint of overcharging with the Law Society of the Northern Provinces against their erstwhile attorneys, Ronald Bobroff and Partners Inc, and Ronald and Darren Bobroff. Dissatisfied with the manner in which the Law Society dealt with their complaint, applicants sought an order inter alia that the court should take over the Law Society's disciplinary enquiry or allow it to continue under the court's supervision. The disciplinary enquiry had been postponed pending the outcome of the application.

Applicants argued that the Law Society had shown an unwillingness to expeditiously and diligently comply with its duties to investigate the Brobroffs. Mothle J identified four main grounds for this complaint: a failure to deal with a report on the Bobroffs' accounting practices (the Faris report); the Law Society's position on common law contingency fee agreements; allowing the Bobroffs to "play possum", and delays in dealing with the complaint. [Paragraph 41]

Mothle J held that the applicants had been "rather impatient" with the procedures followed in relation to the Faris report, but that the report:

"raises serious allegations concerning the management of the trust accounts of the Bobroffs. The report recommends further inspection of these accounts. ... The council did not reject the report but sent it to the disciplinary department, to be dealt with in the normal course of the pending enquiry. Considering the seriousness of the findings in the Faris report, I am of the view that the disciplinary department must inspect the Bobroffs' books of ... before the next sitting of the disciplinary enquiry." [Paragraphs 47, 49]

Mothle J ruled that there was no evidence to support the allegation of a conflict of interest regarding contingency fees, and that making such a finding before the conclusion of the disciplinary enquiry would in any event be premature. [Paragraphs 55 – 57]. Regarding the securing of requested documents, Mothle J held that although the applicants were correct in expecting the Law Society to assist them in securing the documents, subsequent correspondence showed they had effectively withdrawn the request, and therefore the Law Society did not fail in its duty in this regard. [Paragraphs 60. 63] Finally, Mothle J held that as the Bobroffs was not required to disclose their defence either during the enquiry or before the court, the allegation that the Law Society was allowing them to 'play possum', as well as the complaint of undue delay in the prosecution of the complaint, were premature and unfounded. [Paragraph 70]. There was accordingly no basis for the granting of the declaratory orders or for censure of the Law Society. Nor did the circumstances call for an intervention or takeover by the court. Mothle J ruled that the Law Society should be allowed to complete its enquiry and dismissed the application.

JUDGE OWEN ROGERS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 22 October 1958.

BA, University of Cape Town (1982)

Honours, University of Cape Town (1983)

LLB, University of Cape Town (1985)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (2017 – 2019, 2021)

Judge, Competition Appeal Court (2016 -)

Judge, Western Cape High Court (2013 -)

Member, Cape Bar (1988 – 2012)

Articled clerk, Sonnenberg Hoffman & Galombik (1986 – 1987)

Member, Advisory Panel, South African Judicial Education Institute.

Honorary Judicial Member, Society of Tax and Estate Practitioners (2014 -)

Trustee, Supera Moras Trust (Wynberg Boys High School) (2011 -)

SELECTED JUDGMENTS**PRIVATE LAW****ROAD ACCIDENT FUND v MOHOHLO 2018 (2) SA 65 (SCA)****Case heard 24 November 2017, Judgment delivered 24 November 2017.**

The main question in this case was whether the respondent was entitled to damages for loss of support due to the death of her nephew (Otsepeng). The argument was not based on a blood relationship, but on the basis of having taken the deceased into her home and looked after him as her own son. Respondent had testified that Otsepeng had continued to live with her and provide her with financial support [paragraphs 7 – 9]

Rogers AJA (Leach JA and Meyer, Mokgohloa and Makgoka AJA concurring) held that the Court had “on several occasions in recent years considered the extension of claims for loss of support to persons who do not fall within categories recognised by the common law”. [Paragraph 10]. Rogers AJA held that whilst the legal convictions of the community are not static, and that “ideas of morals and justice may not, in general, insist on support between more distant relatives”, it did not follow “that the same approach should be followed where the blood relationship has been fortified by additional circumstances.” In dealing with the issue, it is as necessary to have regard to the values underlying our Constitution, one of which was ubuntu. [Paragraph 12] Rogers AJA found that it was also necessary to consider that, in terms of s 211(3) of the Constitution, the court must apply customary law when that law was applicable, subject to the Constitution and any legislation that specifically deals with customary law.” [Paragraph 13]

Rogers AJA held that whilst as no expert evidence as to customary law had been led,

“[T]he plaintiff testified as to what was required by her culture and her evidence was not put in issue. It may well be that, once she agreed to care for Otsepeng following family consultation, she had by customary law a legal duty to support him but it is unnecessary to go so far. On her evidence, she at least felt under a duty to do so. She started caring for him when he was still an infant and continued to maintain him until he became self-supporting. Her behaviour, and the way Otsepeng reciprocated when he became an adult, gave expression to ubuntu. For all practical purposes the plaintiff adopted him, even though according to her there was no formal process of adoption in her culture. The de facto relationship between them was that of mother and child. This de facto relationship was every bit as real as the de facto life partnerships which our courts have accepted as giving rise to reciprocal duties of support.” [Paragraph 14]

Rogers AJA held that it would be consistent with the legal convictions of the community to recognise a reciprocal duty of support between the plaintiff and Otsepeng. [Paragraph 17]. Rogers AJA rejected an argument that this decision would “open the floodgates” to similar claims against the RAF [paragraphs 18 – 19]. The appeal was dismissed with costs.

INTERCAPE FERREIRA MAINLINER (PTY) LTD AND OTHERS V MINISTER OF HOME AFFAIRS AND OTHERS 2010 (5) SA 367**Case heard 8 - 9 June 2009, Judgment delivered 24 June 2009**

This case concerned an application brought by several companies who occupied office space nearby a refugee reception office run by the Department of Home Affairs (DoHA). The applicants contended that

the use of the premises by the DoHA contravened the zoning scheme of the Municipality of Cape Town (City) and constituted common-law nuisance.

Rogers AJ held that the term “nuisance” connoted “a species of delict arising from a wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference.” Wrongfulness was to be assessed, as in other areas of our delictual law, by the criterion of objective reasonableness, where considerations of public policy are to the fore...” [Paragraph 142] Rogers AJ held that “[t]he sacrificing of individual rights in the public interest should ordinarily be governed by statute”, and that without such legislation a court should be slow to regard an interference with individual rights as justifiable by public welfare.

“Where interference with private rights is contained in a law of general application its constitutionality can be tested and it is open to the State to attempt to justify any derogation from fundamental rights on the grounds set out in s36 of the Constitution. ... In an individual case such as the present one which arises under common law, the court is not well-placed to explore all the issues relevant to the balancing of governmental objectives and individual rights, and indeed neither side advanced the sort of evidence which could be expected if the constitutional validity of legislation were in issue.” [Paragraph 166]

Rogers AJ accepted that the activities of a refugee office had an important social utility, but found that the conditions were “so far in excess of what neighbours should have to bear that the social utility of the Department’s conduct cannot neutralise the unreasonableness of its use of the premises”, and that the nature and extent of the ongoing inconvenience experienced by the applicants was objectively unreasonable [Paragraphs 167 - 168]

An order was granted declaring that the operation of the refugee office was unlawful because its use had not been approved by the Urban Planning Committee, and that it constituted common-law nuisance. The DoHA was given just over three months to cease activities on the premises.

COMMERCIAL LAW

LORCOM THIRTEEN (PTY) LTD v ZURICH INSURANCE COMPANY SOUTH AFRICA LTD 2013 (5) SA 42 (WCC)

Case heard 8 – 9 April 2013. Judgment delivered 29 April 2013.

Plaintiff sued the defendant insurer in terms of an insurance policy, issued by the defendant, in respect of a fishing vessel that had been lost at sea. At trial, the two issues to be determined were whether the plaintiff had an insurable interest, and whether the loss fell within the ambit of the cover. Plaintiff argued that it had an insurable interest on one or more of the grounds that: it was the sole shareholder of the owner of the vessel; it was vested with ownership of the vessel in terms of a purchase agreement; it had a right of use of the vessel; and it held the relevant fishing permit. [Paragraph 18]

Rogers J considered the law on what constitutes an insurable interest, both in terms of general principle and South African case law [paragraphs 21 -] Rogers J held that it was well established that a person other than an owner could have an insurable interest in relation to an asset, but that in the case of a non-owner the insurable interest (ie the extent to which they would suffer financial harm from damage to or

destruction of the asset) would often be less than the market value of the asset. [Paragraph 36]. Therefore “one cannot say, merely because the insured party has an insurable interest in an asset, that he has an insurable interest sufficient to sustain cover of the kind for which the particular policy provides in respect of the asset.” [Paragraph 37]

Rogers J held that the contract did not require the plaintiff to show that it had suffered patrimonial loss. The issue was rather whether plaintiff “had an interest sufficient to render enforceable a policy providing cover measured with reference to the value of the vessel.” [Paragraphs 49 - 50]. Rogers J held that:

“[T]he combination of Lorcom's right of use, its well-founded expectation that such use would continue until it became the owner of the vessel, and its well-founded expectation that Crous by virtue of his contract with Theart would procure that Lorcom became the owner of the vessel by the effective date ... gave Lorcom an insurable interest in cover measured with reference to the market value of the vessel.” [Paragraph 56]

Judgment was granted in favour of the plaintiff.

The judgment is discussed by **JP van Niekerk**, “*Insurance Law*”, *Annual Survey of South African Law*, **Vol 2013, Issue 1**, who describes the judgment as “wide-ranging and at times groundbreaking and controversial”.

The judgment is also discussed by **M.F.B Reinecke**, “*Insurable Interest*”, *TSAR 2013 (4)*, 816 - 824, who praises the judgment for being “a thoughtful contribution to the debate on insurable interest in the context of property insurance.” [Page 816]. The author argues that while the decision is beyond critique, that is not so for the court’s reasoning and obiter dicta [page 817]. The author argues that “[to] divorce indemnity insurance from the principle of indemnity as a basic premise cannot be supported. It would fly in the face of ages of history, long – standing precedents and international thinking.” [Page 820]. The author further suggests that “the court’s interpretation of the marine policy ... to men that it was intended to make provision for payment simply in the event of physical loss of the vessel irrespective of patrimonial loss is not convincing.” [Page 821].

CIVIL AND POLITICAL RIGHTS

IRVIN & JOHNSON LTD V TRAWLER & LINE FISHING UNION & OTHERS 2003 (24) ILJ 551 (LC)

The applicant sought an order declaring that the voluntary and anonymous HIV testing it sought to offer to its employees was outside the ambit of s 7(2) of the Employment Equity Act, or alternatively that such testing was justifiable under s 7(2). The applicant would have access to the statistics resulting from the testing but would not have access to the names of the employees who submitted themselves to testing, nor to the results of the test.

Rogers AJ held that section 7 contemplated that an employer could form and act on its own view as to whether medical testing for conditions other than HIV infection were justifiable, whereas the justifiability of testing for an employee’s HIV status had to be determined in advance by the Labour Court. [Paragraph 15]. Rogers AJ found that section 7 formed part of a chapter in the Act dealing with the prohibition of unfair discrimination. One of the main purposes of the Act being to “achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination”, the purpose of section 7 seemed clear:

“An employer should not unfairly discriminate against an employee on the basis that the latter suffers from some or other medical condition. One of the ways of reducing the likelihood of such

discrimination is to limit the circumstances in which an employer may ascertain the employee's medical condition through testing." [Paragraph 18]

Rogers AJ found that the testing in the present case did not have the purpose of enabling the applicant to ascertain the HIV status of any identifiable employees, but considered whether this would nevertheless be its effect.

"During argument I expressed to [counsel for the applicant] a concern that in certain of the job categories ... the numbers were very small. In response, he stated that the applicant was willing to combine persons ... in a single group for statistical purposes or alternatively to eliminate the distinction between shore-based and seagoing staff for purposes of receiving information on the age group 16 to 25. It seems to me that either of these adjustments would be sufficient to eliminate any reasonable possibility that an individual's HIV status could be deduced from the statistical information." [Paragraph 26]

Rogers J held that there was "good reason to conclude that the legislature did not intend section 7 to apply to voluntary testing", and that medical testing was not itself an act of discrimination. [Paragraph 33] Rogers AJ found that section 7 as a whole applied only to compulsory testing, and not to voluntary testing. Provided testing is truly voluntary, it did not matter whether the initiative for testing came from the employer or the employees. [Paragraph 36] Rogers AJ concluded that the testing in question did not fall within the ambit of section 7(2), and that the applicant did not require the authority of the Court before allowing its employees to be tested. [Paragraph 42]

ADMINISTRATIVE JUSTICE

SHELFPLETT 47 (PTY) LTD V MEC FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING AND ANOTHER 2012 (3) SA 441 (WCC)

Case heard 22 – 23 November 2011, Judgment delivered 28 February 2012

Applicant was seeking to develop a retirement village, and submitted an application for the amendment of a Regional Structure Plan (RSP) to the MEC. The RSP designated the applicant's land in question for "recreation" use. Applicant sought to amend this to "township development" use. Although supported by the municipality, the MEC refused the application. Applicant sought to review and set aside the MEC's decision.

Rogers AJ found that the RSP had been prepared and approved at a time "when the full panoply of apartheid legislation, including the Group Areas Act ... was in force", and noted that the applicant attached the validity of the RSP as "a document rooted in the policy of apartheid" that contemplated and promoted the development of the area in question "from the perspective and to the benefit of the white group", and was unconstitutional. [Paragraph 33]

After considering Constitutional Court jurisprudence [paragraph 36], Rogers AJ held that in the RSP, "[a]partheid thinking and its effects are apparent, at least explicitly, only where land use by humans is under discussion", and rejected the MEC's contention that there was not offensive apartheid social planning. [Paragraphs 38, 45],

"In laying down guidelines for the future spatial development of an area ... the authors of the guide plan had to strike a balance between residential development and other uses. It is apparent that

this is what the authors of the KWP RSP were trying to do. However, they struck this balance on assumptions regarding township development that were ... rooted in apartheid policy.” [Paragraph 45]

Rogers AJ found that there was no suggestion that the RSP had ever been amended in order to give effect to a new vision in accordance with the values of the Constitution, [Paragraphs 49 - 50] and was thus “an instrument that violates the founding values of human dignity and non-racialism in s 1 of the Constitution and the fundamental rights of equality and dignity in ss 9 and 10 of the Constitution.” [Paragraph 51] The RSP was declared invalid. Rogers AJ found that considering the remaining grounds of review, had the validity of the RSP been upheld, the application would have been dismissed.

CRIMINAL JUSTICE

S v TS 2015 (1) SACR 489 (WCC)

Case heard 29 October 2014, Judgment delivered 29 October 2014.

The accused, aged 13 when the offence was committed, had been charged with culpable homicide, having stabbed her father and caused his death. The accused pleaded guilty and was sentenced to five years compulsory residence in a Child Youth Centre. On automatic review, questions were raised about whether reports by a psychologist and psychiatrist were sufficient to rebut the onus on the state to overcome the presumption that the accused lacked criminal capacity. The accused was described in the reports as suffering 'borderline mental retardation' [paragraph 4]. Questions were also raised about whether the accused's statement in terms of section 112(2) of the Criminal Procedure Act was sufficient to satisfy the court of her guilt beyond a reasonable doubt; and over the severity of the sentence.

Rogers J (Saldanha J concurring) held that “at least in relation to children, criminal capacity is relative rather than absolute, in the sense that a child could notionally be criminally capable in respect of one particular crime but not criminally capable in respect of another.” [Paragraph 15]. Noting that “hardly any of the cases dealing with the criminal capacity of children are concerned with crimes of negligence”, [paragraph 18], Rogers J examined delictual cases relating to capacity, and found that, although the issue did not need to be decided finally in this case, there was “much to be said for the view that the subjective frailties of the child find their proper place in the assessment of criminal capacity. If the child has criminal capacity (ie can be held accountable as an adult would), negligence is tested objectively with reference to the standard of the reasonable person.” [Paragraph 23].

“If in our law we were, in cases involving children, to judge negligence by the standard of the reasonable child of the same age, it appears inevitable that the threshold enquiry into delictual or criminal capacity would also have to be adapted. If the child is only to be judged by the standards of the reasonable child of the same age, capacity would logically have to be directed at the question whether the child in question had the same capacities for appreciating wrongfulness, and acting in accordance with such appreciation as the reasonable child of the same age.” [Paragraph 27]

Rogers J held that because the magistrate could not properly have been satisfied that the accused had criminal capacity, she should not have convicted the accused on the basis of her guilty plea. [Paragraph 40]. The plea explanation was also not sufficient to satisfy the magistrate that a defence of private defence could not have succeeded [Paragraphs 41 – 44]. The conviction and sentence were set aside, and the case was remitted to the court *a quo*.

S Walker, in “**Determining the criminal capacity of children aged 10 to 14 years: a comment in light of S v TS 2015 (1) SACR 489 (WCC)**”, 2015, *SACJ*, Vol 28 (3), praises the court’s interpretation of section 11(1) of the Child Justice Act. Although the author welcomes the interpretation, she notes that it is not entirely clear on what basis the court considered that it was entitled to depart from the wording of the statute. [Page 342 ff]

L Jordaan, “**General Principles and Specific Offences**”, 2015, *SACJ*, Vol 28 (3), commends Rogers J for “providing clear guidelines to magistrates in the exercise of their responsible task of assessing the blameworthiness of juvenile offenders.” [Page 375].

SELECTED ARTICLES

“THE ETHICS OF THE HOPELESS CASE”, *ADVOCATE* December 2017, 46 (<https://gcbsa.co.za/law-journals/2017/december/2017-december-vol030-no3-pp46-51.pdf>)

“[D]oes there come a point where the case is so weak that it is not proper to advance it? This is an important question, particularly at a time when there is disquiet that well-resourced private and public litigants sometimes drag out cases by pursuing claims or defences which are unmeritorious. If there is a line which counsel should not cross, at least some of these abuses might be curbed.” [Page 46]

“If counsel argues a hopeless case, is she not guilty of improperly wasting court time and of abusing the court’s process? The courts exist to adjudicate genuine disputes. Judicial expertise and infrastructure are available at no charge to the litigants but at considerable cost to the public purse. There are many litigants needing the court’s attention. Why should we accept that lawyers may take up judicial resources with hopeless cases?”

The article considers English case law, and continues:

“If a point is properly arguable (though in counsel’s view weak), she can legitimately spend less time on it but she should not semaphore to the judge that it is understood between herself and the bench that the point is bad.” [Page 47]

The article further considered the legal position in Australia and Canada, before concluding that it was “improper for an advocate in this country to act in support of a hopeless case.” [Page 49]

“Pleadings and affidavits must be scrupulously honest. Nothing should be asserted or denied without reasonable factual foundation. Counsel who acts contrary to this standard is guilty of misleading the court and may make herself party to perjury. ...”

“It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts. ... Counsel may properly act even though she thinks one or more of the essential links are likely to fail. But if she is quite satisfied that one or more of them will fail, the case is hopeless. ...” [Page 50]

“Should misconduct of this kind be assessed objectively or subjectively? Not without hesitation, I suggest the test is the latter. The emphasis falls on whether counsel genuinely believes that the case is not hopeless and is thus properly arguable. If the case is objectively hopeless, one could usually infer the advocate’s subjective appreciation of this. To ward off this inference, the advocate might have to plead a failure properly to research the case, which would be misconduct of a different kind.” [Page 51]

MEDIA COVERAGE

An article discussing a legal dispute between attorney Barnabus Xulu (described as “Western Cape Judge President John Hlophe’s long-time attorney”) and the Department of the Environment, Forestry and Fisheries, states:

“[N]ot only has Xulu lodged complaints against the department’s lawyers for their conduct in the cases against him, he is also seeking to prevent Judge Owen Rogers – who last year ruled that his firm’s service level agreement and subsequent R20m legal fees settlement agreement with the department was unlawful – from being appointed to the SCA.

The judge also ordered that Xulu must be called upon to explain why he should not be held personally liable for the R20m that was unlawfully paid to his firm, prior to his removal from the matter.

Xulu had sought Rogers' recusal from the case, largely because of the relatively minor role he played in Deputy Judge President Patricia Goliath's misconduct complaint against Hlophe.

Rogers was one of 10 judges who refused to share a Bench with Judge Mushtak Parker, after he tried to backtrack on claims he'd made under oath, and to other judges, that Hlophe had attacked him in his chambers.

*Rogers last year complained about Xulu's various attacks on his integrity to the Legal Practice Council, which reportedly told **News24** that an investigating committee will consider that complaint on 23 March.*

In allegations that are supported by several other judges, Rogers contends Xulu should be investigated for committing 'conduct bringing the legal profession into disrepute', 'abusing court processes to gratuitously disparage, defame and use invective against myself and other judges, and to make reckless and unsubstantiated allegations' and 'failing to treat judicial officers with civility and respect'.

In response, Xulu last month laid a gross judicial misconduct complaint against Rogers and 10 other judges with the JSC, in which he argues that the LPC complaint lodged against him was a 'well-orchestrated' effort that 'strikes at the independence and impartiality of the courts'.

Xulu has now used this complaint as a basis to urge the JSC not to allow Rogers to be interviewed for a position at the SCA, where he has served on an acting basis, because he is 'not a fit and proper person'.

The JSC has yet to respond to that contention." [Emphasis as in original text]

- **Karyn Maughan, News 24, republished at**
<https://www.southafricanlawyer.co.za/article/2021/03/jail-time-sought-for-hlophes-attorney/>
(15 March 2021)

Quoted comments about advocates' fees:

"Last year, Owen Rogers, a senior counsel and former chairperson of the Cape Bar, wrote an article in the journal Advocate, in which he said the silk system (or conferral of senior counsel status on advocates) puts "significant upward pressure on the cost of litigation".

Rogers quoted an English judge, Sir Gavin Lightman, who said that the "granting of silk was tantamount to a licence to print money" and that "the silks' inflated fees became the benchmark for juniors' fees".

Rogers argued that, while top advocates' fees were on par with those charged by top executives and auditors, this was a reflection of a "distorted pattern of remuneration" in which top executives earned disproportionately more than the rank and file.

"As members of an honourable profession, we should be distinguished by our absence, not our presence at this feeding trough," he wrote."

- <http://www.lhr.org.za/news/2013/r45-000-day%E2%80%99s-work>

JUDGE SHARISE WEINER

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 28 January 1954

BA, University of the Witwatersrand (1975)

LLB, University of the Witwatersrand (1977)

CAREER PATH

Acting Justice, Supreme Court of Appeal (April – December 2019, 2020 – to date)

Judge, Gauteng High Court (2011 – to date)

Advocate, Johannesburg Bar (1978 – 2011)

Senior Counsel (1995)

General Council of the Bar (2000 – 2010)

Vice chair

Convenor: Advocacy Training Programme

Member, Johannesburg Bar Council (1999 – 2003)

Trainer, International Advocacy Training Centre (2000 – to date)

Founding member, Lawyers for Human Rights (1979)

Trustee and Founder, Warm the World NPO (2012 – to date)

SELECTED JUDGMENTS**PRIVATE LAW****CHALOM V WRIGHT AND ANOTHER (4104/13) [2015] ZAGPJHC 105 (4 JUNE 2015)****Case heard 24 March 2015, Judgment delivered 4 June 2015**

Plaintiff sued the defendant for damages arising from allegedly defamatory statements made in court papers before the Constitutional Court, and for damages for loss of income arising from alleged fraudulent affidavits filed by the second defendant (a client of the first defendant) in a complaint to the Law Society against the Plaintiff. At issue was whether the relevant proceedings constituted privileged occasions. [Paragraphs 1 – 2]

Weiner J considered the applicable law, finding that a defendant would not escape liability merely because the statements were made in judicial or quasi-judicial proceedings. Defendant had to show that the statements were relevant and germane to issue. Plaintiff could also rebut this defence if it could be shown that defendant had acted with an improper motive and malice. [Paragraphs 24 – 25]

Weiner J considered the pleadings in dispute and found that:

“it can be seen that these proceedings are fraught with allegations made by both attorneys against each other in a most undesirable and unprofessional manner. There has been a failure to deal with the merits of each particular matter and an *ad hominem* attack in respect of both parties.” [Paragraph 36]

Weiner J held that it was clear that the allegations made by the first defendant were germane to the relevant issues of whether there was a conflict of interest and whether or not the Plaintiff should have acted for the second defendant. [Paragraph 38] Furthermore, the statements had been made either in High Court proceedings, Constitutional Court proceedings or to the Law Society, all of which constituted privileged occasions, and the affidavits filed in those proceedings were privileged. [Paragraph 40]

Weiner J dismissed an argument by the plaintiff that the first defendant had a legal duty to the plaintiff to verify the truth and accuracy of the allegations in the second defendant’s affidavit and had failed to do so:

“This duty would impose upon an attorney a highly burdensome task in having to investigate the truth and accuracy of every statement made to him by a client which he may place in an affidavit. Having regard to the fact that the attorney/client relationship imposes a duty upon the attorney to advance the interests of his client even where it could cause harm to the opposite party, this burden does not seem to give rise to a legal duty of care ... This duty contended for ... would have the consequence that an attorney would have to approach, for instance, opposing parties, to enquire as to the veracity of his client’s submissions. This would breach attorney/client privilege and subvert the attorney/client relationship.” [Paragraphs 42 – 45]

The claim was dismissed. Weiner J found that the court intended “to show its disapproval of the unprofessional manner in which both parties have conducted themselves by ordering each to pay their own costs.” [Paragraph 47]

ADMINISTRATIVE JUSTICE

MOELA AND ANOTHER V HABIB AND ANOTHER (2020/9215) [2020] ZAGPJHC 69 (19 MARCH 2020)

Case heard 17 – 18 March 2020, Judgment delivered 19 March 2020.

Applicants were students at the University of the Witwatersrand, who were residing in University residences. As the COVID-19 pandemic struck, the University's senior management team issued a directive for all students to vacate residences within 72 hours. The applicants claimed that the respondents must satisfy themselves that the students had been tested for Covid-19 and were "safe to go home." The second part of the relief that the applicants sought was that the respondents must 'extend' the evacuation notice "until a mechanism is devised to limit the rapid spread of the virus". Applicants argued that the directive was a negligent and reckless response to the pandemic and posed a threat to their rights to life and of access to health care. [Paragraphs 1 – 3]

Weiner J noted that the applicants had abandoned the original relief claimed during argument, and claimed under alternative relief that they should be allowed to remain in their residences and self-isolate. Weiner J however dealt with the relief originally sought "as ... many students at various universities are preparing to defy their university's directive. I therefore believe this matter has a wider public interest." [Paragraph 4]

Weiner J found that the applicants had cited the Vice-Chancellor and Dean of Students as respondents, but the decision to suspend the academic programme and to close the residences was taken by the senior executive team of the University, together with the Chairman of the University's Council. The Vice-Chancellor and Dean could not alter this decision on their own and could not implement the relief sought. [Paragraph 5]

Weiner J considered the respondents' answering affidavit, which set out the background to the decision to require students to vacate residences. Weiner J addressed the applicant's fears of contracting COVID-19:

"As I stated to the applicants during their argument, the majority of people in the South Africa (and globally) are in the same situation as the applicants. We have all had meetings or been in contact with other people who may have been exposed to someone with SARS COV-19, or who may have it themselves. The suggestions by the applicants that the way in which the University should deal with this by testing all students in residences before they are sent home, is simply not feasible. There are approximately 6 000 students in the residences. One has to take into consideration that at present, only 1 student at the University (in the medical school, which is 2 kilometres from the main campus of the University) has tested positive for SARS COV-19." [Paragraph 54]

Weiner J held that the applicants could not succeed with any of the relief sought, as it was "clear that the University has followed precisely all protocols recommended". [Paragraph 58] The application was dismissed with no order as to costs.

"The world has changed, and we are all in a quandary as to how to go about our daily lives in view of the pandemic. I would implore the applicants and all other students seeking to ignore the Directives issued by the University, in the spirit of Ubuntu, to follow the protocols issued by the University, the President, the NCID and the WHO. This is an unprecedented time for all of us. We are stronger if we work together. Nkosi sikelel' iAfrika." [Paragraph 60]

CIVIL PROCEDURE**MASWANGANYI v ROAD ACCIDENT FUND 2019 (5) SA 407 (SCA)****Case heard 18 June 2019, Judgment delivered 18 June 2019**

On the day of trial in the High Court, the parties concluded a settlement agreement and requested the judge to make it an order of court. The judge refused, however, and indicated that the trial should proceed on the merits. The judge was concerned that, on the version provided in the pleadings and witness statements, it was not apparent that the insured driver had been negligent. After the trial was adjourned, an application was brought to halt the trial, declare it a nullity, and make the settlement agreement an order of court. The application was dismissed and an appeal to the full bench of the High Court was also dismissed. [Paragraphs 1 – 3]

Weiner AJA (Maya P and Wallis JA concurring) identified two issues for decision: whether it was permissible to challenge the judge's decision as had been done, and if so, whether the judge's approach to the settlement agreement was permissible. [Paragraph 9] Weiner AJA considered the legal position when parties concluded a settlement agreement, and held:

“Litigants do not mandate courts to decide disputes, and the language of agency or mandate is inappropriate to describe the judicial function. Nor should the jurisdiction of courts be conflated with the concept of mandate. Courts are the judicial arm of the state. They are charged, inter alia, with the determination of civil disputes that arise in the ordinary course of events. Their jurisdiction to do so is founded in ch 8 of the Constitution and defined in various statutes and the common law. ...” [Paragraph 13]

Weiner AJA held further that the issues in a case were determined by the pleadings or affidavits and could be expanded by the parties during proceedings, and it was not for the court to vary the issues so defined. However, once a case was placed before the court for adjudication, it was obliged to decide the issues by rendering a judgment, unless issues were specifically withdrawn by the parties. [Paragraph 14] Furthermore, when parties reach a settlement agreement and require it to become a consent order, “they do not withdraw the case from the judge, but ask that it be resolved in a particular way.” The court's jurisdiction did not end when the parties arrive at a settlement of those issues. “If it did, the court would have no power to grant an order in terms of the settlement agreement.” [Paragraph 15]

Weiner AJA therefore concluded that “[t]he correct position is that the grant of an order making a settlement agreement an order of court necessarily involves an exercise of the court's jurisdiction to adjudicate upon the issues in the litigation.” [Paragraph 16]

“The court's jurisdiction was unaffected by the agreement, as evidenced by the fact that it was being asked both to adjudicate on the application and (once more) to make the agreement an order of court. This relief was being sought in the very action where it was claimed that the court had been deprived of its jurisdiction.... In order to grant that relief the court must have retained jurisdiction in the action. The settlement agreement had not put an end to it.” [Paragraph 19]

Weiner AJA agreed with the full bench that courts could not “act as a mere rubber stamp of the parties” and noted that the court had a duty to the public, since “[p]ublic funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds.” [Paragraph 33]

The appeal was dismissed with no order as to costs. Zondi JA (Mocumie JA concurring) dissented.

CRIMINAL JUSTICE**MINISTER OF POLICE AND ANOTHER v STANFIELD AND OTHERS 2020 (1) SACR 339 (SCA)****Case heard 19 November 2019, Judgment delivered 2 December 2019**

Respondents had been arrested and charged with various offences relating to the unlawful issuing of firearms licenses. Police seized certain firearms under a search and seizure warrant. Respondents approached the High Court and were granted the alternative relief sought of referral an enquiry under the Firearms Control Act (FCA). [Paragraphs 1 – 2] The High Court found that High Court found that whilst criminal proceedings were not pending against the respondents, it was not persuaded that the respondents were entitled to the return of the firearms, as there were legitimate concerns as to the lawfulness of the licenses. The court then ordered an enquiry in terms of section 102 of the FCA. [Paragraph 6]

Weiner AJA (Navsa, Mocumie and Plasket JJA and Dolamo AJA concurring) admitted further evidence which had arisen shortly before the hearing of the appeal. This was to the effect that the NDPP had authorised the prosecution of a number of persons, including the respondents, on charges including offences under the Prevention of Organised Crime Act (POCA). Respondents had launched an application in the High Court to suspend the prosecution and review the decision of the NDPP to consolidate the prosecutions. The application was dismissed. Weiner AJA found that “[t]he respondents did not, in that application, contend that criminal proceedings were not pending, nor did they seek the setting-aside of the charges.” [Paragraphs 9 – 11]

Weiner AJA held that the effect of this evidence was that the respondents could not satisfy the requirement that criminal charges are not pending. However, respondents argued that no criminal charges were pending when the High Court granted its order. [Paragraph 13] Weiner AJA rejected this argument, as undisputed evidence showed that criminal proceedings were pending at the time the High Court made its order, “in the sense that, even though the charges had been withdrawn, there was a reasonable likelihood that they would be reinstated.” This was dispositive of the appellants’ case. [Paragraph 16]

Weiner AJA continued to consider whether the appellants had shown that, if the firearms were returned to the respondents, their possession would be unlawful. Weiner AJA found that on the evidence, that the respondents were not entitled to have the firearms returned. [Paragraphs 18 – 22]

Finally, Weiner AJA considered the issue of the enquiry under section s 102 of the FCA, and found that this provision did not assist the respondents. “

“Whilst the registrar may conduct an investigation to determine whether a person is unfit to possess a firearm in terms of the section, it does not oust the provisions of s 31(1)(a) of the CPA. The central issue in this case is not whether the respondents are unfit to possess firearms, but whether the firearms were justifiably retained by the appellants in terms of the CPA. ...” [Paragraph 23]

The appeal was upheld, and the application dismissed with costs.

CHILDRENS' RIGHTS

FORD V FORD [2004] 2 ALL SA 396 (W)

Applicant sought the court's permission to dispense with the respondent's consent in terms of the Guardianship Act and to give the applicant leave to remove the minor child from South Africa to the United Kingdom. [Page 397]

Weiner AJ considered the evidence of the applicant's employment and other prospects in the United Kingdom, and the child's circumstances if she remained in South Africa. Weiner AJ analysed the expert reports and evidence extensively:

"as I believe that certain of the legal authorities relied upon by the applicant do not sufficiently emphasise the importance of the relationship between a child and the non-custodian parent, in most cases the father, and the detrimental consequences that may arise if a child is separated from such non-custodial parent especially when there is a close emotional bond."
[Page 411]

Weiner AJ held that a custodian parent could not make a decision, even if it was reasonable and balanced, to relocate whilst paying "scant regard to the fact that the access which the children have to their father would be seriously curtailed." Weiner AJ held that:

"in deciding "the very troubling and vexing question that arises in relocation applications, in considering the best interests of the children, a major consideration should be the consequences of interrupting a close psychological and emotional bond which a child has with the non-custodial parent." [Page 412]

Weiner AJ found that the applicant had not established the immediate, medium and long-term advantages of relocating to the United Kingdom. Applicant could only point to the advantage of her mother living in the United Kingdom and being able to provide support. Whilst Weiner AJ was prepared to take judicial notice of crime being worse in Gauteng than the United Kingdom, she noted that "this did not appear to the uppermost factor in applicant's decision to relocate". Weiner AJ found that it was necessary to balance the lifestyle benefits applicant identified with a move to the United Kingdom with the benefits the child enjoyed in South Africa, "particularly her close relationship with her father."

Weiner AJ found that the applicant's initial reasons for moving had not been to give the child a better life, but for the applicant to make a fresh start. However,

"[h]er employment prospects are no better than they are in South Africa. In fact her standard of living would decrease. I am not satisfied that the educational system ... is so superior that it in itself would justify such a drastic move."

Weiner AJ held that the applicant wanted to make a new start and had made her decision on that basis, subsequently making plans for the child to fit in with the decision. Weiner AJ held that:

"There might not necessarily be anything wrong with that approach, if applicant could demonstrate that despite the fact that the decision was initially for her own needs, such decision is so beneficial to S that it justifies the drastic change in the relationship between S and her father." [Page 414]

Weiner AJ found further that the applicant was adopting a somewhat unrealistic approach to her potential new life, and particularly had not adequately considered how the child "would adapt to living

away from her father, her day-mother, her friends, her school and the outdoors lifestyle that she so enjoyed.” Weiner agreed with the importance placed by experts on “the importance of the ongoing and uninterrupted relationship with the non-custodial parent”, particularly in cases where the parents had effectively exercised shared parenting and equal access time. Weiner AJ noted that:

“This approach is a deviation from previous decisions in matters of this nature in which the custodian parent’s decision (if reasonable and rational) was usually held to be sufficient to justify relocation. The interests of the non-custodian parent and the obvious disruption to the relationship with the child have largely been ignored until the decision in the *Jackson* case It has now been accorded its proper place in being a priority in decisions of this nature.”

Weiner AJ thus held that it was not in the best interests of the minor child that the applicant be permitted to remove her from South Africa to the United Kingdom. The application was dismissed. [Page 415] An appeal to the Supreme Court of Appeal was dismissed: ***F v F* [2006] 1 All SA 571 (SCA)**.

SELECTED ARTICLES

“Women at the Bar: Where have all the young girls gone?” *The Advocate*, April 2004, 23
(<https://www.gcbsa.co.za/law-journals/2004/april/2004-april-vol017-no1-p23.pdf>)

The article discusses the “startlingly low” number of women advocates in the “over five years category.” After examining similar problems in Australia, the article notes:

“At the Johannesburg Bar ... there are only six female silks out of a total of 126 and only 34 females over five years' seniority as compared to 265 males of that seniority. Nationally out of 317 silks, only 11 are female.”

“Many reasons have been proffered for this astonishingly low figure. Is it impossible to conduct a successful career at the Bar if one decides to raise children. It shouldn't be. ... If a woman wants to take some time off to spend with her young children, what happens on her return? Generally the experience has been that women have to start from scratch. So that may be one of the reasons for the dwindling number of senior women practitioners, but the Australian experience seems to indicate that there are other more fundamental reasons.”

“Has the profession, in general, transformed sufficiently insofar as gender issues are concerned? Certain senior colleagues are trying to implement transformation in relation to both blacks and women practising in the commercial field. They readily and willingly suggest to attorneys that the latter brief a black or female junior. The responses that some silks still receive from some of their attorneys such as 'But this is a commercial matter!' might be amusing if the story was of historical significance only, and if it was unusual. The problem is it still happens in 2004 and it happens more often than we think.”

“Women are increasingly choosing to practise in the commercial field as opposed to solely practising as family lawyers, but to this day they still seem to have to fight against an unjustified prejudice as to whether they are considered competent in that field. ... Some have chosen to embark upon post-graduate studies in tax and company law in order to gain such expertise. This is, of course, admirable. But it does beg the question: Do women have to be better qualified and more competent to be considered equal?”

MEDIA COVERAGE

Quoted in 2016 interview for position of Public Protector:

“Judge Sharise Weiner has told Members of Parliament (MPs) that she was actively opposed to apartheid as a student.

The Economic Freedom Fighters (EFF)'s Floyd Shivambu wanted to know what role she played in the struggle in the 1970s. ...

Judge Sharise Weiner spelt out why she qualifies for the job.

"I have a non-wavering belief in the rule of law and its applicability to all persons, in particular those in positions of power. I feel strongly about injustice and will endeavour to do all things to right such wrongs."

Weiner told MPs she demonstrated as a student, was a founding member of Lawyers for Human Rights and had defended people for free as an advocate.”

- **Gaye Davis, “Public Protector Interviews: Judge Weiner reveals she fought against apartheid”, *Eye Witness News* 11 August 2016 (<https://ewn.co.za/2016/08/11/Sharise-Weiner-tells-MPs-she-was-actively-involved-in-fight-against-apartheid>)**