2017

dgru Democratic Governance and Rights Unit

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

OCTOBER 2017

North-West High Court (Deputy Judge President)	Judge Ronald Hendricks	123
Northern Cape High Court (Deputy Judge President)	Judge Bulelwa Pakati	128
	Judge Violet Phatshoane	134
Western Cape High Court	Advocate Lance Burger SC	140
	Mr Taswell Papier	143
	Mr Mushtak Parker	147
	Advocate Mark Sher SC	151
	Mr Derek Wille	157

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 complied 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.

METHODOLOGY OF THIS REPORT

4. In our April 2017 report, we recounted how we had attempted to implement a new style of report for the October 2016 sitting of the JSC. This was intended to present a more comprehensive overview of a candidate's track record than presenting simple summaries of judgments and academic articles candidates have written. We attempted to present a comprehensive overview of all a candidate's judgments, including a table of the total number of cases heard and judgments written. We noted that this had presented several challenges, leading to the October 2016 report focusing only on candidates for the Constitutional Court.

5. We noted how, based on this experience and on feedback from members of the JSC on the usefulness of our reports, the April 2017 report adopted a "hybrid" approach between the original structure of our reports, and the changes we had attempted to make in the October 2016 report. In the interests of consistency and continuity, we have again followed this "hybrid" approach in the current report.

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

6. To that end, we have not attempted to set out all of candidate's judgments, and continue to group the summaries of judgments and thematic headings. These thematic headings are the following:
   6.1. Private Law;
   6.2. Commercial Law;
   6.3. Civil and Political Rights;
   6.4. Socio-Economic Rights;
   6.5. Administrative Justice;
   6.6. Constitutional and Statutory interpretation;
   6.7. Environmental Law;
   6.8. Labour Law;
   6.9. Civil Procedure;
   6.10. Criminal Justice;
   6.11. Children's' Rights
   6.12. Customary Law; and
   6.13. Administration of Justice.

7. This is the full list we utilise, and it is possible that some categories will not have any cases included in any particular report.

8. We have always emphasised that the purpose of these reports is not to advocate for or against the appointment of any particular candidate. It is worth emphasising this in light of the inclusion of sections on media coverage of candidates, and of the inclusion of academic commentary on judgments, in the report.

9. 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.

10. We generally do not include media reports of 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.

11. 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.

12. As we have previously noted, we do not provide our own analysis or criticism of the judgments summarised. Several users of our report have indicated that such an approach would be helpful, and so we have tried to integrate academic comment on judgments into the report. 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.

13. We continue to welcome any feedback or suggestions on how the structure of the report may be further improved.

SUBMISSIONS REGARDING THE INTERVIEWS

14. In our previous reports we have regularly made suggestions about how aspects of the JSC's process, in particular relating to the public interviews, might be improved. This has been in the spirit of constructive engagement based on our observations of the work of the commission over a long period of time.

15. We wish to pick up on one issue that, for us, was highlighted by the April 2017 interviews. That sitting of the JSC was striking for the fact that three leadership positions remained unfilled (the positions of Eastern Cape Judge President, Northern Cape Deputy Judge President and North-West Deputy Judge President). This was so despite multiple candidates being interviewed for the Eastern Cape Judge President and North-West Deputy Judge President positions.

16. It would also be fair to note than some of these interviews involved some tense moments and forthright exchanges between candidates and members of the commission.

17. We have previously suggested that the JSC would benefit from giving a brief articulation of the reasons why a particular candidate was appointed or not appointed. In our view, the interviews under discussion further illustrate the desirability of such an approach. It would help to dispel any concerns about the basis on which the JSC's recommendations are made, which, we would submit, is especially important where an interview has seemed to give insight into difficulties in relationships within the judiciary. It would also be an important aspect of the transparency and accountability of the JSC process, not least in light of the fact that these positions are being re-interviewed in the commission's current sitting, with the associated cost to the taxpayer.

18. To reiterate, we would not suggest that these have to be reasons on the scale of a written judgment, nor that they need necessarily be given immediately the JSC's recommendation is announced. But nor should they be perfunctory. They need not undermine a candidate's credibility or professional standing if they are tied to clear criteria for judicial appointment.

19. We say this mindful of the Constitutional Court's pending decision in the case between the Helen Suzman Foundation and the JSC, where the question of access to the record of the JSC's deliberations is in issue. We have argued[2] that the record of deliberations ought to remain confidential, to ensure constructive debate. However, having such confidentiality does make it

[2] DGRU is an amicus curiae in the case, though we have abided the outcome of the appeals in both the SCA and the Constitutional Court.

important that other parts of the process provide transparency and accountability. The giving of reasons, we would suggest, is one way of doing so.

ACKNOWLEDGEMENTS

20. This research was conducted by Chris Oxtoby, DGRU senior researcher, and Musa Kika, Kate Loughran, Thando Gumede and Liat Davis, DGRU research assistants.

21. We are grateful for the financial support of the Open Society Foundation and the Raith Foundation for making this project possible.

DGRU

8 September 2017

JUDGE SELBY MBENENGE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 March 1961

LLB, University of Transkei (1987)

BJuris, University of Transkei (1984)

CAREER PATH

Acting Deputy Judge President, Mthatha High Court (2017)

Judge, Eastern Cape High Court (Bisho Local Division) (2015 -)

Advocate (1993 – 2015)

State Law Advisor (1990 – 1993, 1986 - 1987)

Lecturer, University of Transkei (1988 – 1989)

Prosecutor (1983 – 1985)

Member, Bar Council – Transkei Society of Advocates (1993 – 2015, chairman 2000)

Member, Bar Council – Bhisho Society of Advocates (2009 – 2015)

Member, Black Lawyers' Association (1998 – 2015)

Member, NADEL (- 2015)

Various positions in Seventh-day Adventist church.

SELECTED JUDGMENTS

LABOUR LAW

CLOVER SA (PTY) LTD & ANOTHER V SINTWA (2017) 38 ILJ 350 (ECG)

Case heard 19 August 2016, Judgment delivered 13 September 2016.

First respondent claimed damages for defamation arising from the testimony of the second appellant during proceedings before the CCMA. The claim succeeded in the Magistrates' Court.

On appeal, Mbenenge J (Griffiths J concurring) held:

"In an instance of defamatory statements made during the course of judicial or quasi-judicial proceedings …. [t]o enjoy provisional protection, the defendant need only prove that the statements were relevant to the matter at issue. Once that is achieved a duty is cast on the plaintiff to prove that, notwithstanding the statements' relevance, the statements were not supported by reasonable grounds. …" [Paragraph 16]

"The record reveals that each one of the parties before the arbitrator presented evidence and arguments in support of their respective contentions. It was the duty of the arbitrator to assess and choose between the opposing contentions. In the first place, the reason for which the respondent was dismissed was the allegation of fraudulent conduct. Therefore, the version of the second appellant must indeed have been self-evidently relevant. Without that version the arbitrator would have been oblivious to the reason for the respondent's dismissal and would thus have been rendered unable to assess the validity of that reason." [Paragraph 26]

"In my view … the appellants did establish with the requisite degree of proof that the otherwise defamatory allegation made by the second appellant during the relevant arbitration proceedings that the respondent had been dismissed for having committed fraud was relevant to the issue that fell to be determined by the arbitrator and thus covered by qualified privilege. The court a quo ought to have found as much. …" [Paragraph 27]

"The court a quo assumed the existence of malice by inference; the fact that the operator who had also signed the relevant form had not been charged was, according to the court a quo, a basis for inferring malice. The conclusion is illogical. …" [Paragraph 32]

The appeal was upheld with costs.

CIVIL PROCEDURE

FIRST NATIONAL BANK OF SOUTHERN AFRICA LTD t/a WESBANK v FIRST EAST CAPE FINANCING (PTY) LTD 1999 (4) SA 1073 (SE)

Case heard 10 December 1998, Judgment delivered 7 March 1999

Recovery of costs incurred by the applicant in mandating the drafting of an application against the respondent. The applicant had put the respondent to terms and the respondent had refused to comply

until it received the prepared application, after which it agreed to comply before the application was instituted. The applicant sought to recover the costs incurred in having to prepare the application, and also the costs of the current application. The respondent argued that the costs incurred were extra-judicial and did not fall to be taxed in terms of the Rules of Court.

Mbenenge AJ held:

"... [L]ogic and common sense dictates that any litigant who found himself in the position of applicant would have had no option but to approach this Court for an order of costs. Indeed, nothing precludes this Court from entertaining applicant's formal application for costs as such is a necessary and reasonable step, meant to pave the way for a taxation of a bill by the Taxing Master." [Page 1079, Paragraphs C – D]

"... I find that in the event of an applicant incurring costs in preparation of an application, and against a respondent who is put to terms but steadfastly refuses to concede the applicant's entitlement until after the application has been prepared, but not issued, the intended applicant is entitled, on demonstrating that it would have been successful in the intended application, to an order of costs reasonably incurred. ... A party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps ..." [Page 1080, Paragraphs E – F]

The Application succeeded, and the respondent was ordered to pay both the costs incurred in preparing the previous application, and the costs of the current application.

NXUMALO AND ANOTHER v MAVUNDLA AND ANOTHER 2000 (4) SA 349 (D)

Case heard 8 May 2000, Judgment delivered 16 May 2000

Urgent application in a dispute between family members over where a recently deceased family member should be buried. The applicants wanted the deceased to be buried on traditional family ground, while the respondents maintained that the deceased had wished for the respondents to decide on the place of burial. The deceased had left a will indicating her desire that the respondents should determine her place of burial. The respondents however refused to show this will to the applicant until proceedings were instituted. The applicants argued that had the respondent given them access to the will, they would never have instituted proceedings.

Mbenenge AJ held:

"... [F]irst applicant was entitled, upon having had sight of the will, to seek legal advice regarding its validity and thus make an informed decision regarding whether or not to resort to litigation. First applicant has not been afforded such opportunity by first Respondent, who was clearly in a position to do so." [Page 357, Paragraph I]

"In my view, there is nothing more first applicant could have done to secure a copy of the will than to request first respondent to furnish him with the same." [Page 358, Paragraph A]

"It seems clear ... that had applicants or their attorneys had sight of the deceased's will on or before 18 November 1999 this application could have been avoided. Had the application been heard on the merits, applicants would not have succeeded in the light of the deceased's uncontested will and first respondent would have been entitled to costs. Ordinarily, first respondent would have been entitled to costs to the

extent that she would have been the successful party. But, as I am of the view that first respondent's failure and/or neglect to let applicants or their attorneys have sight of the deceased's will … was the fundamental cause of the litigation, first respondent is not entitled to the costs of the application, and applicants are." [Page 358, Paragraphs B – D]

The Application was dismissed, but the respondents were ordered to pay the costs of the application.

ADMINISTRATION OF JUSTICE

S V FENI 2016 (2) SACR 581 (ECB)

Case heard 15 September 2015, Judgment delivered 15 September 2015.

The accused was convicted of housebreaking with intent to steal and theft in the district magistrates' court. The proceedings were conducted and recorded in isiXhosa. The record took more than two and a half years to be sent to the registrar of the high court for automatic review (the record should have been sent within one week).

Mbenenge J (Goosen J concurring) held:

"The delay, according to the magistrate, was occasioned by the paucity of sworn indigenous translators, hence it took time before the services of a translator could be engaged and the record transcribed. The reason proffered for conducting the proceedings in isiXhosa is the 'campaign that Government embarked on in October/November 2008 through pilot projects to promote the use of indigenous languages in the country's courts called indigenous language courts'." [Paragraph 5]

"I am mindful of the efforts that have been made by the government to promote the use of indigenous languages in courts, with a view to giving expression to s 35(3)*(k)* of the Constitution. It does not appear that those efforts have been successful, principally due to the challenges associated therewith. …" [Paragraph 7]

"It is quite plain that the government is still engaged in coordinating the process of elevating indigenous languages for use in courts. The process has not reached the stage where it could be said indigenous languages should be used in courts, even when the exigencies of a matter did not demand such use. The explanation for the delay given by the magistrate is far from convincing. Nothing is said, for instance, that an interpreter who could have interpreted from isiXhosa to English, and vice versa, was not available during the proceedings under review. The way in which the proceedings were conducted has resulted in an inexplicable, inordinate delay, rendering justice a mockery." [Paragraph 9]

UNCEDO TAXI SERVICE ASSOCIATION V MTWA AND OTHERS [1998] JOL 4281 (E); 1999 (2) SA 495 (E)

Case heard 19 November 1998, Judgment delivered 03 December 1998

This was a contempt of court application. The applicant, a taxi business, had obtained an order preventing the respondents from interfering with the applicants running of its business. The Respondents

however continued to interfere with the applicants business activities (by interfering with the collection of stand fees at taxi ranks, and operating under the Applicant's name).

Mbenenge AJ held:

"As found to have been the position in the instant matter, once a failure to comply with an order of Court has been established, both wilfulness and mala fides will be inferred, and since the defaulting party is regarded as having intended the natural consequences of his action, namely to bring the administration of justice into disrepute and contempt, it will be incumbent on him/her to demonstrate that his/her disobedience was neither mala fide nor wilful." [Page 500, Paragraphs F - G]

"Respondents, having availed themselves of the opportunity to discharge the evidentiary burden resting on them to demonstrate that their disobedience of the Court order in question was not mala fide and wilful, have chosen to be cavalier and not to place sufficient evidence before the Court to create a doubt whether wilfulness or mala fides was present. More than a bold allegation is required if one is to be said to have produced evidence that creates a doubt whether wilfulness or mala fide is present." [Page 503, Paragraphs B - C]

The application succeeded. The Respondents were sentenced to pay a fine of R1000 each or spend two months in prison. A further 2 month imprisonment sentence was suspended for 5 years on condition that respondents were not convicted of contempt of court during the period of suspension.

CRIMINAL JUSTICE

S v MD AND ANOTHER 2017 (1) SACR 268 (ECB)

Case heard 9 December 2016, Judgment delivered 9 December 2016

The first accused stood trial for the rape of the complainant, a ten year old girl. The second accused faced charges of aiding and abetting accused 1 in committing rape, and both accused were charged with causing a child to witness a sexual offence or act.

Regarding the charge of aiding and abetting, Mbenenge J held:

"Accused 2's behaviour on the days subsequent to the rape in question is one of indifference. It is hard to believe that, if accused 2 had been coerced on the previous night, she would not at the earliest available opportunity, especially in the absence of accused 1 (the source of the threat), have reported the rape to the neighbours, at the very least. On her own showing, neighbours had come to her rescue on previous occasions. … Even on her own showing, accused 2 could not have seriously and genuinely believed that her life was in imminent danger. As already pointed out, her neighbours had rescued her when being assaulted. She could, even in this instance, have raised an alarm at some opportune point during the ordeal. Moreover, she is on record as having assaulted accused 1 to the point of causing scars on his face … Accused 2's labelling the complainant as '(t)his thing that sleeps with her father' adds a further dimension, which does not lend support to her version that she acted out of necessity. It shows her indifference to the rape on the complainant and is more consistent with the stance of the complainant." [Paragraphs 60 – 62]

Regarding the charge of causing a child to witness a sexual act, Mbenenge J held:

"In my view, the offence is committed by the perpetrators intentionally and unlawfully causing a child to witness the sexual activity engaged in. Upon a proper construction of the section, the persons concerned must have consciously and deliberately created circumstances that conduce to a child witnessing the sexual activity being engaged in. Furthermore, in my view, the perpetrators must be conscious of the fact that the child is watching them engage in sex. What happens, for instance, where the alleged perpetrators are engaged in sex with the door slightly ajar and not aware of the fact that the child has all along been peeping through and watching them? Can it be said that, merely by causing the door to be slightly ajar in circumstances where they did not even expect the presence of the child, they have committed the offence? I think not. In the instant matter, therefore, the question, whether or not the accused were aware that the child had been watching them, is of significance. Under cross-examination the complainant conceded that it was possible that, on the day(s) she was watching TV from her bed's position, her parents might have thought she was asleep, whereas she was not. ..." [Paragraph 70]

Accused 1 was found guilty of rape and accused 2 was found guilty of aiding accused 1 to commit rape. Both accused were found not guilty of causing a child to witness a sexual act.

MEDIA COVERAGE

"Life and Times of Selby Mbenenge", *City Press* 2 June 2013 (Available at http://www.news24.com/Archives/City-Press/Life-and-times-of-Selby-Mbenenge-20150429)

'"One cannot help but be proud of a profession whose role is to uphold the values and norms enshrined in the Constitution of this Country," he said.'

Chairperson of National Prosecuting authority disciplinary hearing against then senior prosecutor Glynnis Breytenbach:

"Mbenenge ruled … that: "There is not an iota of evidence that the employee tried to get a confession [from Imperial's director] by conspiring to do so." He added: "There is no evidence that the employee was not always in control. She was independent and objective. She cannot be found guilty". …

Mbenenge ruled that it was "hard to see how" Breytenbach contravened any NPA policies and codes of conduct. The NPA claimed that Breytenbach ignored a counter complaint made against Sishen by ICT and she ought to have referred this complaint to a senior Hawks investigator. However, Mbenenge said "the facts of this case do not warrant a conviction on this charge". Mbenenge also found that the NPA "violated" Breytenbach's constitutional right to privacy, following a claim by the NPA that she had refused to hand over her work laptop during their internal investigation last year. "I am satisfied Breytenbach demonstrated the infringement of her right to privacy. The instruction to hand over laptop was unlawful. She was entitled not to give heed to this instructions."

- Sally Evans, "Not guilty: Breytenbach vows to return to all her cases", *Mail & Guardian* 27 May 2013 (available at https://mg.co.za/article/2013-05-27-breytenbach-not-guilty-im-going-back-to-all-my-cases)

JUSTICE XOLA PETSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 10 July 1954

BProc, University of Fort Hare (1975 – 1978)

LLB, University of Natal – Pietermaritzberg (1988 – 1989)

CAREER PATH

Justice, Supreme Court of Appeal (2012 -)

Judge, Eastern Cape High Court (Mthatha) (2005 – 2012)

Acting Judge (1997 – 2005)

Director, XM Petse Incorporated (1994 – 2005)

Partner, Sangoni Partnership (1982 – 1988)

Professional Assistant, Hughes Chisholm & Airey Attorneys (1982 ; 1990 – 1994)

Chancellor, Anglican Diocese of Mbhashe (2011 -)

Anglican Diocese of Mthatha »

Chancellor (2009 – 2011)

Vice Chancellor (2006 – 2008)

Registrar (2000 – 2005)

Councillor, Cape Law Society (1998 – 2001)

SELECTED JUDGMENTS

COMMERCIAL LAW

GRIFFITHS v JANSE VAN RENSBURG AND ANOTHER NNO 2016 (3) SA 389 (SCA)

Case heard 1 September 2015, Judgment delivered 26 October 2015.

Four payments were made to the appellant by a Trust, which was later sequestrated. The trustees brought an action to have the payments set aside. At issue was whether the payments had been made in the ordinary course of business, so as to qualify for a proviso under section 29 of the Insolvency Act. The High Court found that they had not been so made, and set the dispositions aside. For the majority on appeal, Gorven AJA (Shongwe, Pillay and Saldulker JJA concurring) dismissed the appeal.

Petse JA dissented:

"… [M]y learned colleague considers that since the appellant was not aware that his investment agreements with the trust were void, it was not open to him ex post facto to fall back on the condictio when in actual fact he had demanded 'the full amounts due under the void investments' and not under the condictio. …" [Paragraph 45]

"How then, it may be asked, could the appellant be expected to invoke the condictio when he demanded payment if he were unaware of the illegality of the business conducted by the trust? He would surely not have been aware that (to borrow the phraseology adopted in the majority judgment) — 'the transaction arising from the business relationship between [the appellant] and the trust at the time arose from void agreements, [and] not from the condictio'. In my view the fact that the appellant 'misconceived' the nature of his causa in making demand for repayment of the investment amounts is understandable for, as I have already stated, he was not aware at that stage that his agreements with the trust were void." [Paragraph 48]

ADMINISTRATIVE JUSTICE

MAMLAMBO CONSTRUCTION CC V PORT ST JOHNS MUNICIPALITY & OTHERS [2010] JOL 26063 (ECM)
Case heard 29 January 2010, Judgment delivered 24 June 2010

This case concerned the validity of a tender awarded by the first respondent to the second respondent. Applicant, who had submitted a tender, argued that there was no logical basis for the award, and that on the available information the tender should have been awarded to the applicant.

Petse ADJP considered an argument that the applicant had failed to exhaust internal remedies, and after considering academic authority and Supreme Court of Appeal case law, held:

"I have to say that on my reading and understanding of the *ratio decidendi* of the *Nichol* judgment [*Nichol & another v Registrar of Pension Funds & others* [2006] 1 All SA 589 (SCA)] it offers no support that is tenable for the proposition advanced ... All it says is that if the right to appeal in terms of the appellate regime established in terms of section 62(1) of the Municipal Act exists, the aggrieved party is ordinarily obliged to exhaust his or her internal remedies before approaching the court save when exceptional circumstances exist justifying a direct resort to the courts of the land. ... If there exists no right to appeal because such right has ... been extinguished by lapse of time ... it has for whatever reason not been asserted within the period stipulated in terms of the relevant Act the question may well be asked – why should it then still be necessary to seek exemption from "complying" with an obligation that in reality does not exist. .... Thus all what the *Nichol* judgment says ... in my view, is that if the internal appeal remedy was available at the time the review proceedings were launched but was for no good reason not invoked it cannot be an answer for the aggrieved party to say ... that its internal appeal remedy has since been lost due to lapse of time. ..." [Paragraph 31]

"... [T]he applicant had no effective and/or adequate appeal remedy ... there would have been no virtue in applicant appealing against the award of the tender to the second respondent when it was evident that the respondent had evinced a determination to commence with the works through the second respondent. This situation was further exacerbated by the fact that the respondent had steadfastly refused to give the undertaking sought that it would not carry on with the works until the applicant's review application had been determined ..." [Paragraph 32]

"I now turn to consider whether in the context of the circumstances ... it can be said that the award of the tender ... bears close and intense scrutiny. ... [I]t is my judgment that the answer to this question taking an objective and dispassionate view of the facts must be a "no". ... I do not for one moment believe that I have strayed outside the parameters set by judicial precedent which enjoin the courts to "take care not to usurp the functions of administrative agencies". On the contrary it is my conviction that in coming to the decision that I have reached ... I have done no more than "to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution"..." [Paragraphs 41 – 42]

The award of the tender to the second respondent was declared invalid and set aside, and the tender referred back to the first respondent for reconsideration.

CRIMINAL JUSTICE

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v MG 2017 (2) SACR 132 (SCA)

Case heard 2 May 2017, Judgment delivered 2 June 2017.

Respondent was prosecuted on the regional court on various charges involving rape, the use of child pornography and sexual grooming of children. He was convicted on 5 of the 6 counts by the regional court, but on appeal the high court reduced two of the rape convictions to convictions to sexual assault. Pertinently, the high court reduced the sentence for rape, finding that the "strong suspicion that the victim was not an unwilling participant in the events" was an "important factor" to be taken into account in considering sentence [SCA judgment para 11]. The DDP appealed to the SCA on a question of law,

arguing that in terms of the Sexual Offences Act, a child under the age of 12 is incapable of consenting to a sexual act, and therefore her 'consent' could not, as a matter of substantive law, be taken into account in sentencing.

Pete JA (Lewis and Mathopo JJA and Gorven and Mbatha AJJA concurring) held:

"... In this case the High Court imputed consent to the complainant. It did so despite the clear and unequivocal provisions of s 57(1) of the Sexual Offences Act referred to above. In doing so, the High Court committed an error of law. It therefore follows that the present case falls foursquare within the purview of s 311 of the CPA. In these circumstances the interests of justice dictate that the sentence imposed by the High Court must be set aside." [Paragraph 28]

"...]T]he dictum in [the earlier SCA decision of] *Mphaphama*, that 'the exercise of a judicial discretion in favour of a convicted person in regard to sentence . . . cannot be a question of law', is cast too wide. In particular, it does not deal with the position where that discretion has been exercised on an incorrect legal basis. An exercise of a judicial discretion based on a wrong principle or erroneous view of the law is clearly a question of law decided in favour of a convicted person." [Paragraph 29]

The appeal was upheld, and the case referred back to the High Court for the appeal on sentence to be reconsidered.

S V ROMER 2011 (2) SACR 153 (SCA)

Case heard 25 February 2011, Judgement delivered 30 March 2011

The respondent had been convicted on one count of murder and two of attempted murder, the high court finding that he was in a state of diminished responsibility, though not acting as an automaton, at the time of the offences. The respondent was sentenced to 10 years imprisonment, wholly suspended for five years, and to three years correctional supervision. The State appealed against the sentence.

Petse AJA (Lewis and Bosielo JJA concurring) held:

"Romer's bizarre conduct on the day when he shot three strangers, randomly and at different places, was attributed by his expert witnesses to an intake of anti-depressant medication that had been prescribed for him by various doctors (including psychiatrists), as well as over-the-counter medication. He had consulted doctors about his emotional upheaval triggered by the disintegration of his marriage. ..." [Paragraph 14]

"... [T]he High Court found that, although Romer had suffered from diminished responsibility, he had not acted in a state of sane automatism when shooting. The court accepted the evidence ... that Romer had been able to direct his actions ... Accordingly, he was not acting as an automaton when he shot his three victims." [Paragraph 18]

"But the court, in imposing sentence, did place great emphasis on Romer's condition, induced by drugs. Of course, Romer's conduct and its consequences are horrific. ..." [Paragraph 19]

"... [T]he common thread running through [the grounds of appeal relied on by the State] is that the trial court over-emphasised the personal circumstances of Romer at the expense of the gravity of the crimes committed, the interests of society and the interests of the victims." [Paragraph 24]

"I am ... not persuaded that the court a quo committed any misdirection in imposing the sentence it did, or that such sentence is disturbingly inappropriate. I am satisfied, after much anxious consideration, that deterrence of Romer or others is not an overriding consideration, regard being had to 'the concatenation of circumstances' which were of a highly unusual, if not bizarre, nature and which are unlikely to recur." [Paragraph 31]

The appeal was dismissed.

CUSTOMARY LAW

NETSHITUKA V NETSHITUKA AND OTHERS 2011 (5) SA 453 (SCA)

Case heard 10 May 2011, Judgment delivered 20 July 2011

This case dealt with the validity of a civil marriage which had been entered into while a spouse was a partner in an existing customary union. The appellant had sought an order declaring the marriage between the first respondent and the late Mr Netshituka null and void ab initio, and that the last will and testament of Mr Netshituka was invalid. The first applicant (respondent) averred that she had been married to Mr Netshituka by customary rites. It appeared that Mr Netshituka had been married to three other women, including one Martha, by customary rites. None of these marriages were registered with the Department of Home Affairs.

Petse AJA (Mpati P, Bosielo, Tshiqi and Seriti JJA concurring) held:

"In customary law, where a husband has deserted his wife, his offence is not irreparable and does not give her the right to refuse to return to him when he comes to phuthuma [Footnote: "The husband is obliged to phutuma (fetch) his wife who has left him, whether through his fault or hers, unless he intends to abandon her"]her. ... But on the authority of Nkambula a customary law wife who has left her husband as a result of his having contracted a civil marriage with another woman would be entitled to refuse to return to him when he goes to phuthuma her. She would be entitled to assert that he had terminated the union between them. It seems to me, however, that nothing would prevent her from returning to him if she were prepared to do so. ..." [Paragraph 12]

"... [T]he deceased did not have to phuthuma his customary law wives because they never left him after he had married Martha. His continued cohabitation with them after the divorce was clear evidence of a husband who had reconciled with his 'previously deserted' wives. And in his last will and testament ... the deceased refers to Tshinakaho, Diana and the first respondent as his first, second and third wives respectively. What is important ... is the intention of the parties, which can be inferred from their conduct of simply continuing with their relationships and roles as partners in customary unions with the deceased after the divorce. Their conduct clearly indicated that to the extent that the deceased's civil

marriage to Martha may have terminated his unions with his customary law wives, those unions were revived after the divorce." [Paragraph 13]

Petse AJA then found that there was no evidence that the deceased had been mentally incapacitated when he attested to his will. The appeal was upheld in part, with the court a quo's decision to reject the application to declare the marriage between the deceased and the first respondent invalid being overturned.

The judgment has been criticised by **P. Bakker and J. Heaton, "The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the recognition of Customary Marriages Act 120 of 1998 - the Supreme Court of Appeal introduces polygyny into some civil marriages", *Tydskrif vir die Suid-Afrikaanse Reg*, 2012, p. 586 – 593**. The authors argue that:

1. Although the practice of *phutuma* might not be practices by all groups, Petse AJA simply assumed that the custom applied to the deceased and his customary wives.
2. It was 'startling' that Petse AJA could come to the conclusion that "to the extent that the deceased's civil marriage to Martha [M] may have terminated his unions with his customary law wives, those unions were revived after the divorce". Since it is legally impossible to revive a marriage that has been terminated, "one must assume that the acting judge of appeal simply phrased the statement inaccurately and meant to convey that the customary marriages were never terminated by the civil marriage."
3. Based on Petse AJA's interpretation of the *Nkambula* case, the Court concluded that the deceased was still married to his customary wives when he entered into the civil marriage with N. According to the authors it is questionable whether Petse AJA's interpretation of the *Nkambula* case and, consequently, his findings that "the deceased was still married to his customary wives when he entered into the civil marriage with N is correct." The authors asserted that the statements made by the Court in the *Nkambula* case clearly indicate that an existing customary law marriage must automatically come to an end if the husband enters into a civil marriage with another woman. The authors therefore noted that the Court created an incorrect precedent because it failed to properly consider the whole of the *Nkambula* judgment and all the *dicta* in it, and because it ignored earlier case law.
4. An additional concern raised by the authors related to Petse AJA's assumption that *phutuma* was practiced by the groups of which the deceased and his customary wives were members simply because there was no proof that it did not exist in the relevant tribe. The authors criticised Petse AJA for presuming that *phutuma* is practiced by all tribal groups in South Africa.
5. The authors concluded that the consequence of Petse AJA's decision is that customary marriages and civil marriages which "a husband concluded with different woman before 2 December 1988 *co-exist* as valid marriages. In this way, the fundamentally monogamous nature of civil marriage is negated and polygyny permitted in a particular group of civil marriages."

M. Buchner-Eveleigh, "*Netshituka v Netshituka* 2011 (5) SA 453: revival of a customary marriage previously dissolved by a subsequent civil marriage : recent case law", *De Jure,* Vol. 45, Issue 3, Jan 2012, p596-605 criticised Petse AJA's conclusion regarding the validity of customary marriages prior to 2 December 1988. The effect of the rule is that dissolved customary marriages will now be regarded as suspended marriages which can be revived if the civil marriage is terminated by divorce or death. The author indicates that this "is clearly contrary to positive law, which does not recognise latent (suspended)

marriages. This would also produce intractable legal problems as far as the property rights of the women are concerned." As a result the Supreme Court of Appeal has "released on us an arcane mystery void of legal certainty."

The author also discussed the issue of whether it was competent for the deceased to contract a civil marriage during the subsistence of the customary marriages. The author asserts that the Court came to the conclusion that since the deceased had been a partner to existing customary marriages, the civil marriage was a nullity. The author argues that had the Court properly applied the *Nkambula* judgment, the court's findings would most likely have been the opposite, i.e. the civil marriage would have been considered valid. The author laments that it is unfortunate that the Court did not indicate why it chose to apply positive law in the one instance and not in the other. According to the author, the Court paid greater homage to the rights of the discarded customary marriage wives, "to the extent of excluding the patrimonial, and indeed also human rights (such as to respect her dignity, physical and emotional integrity) of the civil law wife."

The author concludes by stating that because the judgment is inconsistent in its application of positive law, it "meanders into the sphere of usurping the powers of the legislature. The court has also failed to give an equitable solution to the rights of both the customary marriage and civil marriage wives."

JUDGE DAVID VAN ZYL

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 10 January 1959

BA, University of Stellenbosch (1980)

LLB, University of Stellenbosch (1981)

Post graduate Diploma in Tax Law, UNISA (1984)

LLM, University of Stellenbosch (1986)

CAREER PATH

Deputy Judge President, Eastern Cape High Court, Bhisho Local Division (2016)

Acting Deputy Judge President, Eastern Cape High Court, Bhisho Local Division (2014 – 2016)

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

Acting Deputy Judge President, Eastern Cape High Court, Bhisho Local Division (2013)

Acting Judge of Appeal, Labour Appeal Court (2010)

Acting Judge, Labour Court (2005)

Acting Judge President, Eastern Cape High Court (2000)

Judge of the Eastern Cape High Court (1997)

Acting Judge, Transkei High Court, Mthatha (1996 – 1997)

Advocate (1988 – 1997)

Senior Lecturer, University of the Transkei (1988 – 1989)

State Prosecutor, Advocate, Department of Justice (1981 – 1987)

SELECTED JUDGMENTS

PRIVATE LAW

STEENKAMP NO V PROVINCIAL TENDER BOARD, EC [2006] JOL 16488 (CK)
Judgment delivered 29 July 2004

The Provincial Tender Board had awarded tenders for the payment of social grants, including to Balraz.. An aggrieved tenderer, Cash Paymaster Service, successfully applied to have the award of the contracts reviewed and set aside on the basis of alleged irregularities in the decision-making process. Two companies were subsequently awarded the tenders, but Balraz did not tender as it was in liquidation. The plaintiff, Balraz's liquidator, lodged a claim for damages.

Van Zyl J held:

"The mere fact of the setting aside of the Tender Board's decision on review did not provide the plaintiff with a cause of action. That decision did not automatically carry in its wake a claim for delictual damages. … [T]he wrongfulness of the Tender Board's conduct is to be determined by asking the question whether the latter had a legal duty to prevent the plaintiff's loss. … [I]t must be borne in mind that there is no general duty on anyone to prevent pure economic loss. …" [Paragraphs 17 - 18]

"The members of the Tender Board did not read the tender documents presented by the tenderers. … [W]hile the tender documents contained technical information which the members of the Tender Board might not have been able to understand, it also contained other information relevant to the adjudication of the tender which the members of the Tender Board could and should have read. The lack of technical qualifications of the Tender Board members was meant to be addressed by a report furnished by the Technical Committee on the tenders and the appearance of the Technical Committee before the Tender Board when the said report was considered. The Tender Board chose not to follow the recommendations made by the second Technical Committee …" [Paragraph 54]

"… [I]t is … clear, having regard to the nature of the functions and duties of the Tender Board … that it failed to comply therewith and with the administrative justice provisions of the Constitution. …" [Paragraph 57]

"The final question is whether in all the circumstances of the case it is just and reasonable that the Tender Board was under a legal duty to prevent harm or loss to Balraz. The failure of Balraz to submit a valid tender resulted in the absence of a relationship between it and the Tender Board as contemplated by the Act and the administrative justice provisions of the Constitution. In these circumstances it could not have been within the reasonable contemplation of the Tender Board that Balraz might suffer harm or loss when it directed its mind to the acts or omissions which have been called into question." [Paragraph 85]

Van Zyl J concluded that the plaintiff has not established the delictual requirement of wrongfulness. The claim was dismissed with costs. The decision was upheld by the SCA in Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA). A further appeal to the Constitutional Court was dismissed in Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC).

ADMINISTRATIVE JUSTICE

ESORFRANKI PIPELINES (PTY) LTD AND ANOTHER V MOPANI DISTRICT MUNICIPALITY AND OTHERS (40/13) [2014] ZASCA 21

Case heard 4 March 2014, Judgment delivered 28 March 2014

This case was about judicial review of administrative action in the form of a tender process.
A District Municipality had invited tenders for the construction of reservoirs and a bulk pipeline. The tender was awarded to a joint venture, and two unsuccessful bidders, the first appellant (Esorfranki) and the second appellant, Cycad Pipelines (Pty) Ltd (Cycad), brought review proceedings in the High Court. This culminated in an agreement in terms of which the award was set aside and the municipality was ordered to re-adjudicate the tenders. The tender was again awarded to the two original winners, and the two unsuccessful bidders again took the award on review. The ensuing litigation culminated in this appeal.

Van Zyl AJA (Mthiyane DP, Lewis and Bosielo JJA and Legodi AJA concurring) held:

"In this case, however, the high court, although correctly finding that the flaws in the tender process and award tainted it and the contract, nonetheless in effect ordered that the joint venture continue to execute the invalid contract under the municipality's supervision. No doubt it was the consideration of pragmatism and practicality that weighed heavily with the high court in ordering the continued execution of an invalid contract. …" [Paragraph 21]

"The decision of the high court to give effect to a contract concluded pursuant to an unlawful tender award is flawed for several reasons. First, the parties to that contract had acted dishonestly and unscrupulously and the joint venture was not qualified to execute the contract. The first order that the high court made – that the award was unlawful – was undermined by the order that the joint venture continue the work. The second reason is that it was premised on the possible existence of a number of unknown consequences which might follow upon an order declaring the award of the tender unlawful. A decision made in the exercise of the discretion in s 8 of PAJA must be based on fact and not on mere speculation. The delay in the finalisation of the review proceedings brought about a change in the factual position and it was the function of the court to ensure that it be placed in a position to arrive at an informed decision with regard to what an appropriate remedy would be. This could and should have been addressed by an appropriately worded order." [Paragraph 22]

"… [T]he decision whether to declare conduct in conflict with the Constitution unlawful but to order equitable relief … involves the weighing up of a number of competing interests. Certainty is but one. Other factors include the interests of affected parties and that of the public. … [T]hen the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality." [Paragraph 23]

"I therefore conclude that the high court erred in the exercise of its discretion and that its decision in effect to allow the continuation of the contract should be set aside. … [B]ecause of the bias displayed by the municipality in the adjudication of the tender and its conduct in the review and interlocutory proceedings, it should play no part in any further tender process in relation to this project." [Paragraph 27]

"…The joint venture was in turn found to have made itself guilty of dishonest conduct by misrepresenting the facts in their tender bid in an effort no doubt to achieve an advantage and to secure the award of the tender. The costs order made by the court does not reflect the seriousness of this conduct and the disapproval which it deserves" [Paragraph 31]

"The manner in which the municipality conducted itself in the litigation also calls for censure. Instead of complying with its duty to act in the public interest and to allow the serious allegations of fraud and dishonesty in the tender process to be ventilated and decided in legal proceedings, it chose to identify itself with the interests of the tenderers who stood accused of improper conduct. …" [Paragraph 32]

The appeal was upheld, with costs on the attorney and client scale.

CIVIL PROCEDURE

MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM v KRUISENGA AND ANOTHER 2008 (6) SA 264 (Ck)

Case heard 30 April 2008, Judgment delivered 30 April 2008

In an action for damages arising from a forest fire, the defendant's (applicant's) legal representatives, both at the pre-trial conference and later at the trial, conceded liability on the merits and gave an undertaking to pay the amounts claimed under certain heads of damage. An order that the applicant was to pay the admitted damages was made by consent, and the hearing postponed. The applicant, with a view to reopening his case on the merits, then launched an application for rescission of judgment ordering him to pay the admitted damages, and an order withdrawing his admissions of liability on the merits as reflected in the pre-trial minute.

In deciding the case, Van Zyl J considered the agent-principal relationship between an attorney and their client:

"... [J]ust as any other principal who may be liable for the acts of his agent despite limitations placed on the agent's authority, a litigant may be bound to a compromise entered into, or a judgment or order consented to, by his legal representative despite instructions to the contrary. The reason therefore lies in the fact that an agent's implied authority and his apparent or ostensible authority normally coincide, and the act of representation does not merely operate between the client and his representative, but also between the client and his opponent who deals with the representative. Unless the limitation of authority is communicated to the litigant's opponent or his legal representative, or it is implicit from what the litigant does or the surrounding circumstances, he may be estopped from relying on the absence of or excess of authority. A litigant can therefore not secretly or by way of private instructions to his legal representative curtail the latter's authority as far as third persons are concerned." [Paragraph 60]

"Because of the limitation placed on the authority of the State attorney by the so-called practice in the applicant's department, it must be accepted that the attorney concerned did not have actual authority to compromise on behalf of the applicant. The same does, however, not apply to counsel. There is no indication that counsel's authority or control over the way in which the applicant's defence was conducted was limited in any way. ... I do not believe that it must simply be accepted that because a limitation was placed on the authority of the State attorney, a similar limitation automatically extended to counsel. In my view, and in the absence of counsel having said so in his affidavit, it must be accepted that he acted in the exercise of his implied authority when he concluded the settlement agreement." [Paragraph 65]

"Through his conduct the attorney tacitly gave the assurance that he acted with the necessary authority while in truth, and to his knowledge, this was not the position. On his own account of events, it is clear that he acted improperly, not only in relation to his own client's affairs but also to the court, counsel retained by the department and the legal representatives of the respondents..." [Paragraph 78]

Van Zyl J found that the application had been brought about entirely as a result of the improper conduct of the applicant's attorney, and dismissed the application with costs. The decision was upheld by the Supreme Court of Appeal in **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA)**, the SCA finding that the High Court had been correct to hold that the appellant was estopped from denying the authority of the State Attorney to enter into the agreements.

CRIMINAL JUSTICE

S v YANTA 2000 (1) SACR 237 (TK)

Case heard 9 December 1999, Judgment delivered 9 December 1999

The appellant was denied bail by a magistrate for planned and premeditated murder, a Schedule 6 offence in terms of the Criminal Procedure Act. On appeal, the High Court had to consider whether there were exceptional circumstances warranting the granting of bail.

Van Zyl J dismissed the appeal:

"The appellant has undoubtedly been charged with a very serious offence and if convicted could face a long term of imprisonment. If the commission of the crime is proved by the State, factors such as the fact that it was planned and premeditated and that it was aimed at eliminating a witness would undoubtedly constitute aggravating factors which would have a bearing on the sentence that may be imposed. These considerations are quite clearly relevant in assessing whether there is a likelihood that the appellant, if she is released, will attempt to evade her trial. ..." [Page 247D-E]

"By the nature of the appellant's involvement in crime itself it is possible to make an assessment of her character which is equally important in assessing the likelihood of her undermining or jeopardising the objectives of the proper functioning of the criminal justice system. ... To this extent the magistrate also in my view did not err in assessing the credibility of the appellant for purposes of establishing grounds against the granting of bail ... and for purposes of deciding whether or not the appellant adduced acceptable evidence supporting her contention that she should be released on bail. In this regard the magistrate took into account the appellant's failure to disclose all her previous convictions as well as postal and residential addresses of which she had made use in the past." [Page 247J – Page 248A & B]

"I cannot ... fault the magistrate's finding that the contention 'namely that the accused person needs to go and run her businesses has been overtaken by events so to speak'. Further ... the personal interests of the accused are secondary and the interests of society in the proper and effective administration of criminal justice are supreme." [Page 249B-D]

"It is not competent for an appellant in appeal proceedings to place new evidence before the Appeal Court by way of statements from the Bar. An appeal in terms of s 65 is analogous to an ordinary appeal. Like any other appeal an appeal against the refusal of bail must be determined on the material on record. ..." [Page 249E-G]

Van Zyl J dismissed the appellant's contentions that if denied bail she would not be able to take care of her children, on the basis that even during the trial she has been assisted by her family members, who were able to take care of her children.

MR NDUMISO PATRICK JAJI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 7 January 1967

B. Proc, University of Durban Westville (1995)

LLB, University of Durban Westville, 1996

MSc Transport and Maritime Management, Antwerp University, Belgium (2003)

CAREER PATH

Acting Judge of the High Court, Grahamstown and Port Elizabeth (2017)

Magistrate, Cape Town (2015 -)

Acting Judge of the High Court, Bloemfontein (2014)

Additional / acting Magistrate, Port Elizabeth (2010 - 2015)

Attorney, D. Gouws Inc. (2006 – 2010)

Attorney, Lindoor & Nogcantsi (2002)

Attorney, Goldberg & De Villiers (1996 – 2002)

NADEL

Secretary General (February 2014 –)

Deputy Chairperson (2000 – 2001)

Member, African National Congress (1985 – 1995)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

SEOE AND ANOTHER V DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS OF THE FREE STATE [2014] ZAFSHC 212

Judgment delivered 27 November 2014

Applicants sought a permanent stay of prosecution, placing the reasonableness of the time taken to prosecute in issue (the alleged offence having taken place between 2001 and 2003).

Jaji AJ held:

"Corruption is a cancer to the body of South Africa from time immemorial. The country has been facing the challenge of corruption which is unfortunately not subsiding. Different legal instruments, enforcements units/agencies, laws and regulations have been introduced to fight this scourge, seemingly to no avail. The Scorpions, Hawks and organized crime units have not managed to deal properly with these types of offences to such an extent that we can safely believe that they are becoming few and far between. The public, taxpayers, are directly affected by the offences as they inadvertently further burden the public with tax and high cost of living which is a direct consequence of these. On daily basis, the state from different departments, provinces and municipalities is strenuously faced to contend with these types of matters. These involve officials and other closely connected individuals. Whistle-blowers and upright officials have not escaped the wrath of those involved in these activities. Clearly, the public interest is that those involved should be prosecuted and these matters be disposed of in open courts." [Paragraph 27]

The application was dismissed with costs. Leave to appeal was dismissed by Jaji AJ (25 June 2015) by the SCA (21 September 2015) and by the Constitutional Court (2 December 2015).

M V S [2014] ZAFSHC 70

Case heard 5 May 2014, Judgment delivered 15 May 2014

Appellant was convicted on three counts of rape and sentenced to life imprisonment. The matter came before the High Court on an automatic appeal.

Jaji AJ (Van Zyl J concurring) held:

"It is clear from the record that the mitigating factors are far outweighed by the aggravating factors. The court a quo wrote a detailed and well-reasoned judgment. The judgment is justified in the circumstances. The sentence cannot be considered to be shockingly excessive and cannot induce a sense of shock in these circumstances. The court a quo in weighing appellant's circumstances against the offence stated that the sentence is not unjust given the circumstances. Appellant complied with the provisions of Part 1

of Schedule II of the Criminal Law Amendment Act … not just once but on two occasions. He raped his own child more than once and she is mentally challenged. Appellant has no remorse; he believe what he did was right. His low intelligence is immaterial, because he could still put on his clothes; know basic things about life and the question is why wouldn't he know that it is wrong to have sexual intercourse with one's daughter. The court a quo correctly believed that injustice would result if life imprisonment was not imposed." [Paragraph 8]

"Indeed a rape of the child deserves full maximum sentence permitted by law. The record at page 90 and 91, the court a quo correctly highlighted the victim's rights, views of broader community, courts having to show the community that rape is unacceptable and that all rapes deserve exemplary punishment." [Paragraph 9]

NTHAKO V S [2014] ZAFSHC 71

Case heard 12 May 2014, Judgment delivered 15 May 2014

Appellant had been convicted of the rape of an eight year old minor, and sentenced to life imprisonment. The appeal was against sentence only.

Jaji AJ (van der Merwe J concurring) held:

"I am of the view that life imprisonment of this young appellant takes away the possibility of rehabilitation of the offender. The appellant clearly was remorseful. He pleaded guilty and had asked for forgiveness. The court has to take into account all the relevant mitigating factors in favour of the accused and also the aggravating factors in assessing an appropriate sentence. Cumulatively, the factors of youthfulness, first offence, plea of guilty and forgiveness and the fact that appellant passed matric, all these should be considered in favour of the appellant. There is a real possibility of rehabilitation of the appellant. He is clearly somebody with the potential to make something of his life. In the particular circumstances of this case the sentence of life imprisonment is unjust." [Paragraph 13]

The sentence was reduced to twenty years imprisonment.

KOTZE V S [2014] ZAFSHC 156

Case heard 23 June 2014, Judgment delivered 11 September 2014

The appellant was convicted of assault by the district court and sentenced to thirty six months correctional supervision. On appeal, the court *a quo*'s treatment of video evidence was in issue.

Jaji AJ (Lekale J concurring) held:

"I am of the view that the procedure adopted by the magistrate herein was irregular. It is clear from the introduction of video evidence, footage viewed outside court and the magistrate viewing it alone to such an extent that she made her own observations. She carried on using those observations in her judgment

without first having noted the same and advised the other role players especially the appellant. The appellant was never given the opportunity to respond or challenge the observations. Clearly, the magistrate was being subjective when noting her observations." [Paragraph 15]

The appeal succeeded.

SELECTED ARTICLES

"CRITICISM OF JSC'S INTERPRETATION OF SECTION 174(2) OF THE CONSTITUTION OF SOUTH AFRICA: IS IT CRYING WOLF OR A QUESTION OF INTELLECTUAL DISHONESTY?" (2012)

"Please, can we be honest and agree that there is only one interpretation of Section 174(2) in our context, the one followed by the JSC. Once you start by attacking the composition of JSC and top your argument further by advocating for an interpretation of Section 174(2) which is inimical to the values of the Constitution, surely you must expect a response from the victims of legalized discrimination." [Page 10]

ADVOCATE SUNIL RUGUNANAN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 2 July 1966

BA, Legal Theory and Industrial Sociology, Rhodes University (1990)

LLB, Rhodes University (1993)

CAREER PATH

Acting Judge, Eastern Cape High Court, Grahamstown (25 July 2016 – 23 September 2016, May 2014)

Commissioner, Small Claims Court (2007 –)

General Secretary, Eastern Cape Society of Advocates (2003 - 2004)

Advocate, Grahamstown Bar (2001 –)

Commissioner, Eastern Cape Tax Board (2008)

Estates Examiner, Department of Justice Master's Division (1998 – 2001)

Candidate Attorney and Professional Assistant, NN Dullabh & Co (1995 – 1998)

Candidate Attorney, B. Sandi & Co (1993 – 1995)

SELECTED JUDGMENTS

PRIVATE LAW

EASTERN CAPE MOTORS (PTY) LTD V STU DAVIDSON AND SONS (PTY) LTD [2016] ZAECGHC 109

Case heard 29 July 2016, Judgment decided 25 October 2016

This was an appeal against the dismissal of the appellant's claim for damages against the respondent. The claim was based on a breach of a warranty contained in a written agreement, alternatively a claim formulated in delict arising from an alleged negligent misrepresentation, relating to the trade-in of a vehicle previously involved in an accident..

Rugunanan AJ (Pickering J concurring) held:

"Respectfully, the magistrate erred in concluding that the representation constituted only an opinion on the condition of the vehicle and that by implication it was not an enforceable term of the parties' agreement. The issue to be decided on appeal must accordingly be approached on the footing that clause 7 encapsulates a warranty, the breach of which will depend on whether the Transporter was involved in a "*substantial / major accident"* affecting its resale value. …" [Paragraph 11]

"I am of the view that the evidence … establishes that the Transporter was involved in "*a substantial / major accident".* The consequence is that the appellant has proven a breach of the warranty contained in clause 7 of the *trade-in declaration*. …" [Paragraph 24]

The appeal was upheld.

CRIMINAL JUSTICE

S v KOESTER [2016] ZAECGHC 60 / 61

Case heard 1, 2 and 4 August 2016, Judgment delivered 10 August 2016

The accused was convicted of murder. This judgment dealt with sentencing.

Rugunanan AJ held:

"Having considered the matter anxiously, I am of the view that, in the circumstances of this matter, a heavy sentence in excess of the prescribed minimum is justified. The accused committed a brutal and callous act for no justifiable reason and for which no explanation exists other than a blatant denial premised on the notion of a conspiracy against him. This kind of brutality has unfortunately become a regular occurrence of life in South Africa and courts are enjoined to signal a clear message that such behaviour will not escape the full force and effect of the law …. It is noted the accused elected not to testify in mitigation of sentence. Whatever his reasons, that was his right but it is not without consequences … His silence simply meant there was nothing to be said in his favour." [Paragraph 17]

"Accordingly, a sentence of 18 years' direct imprisonment is one that I consider proportionate to the nature and seriousness of the crime and which takes due cognisance of the Legislature's desire to impose a firm punishment, the circumstances of the accused and the interests of society." [Paragraph 18]

S V NOJOKO 2016 JDR 1908 (ECG)

Case heard 27 July 2016, Judgment delivered 17 October 2016

This was an appeal against conviction and sentence, the appellant having been convicted in the regional court on charges of rape, kidnapping and assault with intent to commit grievous bodily harm.

Rugunanan AJ (Lowe J concurring) held:

"… [T]he evidence on record reveals that the assaults on the complainant, her enforced deprivation of freedom and repeated rapes were tormenting, callous and perpetrated with a flagrant disregard for the sanctity of her physical and mental integrity. A society striving towards the ideals of equality and dignity does not sit back and adopt a passive and indulgent approach to crimes of violence against women. This kind of brutality has unfortunately become a regular occurrence of life in South Africa and courts are enjoined to signal a clear message that such behaviour will not escape the full force and effect of the law …" [Paragraph 24]

The appeal was dismissed.

TROSKIE V *S* [2016] ZAECGHC 53

Case heard 27 July 2016, Judgment delivered 27 July 2016

An appeal against a sentence of three years direct imprisonment for fraud.

Rugunanan AJ held:

"Although nothing is known of her personal circumstances during the aforementioned period nor of the origins of her fraudulent conduct, the appellant contritely acknowledged that she 'did not make the right decisions'. It is considered appropriate to mention at this point that the plea of guilty discloses that the

appellant committed the offence of fraud for personal gain. Whether this can be attributed to greed or need, is uncertain. During her evidence in mitigation she also disclosed that the amount of money involved has never been repaid to the complainant. This emerged under cross-examination. While incarcerated it is also evident that she has persevered in becoming a responsible member of society. She attended several rehabilitation programs conducive to character development and decision making and is currently, through sponsorship assistance, studying towards a bachelor's degree in ministry. Seemingly influenced by these programs, she pleaded guilty to the present charge and expressed remorse for her wrongdoing. In this regard her potential for rehabilitation was either completely overlooked or received insufficient consideration by the magistrate and was in fact under-emphasised. By emphasising the impact of a sentence on potential offenders without attaching sufficient weight to her potential for rehabilitation, the approach adopted by the magistrate points to the sacrifice of the appellant on the altar of deterrence." [Paragraph 8]

"Respectfully, the result achieved does not lend itself to a conclusion that there was a proper and reasonable exercise of discretion by the magistrate upon imposing sentence. The magistrate's approach amounts to a misdirection which entitles this court to interfere with the sentence imposed and to revisit the identification of a sentence which is appropriate in all the circumstances of this matter." [Paragraph 9]

The sentence was reduced to two years' imprisonment, antedated.

VAN BREDA V S [2014] ZAECGHC 42

Case heard 14 May 2014, Judgment decided 4 June 2014

The appellant was convicted in the magistrates' court on a charge of fraud and sentenced to a fine of R1 000,00 or 60 days' imprisonment, conditionally suspended for 5 years. This was an appeal against conviction.

Rugunanan AJ (Eksteen J concurring) held:

"The reasoning employed by the magistrate shows that he did exactly what is cautioned against in the dicta cited from the aforegoing judgments. His line of reasoning, apart from disclosing no good reason for rejecting the appellant's version, evidences a selective and piecemeal process of reasoning which overlooks consideration of a crucial ingredient, namely whether the reasonable possibility remains that the appellant's explanation may be true. Clearly, the appellant's version is not so improbable as to be rejected out of hand" [Paragraph 23]

"... I consider that the magistrate erred in holding that the State succeeded in discharging the onus on the main issue and therefore in proving the appellant's guilt beyond reasonable doubt." [Paragraph 24]

"The appeal is accordingly allowed and the appellant's conviction and sentence is set aside." [Paragraph 25]

JACOBUS AND ANOTHER V S [2016] ZAECGHC 65

Case heard 18 August 2016, Judgment delivered 22 August 2016

This was an appeal against the decision of a magistrate refusing appellants' application for release on bail pending their trial on a charge of theft of stock or produce.

Rugunanan AJ held:

". . . For the second appellant, the consequence of the approach adopted by the parties is that it attracted an onus for him to adduce evidence to the satisfaction of the court that the interests of justice permit his release. It goes without saying that in all instances except those provided for in section 60(11) of the Act the onus remains on the State. It is disquieting that the parties' approach to the matter, particularly for the second appellant, appears to have been uncritically accepted by the magistrate. In Schedule 5 bail applications, the burden of proving that the interests of justice would be served by the continued detention of an accused remains with the State. The State may discharge this burden by giving a full and proper description of the alleged offence in the charge sheet, or by resorting to a certificate from the attorney-general in terms of section 60(11A) of the Act. In the present case the State did not procure the relevant certificate nor can it be said that the charge sheet contained a full and proper description of the alleged offence. In point, the charge sheet appears to be pro- forma which at best names the offence for which the second appellant is charged with abbreviated reference to the provisions of the Stock Theft Act …. The approach adopted by the parties is impermissible." [Paragraph 11]

The appeal was upheld and the appellants released on bail, subject to conditions.

MS ONICA VAN PAPENDORP

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 18 December 1967

B. Juris, University of Port Elizabeth (1988)

LLB, University of Port Elizabeth (1990)

LLM, UNISA (2011)

CAREER PATH

Acting Judge, Eastern Cape High Court (Port Elizabeth and Grahamstown January – March 2015, April – June 2016, October – December 2016, Port Elizabeth and Mthatha April – June 2017, June 2017)

Chairperson of Association of Regional Magistrates of Southern Africa, Eastern Cape

Facilitator, South African Judicial Education Institute (2013 –)

Regional Magistrate, Queenstown (2010 – Present)

District Magistrate, Queenstown (2003 – 2010)

Acting Magistrate, Mdantsane (2003)

Acting Magistrate, Queenstown (April 2003)

Acting Magistrate, Special Court Ezibeleni (2002 – 2003)

Attorney, Van Papendorp Attorneys (2001)

Professional Assistant, Fiveash & Cloete Attorneys, Queenstown (2000 – 2001)

Attorney, Van Papendorp Attorneys, Wellington (1995 – 2000)

Professional Assistant, Minitzer Attorneys, Paarl (1994 – 1995)

Admitted as practicing Attorney, Grahamstown High Court (May 1993)

Candidate Attorney, Squire Smith & Laurie Attorneys King Williams Town/Bisho, (1990 – 1993)

SELECTED JUDGMENTS

PRIVATE LAW

POHL V WEYER [2016] ZAECPEHC 21

Case heard 28 April 2016, Judgment delivered 10 May 2016

Applicant sought the termination of a joint venture agreement and concomitant termination of the respondent's right to continue performing radiography services from a hospital laboratory, and to vacate the laboratory.

Van Papendorp AJ held:

"Having regard to the various letters and attempts to settle the differences between the parties and the subsequent failure to do so, which is attached to the Applicant's founding affidavit, it is clear that the relations between the two parties soured to the extent that any continued working relationship has become strained and almost impossible. On these grounds alone, the Applicant would be entitled to have terminated the joint venture agreement as she did.." [Paragraph 39]

"... I have concluded that the Applicant was well within her rights to terminate the agreement." [Paragraph 40]

The termination of the agreement was confirmed.

MS NOLUTHANDO CONJWA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 26 June 1964

BJuris, University of Transkei (1986)

LLB, University of Transkei (1988)

CAREER PATH

Acting Judge, Eastern Cape High Court and Land Claims Court (2006 – 2007, 2010 – 2015, 2017)

Regional Magistrate (2004 -)

Head of Office, Department of Justice (1999 – 2004)

Acting Regional Magistrate (1996 – 1999)

Magistrate (1994 – 1996)

Prosecutor, Regional Court (1992 – 1994)

Member, ARMSA (2005 -)

Provincial Secretary, JOASA (2003 – 2005)

Member, Mbusco community organisation

Member, Masincedane womens' association

SELECTED JUDGMENTS

PRIVATE LAW

MINISTER OF SAFETY AND SECURITY V THEMBA TOKOTA, UNREPORTED JUDGMENT, CASE NO: CA 108/2010 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

Case heard 12 November 2010, Judgment delivered March 2011.

Respondent was awarded damages for injuries sustained while in custody of the SAPS, having been stabbed with a knife by another detainee while being detained in holding cells.

On appeal, Conjwa AJ (Revelas J concurring) held:

"The only real issue that this court is called upon to decide is whether ... the magistrate erred in his finding that the appellant had a duty of care to ensure, within reasonable limits, the safety of the respondent and had neglected to do so." [Paragraph 11]

"The knife used to stab the deceased was described as being approximately 22cms long. It was by no means a small knife which could easily be hidden. Had the police officers conducted a proper search of the detainees in their care, they would have discovered a knife of that size. ..." [Paragraph 14]

"... The appellant's members were, by reason of the relationship between themselves and the detainees, under a duty to have taken reasonable steps to protect the detainees including the respondent from such foreseeable harm by conducting a thorough search of the detainees. It was as a result of the negligence of the appellant's employees, by failing to thoroughly search the detainees that the knife in question found its way into the cells leading to the stabbing of the respondent. The appellant is in law liable for the injuries suffered by the respondent." [Paragraph 15]

The appeal was dismissed with costs.

CIVIL PROCEDURE

NORMANDIEN FARMS (PTY) LTD V TWALA 2010 JDR 0853 (LCC)

Case heard 19 March 2010, Judgment delivered 19 March 2010

Applicant sought an urgent order pending an action for eviction, seeking that the respondents be ordered to reduce their joint number of cattle to 14 head of cattle, and that the cattle be grazed only in a designated area.

Conjwa AJ held:

"It is correct that, where in proceedings on notice of motion a dispute of fact has arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicants' factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks." [Paragraph 14]

"From the papers … it appears that Mr Gebers in clause 15 of the lease agreement sought to set out the rights of the labourers. It is unfortunate that he has since passed on … There is nothing on the papers nor do the respondents suggest that Mr Gebers told an untruth. What the respondents allege is that their right to have cattle on the farm obtains from an agreement which their father had with Mr. Gebers to keep 50 head of cattle at the time. It is highly improbable that Mr. Gebers would, after having decided to set out the rights of the labourers, make a round about turn and change the number that they are allowed to keep. When one considers the size of the farm in question … as well as the fact that it is a timber farm, it casts some doubt as to whether the respondents would be allowed to keep the number that they allege as this would leave little room for the owner to farm." [Paragraph 15]

The order was granted. Respondents were ordered to reduce their joint heard to 19 head of cattle.

CRIMINAL JUSTICE

S V NDZUZO [2009] JOL 23962 (TK)

Judgement delivered 21 June 2006

The accused had pleaded guilty to theft in the Magistrates' Court, having been accused of stealing meat to the value of R17.50 from a supermarket. The accused had conducted his own defence. The matter came before the High Court on review in terms of section 304 of the Criminal Procedure Act.

Conjwa AJ (Miller J concurring) held:

"The section [invoked by the magistrate] certainly did not allow the magistrate to impose a sentence of direct imprisonment. The section allows the magistrate to impose a sentence of imprisonment that must be coupled with an option of a fine which, in the circumstances, would not exceed R1 500. The sentence was in the circumstance improperly imposed … The fact that the magistrate convicted the accused merely on a plea of guilty shows that she regarded the offence as minor. The sentence that the magistrate imposed is unduly harsh and disproportionate … especially when one takes into account the alleged value of the stolen item. The magistrate does not seem to have considered other sentencing options which the Act avails to her before she imposed the sentence … She does not seem to have

considered requesting a probation officer to investigate the personal circumstances of the accused, which would have assisted her in sentencing. ...” [Page 4]

“I am concerned about the way the public prosecutor tendered into evidence the information relating to accused's previous conviction. The previous conviction against the accused was not proved as provided for in the provisions of section 271 of the Act. The accused was not afforded an opportunity to deny or confirm same. Although it does not appear ex facie the record of the proceedings that the court took the previous conviction into consideration in reaching sentence, it does however seem to have tainted her mind hence the sentence. ” [Pages 4 - 5]

The conviction was confirmed, but the sentence was set aside and replaced with a fine of R300 or 30 days imprisonment, suspended for 2 years.

SIPHAMANDLA XOLI V THE STATE, UNREPORTED JUDGMENT, CASE NO: CA & R213/10 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

The appellant was convicted in the Regional Court on counts of pointing a firearm, unlawful possession of a firearm and malicious injury to property. He was sentenced to 4 years imprisonment (half of which was conditionally suspended for 5 years); a fine of R6 000 or 4 years imprisonment; and a fine of R500 or 6 months imprisonment respectively. All the sentences were ordered to run concurrently. The appeal was against the sentence only.

Conjwa AJ held:

“The sentence imposed ... raises a question ... whether it was competent for the Magistrate to have ordered that a sentence consisting of a fine with an alternative of imprisonment should run concurrently with another sentence. ...” [Paragraph 6]

“A reading of section 280(2) seems ... to lend itself to an interpretation that a court is empowered to order a concurrent running of sentence when the sentence imposed consists of imprisonment only. The section is framed in such a way that it makes express mention of sentences of imprisonment which shall be ordered to run concurrently. No mention is made ... of a sentence of a fine. There is no authority in this section to direct punishment of a fine to run concurrently with a punishment consisting of imprisonment. It is difficult to understand how a sentence of a fine can be said to run. Time does not enter into the consideration of punishment in the case of a fine and therefore fines cannot appropriately be said to run, let alone run concurrently.” [Paragraph 10]

“To hold otherwise would offend the express provisions of this section and would lead to an absurd result in that ... if the accused were to pay the fine, he would be left in the same position as if he had not paid, for he would still be required to undergo imprisonment. ... There is an added difficulty in this matter in that, it is not clear which of the three sentences ... the learned Magistrate intended to order that it run concurrently with the others ... It would appear further that, with the order as it stands the accused might, with the payment of one of the fines be able to escape liability in respect of the other.” [Paragraphs 11 - 12]

Conjwa AJ thus held that the magistrate had committed a material misdirection [paragraph 13]. In considering sentence, she found that the personal circumstances of the accused were "far out-weighed" by the nature and seriousness of the offence and the interests of society, and hence that a custodial sentence was unavoidable [paragraph 17]. The accused was sentenced to 2 years imprisonment on count 1, 2 years imprisonment on count 2 and 3 months imprisonment on count 3, the sentences imposed on counts 2 and 3 to run concurrently with that imposed on count 1. The sentence was backdated.

MEDIA COVERAGE

While sitting as a magistrate, convicted Mandla Mandela, grandson of Nelson Mandela, of assault and grievous bodily harm.

"Conjwa said Mandela was "arrogant, argumentative and evasive" during his testimony, adding that he had an "exaggerated sense of self"."

- Dorette de Swart, "Mandla Mandela found guilty of assault", *Herald Live* 31 March 2015 (available at http://www.heraldlive.co.za/news/2015/03/31/mandla-mandela-found-guilty-assualt/) It was reported that an appeal against the conviction and sentence was unsuccessful (http://ewn.co.za/2015/11/27/Mandla-Mandela-appeal-bid-flops)

MR MBULELO JOLWANA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 22 October 1966

LLM (Labour Law), University of South Africa (2016)

LLM (Banking Law), University of South Africa (2007)

LLB, University of Transkei (1994)

B Juris, University of Transkei (1992)

CAREER PATH

Acting Judge, Eastern Cape High Court, Mthatha (2017)

Director, Jolwana Mgidlana Incorporated (2001 –)

Professional Assistant, Nompozolo & Gabelana Incorporated (1997-2001)

Professional assistant, M.B. Mda Incorporated (1995-1997)

Candidate Attorney, M.B. Mda Incorporated (1993-1994)

Cape Law Society:

President (2016 -)

Council Member (2011 -)

Co-Chairperson, Disciplinary Committee (2014-2016)

Member, Disciplinary Committee (2011-2016)

Vice President, Cape Law Society (2 years)

Black Lawyers' Association:

Deputy Chairperson (2 years)

Deputy President (2 years)

SELECTED JUDGMENTS

PRIVATE LAW

MLILWANA V MINISTER OF POLICE (2212/2012) [2017] ZAECMHC 9 (22 MAY 2017)

Case heard 20 April 2017; Judgment delivered 22 May 2017

This was an action for damages for unlawful arrest and detention.

Jolwana AJ held:

"... [T]he arresting officer seems to have made up his mind that he was arresting the Plaintiff and that he would detain him for the investigating officer to continue with the investigation ... He even boldly stated that he did not have to investigate anything, all he needed to do was to respond to the complainant who claims to have seen the suspects by arresting them. It is clear by his own admission that the arresting officer did not have a reasonable suspicion at the point of arrest. He also did nothing to satisfy himself subjectively that there was a basis for detaining them. In these circumstances, the arrest of the plaintiff ... and his detention until he was seen by the investigating officer ... were both unjustified and therefore unlawful. ..." [Paragraph 14]

"... [I]t is clear that Warrant Officer Nombe relied on the suspicion of the complainant and not his own suspicion. In turn Warrant Officer Matanda relied on the suspicion of Warrant Officer Nombe when he decided to further detain the Plaintiff. This is so because both the arresting officer and the investigating officer did not have even a shred of evidence other than the pointing out of the complainant whose statement makes it clear that he did not personally witness the incident. There was also no statement at all from a person who witnessed the crime being committed. This was clearly an abuse of public power which is obviously unconstitutional and should therefore not be countenanced." [Paragraph 17]

The plaintiff's claim succeeded.

CIVIL PROCEDURE

EASTERN CAPE HUB DEVELOPMENT SERVICE NETWORK V RADIO GRAAF - REINET 2017 JDR 1093 (ECM)

Case heard 26 May 2017; Judgment delivered 27 June 2017

This was an appeal against the decision of a magistrate refusing an application for rescission of a default judgment.

Jolwana AJ (Majiki J concurring) held:

"... In his reasons for judgment the magistrate made no attempt at all to deal with the matter beyond wilful default. Once he satisfied himself that Rule 9 was complied with, he did not evaluate whether the appellant had a bona fide defence and or there was good cause shown or whether there was good reason to rescind the default judgment. This was a serious misdirection

on the part of the magistrate and a failure to do a proper assessment of whether or not there was good reason to rescind the default judgment as required by Rule 49." [Paragraph 9]

"... It would lead to a miscarriage of justice if in an appropriate case a Court were to be constrained into looking only on whether there is sufficient explanation for the default. In other words having found there to be wilful default it must still rescind default judgment in the interests of justice and allow the matter to be defended on the merits, wilful default notwithstanding where there is good reason to do so." [Paragraph 11]

"... The Court should satisfy itself that there is no good reason to rescind default judgment despite lack of or unsatisfactory explanation for the default, on the part of the defendant. In a country like ours in which there are thousands of small businesses that could be liquidated for a debt of a few thousands of rands, it would not be in the interest of justice that a good defence to the claim is ignored simply because there was proper service of the summons. There is a very high level of illiteracy in South Africa, not to mention illiteracy on matters concerning law, this will always require the courts, in the interests of justice, to be freed to evaluate each case on its own merits and decide accordingly. [...] The Courts should be able to exercise an unfettered discretion and decide whether it is in the interest of justice to refuse an application for rescission despite the existence of a bona fide defence. ..." [Paragraph 12]

"In my view, the respondent is not very sure of its own case. This then makes it possible that at trial, evidence may very well be led which shows that they are not only mistaken in the amount owing but, as alleged by the appellant, they are not owed at all or are owed less than the amount claimed. On the other hand, the respondent may very well prove, through the discovery process and evidence being led in court that they are indeed owed. It is clear that the magistrate failed to look beyond wilful default and therefore exercised his discretion incorrectly by failing to consider whether or not there is good reason to rescind the default judgment despite insufficient explanation for not defending the matter." [Paragraph 15]

The application for rescission was granted with costs.

LIBALELE V LIBALELE 2017 JDR 0999 (ECM)

Case heard 19 May 2017, Judgment delivered 13 June 2017

The issue in this case was whether a successful party in the Magistrates Court can, without more, proceed to execute a judgment when the appeal is deemed to have lapsed.

Jolwana AJ held:

"I have come to the conclusion that both Rule 50 (1) of the Uniform Rules as also Rule 51 (9) of the Magistrates' Court Rules in terms of which an appeal that is not prosecuted within 60 days of noting is deemed to have lapsed do not entitle the party in whose favour the judgment was granted in the court before to act on that judgment. ... " [Paragraph 17]

"The Magistrate's Court is part of the judicial system provided for in section 166 of the Constitution and it is specifically listed there as part of the Courts. Section 165 of the Constitution vests the judicial authority of the Republic in the Courts and in terms of subsection

(5) thereof 'An order or decision issued by a Court binds all persons to whom and organs of the state to which it applies'." [Paragraph 18]

"There is no rational basis or authority for interpreting the legal position differently in so far as the effect of noting an appeal against the decision of the Magistrates' Courts is concerned. The legal position has to be that the decision appealed against in the Magistrate's Court remains suspended until the appeal is finalised. Rule 50 (1) of the Uniform Rules and Rule 51 (9) of the Magistrate's, Court Rules are, in any view, no basis for treating judgments of the Magistrates' Courts differently. The fact that there is no equivalent provision to section 18 of the Uniform Rules in the Magistrates' Court Rules is certainly no rational basis for that contention either. This is more so if one takes into account the single united court structure that is provided for in section 166 of the Constitution. …" [Paragraph 19]

The first respondent's conduct in executing the judgment of the court a quo without a declaratory order of the High Court was declared irregular.

CRIMINAL JUSTICE

S V NGAKANA 2017 JDR 1091 (ECM)

This matter came by way of a special review. The matter commenced before a Mr Mgudlwa, an acting magistrate, who heard the state's case in respect of one witness. The matter was adjourned, and was heard again on 1 March 2017, the day after Mr Mgudlwa's appointment as an Acting Magistrate had expired. He was re-appointed with effect from the 8 March 2017 up to 7 June 2017.

Jolwana AJ (Brooks J concurring) held:

"… This means that as at the date the hearing commenced the Presiding Officer was not a judicial officer as his re-appointment had not yet been effected and when he was re-appointed, the appointment was with effect from the 8 March 2017. His services were effectively terminated on the 28 February 2017 and on the date of him presiding over this matter his jurisdiction to preside over the matter had come to an end and accordingly he is functus officio and proceedings are aborted and a nullity" [Paragraph 2]

"… It is irrelevant whether the matter had reached the conviction stage or not and therefore the provisions of Section 275 of the CPA are not applicable." [Paragraph 5]

"In my view where the accused pleaded but before conviction or where there was a conviction but before sentence could be imposed it transpires that the presiding officer who heard the matter had not yet be appointed or re appointed as such on the date of hearing, the proceedings are a nullity ex lege and can continue before another magistrate de novo without the necessity of an order from the High Court" [Paragraph 6]

Jolwana AJ declared the proceedings a nullity ex lege and ordered the proceedings to continue before another magistrate de novo without the necessity of an order from the High Court.

MGXABHAYI V S (CA&R05/2017) [2017] ZAECMHC 8 (12 MAY 2017)

Case heard 05 May 2017; Judgment delivered 12 May 2017

The Appellant was convicted and sentenced to life imprisonment by the regional court for raping a 15-year-old. This was an appeal against both conviction and sentence

Jolwana AJ (Majiki J concurring) held:

"This evidence of the complainant is fraught with problems in terms of its credibility and sufficiency for purposes of conviction bearing in that the evidence that is required is of a standard of proof that is beyond reasonable doubt. …." [Paragraph 9]

"Furthermore, the court a quo erred in its application of section 208 of the Criminal Procedure Act which makes provisions for the conviction of the accused on the evidence of a single competent witness. In the process the court a quo misdirected itself in applying, if it did apply at all, the cautionary rule. […] If this evidence was to be considered at all for the purposes of conviction, it goes without saying that it ought to have been tested both for relevance and credibility and this the court a quo failed to do." [Paragraph 11]

"The Magistrate did not even try to test this child's, evidence for trustworthiness to exclude suggestibility, for instance. We know that the child named the appellant after the doctor told her that her kind of sickness is only sexually transmitted. The child could be substituting the person who had sexual intercourse with her, consensual or not, with the appellant." [Paragraph 12]

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

MEDIA COVERAGE AND ADDITIONAL INFORMATION

Quoted supporting a fellow lawyer and BLA member who gave pro-bono representation to 20 University of Fort Hare students arrested on charges of public violence during a fees must fall protest in October 2015.

(http://www.dispatchlive.co.za/news/2015/10/23/attorney-happy-to-help-defend-rights-of-those-arrested-for-free/)

"We want to assist the administration of justice. […] In the same way they cannot afford fees, they cannot afford lawyers. We want them to focus on their cause and not be distracted because their peers have been arrested."

Quoted speaking on behalf of the Cape Law Society on calls for an investigation into the conduct of the National Director of Public Prosecutions Shaun Abrahams.

(http://www.sowetanlive.co.za/news/2016/12/03/cape-law-society-calls-for-probe-into-shaun-abrahams)

"The baseless fraud charges filed against a sitting Finance Minister, Pravin Gordhan, during October 2016 and many other pending investigations against the President and senior members of government ostensibly on allegations of corruption, theft, fraud and other heinous crimes, signifies that South Africa is facing a constitutional crisis. [...] These cases come at a time when the country continues to face the threat of a serious economic downgrade with far-reaching consequences for our collective future. [...] The Cape Law Society views these developments with great concern and trepidation, and calls on the Office of the NDPP not to do anything relating to the Finance Minister that further undermines the good standing of this office and the country at large. This is vital to the rule of law and constitutional democracy."

This did not mean that Gordhan was above the law, he cautioned.

"We believe that there is a sound rational basis for the President to launch an investigation into the conduct of the NDPP during the period leading up to and including the filing of the charge against Minister Gordhan and its subsequent withdrawal. [...] We urge the NDPP to submit to such an investigation by an independent and objective group of people, while maintaining a measure of decorum and integrity throughout."

MS SHARON CHESIWE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 29 November 1963

LLB, Vista University (2002)

LLM, Free State University (2007)

NDip Labour, Oxbridge Academy (2013)

CAREER PATH

Acting Judge, Free State and Gauteng High Courts (2016 – 2017, 2012)

Family Advocate (2008 – 2016)

Legal Advisor, Legalwise (2006)

Professional Assistant, Bezuidenhout Attorneys (2005 – 2008)

South African Women Lawyers' Association (SAWLA)

Member (2010 -)

Treasurer (2008 – 2010)

Secretary (2006 – 2008)

Member, Lebone Childrens' Home

Member, Democratic Alliance (2006 – 2009)

Member, African National Congress (1998 – 2002)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

QIBING TRANSPORT ASSOCIATION AND OTHERS V REGISTRAR OF PUBLIC TRANSPORT AND OTHERS, UNREPORTED JUDGEMENT, CASE NO.: 3108/2011 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 1 March 2012, Judgment delivered 26 April 2012

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

Chesiwe AJ held:

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

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

"… It is common cause that the interdict is against the withdrawal of the temporary permits … [and] that these permits have expired and the matter is moot and is non-existing. It would therefore be academic to grant such an order" [Paragraph 25]

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

CIVIL PROCEDURE

MOQHAKA MUNICIPALITY V MABULA (2292/2008) [2012] ZAFSHC 38 (15 MARCH 2012)

Case heard 5 March 2012, Judgment delivered 15 March 2012

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

Chesiwe AJ (Claasen AJ concurring) held:

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

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

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

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

The appeal was upheld with costs and the summons removed from the roll.

SUIDWES LANDBOU (EDMS) BPK H/A SUIDWESFIN V LOOMAR BOERDERY (EDMS) BPK AND ANOTHER (5129/2011) [2012] ZAFSHC 24 (1 MARCH 2012)

Case heard 9 February 2012, Judgment delivered 1 March 2012

Plaintiff sought summary judgment against defendants.

Chesiwe AJ held:

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

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

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

The defendants were granted leave to defend the action.

CRIMINAL JUSTICE

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

Case heard 20 February 2012, Judgment delivered 19 April 2012

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

Chesiwe AJ (Ebrahim J concurring) held:

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

"MR's evidence was formalistic in nature …There was no fumbling or hesitancy … in giving her testimony. … The court is an intimidating place for most witnesses and, doubtless, even more so for child witnesses. In the face of such direct scrutiny, bearing in mind that MR was not testifying through the medium of an intermediary, but in person in full view of the appellant, his attorney, the prosecutor, as well as the presiding magistrate, I am convinced that, had she indeed not been telling the truth, this would have been patent to the court by virtue of her demeanour. In court the content of her evidence also speaks volumes as to her veracity in giving it. It was such a straightforward, simple story that she was called upon to tell the court, that it permitted of no fabrication. … " [Paragraph 8.1]

"It was submitted on behalf of the appellant that the rape was not of such a serious nature, but the fact that the child was 9-years old at the time of the crime, in itself, is very serious. Rape of a child violates the child's dignity. …" [Paragraph 17]

"In my view the trial court did not accord due weight to the personal circumstances of the appellant: the fact that he was 19 years of age and a scholar when the offence was committed; that he is a first offender with good prospects of rehabilitation, and that he had spent three years and three months in custody while awaiting his trial. …" [Paragraph 19]

"… [D]espite his lack of remorse … I am not persuaded that the sentence of life imprisonment … is warranted in the appellant's case. I say so in light of the fact that the appellant is a youthful first offender who has been assessed by expert evidence to be capable of being rehabilitated, given the opportunity. These are weighty factors, which cumulatively must redound to his benefit as substantial and compelling circumstances justifying the imposition of a sentence less than the minimum prescribed …" [Paragraph 21]

"…. I am of the view that every judicial officer who has to sentence a youthful offender must ensure that, whatsoever sentence he or she decides to impose, will promote the rehabilitation of the particular youth. …" [Paragraph 22]

"A fine balance needs to be struck between society's needs to punish crime, whilst not overlooking the right and interest of a juvenile offender to be accorded an opportunity to be rehabilitated in suitable and appropriate cases. Taking into account all the relevant factors … leaves me with the conviction that a sentence of 15 years' imprisonment would be an appropriate sentence …" [Paragraph 23]

KHUMALO V S (A175/2010) [2012] ZAFSHC 28 (8 MARCH 2012)

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

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

Chesiwe AJ (Mocumie J concurring) held:

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

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

The appeal was dismissed.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE FREE STATE V RADEBE (5293/2015) [2016] ZAFSHC 97 (9 JUNE 2016)

Case heard 12 May 2016, Judgment delivered 9 June 2016

Applicant sought an order striking off, alternatively suspending, the respondent from the roll of attorneys. The application stemmed from a complaint that the respondent had failed to properly administer a deceased estate.

Chesiwe AJ (Rampai J concurring) held:

"... [T]he respondent is young and relatively inexperienced in the running of an attorney's office. It was irregular and unethical of him to abuse the funds of the estate and not give proper account to the heirs. He admitted his mistakes, which indicates a measure of remorse. He has not attempted to deceive the applicant nor the court. ..." [Paragraph 29]

"We have considered the peculiar circumstances of the misconduct. We are not convinced that a proper case has been made out to justify the finding that the respondent is no longer a fit and proper person to continue practicing as an attorney. [...] We have weighed up the respondent's conduct against the conduct expected of a prudent attorney. We found the conduct of the respondent to be wanting. However, his deviant conduct did not, in our view, stem from an inherently irreparable character defect. It append to us that, given a chance, he would probably redeem himself and prudently conduct himself in an honourable manner as a fit and proper attorney is expected to. In the light of all those considerations we are inclined to exercise the discretion entrusted to us in favour of the respondent as regards the second leg of the enquiry. This then is our value judgment." [Paragraphs 30 – 31]

"... [T]he respondent admittedly made withdrawals from the estate account of the deceased. The respondent acknowledged that he had no intention of stealing the funds, but always intended to pay back all the money he took from the estate account. The deposits he made supported his averments. That tended to diminish the moral blame worthiness of his action. He did not have the *mala* fide criminal intent to permanently deprive the estate the actual benefit of its funds. ..."

Respondent was suspended from practising as an attorney for his own account for 12 months.

ADVOCATE PHILLIP LOUBSER SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 10 August 1954

LLB, University of Stellenbosch (1983)

BA (Law), Free State University (1978)

CAREER PATH

Acting Jude, Free State High Court (2017)

Member, Free State Society of Advocates (1991 –)

Member, Law Society of Lesotho (1996 –)

State Advocate, Department of Justice, Kimberly and Mthatha (1986-1990)

Control Prosecutor, Department of Justice, Kimberly (1984-1985)

Journalist and sub-editor, Nasionale Pers (1979-1980)

SELECTED JUDGMENTS

PRIVATE LAW

MNYANDU V OLIPHANT AND OTHERS (A202/2016) [2017] ZAFSHC 61 (20 APRIL 2017)

Case heard 27 March 2017; Judgment delivered 20 April 2017

This was an appeal against the judgment of a Magistrate dismissing an application for the eviction of Mr Oliphant and all other occupants from the premises they occupied, together with ancillary relief. The application was brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

Loubser AJ (Daffue J concurring) held:

"[T]he Court a quo incorrectly borrowed the words of Moloi J in Dhlamini v Lopolo and Another 2010 ZAFSHC 54 to the effect that only a legally valid Deed of Transfer confers ownership in property. A Deed of Transfer is a valid document indicating ownership in the immovable property mentioned therein, until such time as it is set aside by a High Court. The Deed of Transfer did in fact justify a finding that the Appellant was the owner of the property, contrary to the Court a quo's misdirection in this regard. That judgment is at best for the Respondent distinguishable on the facts, but from a legal point of view wrong in the doubt created pertaining to the Title Deed." [Paragraph 21]

"The Magistrate did not have any jurisdiction to decide the validity of the Appellant's Deed of Transfer or even to raise questions as to whether it was defective or not. The Magistrate ought to have found that the Appellant was the registered owner of the property and therefore vested with the necessary locus standi to launch the application for eviction." [Paragraph 22]

"… The Magistrate had therefore also erred by finding that the Respondent has shown a right to inheritance that made his occupation of the property lawful. The Magistrate ought to have found that the Respondent was an unlawful occupier that had to be evicted if it was considered just and equitable to make such an order." [Paragraph 24]

"In order to establish what is just and equitable in the circumstances, a balanced approach must be adopted, that is by considering the interests of the land owner on the one hand, and the interests of the unlawful occupier on the other. …" [Paragraph 25]

"Considerations of what is just and equitable may not be allowed to trump the illegality of occupation. An unlawful occupier can never remain indefinitely on the property, and the question is merely how much time should he be given to vacate the property." [Paragraph 26]

"… [T]he Respondent and his wife and two children, aged 5 and 15 years, have been occupying the property for some nine years prior to his testimony in the Court a quo. The Respondent's source of income is a tavern that he operates on the property. Although the application was initiated in the Court a quo during the course of 2013, the hearing thereof was delayed for a period of some three years …" [Paragraph 27]

"The Respondent was therefore aware, at least since 2013, that proceedings were under way to have him and his family evicted from the property. He had ample time to make provision for such an eventuality. Moreover, he chose not to partake in these proceedings, and informed through his legal representatives that he would abide by the decision of the Court." [Paragraph 28]

The appeal was upheld with costs and the occupiers were ordered to vacate the property.

CRIMINAL JUSTICE

MALINGA V S (A164/2016) [2017] ZAFSHC 40 (23 MARCH 2017)

Case heard 06 March 2017, Judgment delivered 23 March 2017

Appellant was sentenced to life imprisonment in the regional court for rape. The appeal was against conviction and a sentence on the grounds that, among others, the Appellant had not been informed of the prescribed minimum sentences provided for in sections 51(1) and 51(2) of the Criminal Procedure Act, and that on a proper construction of the prosecution's evidence the Court a quo should have found that the complainant was not raped more than once. The sentence was based on the finding of the court a quo that the Appellant had raped the complainant five times.

Loubser AJ (Reinders J concurring) held:

"... [T]he charge sheet did indeed refer to the Act, although the specific section was not mentioned. In addition, the Appellant was legally represented throughout the trial proceedings, and the probability of any prejudice to the Appellant is therefore regarded as minimal." [Paragraph 6]

"... [B]oth the prosecutor and the legal representative of the Appellant have referred to the aspect of minimum sentences prior to the commencement of the sentencing proceedings. I therefore find that there was no prejudice to the Appellant caused by the failure concerned." [Paragraph 8]

"As to the question whether the Appellant had raped the complainant only once, the Court a quo found beyond reasonable doubt that she was raped at least five times during the course of the night. ...'" [Paragraph 9]

"... [T]he evidence of complainant was sadly lacking in providing the Court a quo with any of the information referred to in the authorities ... We do not know, for instance, whether the Appellant ever ejaculated during the course of the events, nor do we know how long the intervals between the separate acts of penetration were. In my view, the Court a quo was therefore wrong in concluding that there were five separate incidents of rape. The evidence of the complainant was glaringly insufficient and inadequate to justify the conclusion so reached." [Paragraph 10]

"It is found, in the circumstances, that the Court a quo wrongly applied the provisions of Section 51(1) of the Act and sentenced the Appellant as if he had raped the complainant more than

once. Section 51(2)(b) of the Act prescribes a minimum sentence of 10 years imprisonment for a first offender who commits rape. … The Appellant was a first offender …" [Paragraphs 11 - 12]

"In my view, the aggravating facts justify a sentence heavier than the prescribed minimum sentence. I regard 14 years imprisonment as appropriate in all the circumstances." [Paragraph 13]

The sentence of life imprisonment was replaced with a sentence of 14 years' imprisonment.

ADVOCATE LOUIS POHL SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 28 September 1959

BA, University of Stellenbosch (1983)

LLB, University of the Free State (1987)

CAREER PATH

Acting Judge, Free State High Court (2013, 2014, 2017)

Advocate (2008 -)

Director, Honey Attorneys (2006 – 2008)

Advocate (1992 – 2006)

Prosecutor and State Advocate, Department of Justice (1988 – 1992)

Member of the Bar Council, Free State Society of Advocates

SELECTED JUDGMENTS

COMMERCIAL LAW

BLIGNAUT V STALCOR (PTY) LTD AND OTHERS 2014 (6) SA 398 (FB)

Case heard 7 November 2013, Judgment delivered 14 November 2013

This was an application by the surety and co-principal debtor of a close corporation to have a warrant of execution against his immovable property set aside, on the basis that it was his personal residence. The main issue before the court was whether a business rescue amounted to a 'statutory compromise' and would amount to a defence available to the applicant.

Pohl AJ held:

"In their authoritative work Henochsberg on the Companies Act … the learned authors … state that the effect of s 154 on a surety could be that the creditor will not be able to claim against the surety due to the fact that the principal debt has been discharged. No authority is however quoted for this contention and no reference is made by the author to the applicability or not of defences in rem and/or defences in personam. I find this contention speculative at best." [Paragraph 13]

"Mr Roux … referred the court to the definition of business rescue as contained in s 128 of the Companies Act 71 of 2008. He submitted that it is clear from this definition of business rescue that it amounts to a temporary supervision of the company and of the management of its affairs, thrown out to the company as a lifeline to resuscitate it, as it were. He thus furthermore submitted that from this it is evident that it is a defence in personam which attaches to the relevant company under business rescue, and the company alone. It does not bring an end to the obligation. I agree …" [Paragraph 18]

"I … conclude that the purpose of the whole business rescue scheme is to, inter alia, enable a company in financial distress to get back on its 'financial feet' … It is thus a temporary measure, by the very nature of it, which can only be achieved if it is afforded to the company, and the company alone. It could not have been the intention of the legislature … to include sureties and co-principal debtors as beneficiaries within the scheme of business rescue provided for in the Companies Act … It therefore does not include any sureties and/or co-principal debtors singuli in solidum like the applicant within the context of the factual matrix of this case." [Paragraph 20]

The application was dismissed with costs.

The judgment was cited with approval by Charles Shapiro, "Article on Judge Rogers Judgement", 20 April 2015 (http://www.fluxmans.com/article-on-judge-rogers-judgement-by-charles-shapiro/):

> "We agree with the view expressed by Pohl in the Blignault case and the obiter dictum of Wallis in the New Port Finance case because in our view business rescue was intended to resuscitate companies under financial distress and could never have been intended to come to the aid of sureties; had the legislature intended to extend the protection afforded to financially distressed companies to sureties; the legislature would have expressly provided for such extension …"

PRIVATE LAW

INNOVENT RENTAL & ASSET MANAGEMENT SOLUTIONS (PTY) LTD V MEC FOR THE PROVINCIAL DEPARTMENT OF HEALTH, FREE STATE PROVINCE (2234/2013) [2013] ZAFSHC 224 (5 DECEMBER 2013)

Case heard 21 November 2013, Judgment delivered 5 December 2013

The applicant was seeking payment of rentals due to it by the respondent in terms of a written rental agreement. The respondent's argued that the written rental agreement was null and void due to the parties' failure to adhere to the relevant Supply Chain Management Policy, the Public Finance Management Act, and certain provisions of the Constitution.

Pohl AJ held:

"The applicant's name is also conspicuously absent from the … annexures. This is a clear indication that the applicant did not take part in the applicable Supply Chain Management Policy, which was followed by the respondent at all relevant times hereto." [Paragraph 11]

"It is important to have regard to the fact that the applicant filed a replying affidavit, but in this affidavit there is no allegation to the effect that the applicant complied with the relevant Supply Chain Management Policy and the relevant statutes." [Paragraph 13]

Pohl AJ then dealt with an argument that the applicant fell under an "umbrella of legitimacy" from a supplier which did comply with supply chain procedures:

"… Such a construction would, to my mind, defeat the object of the supply chain procedure and the relevant statutory provisions, which are inter alia designed to facilitate a fair, equitable, transparent, competitive system which combats the possibility of fraud, corruption and favouritism." [Paragraph 15]

"It is common cause that the applicant did not take part in the supply chain process that was in place at the time. This, together with the other facts alleged by the respondent in raising the defence of invalidity of the contract, has the inevitable effect that the rental agreement is invalid and cannot be enforced." [Paragraph 19]

"The basis of the relief sought by the applicant … is premised on the validity of the rental agreement. My finding that the contract is invalid and unenforceable, by necessary implication precludes the applicant from obtaining such relief… The same applies to … the prayer for the return of the goods. …" [Paragraph 20]

The application was dismissed with costs

CIVIL PROCEDURE

MOLOI V MEDI-CLINIC (PTY) LIMITED (A38/2014) [2014] ZAFSHC 153

Case heard 1 September 2014, Judgment delivered 11 September 2014

This was an appeal against certain orders of a Magistrates' Court, refusing an application for postponement, granting an eviction order and awarding punitive costs against the appellant. The appellant had leased certain consulting rooms from the respondent, and had refused to vacate the premises despite the lease having come to an end through effluxion of time.

Pohl AJ (Kruger J concurring) held:

"A Court entertaining an application for a postponement exercises a discretion. It is a discretion in the narrow sense. … [T]his requires the appellant to establish that the magistrate exercised the power conferred on him capriciously or upon a wrong principle, or did not bring his unbiased judgment to bear on the question, or did not act for substantial reasons." [Paragraph 10]

"It is important to have regard to the fact that this particular date when the eviction application served before the court a quo, was prearranged by agreement between the parties. The mistaken belief that the appellant's legal representatives may have laboured under, namely, that the magistrate's court application will not proceed because of the High Court application, was a presumption they made at the peril of the appellant." [Paragraph 16]

"An important aspect, which the magistrate correctly took into account, is that the application was brought by the appellant at the last moment. It could hardly have been made at a later stage. It must have been apparent to the appellant well before the agreed date for the hearing that the matter was proceeding and that the High Court application, which was the apparent reason for the postponement, would not be ready in time. … Despite this, the first suggestion that the appellant may not be prepared to proceed on the agreed date was provided on the afternoon before the hearing. This does not constitute timeous bringing of the application." [Paragraph 18]

"The contract expired, it came to an end. In the papers before the court the appellant did not take the point that he wished to argue that the respondent was obliged to allow him to occupy the rooms, despite his agreement of lease having come to an end and despite his concession on the papers that he had no problem in vacating the rooms. The appellant's attitude illustrated a pattern of being obstructive and wanting to buy time, trying to find reasons to justify his continued occupation. The application for postponement was correctly refused." [Paragraph 19]

"Another important aspect with regard to the prejudice to the respondent is the fact that by the time the eviction application was to be heard in the court a quo, the appellant had been in unlawful occupation of the premises for over six months. … The fact that there was significant prejudice to the respondent and that the application for the postponement was properly opposed, leads this court to the conclusion that the magistrate exercised his discretion judicially and that the appeal against the magistrate's refusal of the application for postponement should be dismissed." [Paragraph 20]

"The lease agreement expired and terminated ex lege due to effluxion of time. A lease that has a fixed period terminates automatically, as a matter of law, upon the expiry of the time period. When a lease terminates due to the expiry of its fixed period, all rights terminate immediately and no rights to occupation remain." [Paragraph 21]

"The appellant provided an undertaking to the respondent that he would vacate the premises by 30 April 2013. He then elected to renege on this undertaking. It is furthermore true that the appellant waited till the very last moment before he informed the respondent about his intention to apply for a postponement and he then, on the day of the hearing of the eviction order, only gave the respondent his application for the postponement. … The appellant furthermore wasted a considerable amount of time and legal costs by breaching the legal obligation and his undertaking given to respondent to vacate the premises. His defence to the eviction application was manifestly spurious." [Paragraph 24]

The appeal was dismissed with costs.

CRIMINAL JUSTICE

S V MPHARU (147/2014) [2014] ZAFSHC 133

Judgment delivered 04 September 2014

This was a special review in terms of section 304 (4) of the Criminal Procedure Act. The accused had been convicted of housebreaking with intent to steal and theft. The magistrate sentenced the accused to three months imprisonment and made an order that the accused was not eligible for parole - a provision only applicable for sentences of 2 years and more.

Pohl AJ (Jordaan J concurring) held:

"The control magistrate, Bloemfontein, Magistrate Matshaya, who sent this matter on special review, indicated that the Correctional Centre Head phoned the control magistrate reporting that the accused is due for parole but cannot be released due to the fact that the magistrate that sentenced him invoked the provisions of 276B of Act 51 of 1977." [Paragraph 4]

"It is clear from the wording of Section 276B(1) that the court that sentenced the accused was only allowed to invoke the provisions of Section 276B when a sentence of direct imprisonment for a minimum period of 2 years were imposed. In this case the magistrate imposed a sentence of only 3 months imprisonment and therefor did not have the power to fix a non-parollable period. The magistrate thus committed an irregularity which resulted in a failure of justice." [Paragraph 5]

"The magistrate's order invoking the provisions of Section 276B of Act 51 of 1977 is set aside, otherwise the conviction and sentence are confirmed." [Paragraph 6]

MS TANYA BRENNER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 4 March 1962

BA, University of Natal, Durban (1982)

LLB, University of Cape Town (1986)

Post graduate Diploma in Corporate Law, UNISA (2004)

CAREER PATH

Acting Judge

Gauteng High Court, Johannesburg (2004 – 2007, 2010 – 2011, 2017)

Gauteng High Court, Pretoria (2016 – 2017)

North West High Court, Mahikeng (2012)

Tanya Brenner Attorney (2004 -)

Professional Assistant, Stan Fanaroff Attorneys (2002 – 2004)

Professional Assistant and Director, Feinsteins Attorneys (1991 – 2002)

Professional Assistant, Miller Ziman Attorneys (1990 – 1991)

Professional Assistant, Melamed & Hurwitz Attorneys (1989 – 1990)

SELECTED JUDGMENTS

PRIVATE LAW

EKURHULENI METROPOLITAN MUNICIPALITY V ROSENKRANTZ (82075/2014) [2016] ZAGPPHC 462 (6 JUNE 2016)

Case heard 29 April 2016, Judgment delivered 6 June 2016.

This was an application to interdict the respondent from using property for purposes beyond those authorised by the title deed, and to demolish and remove unauthorised building structures. Applicant argued that respondent had erected buildings on the property without plans or permission, and was renting the buildings out contrary to title deed permissions. Respondent argued that the demolition order would be an effective eviction of the tenants, who were protected by the Extension of Security of Tenure Act (ESTA).

Brenner AJ held:

"It appears that Rosenkrantz is invoking ESTA as a convenient mechanism for flouting his legal duty to respect the conditions of title to which he bound himself when he acquired the property, and to which he remains bound to date. This is an untenable state of affairs which no Court of law should countenance. … This does not mean, however, that the constitutional rights of the tenants on his property should be compromised as a result of his conduct. There is certainly no indication that the tenants are even aware of the fact that their tenancy on the property falls foul of its conditions of title." [Paragraphs 31 – 32]

"While taking cognisance of Rosenkrantz' disregard for his legal obligations vis a vis the Municipality, I am nevertheless constrained to take account of the legal rights of the tenants on his property. I cannot, as the Municipality expects, disabuse my mind of their constitutional rights. Pure common sense dictates that an order for the demolition and removal of the unauthorised structures on the property will necessitate the prior, or accompanying, eviction of these tenants. The Municipality argues that an adverse order against Rosenkrantz on his own would suffice because it would compel him to cancel the leases with the tenants. Yet, on the facts, the leases appear to have been concluded between the Goebels and the tenants, and the Goebels have not been cited as co-respondents. …" [Paragraph 39]

"Based on the applicability of ESTA to the facts in casu, this Court has no jurisdiction to hear an application which, if granted, will cause, as a concomitant and necessary incident, the eviction of tenants who are occupying agricultural land with the consent of the owner. On this ground simpliciter the application must fail. … Moreover, and albeit that the jurisdictional issue disposes of the case in this Court, so that the issue for present purposes is academic, it will be necessary in due course for the Municipality to join all tenants residing on the property, and the Goebels, and possibly the bondholder, as interested parties to any such proceedings." [Paragraphs 60 – 61]

The application was dismissed, with each party bearing their own costs.

THABANG DENNIS SEPHAI V MEC FOR TRANSPORT, ROADS AND COMMUNITY SAFETY, UNREPORTED JUDGEMENT, CASE NO. CIV APP. 42/2011 (NORTH WEST HIGH COURT, MAFIKENG)

Case heard 23 March 2012, Judgment delivered 29 March 2012

This was an appeal against the Magistrate's dismissal of a claim of damages for unlawful arrest and detention. The appellant (plaintiff in the court a quo) claimed R25 000.00 in damages for unlawful arrest and detention.

Brenner AJ (Hendricks J concurring) held:

"It is common cause that the arrest was without warrant. The offence for which the plaintiff was arrested is not an offence described in Schedule 1 to the Criminal Procedure Act … ("the CPA"). So section 40(1)(b) of the CPA which permits an arrest without warrant on reasonable suspicion of the commission of a Schedule 1 offence does not apply." [Paragraph 20]

"… At issue was whether the plaintiff had committed the offence of contravening section 127(1) of the NLTTA in his presence. This is a jurisdictional prerequisite to the power of arrest and requires some knowledge by the arrestor of the essential elements of the particular offence." [Paragraph 22]

"On an overview of the established facts, this jurisdictional prerequisite did not exist. The plaintiff was an off-duty taxi-driver who was driving home after finishing work, and was conveying two passengers home without reward." [Paragraph 23]

"Since the jurisdictional facts for section 40(1)(a) of the CPA to apply were not present, it is unnecessary to decide whether or not the discretion to arrest was exercised reasonably." [Paragraph 29]

"Apart from the bare modicum of inconvenience, there is little to aggravate the respondent's conduct vis a vis the appellant. Taking into account the age of the plaintiff, the circumstances of his arrest, including the fact that he was neither handcuffed or manhandled, the short duration of his detention (some four and a half hours), its limited publicity, the fact that no sinister motive was proved in his arrest, his vocation as a taxi-driver in the employ of another person, the fact that his livelihood was not compromised in any way by his arrest, and awards made in comparable cases, a fair and appropriate award for damages in an amount of R7 500.00." [Paragraph 39]

The appeal was upheld with costs.

COOPER V ACKERMAN, UNREPORTED JUDGEMENT, CASE NO. 2006/5897 (WITWATERSRAND LOCAL DIVISION)

Judgment delivered 28 February 2008

The case was based on three claims for defamation. Defendant instituted a counter claim for a statement and debatement of account. The defendant denied publication of the statement in issue, and denied the defamatory nature of the statements. His counterclaim alleged that the plaintiff in an express, tacit or implied agreement was to supply him with regular and not less than monthly updates on the affairs of his trust account in respect of a certain deceased estate and a company, Mystic Beverages (Pty) Ltd. The plaintiff denied having concluded an agreement on the terms alleged by the defendant.

Brenner AJ held:

"No evidence was adduced by the defendant to support his counterclaim. None of the requirements for a statement or debatement of account was established in evidence, quite apart from the fact that, if there were such a claim, it would enure in favour of the company and not the defendant personally. The company was not party to this action. The claim must accordingly fail." [Paragraph 104]

"... [T]he claims for defamation should be viewed in the context of the parties' conduct. Neither party was beyond reproach. It is inexplicable why the plaintiff did not convey to the defendant his decision, when he made it, to hold the settlement sum in his trust account in the name of the estate. And to tell the defendant his reasons for doing so. The plaintiff should have stated his case in circumstances in which he had signed an agreement which expressly provided that the monies were jointly payable to the estate and the company. ..." [Paragraph 105]

"I refer to the first of the plaintiff's claims. ... In my view, the words used in the penultimate paragraph of the defendant's affidavit were per se defamatory, making the defendant's views quite plain: that the plaintiff had stolen money from Mystic Beverages (Pty) Ltd, thereby imputing dishonesty, and criminal and unprofessional conduct of the plaintiff." [Paragraph 112]

"I refer to the second claim. The plaintiff contended that the defendant's publication of an objection to his appointment as executor was defamatory in the secondary sense, carrying with it the innuendos that the plaintiff was not a fit and proper person to carry this office, and that he was untrustworthy and dishonest. I disagree. An objection on its own does not impute these innuendos. The evidence revealed that the defendant had mentioned the criminal investigation and the Law Society complaint in his correspondence with the Master. This was not the case pleaded by the plaintiff. On the facts, I find that an objection was made by the defendant to the plaintiff's appointment as executor, despite the defendant's desperate attempts to prove otherwise. But the plaintiff failed to prove that the statement itself was defamatory, whether in the primary or secondary sense." [Paragraph 116]

"I refer to the third claim. It was the plaintiff's case that the statement in the complaint to the Law Society inferred that the plaintiff had misappropriated money from the company which he was obliged to retain in his trust account. I disagree. One cannot infer from the offending statement quoted ... that the plaintiff allegedly misappropriated money from the company. The defendant simply asked the Law Society to establish the whereabouts of the money from the settlement agreement, and there was a basis for this enquiry. ..." [Paragraph 117]

The plaintiff was partially successful. The defendant's counterclaim was dismissed.

CRIMINAL JUSTICE

S V ROSELE AND ANOTHER (CA 100/2008) [2012] ZANWHC 9 (3 APRIL 2012)

Case heard 23 March 2012, Judgment delivered 3 April 2012

This was an appeal against the conviction and sentence, appellants having been convicted in the regional court on two counts of robbery with aggravating circumstances. In addition, the first appellant was

convicted on a charge of escaping from lawful custody. At trial, the first appellant elected to conduct his own defence, while the second appellant was legally represented.

Brenner AJ (Hendricks J concurring) held:

"It has become established practice to separate trials where one or more accused pleads guilty and the others not guilty." [Paragraph 31]

"But this is not a peremptory requirement, and a failure to separate does not automatically result in the setting aside of a conviction where an appeal court is of the view that a reasonable court would have nevertheless convicted the accused. ..." [Paragraph 32]

"The probability of prejudice is the critical criterion. In casu, accused one and three pleaded guilty to one count of robbery, and their plea explanation simply admitted the elements of the offence without any factual detail. They did not incriminate their co-accused, nor did they state that they were in the company of others at the time. They did not testify against the appellants." [Paragraph 33]

"In the result, no prejudice was suffered by the appellants. There was no irregularity or failure of justice because the court did not mero motu separate the trials." [Paragraph 34]

"In our respectful view, the court a quo misdirected itself by convicting on two counts of robbery and not one. The persons whose goods were taken from them by force were all present at the same place and time when this occurred. There was only one intent, that is, to rob the occupants of Mr Masibi's house. There was one continuous criminal transaction. In the light of our finding that only one count of robbery is sustainable, it is unnecessary for us to deal with the cumulative effect of the sentences." [Paragraph 40]

"A conspectus of all relevant circumstances pertaining to sentence does not reveal any substantial and compelling circumstances which would justify a lesser sentence than fifteen years. The prescribed minimum sentence is neither unjust nor disproportionate to the crime in casu, the appellants, and the interests of society." [Paragraph 45]

The appeal was upheld in part and dismissed in part.

ADMINISTRATION OF JUSTICE

NEDBANK LIMITED V CHIURA AND ANOTHER (74492/2016) [2016] ZAGPPHC 1197 (3 NOVEMBER 2016)

Case heard 3 November 2016, Judgment delivered 17 November 2016

This was an application to have the respondents declared vexatious litigants.

Brenner AJ held:

"A conspectus of the facts outlined above, fortified by the Chiura's own version in their answering affidavit, makes it quite plain that Nedbank exhausted all avenues available to it to come to an accommodation with the Chiuras to resolve matters." [Paragraph 105]

"They went so far as to guide them in the right direction by suggesting the best expedient available to them: that they pursue their legal rights and the process of this Court by applying for further leave to appeal the Ledwaba order directly to the SCA. This advice was ignored with brazen impunity, and instead, a litany of unfounded and vexatious applications have been brought, at great expense, inconvenience and prejudice to Nedbank, with little or no prospect of recovering any legal costs from the Chiuras. The Chiuras must bear the consequences for their untenable disrespect of the rules of this Court." [Paragraph 106]

"This is a situation in which the employment of the Vexatious Proceedings Act is the only practical and viable remedy at Nedbank's disposal to put an end to the frivolous torrent of litigation which appears to have had no end in sight, and which was bringing the process of this Court into unwarranted disrepute." [Paragraph 107]

The application was granted. Leave to appeal was refused in **Chiura and Another v Nedbank Limited and Another (96723/2015) [2016] ZAGPPHC 971 (29 November 2016)**.

MS COLLEEN COLLIS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 19 April 1973

BProc, University of Pretoria (1997)

CAREER PATH

Acting Judge, Gauteng High Court Pretoria and Johannesberg ; High Court Polokwane and Thoyandou (2012 – 2017)

Additional Magistrate (2002 -)

Professional Assistant, Swartz & Du Plessis Inc (2002)

Candidate Attorney, Lennon Moleele & Partners (2000 – 2002)

State Prosecutor, National Prosecuting Authority (1998 – 2000)

Judicial Officers Association of South Africa (JOASA)

PEC Member, National Treasurer (2009 – 2012)

Member (2003 -)

South African Chapter of International Association of Women Judges

Provincial Co-ordinator, Gauteng (2015 -)

Member (2014 -)

Member, Black Lawyers' Association (2013 -)

Member and Secretary, Anglican Women's Fellowship

SELECTED JUDGMENTS

PRIVATE LAW

ADAMS V ROAD ACCIDENT FUND (31049/2011) [2014] ZAGPJHC 351 (21 NOVEMBER 2014)

Case heard 3 September 2014, Judgment delivered 21 November 2014

Plaintiff instituted a damages action against the defendant for bodily injuries he sustained in a motor vehicle collision. The issue of liability having been settled, the matter concerned the determination of the quantum of damages.

Collis AJ held:

"... [T]he plaintiff as at date of the accident was earning R 7000 per month. ... Even if this court is to accept that his earnings at the time of R7000 per month, was considered to be a high income bracket for someone of his ilk, it was a salary that he was earning before even taking up employment at ... the position he found himself in as at date of collision. That having been the position; in all likelihood or probability would have translated in this being his likely earnings or probable earnings. ... In the result I do not accept ... that indeed pre-morbid, the plaintiff had reached his career ceiling and to suggest otherwise would be wholly unrealistic. ..." [Paragraphs 30 - 32]

"The evidence presented in respect of the plaintiff's post-morbid career path was that the plaintiff post collision has been left completely unemployable. In substantiation of this contention the plaintiff proceeded to not only present factual evidence by his spouse and previous employer, but also presented evidence of an expert nature. ... [H]is spouse testified that post collision the plaintiff is a different person. He has become very irritable; he is very forgetful and has to be reminded all the time about things left for him to do. The same sentiments was also expressed by his previous employer ..." [Paragraph 34]

"... Dr Harmse conceded during cross-examination, that the plaintiff if he is able to obtain future employment, he would have to perform work for a very sympathetic employer. The doctor further conceded that in his endeavours to obtain employment that the plaintiff with his limitations would have to compete with other job seekers and in all likelihood would find this challenging. ... On the evidence presented by the defendant; I cannot find that the defendant succeeded in proving that the plaintiff post-morbid maintained a residual earning capacity and as a result I must find that such earnings are zero." [Paragraphs 36 - 38]

"For all the above reasons, that in regard to the plaintiffs loss of earnings, taking into account all the circumstances of the matter, including the medical evidence, it would be fair and just that a 5% (percent) contingency deduction be made in respect of past loss of earnings of R 554 84. For the same reasons a 15% (percent) contingency deduction in respect of future loss of earning capacity of R 2 687 070 would be equitable. ... [F]rom these amounts in addition to the already agreed amounts between the parties, the defendant accepted liability for 80% of the plaintiffs proven damages and as a result a 20% deduction is to follow." [Paragraphs 39 - 40]

CIVIL PROCEDURE

MENDELSOHN NO AND OTHERS V VONDO AND ANOTHER (18925/2015) [2016] ZAGPJHC 339 (7 DECEMBER 2016)

Case heard 5 August 2016, Judgment delivered 7 December 2016

This was an application under Rule 30 of the Uniform Rules of Court by the City of Johannesburg Metropolitan Municipality, arguing that its citation as third plaintiff in action proceedings had been done without its consent and approval, and constituted an irregular proceeding.

Collis AJ held:

"Counsel appearing on behalf of the CoJ … submitted that the First and Second Plaintiffs lacked authority to institute action proceedings on behalf of the CoJ and that such authority can be attacked in terms of Rule 7. I cannot find favour with this submission. … [T]he action proceedings were not instituted by the First and Second Plaintiffs against the CoJ, but the CoJ is itself a co-plaintiff together with the First and Second Plaintiffs, albeit by default, being cited as the Third Plaintiff. Secondly, the Third Plaintiff in the present instance has failed to invoke the provisions of Rule 7(1), disputing the authority of the First and / or Second Plaintiff." [Paragraph 17]

"… [A] party applying to Court to invoke the provisions of Rule 30, must complain about an irregular step taken by any other party. Further, it follows that such a party … must allege prejudice if the summons and the particulars of claim, were allowed to stand. To the matter at hand the CoJ has failed to allege any prejudice which might occasion it if the summons and particulars of claim are allowed to stand. The main basis for opposing its citation in the action proceedings is the allegation that a contrary decision was taken by the council, not to recover the expenditure." [Paragraph 20]

"Given the relevant constitutional imperatives including section 173 of our Constitution,it simply cannot be contended that a local government is entitled to unreasonably refuse to hold accountable any person against whom the possibility of liability exists on the pleaded facts, notwithstanding that there is a case against such a person to answer." [Paragraph 22]

The application was dismissed.

CRIMINAL JUSTICE

MASHABA AND OTHERS V S, UNREPORTED JUDGMENT, CASE NO. BA OS/2015, GAUTENG DIVISION, PRETORIA (FUNCTIONING AS LIMPOPO DIVISION, POLOKWANE)

Case heard 12 June 2015, Judgment delivered 19 June 2015

This was an appeal against a refusal of bail pending trial. The appellants were accused of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act, thus the charge fell within the category of Schedule 6 offences in terms of the Criminal Procedure Act.

Collis AJ held:

"The record reflects that the learned magistrate went to great lengths albeit that the applicants were legally represented to satisfy herself that they understood the charge which they were facing and the *onus* which they carried in applying for bail … The magistrate had found that the appellant's defence of self-defence was neither corroborated by witnesses nor objective probabilities and had rejected their contentions that the murder was not committed at the very least by a group of persons acting in the furtherance of a common purpose. … Similarly, in relation to any loss they might suffer to their businesses, employees and families, the magistrate found no additional evidence except that their own affidavit evidence were presented before the Court *a quo* to corroborate such evidence. As a consequence the Court *a* quo did not consider these factors to constitute exceptional circumstances …" [Paragraphs 18 - 20]

"Having regard to the evidence presented before the Court *a quo* they had not succeeded in demonstrating that the decision of the Court *a quo* was wrong and therefore needed to be set aside … In respect of whether the bail application should have been brought in terms of Schedule 6; the record reflects that the appellants duly understood when the learned magistrate explained to them and questions were individually put to them by the learned magistrate that they carried the *onus* as set out in Schedule 6 when they applied for their release on bail. …" [Paragraphs 22-25]

The appeal was dismissed.

ASHWIN V S, UNREPORTED JUDGMENT, CASE NO. A354/13, SOUTH GAUTENG HIGH COURT

Case heard 6 August 2014, Judgment delivered 19 August 2014

This was an appeal against conviction and sentence, the appellant and his co-accused having been convicted of murder in and sentenced to 20 years and 25 years' imprisonment, respectively.

Collis AJ (Nicholls and Claassen JJ concurring) held:

"The case for the Respondent was founded on circumstantial evidence and pointings out made by the Appellant and that of his co-accused. There were no eyewitnesses to the murder and no witnesses who allegedly saw the Appellant, his co-accused or the deceased in each other's company on the night in question. …" [Paragraphs 7-8]

"I am of the opinion that the trial Court correctly admitted the evidence tendered by the Respondent as against the Appellant and that of his co-accused during the pointing out. No objective facts were shown by the Appellant suggesting that the police officials, on the day that the pointing out was conducted, had any reason to falsely implicate the Appellant or his co-accused in the commission of the offence. … As a general rule, hearsay evidence is inadmissible in both civil and criminal proceedings. However, Section 3 of The Law of Evidence Amendment Act … provides for circumstances under which hearsay evidence may be admitted. … In *casu* the probative value of the hearsay evidence tendered by the police witnesses thus depended primarily on the testimony of the Appellant and his co-accused, confirming the extra-curial statements and pointings out made vis a vis one another or disavowing the aforesaid. During

the hearing of the trial within-a-trial, both the Appellant and his co-accused disavowed their extra curial statements and the voluntariness of the pointings out…" [Paragraphs 21 - 27]

"… [T]he objective factors do not support their disavowals given the nature of what was pointed out, and given the nature of the information around how the offence had been committed. The Appellant and his co-accused could only bear knowledge of the above, if they had both been involved in the commission of the offence. … I conclude that the trial Court correctly admitted and placed reliance on the pointing out evidence and accompanied statements as made not only the Appellant but also by his co accused. … I am of the view that the trial Court correctly concluded that the circumstantial evidence established the guilt of the Appellant." [Paragraphs 30-33]

"… [A] Court of appeal may only interfere with the sentence imposed by the trial Court, if the trial Court exercised its discretion unreasonably and therefore improperly … In the present matter the trial Court took into account the seriousness of the offence, the personal circumstances of the accused and the interest of society. The trial Court further took into account the time spent in custody awaiting trial and the fact that the Appellant was a first offender before the Court. … The Appellant … was convicted of a heinous offence and lack of respect for another's life must be frowned upon by our Courts. … I could find no misdirection on the part of the trial Court in respect of the sentence imposed, and consequently the appeal in respect of sentence must also fail." [Paragraphs 41 - 45]

The appeal was dismissed.

MEDIA COVERAGE

Media reported that the Gauteng Judge President was investigating a complaint that a man had attempted to influence some of Acting Judge Collis' decisions:

> "The alleged interference with the judge's independence was brought to light by a dispute over the Venda chieftaincy. The argument about who should succeed the late Thovhele Vho-Vusani Netshimbupfe as the chief of the Tshimbupfe Traditional Authority is before the high court in Thohoyandou. …
>
> Judge Collis stepped down from the case last month, citing discomfort caused by a stranger who seemingly tried to influence her. …
>
> The man, whose name is known to The Star but was not mentioned in court, twice tried to sway Judge Collis before the court heard the matter.
>
> Judge Collis told the court that the man phoned her when she was in Polokwane to say a meeting should be arranged between her and the royal family when she arrived in Thohoyandou.
>
> Judge Collis said the man phoned her before she knew she had been assigned the case.

> A few weeks later, before the matter was set to be heard in court, he approached Judge Collis at a Thohoyandou hotel. Judge Collis didn't divulge details of their hotel conversation.
>
> She told the court that it had made her uncomfortable. "The person who approached me is not even a legal representative but it appears he has an interest in the case of the applicants before court," Judge Collis said. …
>
> Judge Collis said the applicants' legal representatives, led by advocate Zinzile Matebese, said the man had apologised for his actions."

- Moloko Moloto, "Probe into alleged bid to influence judge", *The Star* 22 July 2015 (available at https://www.iol.co.za/news/crime-courts/probe-into-alleged-bid-to-influence-judge-1888996)

While presiding in the Equality Court, found then ANC Youth League President Julius Malema guilty of hate speech and harassment for remarks made about the complainant in President Zuma's rape trial:

> 'The Johannesburg Equality Court on Monday found ANC Youth League president Julius Malema guilty of hate speech and harassment.
>
> "This court is satisfied that the utterances by the respondent … amounted to hate speech," said magistrate Colleen Collis.
>
> "The uttered words constitute harassment as contemplated in the Equality Act."
>
> Collis ordered Malema to make an unconditional public apology within two weeks and pay an amount of R50 000 to a centre for abused women within one month.
>
> Collis concluded her judgement with a word of wisdom to Malema.
>
> "Mr Malema, being a man of vast political influence, be wary of turning into a man that often speaks but never talks."'

- Staff reporter, "Malema guilty of hate speech", *Mail & Guardian* 15 March 2010 (available at https://mg.co.za/article/2010-03-15-malema-guilty-of-hate-speech)

ADVOCATE NORMAN DAVIS SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 10 August 1963

BCom, University of Pretoria (1984)

LLB, University of Pretoria (1986)

LLM, UNISA (1991)

CAREER PATH

Acting Judge, Gauteng High Court, Pretoria (2006 – 2009, 2012, 2014 – 2017)

Bar Council, Pretoria Society of Advocates

- Chairperson (2016 – 2017)
- Deputy Chairperson (2015 – 2016)
- Member (2010 -)

Advocate, member of Pretoria Society of Advocates

- Senior Counsel (2006 -)
- Member (1990 -)

Attorney (1988 – 1989)

Member, Advocates for Transformation (2017)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

BADER V SA COUNCIL FOR SOCIAL SERVICES PROFESSIONS AND ANOTHER (56790/2013) [2015] ZAGPPHC 318 (20 FEBRUARY 2015)

The applicant lodged a complaint of misconduct against the second respondent (a social worker) with the first respondent. The second respondent was supervising contact between applicant and his son, after the conclusion of domestic violence proceedings against the applicant. Second respondent submitted a report in which she advised that all contact between the applicant and his minor son be terminated pending the child's further maturation. The applicant complained that the report was biased and incorrect; that the second respondent was therefore guilty of professional misconduct, and ought to be struck of the registry for social workers. First respondent escalated the complaint to its Registrar's Committee for Professional Conduct (RCPC) for assessment. The RCPC decided that the allegations of misconduct did not have to be further escalated. The applicant appealed this decision to the Committee for Preliminary Inquiry (CPI), which dismissed his appeal. The applicant sought to have the decisions of the RCPC and the CPI set aside on review, and replaced with new orders effectively declaring the second respondent to be guilty of such misconduct and to be removed from the social workers registry.

Davis AJ held:

"… [N]o "reasons" for its decision appears from the RCPC's letter, its minutes or the affidavit of its Chairperson. Insofar as it was argued or contended that the minutes should be taken to constitute adequate reasons, I again differ. It has been stated that the usage of the word "adequate" in section 5(2) of PAJA constitutes an "important qualifier"." [Paragraph 11]

"… In the present instance the RCPC documents do not contain and explanatory statement as to why the Applicant's contentions of unprofessional conduct and complaints against the insertion of certain statements in the Second Respondent's report (which had adversely affected him at the time) had not been dealt with or if it had been dealt with, on what basis it had been rejected." [Paragraph 12]

"… Neither the RCPC (or the Registrar) or the CPI provided adequate reasons for its decisions. … The PAJA deeming provision which follows to the effect that the decisions were made without good reason, was not disturbed by any evidence provided in rebuttal … Although there is no specific provision providing for a body or committee such as the RCPC but in order to err on the side of caution and on the assumption that the RCPC performs the same functions of the Registrar provided for in Regulation 4, its decision should be set aside. The same deeming provision operating against the CPI in the absence of the furnishing of adequate reasons as well as an absence of evidence that it had complied with its obligations in terms of Regulation 6, similarly renders its decision invalid and it should be set aside." [Paragraph 24]

"… Neither the Registrar, nor the RCPC, not the CPI have been empowered by the regulations to cancel the registration of a person such as the Second Respondent. It is only after the proceedings in a disciplinary inquiry has taken place … that the decision of such a committee … reports its findings to the First Respondent who may then act in terms of Section 22 of the SSPA." [Paragraph 28]

"... At common law it is well established that the court will generally refer the matter to the original decisionmaker rather than to attempt to correct the decision ie substitute its own decision for that of the administrator..." [Paragraph 30]

"In the present instance however, the "correction" is only to the extent that a disciplinary inquiry should be held. The "correction" would not lead to a final determination regarding the conduct of the Second Respondent ... I am of the view that in the present circumstances such a determination is warranted..." [Paragraph 32]

The decisions of the RCPC and the CPI were set aside, and the matter remitted to a disciplinary inquiry.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

NYATHI V MEC, DEPARTMENT OF HEALTH, GAUTENG & ANOTHER [2007] JOL 19612 (T)

Judgment delivered 3 March 2007

This was an application seeking an order declaring that section 3 of the State Liabilities Act was unconstitutional. Section 3 prohibited the recovery of a judgment debt through attachment and execution proceedings against the state. The issue was whether section 3 was inconsistent with sections 165(5) and 195(1)(f) of the Constitution, and whether the state could be held to be in contempt of court for failing to make due payment on a judgment debt.

Davis AJ held:

"In the present instance, the first respondent's failure has, due to the nature of the interim payment order, effectively prevented the applicant's proper preparation for the quantum portion of his trial. It has therefore also effectively encroached on or prejudiced his rights of access to this Court as enshrined in section 34 of the Constitution. ..." [Paragraph 11]

"Section 165(5) of the Constitution stipulates that "an order or decision issued by a court binds all persons to whom and organs of state to which it applies". ... In addition ... section 195(1)(f) of the Constitution prescribes that public administration must be accountable." [Paragraph 14- 15]

"It is clear that section 3 of the State Liability Act is inconsistent with the aforesaid constitutional provisions by placing the State and its officials above the law and beyond the very orders which should bind it or hold it accountable." [Paragraph 16]

"It is clear ... that section 3 of the State Liability Act is not capable of being "read down" in order to have it pass constitutional muster. That much has been attempted by Froneman J ... The attempt, however, serves to confirm the futility of a finding of contempt but without a consequent committal and further confirms the ineffectiveness of an attempted reading down of the section." [Paragraph 24]

"I have furthermore considered whether the section can be saved from unconstitutionality by excising from it a portion thereof, such as finding only the portion "or against the property of the state" to be offensive. It was, however, correctly, in my view, pointed out by counsel for the applicant that even

though attachment might then be allowed, the issuing of a writ therefor will still be precluded by the remaining portion of the section. ..." [Paragraph 25]

"I have lastly considered whether a declaration of invalidity having immediate effect would disrupt good governance ... Any levying of execution or attachment of assets of the State as a result of the striking down of the prohibition contained in section 3 of the State Liability Act, could only come about as a result of the State's failure to comply with a court order and such good governance imperatives is in any event constitutionally enshrined. Any disruption, or rather, the prevention thereof, will therefore be in the hands of the State itself and that of its officials. For this reason, I do not consider an order suspending the declaration of invalidity for any period and on any conditions necessary." [Paragraph 28]

The application was granted with costs. The decision was upheld by a majority of the Constitutional Court in **Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another 2008 (5) SA 94 (CC**), with the court suspending the declaration of invalidity of twelve months to allow Parliament to pass legislation to deal with the effective enforcement of court orders.

CRIMINAL JUSTICE

MAAHLA V S, UNREPORTED JUDGMENT, CASE NO. A331/2014, NORTH GAUTENG HIGH COURT

Case heard: 10 February 2015, Judgment delivered 10 February 2015

The accused was convicted of murder, having assaulted the deceased repeatedly. The accused maintained that his intention was never to kill the deceased, but to administer punishment, and that he never foresaw the death of the deceased resulting from his conduct. The magistrate in the court *a quo* found the accused guilty of murder *dolus eventualis* and sentenced him to 10 years' imprisonment. Both the conviction and sentence were appealed.

Davis AJ (Louw J concurring) held:

"... [T]he appellant expressly testified that these acts amounted to assault but was only directed at the main aim of punishing the deceased. ... The appellant stated that he never intended to kill the deceased, nor did he foresee his death ... There is no indication that a murderous intent was at some stage formed or became present during the assault. In my view the finding of guilt based on dolus eventualis is incorrect and the appeal against the conviction of murder on this ground must succeed. However, having regard to the extent of the assault and the time period thereof, resulting in the ultimate death of the deceased, one must consider whether the appellant is not guilty of culpable homicide." [Pages 5-6]

"... [C]ounsel for the state argued that at some stage during the assault, the appellant must have realised that his conduct exceeded the bounds of a pure chastisement or punishment and he must have foreseen that persisting therewith, could have a result other than his aim. In this sense the appellant did not act as a reasonable man would have done and he exceeded the bounds. Put differently, where he has admitted to the acts and the assault and the extent thereof, albeit not with a weapon which on the face of it would have been lethal, being the length of an electric cord, I am satisfied that he made himself guilty of culpable homicide." [Pages 6-7]

"... [N]ow that a new conviction is on the table, the issue of sentence can be and should be considered afresh. ... Counsel for the appellant suggested that a sentence of five years' imprisonment would be

sufficient, but in my view that would trivialise the extent of the assault and trivialise the worth of a life, in this case, which has been lost by the deceased. In my view a serious sentence is justified and it should be a period of effective imprisonment for some years." [Pages 7-8]

The appeal against the conviction of murder succeeded, and the conviction and sentence were overturned in favour of a conviction for culpable homicide. The sentence was replaced with one of eight years' imprisonment.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE NORTHERN PROVINCES V KHOZA (52448/14) [2014] ZAGPPHC 977 (9 DECEMBER 2014)

The Law Society alleged that the respondent had committed several transgressions, including misappropriation of trust funds, delaying payment of trust funds to clients, failing to account to clients, running a deficit on trust accounts and contravention of Attorneys Act provisions relating to bookkeeping by attorneys. The respondent's appeal against the interim order was dismissed.

On the return date, Davis AJ (Fourie J concurring) held:

"The existence of a deficit on a trust account constitutes a contravention of Section 78(1) of the Attorneys Act read with Rule 69.3 thereof in that the practitioner has failed to ensure that the total amount in his trust banking account was not less than the total amount of balances of his trust creditors. … The Respondent could not exactly explain how this deficit arose, apart from the issue of banking charges…" [Paragraph 11]

"No other impropriety has been indicated save for the fact that, had the respondent kept proper books, he should have noted these payments and the erroneous nature thereof and, in the instances where he had been obliged to repay, he should have done so timeously …" [Paragraph 13]

"Having regard to the trust deficits, the manner in which the bookkeeping regarding the trust account has been done, as well as the other aspects referred to above, the offending conduct in respect of most of the charges against the respondent have been established on a preponderance of probabilities." [Paragraph 18]

"Regarding the issue of fitness to practise, which is a value judgment … I did not form the impression from the papers that the Respondent was a dishonest practitioner or had intentionally misappropriated trust funds. … The value judgment at this stage of the enquiry and the declaration as to whether the practitioner is no longer a fit and proper person to practise also lies within the discretion of the court…" [Paragraph 19]

"…The indications are, however, that the offending conduct had been remedied and would in future be remedied (and should and must be eradicated). Were this so, then, in my view, the value judgment would be that the Respondent remains a fit and proper person to continue to practise…" [Paragraph 20]

The Respondent was suspended from practise for a period of 6 months, and costs awarded against the Respondent.

MEDIA COVERAGE

Quoted in support of moves to record the race and gender of advocates appearing at the High Court in Pretoria:

> "Chairman of the Pretoria Bar Norman Davis SC welcomed the move, saying the information would be useful to the Bar Council, including in its discussions with the state attorney's office.
>
> "The Bar is concerned about briefing patterns, particularly by the state attorney, organs of state and large corporate entities," he said.
>
> "I am not averse to the information being gathered," he said."

- Franny Rabkin, "Exclusive: Advocates' races and genders to be recorded at Pretoria court", *Business Day* 18 November 2016 (available at https://www.businesslive.co.za/bd/national/2016-11-18-exclusive-advocates-races-and-genders-to-be-recorded-at-pretoria-court/)

ADVOCATE TAKALANI MADIMA SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 6 October 1956.

BJuris, University of the North, Limpopo (1985)

LL.M, University of Essex, United Kingdom (1988)

Ph. D (Law), University of Essex (1993)

MBA, University of Cape Town (2002)

Advanced Human Rights Diploma, University of Strasbourg

Diploma in Mediation and Arbitration, University of Pretoria

CAREER PATH

Acting Judge

- South Gauteng High Court, Johannesburg (2013, 2015, 2016)
- Western Cape High Court (2005, 2008, 2010)

Member, Competition Tribunal (2009 – 2014)

Chairperson, western Cape Gambling and Racing Board (2008 – 2014)

Adjunct Professor, Department of Commercial Law, University of Cape Town (2008 -)

Advocate

- Senior Counsel (2011 -)
- Cape Bar (2004 -), member of Cape Bar Council (2004, 2012 – 2013)
- Johannesburg Bar (1996 -)
- Admitted 1994

Transnet Group

- Member, Tender Board
- Permanent invitee to board and Nominations and Governance Committee

General Counsel, Transnet Limited (1997 – 2004)

Chief Legal Advisor, Transnet Limited

Chairman and chairman of Remuneration Committee, Autopax (Pty) Ltd

Senior Lecturer, UNISA (1996 – 1997)

Principal Consultant, Ernst and Young (1994 – 1995)

Manager: Labour Relations, Telkom SA Ltd (1993 – 1994)

Senior Research Officer, Centre for Applied Legal Studies, University of the Witwatersrand (1992 – 1993)

Member, Advocates for Transformation (2004 - 2011)

Black Lawyers' Association

Legal Education Centre Trial Advocacy Faculty (2005 -)

Member (1994 -)

Counsel for Department of Defence, Seriti Commission of Inquiry (2013)

Evidence leader, Semenya Commission of Inquiry (1996 – 1997)

Chairman of Board of Inquiry, Sedibeng Water Corruption Inquiry (February 2008)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

NDUBANE V S (A238/2016) [2017] ZAGPPHC 111 (8 FEBRUARY 2017)

Case heard 6 February 2017; Judgment delivered: 8 February 2017

This was an appeal against conviction and sentence for rape. Appellant had been convicted and to life imprisonment for raping his cousin ("O"), who was 12 years old at the time of the incident.

Madima AJ (Prinsloo J concurring) held:

"Rape is a serious offence. The rape of an underage and defenceless child is in itself an aggravating factor. The rape of an underage relative who looked up to the perpetrator for protection, love and comfort is beyond devastation for the victim [Paragraph 28]."

"O was twelve years old at the time she was raped ... She testified that prior to the rape she was not scared of him. She referred to him as her brother. Indeed in certain African cultures, one's mother's siblings' children are referred to as one's siblings, that is, brothers and sisters. The same applies to one's fathers' siblings' children. It is not easy to describe the pain, the humiliation and shame O feels after being violated by her brother [Paragraph 32]."

"[T]he appellant showed little or no remorse. He was smiling during the proceedings and when confronted about that, he stated that it was his nature [Paragraph 32]."

"There is no doubt that each case must be evaluated according to its own merits. The appellant in this case has shown no remorse. He has not apologized for his actions. He has not demonstrated any substantial and compelling circumstances that would merit a deviation from the prescribed minimum sentence. I hold the view that even in the absence of the prescribed minimum sentence the appellant is a textbook example of someone deserving of a long period of incarceration." [Paragraph 42]

The appeal was dismissed.

RAFATLEMA V S (A627/2015) [2017] ZAGPPHC 481 (9 MARCH 2017)

Case heard: 9 February 2017; Judgment delivered 9 March 2017

This was an appeal against conviction and sentence, the appellant having been sentenced to a cumulative life sentence for four counts of rape, one count of kidnapping and another count of theft. The complainant was 17 years old at the time of the incident.

Madima AJ (Windell J concurring) held:

"Although the appellant apologised to the complainant after the rape in the bush, he took her home with him and raped her again. This is not conduct consistent with a remorseful person." [Paragraph 38]

"It is the function of the courts to protect society, especially women and children. The question of retribution, deterrence, and the prevention of crime as well as the protection of the community at large cannot be overlooked in passing an appropriate sentence. I am satisfied that the trial court had regard to all of the relevant factors when it passed the sentence. ... I find the sentence imposed by the trial Court not shocking, not startling or

disturbingly inappropriate. On the contrary the sentence imposed fits the crime and will send a clear message to all would be rapists." [Paragraphs 40 - 41].

The appeal was dismissed.

CHILDRENS RIGHTS

FAMILY ADVOCATE, CAPE TOWN, AND ANOTHER v EM 2009 (5) SA 420 (C)

Case heard 28 November 2008, Judgment delivered 28 November 2008

This was an application in terms of the Hague Convention on the Civil Aspects of Child Abduction, as incorporated into South African law, for an order directing the return of the minor child M to the United Kingdom.

Madima AJ held:

"I have no hesitation in finding that second applicant's [the father] joint right(s) of custody were breached under the laws of the country where M was habitually resident before her removal or retention, as well as that second applicant, at the time of the removal or retention, was actually exercising those rights jointly with respondent. What is paramount, in my view, is the intention of the *removing and/or retention* spouse. What is equally of importance is the state of mind of the second applicant." [Paragraph 25]

"There is no doubt that the removal and retention is unlawful. The fact that respondent has allowed M to travel to the United Kingdom to visit second applicant and in turn the fact that second applicant has allowed M to return to respondent … should not distract us from the fact that respondent's intention was to permanently remove M from the United Kingdom and/or to permanently retain M in South Africa." [Paragraph 27]

"I have gone over the letter of 4 December 2007 several times. I can find nothing which suggests that the letter was intended to grant consent for M to be permanently removed from the United Kingdom or for her permanent retention in South Africa by respondent. What I have found is a letter that facilitates easy passage for an adult travelling with a minor child who bears a different surname to the adult. …" [Paragraph 31]

"…I must say that I find nothing that suggests any slackness on second applicant's part in this regard that can be interpreted as acquiescence in the removal and retention of M. I do not find the delay inordinate. On the contrary, I am impressed that second applicant was able to bring these proceedings inside a period of four months … I have also come to appreciate the time that it takes to get urgent matters such as the instant proceedings on

the roll of our court system. I find it is reasonable in the circumstance for a person in second applicant's place to seek and obtain legal advice in the manner he did. I therefore find that the slackness attributed to second applicant by respondent lacks merit, and consequently second applicant did not consent or acquiescence in M's removal and/or retention by his conduct." [Paragraph 41]

An order was granted whereby M be returned to the United Kingdom. Each party was to bear their own costs.

ADMINISTRATION OF JUSTICE

WEBBSTOCK V LAW SOCIETY OF THE NORTHERN PROVINCES (78556/2015) [2016] ZAGPPHC 545 (20 JUNE 2016)

Case heard 19 April 2016, Judgment delivered 20 June 2016.

Applicant sought admission as an attorney in unusual circumstances. Applicant had been accepted to study for his LLB at Wits University, and at the same time entered into a five year contract of articles at his father's law firm. Respondent opposed the application.

Madima AJ (Jansen J concurring) held:

"Irregular service that may be condoned would constitute breaks in service through accidents such as illness, through a bona fide mistake or other sufficient causes ... It does not seem that the grounds proffered by the applicant would constitute sufficient cause in order to satisfy the requirements of the Act. Those requirements include the existence of a valid contract of articles of clerkship. It is not within the powers of the court to render an otherwise invalid contract, valid." [Paragraph 34]

"There is little doubt that the above arrangements were made possible because of the special relationship between the applicant and the principal. No principal should allow his articled clerk to study full time for his law qualification and serve his articles of clerkship at the same time. Their agreement would best be described as a sham and intended to deceive the Law Society, and make possible the applicant's premature admission to the attorneys' profession." [Paragraph 36]

"Because the applicant was never a candidate attorney as defined in the Act, it would seem that the only option available to the applicant would be to enter into a valid contract in terms of the Act if he wishes to be admitted and enrolled as an attorney. There is no any other way. ... The short cut approach to the killing of two birds with one stone has backfired badly and delayed the applicant's entry into the attorneys' profession by more than two years. Hopefully, the applicant has learnt his lesson. Hopefully the applicant shall in the future shy away from attempting to beat the system by opting for quick fixes." [Paragraphs 49 – 50]

The application was dismissed, and the applicant order to pay costs on the attorney and client scale.

SELECTED PUBLICATIONS

"FREEDOM OF ASSOCIATION AND THE CONCEPT OF COMPULSORY TRADE UNION MEMBERSHIP", *TSAR* 1994.3, 545.

This article discussed the validity of closed shop agreements in light of decisions by the then Industrial Court.

"The court … should act as if it were the legislator for the parties. It should follow the industrial norms of the society, one of which is that the closed shop is permissible if the parties are sufficiently representative. It is for this reason that judges De Kock and Erasmus ought to have interpreted paragraph (j) in a manner which is consistent with the act and its historical application. This would have meant that judge De Kock's ruling in the *Mazibuko* case should have said that the closed shop was not a violation of paragraph (j) because the prohibition against compulsory union membership applies only if the union is not sufficiently representative. Were the same argument to be made in *Veldspun*, then it can be said that the closed shop is not *contra bonos mores*." [Page 552]

"It is about time that most of us came to terms with the fact that there is no inherent right of the individual to refuse to associate with others in the industrial relations sense. An absolute right to refuse to belong can only be exercised in the membership of political parties, because the interest of those who want to join appears to be equivalent to the interest of those who do not want to join. The same cannot be said about association in trade unions." [{pages 552 – 553]

MS MALETSATSI MAHALELO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 6 April 1963

BJuris, North West University (1988)

LLB, North West University (2000)

CAREER PATH

Acting Judge

North Gauteng Provincial Division of the High Court (2017)

South Gauteng Local Division of the High Court (2011 – 2016)

Regional Magistrate (2003 -)

Acting Regional Magistrate (2003)

Magistrate (1993 – 2003)

Acting Magistrate (1991 – 1992)

Public Prosecutor (1988 – 1991)

Member, South African Chapter of the International Association of Women Judges (2004 -)

Member, ARMSA (2004 -)

JOASA

- Provincial Chairperson (2002 – 2003)
- Provincial Deputy Chairperson (2001 – 2002)

Provincial Treasurer, NADEL (2000 – 2001)

SELECTED JUDGMENTS

CIVIL PROCEDURE

S V S (2014/04605) [2016] ZAGPJHC 357 (22 FEBRUARY 2016)

Case heard: 1 February 2016; Judgment delivered 22 February 2016

Applicant, the defendant in the main divorce action, sought a further contribution to her legal costs in terms of Rule 43(6).

Mahalelo AJ held:

"Even if I accept – upon a generous interpretation of the applicant's papers – that she has made out a *prima facie* case entitling her to substantial success in her claims, and that her papers disclose an inability to fund her own litigation costs, I cannot accept that she has made out a case for the scale of the contribution she seeks. An applicant seeking a contribution towards costs must set out the anticipated reasonable legal expenses with sufficient detail to enable the court to properly assess what is reasonably required in order to do justice between the parties." [Paragraph 10]

"Upon weighing the facts of the present matter, it becomes clear that the applicant is entitled to a further contribution towards her costs which would ensure that she litigates on the same scale with the respondent in a divorce action. However she is not entitled to have her entire legal costsl covered in advance. She is entitled to a contribution only. It is open for her to approach the court for a third and further contribution in due course if need be. But a substantial contribution is now necessary to ensure that she is not disadvantaged as a litigant." [Paragraph 17].

Respondent was ordered to make a further contribution of R90 000.

CRIMINAL JUSTICE

NGWENYA V MINISTER OF POLICE (SS24398/2013) [2015] ZAGPJHC 326 (23 NOVEMBER 2015)

Case heard: 7 September 2015; Judgment delivered 23 November 2015.

The Plaintiff sued for damages for unlawful arrest, unlawful detention and malicious prosecution. Plaintiff had been arrested without a warrant and detained n a charge of possessing illicit cigarettes.

Mahalelo AJ dismissed the claim:

"According to the evidence of Sergeant Kuilder he received information, went to the address pointed out by the informer, found the plaintiff in the bedroom, searched and found illicit cigarettes. He never came across the owner of the premises other than the plaintiff at that house. ... There was no other person except the plaintiff who was arrested in connection with the illicit cigarettes found at the said address." [Paragraph 29]

"Taking into account the fact that the plaintiff was found alone in the bedroom in which the illicit cigarettes were found and was not able to explain the presence thereof, it is reasonable that the arresting officer entertained the suspicion that a crime was committed in his presence, consequently it was not necessary for him to obtain a warrant." [Paragraph 31]

ADVOCATE NANA MAKHUBELE SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 2 April 1964

B.A, Social Work, University of the North (Turfloop) (1981- 1983)

LLB, Wits University (1989 – 1991)

CAREER PATH

Acting Judge, Gauteng High Court (2013 -)

Chairperson, Water Tribunal (2015 -)

Panel member of Minister of Environmental Affair's Panel of Arbitrators and Mediators

(2014)

Senior Counsel (2014 -)

Chairperson of the Income Tax Board for hearing Appeals (2013)

Serves on the panel of mediators and arbitrators of the Arbitration Foundation of Southern Africa, Pretoria

Advocate (1999 -)

Assistant Master of the High Court, Pretoria (1997 – 1999)

Public Prosecutor, Giyani Magistrate's Court (1992 – 1997)

Social Worker, Department of Health and Welfare (1984 – 1988)

Executive Committee Member, General Council of the Bar (2013/2014)

Pretoria Society of Advocates

Chairperson (2015 – 2016)

Member, bar council (2001 – 2002, 2002 – 2003, 2005 – 2006, 2007 – 2008, 2009 – 2010, 2012 – 2013).

Co-secretary (2007 – 2008)

Advocates for Transformation

Deputy chairperson (2012)

Deputy chairperson, Pretoria branch (2015 – 2016)

Deputy/acting chairperson (2009 – 2010)

Secretary (2006 – 2008)

Deputy Chairperson of Council, University of Limpopo (2016 –)

SELECTED JUDGMENTS

COMMERCIAL LAW

DAIKIN AIR CONDITIONING SA PTY(LTD) V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE 50781/2015 [2016] ZAGPPHC 854 (14 SEPTEMBER 2016)

Case heard 19 May 2016; Judgment delivered 14 September 2016

The applicant in this matter was an importer of air conditioning products sourced mainly from Japan and Malaysia. The issue concerned the importation of a split system air-conditioning unit, and how such unit would be catagorised for purposes of import duties and VAT. The respondent argued that the applicant had incorrectly classified the goods upon importation. Therefore, the applicant did not pay the requisite amount in importation duties and tax (VAT). This allegation was supported by an auditor's report conducted shortly after the imported goods were cleared. Applicant appealed against the respondent's tariff determination.

Makhubele AJ held:

"The question is whether the words "split system" is restricted to air conditioners that are capable of being mounted in the window or wall as the first part says or they include split system air conditioners that can also be mounted in the ceiling [Para 41]."

"If the meaning that the Commissioner seeks to ascribe to the first paragraph is correct, then there would have been no need to further breakdown and make provision for the type of air conditioners (8415.8) identified as "Other" in the sub headings. This is a clear indication that the words "types" were not intended to give examples of air conditioners but to restrict the meaning to the two mentioned by name [Paragraph 48]."

The appeal was upheld, and the tariff determination set aside and replaced.

EX PARTE: VAN DYK (1869/2015) [2015] ZAGPPHC 154 (26 MARCH 2015)

This was an application for voluntary surrender. At issue was whether a forfeiture of salary could establish benefit to creditors in terms of the Insolvency Act.

Makhubele AJ held:

"It is common cause that the applicant does not own realizable property of a sufficient value to defray all costs of the sequestration out of the free residue .

The undertaking to make a contribution from his salary into the insolvent estate is in my view impermissible, not only in view of the risks associated with policing of the order and delays in finalizing the administration of the estate, but also in view of the constitutional challenges that may arise should the applicant at any stage in the future require the amount for the basic needs of his family." [Paragraph 23]

The application was dismissed.

ADMINISTRATIVE JUSTICE

DU PLESSIS V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER (71827/2013) [2015] ZAGPPHC 973 (11 DECEMBER 2015)

Case heard 30 October 2015, Judgment delivered 11 December 2015

Applicant sought an order that she be appointed to a position as senior magistrate, head of office.

Makhubele AJ held:

"According to Mr. Greeff, it can be deduced from the papers as a whole that the reason the applicant was not appointed is because she is not from the Previously Disadvantaged category. … I agree with the submission of Mr. Gwala that there is a difference between a decision not to appoint an applicant for a post and a decision not to fill a post. I may add that in my view, the evidence required to justify each one of them would be different." [Paragraphs 62 – 63]

"The applicant has built this case around herself, forgetting that there were 23 posts at stake and the reasons given for not filling them were not specifically directed at the individuals, but the

recruitment processes of the Commission. It was never about her, but the entire recommendations made by the Commission in as far as it had submitted one name only for consideration. How the Minister was expected to consider one name is a mystery. The applicant insists that a decision was made not to appoint her. This is not the case." [Paragraph 66]

"... [I]t is clear that the high-water mark of the applicants' case is that she was interviewed by the Commission and found to be the only suitable candidate for appointment in the position of Senior Magistrate, Head of the Office, Middelburg, Mpumalanga. The Commission recommended her for appointment in that post. However, the Minister has, without good cause, failed to appoint her as recommended. ... The applicant would have to prove that the Minister is bound by the recommendations of the Commission. I have already dealt with this issue. Therefore, the applicant has not made a case for the relief sought in prayer 1." [Paragraphs 74 – 75]

The application was dismissed with costs.

CRIMINAL JUSTICE

S V S (A71/2013) [2014] ZAGPPHC 450 (20 JUNE 2014)

Case heard 27 January 2014; Judgment delivered 20 June 2014

This was an appeal against conviction and sentence following conviction on one count of rape. Appellant had been sentenced to 20 years' imprisonment for raping his daughter, who was 6 years old at the time of the incident.

Makhubele AJ (Bam J concurring) held:

"...The presiding magistrate misdirected himself by failing to consider what the appropriate sentence would be by striking a balance between the circumstances under which the rape occurred, the impact it is likely to have on the complainant and the mitigating factors (what he referred to as substantial and compelling circumstances)...The fact that he went ahead and deviated from the prescribed minimum sentence despite being aware that the circumstances are worse than in the Skipa case constitute a misdirection that entitles this court to intervene." [Paragraph 46]

"The appeal on conviction is dismissed...The sentence imposed by the Magistrate is set aside and substituted with the following: "The accused is sentenced to life imprisonment."" [Paragraph 58]

FAQUIR V S (A73/2013) [2013] ZAGPPHC 523 (15 MAY 2013)

Case heard 15 February 2013, Judgment delivered 15 May 2013

This was an appeal against a refusal of bail. Appellant was a Mozambiquan national charged under the Drugs and Drug Trafficking Act.

Makhubele AJ held:

"The matter came before me on 14 February 2013 and after perusing documents filed and hearing counsel for both parties, I ordered the release of appellant on bail under certain conditions. I was on a three (3) weeks acting appointment stint at the time and due to heavy court roll, I was not able to give a written judgement. I undertook to give reasons at a later stage." [Paragraph 2]

"It is difficult to discern findings of facts and reasons for judgment because as counsel for the appellant submitted … the Magistrate simply summarized the facts and shied away from making findings on those facts." [Paragraph 40]

"I do not understand why the Magistrate would refer to a restatement of facts that were placed on record by the appellant and the prosecutor as having been "confirmed" by her. The evidence of the investigating officer was not of assistance in material respects … He was not clear about the existence of an extradition treaty between the two countries. This lack of a treaty was his view, and he did not take steps to verify. … The fact that the appellant bore the onus to present facts that would establish that the interests of justice required her to be released on bail does not mean that the State had to sit back and hope that she was not going to discharge her onus. In fact, as i have already indicated above, the stance of the State was that appellant was a drug mule who was going to evade trial simply because she was a foreigner." [Paragraphs 42 – 42.1].

"It would appear from the record that the concern that appellant would not stand trial was not based on objective facts that there was a likelihood that she would flee, but simply on the basis that she was a foreigner. … Of course, there is ample authority that our courts do grant bail to foreigners. Therefore, this alone can not be a reason for refusal to grant bail." [Paragraphs 52, 54]

The appeal was upheld and the appellant was released on bail, subject to certain conditions.

MEDIA COVERAGE

Interview near the end of her tenure as chairperson of the Pretoria Bar:

> 'But the road to success was fraught with difficulty.
>
> Makhubele joked that she took a gap year - but not the kind that involves volunteering at a kibbutz and savouring the freedoms of new-found adulthood.
>
> "My parents could not afford to pay for [my] secondary education. What compounded their financial woes is the fact that I caught up with my elder brother after being promoted [at primary school]. As a result, we both passed Standard 6 in the same year."
>
> At the age of 12, Makhubele had to leave school and work as a domestic worker in the home of the village school's principal. She also occasionally worked in local tomato fields when she could sneak onto a farmer's truck with the regular workers."
>
> "Being able to choose her cases was a luxury not easily earned. When Makhubele first joined the bar, she took all kinds of cases to stay in business.
>
> "Being in legal practice as a black person has its challenges. We don't get work from commercial law firms."
>
> Makhubele said a lack of exposure and opportunity is what makes it tough for black and women advocates to stay in practice and achieve senior status.
>
> As she prepares to step down at the end of the month after serving her year as chairwoman of the Pretoria Bar, Makhubele says transformation was her biggest challenge in the position. She believes the only way to turn the tide is through deliberate empowerment of black and female advocates.
>
> "We need to ensure black people are admitted [to the Bar] in numbers and make sure they remain in practice."'

- Roxanne Henderson, "Makhubele: rural girl now a top legal mind", *Sowetan* 10 February 2016 (available at http://www.sowetanlive.co.za/news/2016/02/10/makhubele-rural-girl-now-a-top-legal-mind)

MS SELEMENG MOKOSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 25 June 1963, United Kingdom

BA (Law), National University of Lesotho (1980- 1984)

LLB, University of the Witwatersrand (1985 – 1987)

Certificate in Refugee Law, University of Cape Town (2008)

Property Development Programme, University of Cape Town (2013)

CAREER PATH

Acting Judge, Gauteng High Court (2016 – 2017)

Consultant, Mohamed Randera and Associates (January 2017 –)

Director, Bowman and Gilfillan Inc (2008 – 2016)

Founder and Director, Selemeng Mokose Inc (1996 – 2008)

Associate Director, Van Der Venter Meiring (1994 – 1995)

Associate, Edward Nathan & Friedland Inc (1991 – 1994)

Candidate Attorney, Edward Nathan & Friedland Inc (1989 – 1990)

Candidate Attorney, Dangor Attorneys (1988 – 1989)

Legal Adviser on Refugee Law, Pro.Bono.org

Chairperson, Upper Houghton Body Corporate (2008 – 2016)

Chairperson, Property Law Committee, Law Society of South Africa (2006 – 2016)

Chairperson, Property Law Committee of the Law Society of the Northern Provinces (2004 – 2016)

Independent Non-Executive Director, 1Time Holdings Ltd (2011)

Basic Aspirant Judges Course, South African Judicial Education Institute (2016)

Advanced Aspirant Judges Course, South African Judicial Education Institute (2017)

Judicial Skills Training, Law Society of the Northern Provinces (2015)

SELECTED JUDGMENTS

COMMERCIAL LAW

QBX CONSULTING SERVICES (PTY) LTD V MAFURI TURNKEY ACCELERATED CONSTRUCTION (25077/2016) [2017] ZAGPPHC 535 (16 August 2017)

The applicant claimed to be a creditor of the respondent (affected person), and sought an order (in terms of sections 131 (1) of the Companies Act 71 of 2008) placing the respondent under supervision; as well as initiating business rescue proceedings. In the alternative, the applicant sought an order placing the company into liquidation.

Mokose AJ held:

"... [T]here is a factual dispute as to the locus standi of the applicant. The respondent's version is not far-fetched and untenable that it can justifiably be rejected merely on the papers. For this reason and on the papers before me, the applicant cannot be found to be an affected person". [Paragraph 11]

In respect of the order for supervision and business rescue, Mokose AJ considered two conflicting judgments in order to determine whether the respondent was in financial distress or not.

"There is no decided case in the Gauteng Division nor has it been decided in the SCA. I am, however, inclined to follow the decision of the Western Cape Division and order that the applicant must give concrete and objectively ascertainable details going beyond mere speculation. The applicant has failed to give such details in his application and for that reason, I order that the prayer that the respondent be placed under supervision and business rescue fails." [Paragraph 16].

"I am of the view that on the applicant's own version, the respondent is commercially solvent and able to pay its debts. The applicant has not presented sufficient information for this court to make a decision regarding the solvency of the respondent. The alleged debt which has caused the applicant to bring this application first needs to be proven at trial for the applicant to qualify to bring this application at all [Para 20]."

The application was dismissed with costs.

CIVIL PROCEDURE

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE V PRO-WIZ GROUP (PTY) LIMITED AND OTHERS; IN RE: PRO-WIZ GROUP (PTY) LIMITED V PRO-WIZ GROUP (PTY) LIMITED AND OTHERS (28890/2016) [2017] ZAGPPHC 542 (16 AUGUST 2017)

Applicant in the original application was seeking to convert a liquidation order into business rescue proceedings. SARS applied to intervene and have the application dismissed. The application was then withdrawn, applicant tendering costs of SARS but not of the liquidators.

Mokose AJ held:

"The general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. The court however, has the discretion to deprive the successful litigant of its costs but such discretion must be exercised judicially i.e have regard to whether, objectively viewed, the applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because of emerging facts or because the relief was no longer necessary or obtainable."[Paragraph 6]

"We are presented with two divergent views as to the correct interpretation of section 131(6) and the intention of the legislature … The objective of a business rescue application is firstly to facilitate the continued existence of the company in a state of solvency and secondly to facilitate a better return for the creditors or shareholders of the company in the event that the first goal proves not to be viable. In Richter v Absa Bank … it was held that the proper interpretation of "liquidation proceedings" in relation to Section 131(6) must include proceedings that occur after a winding-up order to liquidate the assets and account to creditors, up to the de-registration of a company. As such, I am inclined to follow the decision in the Richter v Absa matter. On a proper reading of Section 131(6) there is no suggestion that the administrative powers of the liquidators would be retained thereby enabling them to continue to perform their duties as liquidators in an insolvent estate. Accordingly, I dismiss the application for costs and order costs for the argument for costs in favour of the applicant."[Paragraph 15]

MR CASSIM SARDIWALLA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 27 July 1955

B Proc, University of South Africa & University of Durban Westville (1981)

CAREER PATH

Acting Judge

South and North Gauteng High Court (2016-2017)

Land Claims Court (2010-2016)

Eastern Cape High Court (2002)

KwaZulu-Natal Provincial Divisions and Local Division (2001, 2002, 2003, 2006, 2015 & 2016 – one term each year)

Managing Partner, CM Sardiwalla and Company (1982-2012)

Member, Advisory Board, Small Claims (1987-)

Member/Exco, Rules Board for the Courts of Law (1999-2011)

Member/Vice President, KZN Law Society (1998-2004)

Member, Commonwealth Lawyers Association (1999-2003)

Member, Ladysmith Justice Forum (1999-2003)

Branch Chairperson, NADEL (1989-2002)

SA Law Commission, Domestic Arbitration Project (1999-2001)

Member, Fidelity Fund, Board of Control (1998-2000)

Exco Member, Engineering Council of South Africa (dates not supplied)

Deputy Mayor, Local Council, Ladysmith Emnambhiti (dates not supplied)

Chairperson, Flood Liaison Committee

Co-Chair, Acaciaville Housing Action Committee

Member, African National Congress (1989 - 2011)

SELECTED JUDGMENTS

SOCIO – ECONOMIC RIGHTS

SALEM COMMUNITY V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (REGIONAL LAND CLAIMS COMMISSION, EASTERN CAPE REFERRING PARTY) 2014 JDR 0910 (LCC)

This was a restitution of land matter. Plaintiff argued that certain communities enjoyed indigenous rights to the land and this was a clear indication that the communities who lived there were removed subsequent to colonial occupation. The eight to twenty forth Defendants, (Land-Owner Defendants) disputed that a Community existed in the area, whereas the plaintiff contended that the indigenous communities existed prior to the arrival of the 1820 settlers. The Land-Owner Defendants contended that even if these communities existed, their rights were extinguished by colonial conquest. The Land-Owner Defendants further argued that the subdivision of the Commonage was not as a result of the application of any racially discriminatory law or practice, and hence the plaintiff was not dispossessed of rights in land as a result of racially discriminatory laws or practices.

Sardiwalla AJ held:

"... The Richtersveld Community decisions indicate that the rights people enjoyed must be determined by reference to customary or indigenous law. The Land-Owner Defendants contend that because the Xhosa's holding of the land was not registered in the Office of the Governor in the Cape Colony, or the offices of the Landrost, they did not exist. The only persons who held such rights are those who

registered them in these official places that only Whites had access to. It is clearly and blatantly a flawed approach. Accordingly, it must fail." [Paragraph 118]

"While in the past indigenous law was seen through the common-law lens, in the context of our internationally acclaimed Constitutional dispensation it must be seen as an integral part of our law. The courts are obliged by Section 211(3) of the Constitution to apply customary law when it was applicable, subject to the Constitution and any legislation that dealt with customary law. In doing so the courts had to have regard to the spirit, purport and objects of the Bill of Rights." [Paragraph 119]

"Racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. Precisely, what happened in Salem. [...] The inevitable impact of this differential treatment was racial discrimination against the Plaintiff, which caused it to be dispossessed of its land rights. ..." [Paragraph 122]

"The threshold [of defining a community] is deliberately low and this Court is empowered to use a generous notion of what constitutes a Community. [...] Mr Nondzube's testimony described the community's shared interest in the Commonage that the families grazed their cattle and ploughed the land according to communal rules. The families interacted with each other and through their chief there were demarcations and homesteads were built and land was allocated. Cattle were grazed communally in one area. This evidence could not be refuted only because the basis of the defence is that such people did not exist. It is difficult to conclude that such persons could have lived on the Commonage in such large numbers and not form a Community. Even more difficult is that such a large number of people would go unnoticed. Given the constitutional imperative to perceive the notion of a Community generously, it is difficult to come to another conclusion. Therefore, I find that the Plaintiff is a Community in terms of the definition of a Community in the Act." [Paragraph 132]

"As a result of the above I find that the Plaintiff enjoyed a right in land in the Commonage after 19 June 1913. Such right stemmed from the Xhosa occupation of the Zuurveld which was never extinguished and extended to the community that occupied the Commonage in Salem after 1913." [Paragraph 148]

It was found that the Salem Community was dispossessed of a right in land after 19 June 1913, as a result of past racially discriminatory laws and practices in terms of section 2 of the Restitution of Land Rights Act 22 of 1994, and there was no order as to costs.

The decision was upheld by the Supreme Court of Appeal in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016) - Pillay and Dambuza JJA (Seriti and Mbha JJA concurring) and Cachalia JA dissenting.

ROOYENDAL (PTY) LTD V MINISTER OF LAND AFFAIRS 2013 JDR 1003 (LCC)

Case heard 29 July 2011; 03 – 07 October 2011; 29 February - 02 March 2012; 24 October 2012, Judgment delivered 14 May 2013

The plaintiffs were farm owners and farmed in the names of juristic persons. They sued the first and second defendants for payment of certain input and development costs based on an oral agreement. Plaintiffs alleged that agreement was reached in the course of several meetings pursuant to the settlement of a land claim, and instituted this claim to enforce the alleged oral agreement for the

payment of input costs and development costs, following a purchase of land by the Department of Land Affairs from the plaintiffs for restoration to claimants. In the alternative the plaintiffs claimed that the properties were sold for an amount below their actual value and claimed the difference from the defendants.

Sardiwalla AJ held:

"What is pertinent from the evidence of the plaintiffs is that the deeds of sale would have not been signed had the defendants not undertaken to pay the input costs. The importance that the plaintiffs place on these costs is underscored by the alternative claim for an increased purchase price indicating that the plaintiffs felt that the purchase price paid was not sufficient. …" [Paragraph 66]

"The evidence of the plaintiffs clearly suggests that input costs were material to the purchase and sale agreements. In fact both Boshoff and Hohls testify that had the agreement relating to input costs not been concluded they would not have signed the deeds of sale. Which begs the question why was the aspect of input costs not included in the written agreements." [Paragraph 70]

"It is highly improbable as the plaintiffs allege that the second defendant stated that they did not want to reduce the agreement to writing because the money was to come from another source; the second defendants and all the witnesses for the defendants unequivocally state that they do not have any direct access to the budgets of other ministries. It is equally improbable that the second defendant would commit to an amount of almost five million rand of tax payers money on the basis of an oral agreement." [Paragraph 77]

"It is improbable that a person who has been a legal practitioner for over two decades would have advised her clients to conclude oral agreements that would amount to almost five million rand. She was present at all meetings, was aware that negotiations were taking place and Shange's refusal to record the input and development costs in writing. …" [Paragraph 82]

"The plaintiffs version that a seasoned practitioner and conveyancer took the advice of a government official not to record an agreement that was pertinent to a negotiation process is highly improbable." [Paragraph 84]

"There is no agreement on what the merx actually is, input costs consists of various elements and I am not persuaded that the State agreed to pay all input costs without determining precisely what input costs actually entailed." [Paragraph 96]

The plaintiffs' claim was dismissed with costs. This decision was unanimously upheld on appeal in *Rooyendal (Pty) Ltd v Minister of Land Affairs* 2015 JDR 1694 (SCA).

NDABA V BRAITHWAITE NO 2013 JDR 1284 (LCC)

Case heard 16 March 2012, Judgment delivered 14 November 2012

This was an application for an interdict restraining the respondents from harassing, intimidating and removing or threatening to remove the applicant, her family members and her livestock from a farm. The applicant and her family members were residents of a farm owned by Damview Trust with the respondents being trustees of the trust. They had been residing on the farm since 1994 in terms of a

labour tenancy agreement entered into by the applicant's husband and the previous owner. The applicant's husband provided labour on the farm until he was retired due to ill health and subsequently died in 2010. The applicant also provided labour on the farm, and contended that her right of residency emanated from her husband's status as a labour tenant in terms of the Land Reform (Labour Tenants) Act. In the alternative, she argued that she was a labour tenant in terms of the Act and additionally she was an occupier in terms of the Extension of Security of Tenure Act.

Sardiwalla AJ held:

"In order to comply for such relief the applicant needs to meet the requirements for a final interdict as the relief she is seeking is not interim in nature and will have the effect of a final determination of the rights of the parties to the litigation." [Paragraph 20]

"... [T]he respondents allege an agreement was entered into with the deceased husband. The respondents have the onus of proving the existence of such an agreement and the terms and conditions thereof." [Paragraph 24]

"... [T]he respondents have failed to discharge their onus of proving there was an agreement. The evidence before me is contradictory and inconclusive." [Paragraph 32]

"The alternate hurdle that the respondents face is the enforceability of a contract against the applicant. The doctrine of privy of contract has its basic tenements in the principle that people must be bound by the contracts they make with each other. The doctrine provides that parties who are not privy to a contract cannot sue or be sued on it. Thus even if it is doubtful there was an agreement with the deceased husband what is clear is that there was never one with the applicant. While the respondents contend that she was aware of the agreement and was employed to supplement their income because of it this is not sufficient; she was not privy to the contract and thus cannot be bound by it. ..." [Paragraph 33]

"To grant the applicant a final interdict I must be satisfied that the applicant is being imminently threatened with eviction. The applicant has not shown this within the ambit of ESTA." [Paragraph 35]

The application was dismissed.

MEDIA COVERAGE

Plaintiff in *Sardiwalla NO v Road Accident Fund* (441/2003) [2009] ZAKZPHC 45 (21 September 2009)

Instituted action in the KwaZulu-Natal High Court at Pietermaritzburg, in his capacity as Administrator / Executor of the Estate of the plaintiff, against the Road Accident Fund (the defendant) for payment of damages arising from injuries sustained in a motor vehicle collision which occurred on 2 September 1998.

Quoted speaking at a breakaway session on court-annexed mediation at the Law Society of South Africa (LSSA) held its annual general meeting (AGM) on 1 and 2 April 2016 in Johannesburg.

(Mapula Thebe**, 'Towards a unified independent legal profession', De Rebus, 01 June 2016, http://www.derebus.org.za/towards-unified-independent-legal-profession/)**

"Acting Judge Sardiwalla said that court-annexed mediation was a very important topic that has raised many eyebrows, and had received tremendous support and just as much criticism, giving some background on court-annexed mediation: "It is a mediation process that is linked to the courts, not controlled by the courts, not a function of the courts, not a function of anyone within the court system, but an independent facility that is housed, for convenience, at courts".

He added that the background behind the court-annexed mediation was that litigation has become far too expensive and that the majority of the people in this country cannot afford to resolve their disputes in a formal manner: "[M]any a families and many individuals have been totally destroyed because of disputes that could have been resolved. They just did not have the capacity and the support to have these disputes resolved'. Judge Sardiwalla said that the process of court-annexed mediation was accessible to everyone, although, targeted for the less fortunate, adding that in the two years since the launch of the 12 sites in Gauteng and North West, 1 500 disputes had been resolved.

Judge Sardiwalla said that there has been consultation with the universities where deans of all the faculties of law were addressed about this mediation, and that his committee had received an overwhelming nod for the project and the deans were planning to introduce mediation as a course in the LLB degree. Judge Sardiwalla also said that there has been great interest by state organisations who would like to use the court-annexed mediation process to try and have a first bite at resolving disputes in a semi-formal way, without the court process."

Quoted commenting on the Launch of project to use lawyers as magistrates:

Bob Aldridge 'Launch of project to use lawyers as magistrates' Natal Witness, 15 February 2000 at http://www.lawlibrary.co.za/notice/presscuttings/miscellaneous/launchlawyersmag.htm)

"The Justice Minister Penuel Maduna had announced the launch of a national pilot project in Pietermaritzburg in which members of the NADEL and the Black Lawyers' Association (BLA) would act as magistrates in the courts of KwaZulu-Natal. Then Deputy Mayor of Ladysmith, Cassim Sardiwalla, who was also the co-ordinator of the project, said: "This addresses the issue of justice as well as the problems of ill-prepared SAPS investigation officers and badly prepared prosecutors and attorneys. Many senior

attorneys and some advocates will now be able to assist in the legal process ... The delays which are being experienced so far as a result of the lack of manpower are totally unacceptable and mean that many awaiting trial prisoners can remain in custody for more than a year before their case is heard".

Sardiwalla stressed that "this project is being supported voluntarily and without remuneration, purely as a service to the people of our country". Nonetheless, whilst there was potential of the project to help to reduce the backlog of many cases, it was criticized by some experienced legal specialists on the basis that it as a clever way for career opportunists to "fast track" through the normal experiential process of promotion."

ADVOCATE DAVID UNTERHALTER SC

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

Advocate
- Johannesburg Bar (1990 –)
- Senior Counsel (2002- present)
- English Bar (2009 – present)

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

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)

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 –)

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

Trustee, Helen Suzman Foundation (1994 –)

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.

BETTERBRIDGE (PTY) LTD V MASILO AND OTHERS (54727/2011) [2014] ZAGPPHC 813; 2015 (2) SA 396 (GP) (17 OCTOBER 2014)

Case heard 14 October 2014, Judgment delivered 17 October 2014

The Plaintiff instituted an action against the Defendants, as the joint liquidators of Crystal Lakes Vaal Private Eco Estate (Pty) Limited, claiming that it advanced R5 million to Crystal Lakes pursuant to an agreement of loan, and that Crystal Lakes, in breach of its obligations, failed to repay. Defendants raised a special plea of prescription. The central issues were whether prescription was delayed by reason of the application of Section 13 (1) (g) and (i) of the Prescription Act, and the meaning of the statutory phrase: "the debt is the object of a claim filed against … a company in liquidation".

Unterhalter AJ held:

"… The filing of a claim, in ordinary language, is to take the required step so as to commence the formal process by which a claim is entertained. It is the commencement of the process by which a person formally seeks to enforce the payment of a debt. … [T]he filing of a claim is not the same thing as the determination of that claim. Just as the service of a summons is a procedural step removed from the final judgment of the claim." [Paragraph 12]

"Lodgement, admission to proof, and the decision to admit a claim are separate stages in the making of a claim against a company in liquidation. Lodgement does not necessarily entail that the person making the claim has complied with the requirements of Section 44 (4) [of the Insolvency Act]. A claim is admitted to proof when these requirements are met, failing which, absent an exercise of discretion by the presiding officer, the claim is not admitted to proof. Filing in this sense would require both lodgement and satisfaction of the requirements stipulated in Section 44 (4). A claim is admitted in terms of Section 44 (3) only once a claim is proved to the satisfaction of the officer presiding who then shall admit the claim." [Paragraph 19]

"The matter is not free of all ambiguity. … [T]he concept of filing is to be ascertained by reference to the procedure for proof provided in Section 44 of the Insolvency Act. […] Accordingly the sense in which the presiding officer admits the claim for purposes of proof is a reference to compliance with the procedural requirements of Section 44 (4) and not the substantive power conferred upon the presiding officer to admit a claim in terms of Section 44 (3). …" [Paragraph 23]

"… I find that the correct interpretation of the Thrupp decision is that the full bench held that a claim has been filed against the company in liquidation when the presiding officer at either the first or second meeting of creditors admits the claim for purposes of proof in the sense of allowing the claim to go forward to the meeting of creditors so as determine whether the claim should be admitted or rejected." [Paragraph 24]

"There are important entailments that follow from my interpretation of the decision in Thrupp. Since the decision was rendered by a full bench of this division, sitting alone, I am bound by the ratio of the decision. The Constitutional Court has recently stressed the importance of adherence to precedent as an attribute of the rule of law. And unless Thrupp has been overruled, I am bound to follow it." [Paragraph 26]

"Quite apart from the question of authority, there are two broad principles that underlie the meaning to be attributed to the word "filing". The first is the principle, referred to above, that a creditor already

taking appropriate steps to recover his debt should not be required to institute legal proceedings merely to interrupt the running of prescription. And the only question that then arises is what is it to take an appropriate step to recover a debt against an insolvent company. The other principle … is that opportunistic action by a creditor to engage the process detailed in Section 44 (4) should not be rewarded with delay in the completion of prescription." [Paragraph 31]

"It appears to me however that the legislature has, in using the word "filing" decided between these principles. Under the interpretation of the court in Thrupp, the appropriate step is admission to proof. This discourages informal opportunistic behaviour and requires at least that the claim be made in accordance with the procedural requirements of Section 44 (4)." [Paragraph 32]

The special plea was dismissed with costs.

ADMINISTRATIVE JUSTICE

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 Mlanga to recuse themselves.

Unterhalter AJ held:

"The central question that arises is whether Dr Basson may appeal the refusal by the committee to uphold his application for the recusal of Professors Hugo and Mhlanga to an ad hoc appeal committee established in terms of section 10 (2) of the Act [Health Professions Act]?" [Paragraph 24]

"The powers vesting in an appeal committee constituted in terms of section 10 of the Act … reference "a finding of a professional conduct committee". …" [Paragraph 26]

"… [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 recussal 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]

It was held that the application was premature and may not be entertained until such time as he has exhausted his internal remedy of appeal.

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

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.

Jenna Etheridge, "Prominent advocate robbed at gunpoint while driving to Joburg court", News24, 24 August 2017, http://www.news24.com/SouthAfrica/News/prominent-advocate-robbed-at-gunpoint-while-driving-to-joburg-court-20170824

Advocate David Unterhalter SC was robbed at gunpoint while on his way to the South Gauteng High Court. "He was stuck in the usual Johannesburg traffic and was a sitting target. It was a robbery at gunpoint." His cellphone and watch were taken. Unterhalter was unharmed and had already resumed his duties as an acting judge for the urgent court roll in the high court at the time of going to press. No comment was made as to whether the incident was isolated or connected to his cases. He had most recently represented the SA Reserve Bank in an application to have the Public Protector's remedial action to change its constitutional mandate set aside. The application in the North Gauteng High Court was successful and the remedial action was set aside.

"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."

ADVOCATE CORNELIUS VAN DER WESTHUIZEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 22 June 1956

BA, University of Pretoria (1979)

LLB, University of Pretoria (1982)

CAREER PATH

Acting Judge, North & South Gauteng High Courts (2015 - 2017)

Advocate, Pretoria Society of Advocates (1984 – present)
Senior Counsel (2008)

President, North Gauteng Fencing Union (2011-2014)

Member Ex Officio, South Africa Amateur Fencing Association (2011-2014)

Vice President, North Gauteng Fencing Union (2010-2011)

Honorary Secretary, Pretoria Bar (1990 – 1991)

First Honorary Secretary, Pretoria Bar (1989 – 1990)

Second Honorary Secretary, Pretoria Bar (1988 – 1989)

SELECTED JUDGMENTS

PRIVATE LAW

GRIFFITHS V MINISTER OF POLICE (15/27028) [2017] ZAGPJHC 51 (3 MARCH 2017)

Case heard 21 February 2017 and 22 February 2017, Judgment delivered 03 March 2017

The plaintiff was arrested on a charge of alleged interference with the duties of a police officer. He claimed that his arrest without a warrant and subsequent detention was unlawful, and instituted an action for damages of R500 000.00

Van der Westhuizen AJ held:

"The manner in which this matter was presented to court leaves much to be desired. Suffice to say that the parties underestimated the issues and the evidence required in that regard. This matter should never have progressed to court." [Paragraph 1]

"The evidence of W/O Strydom clearly lacks particularity. He refrains from explaining the alleged interference with his duties, other than a verbal interference. How that verbal interference impacted on his duties was not explained, particularly where on his own evidence he had already completed his duties …" [Paragraph 18]

"The only evidence that is before the court to consider whether there was an interference with the duties of a police officer and the alleged resisting of arrest are the mere statements to that effect by W/O Strydom that it did occur, without any elaboration." [Paragraph 20]

"… On the probabilities, the plaintiff merely made a nuisance of himself. That in itself cannot constitute an interference with police duties that would translate into the committing of a crime." [Paragraph 22]

"The issue of costs require some consideration. It would have been clear to the plaintiff that an amount R500 000.00 in respect of damages in the circumstances of this matter was unduly excessive. The only probable reason to have claimed such amount was to bring the matter within the jurisdiction of the High Court. The matter is simple and uncomplicated. It could have been dealt with in a lower court with appropriate jurisdiction. The matter certainly did not warrant the attention of the High Court. It follows that the plaintiff is only entitled to costs on the appropriate Magistrate's Court scale." [Paragraph 40]

Plaintiff was awarded damages of R50 000.

CIVIL AND POLITICAL RIGHTS

SOUTH AFRICAN NATIONAL EDITORS FORUM AND OTHERS V BLACK FIRST LAND FIRST AND OTHERS (23897/17) [2017] ZAGPJHC 179 (7 JULY 2017)

Case heard 6 July 2017, Judgment delivered 7 July 2017

The applicants brought an urgent application seeking interdictory relief against the respondents, for actions and conduct alleged to constitute harassment, intimidation and threats in respect of their bodily and physical integrity, their safety, liberty and the right to earn a living as a journalist.

Van der Westhuizen AJ held:

"The incident … at the home of the second applicant clearly demonstrates that the respondents do not intend to follow peaceful protest. A gathering where participants are armed with sticks and golf clubs, defacing private property, invading the property and turning off the water supply, assault on the person of fellow journalists who show support for their colleague targeted, hardly constitutes a peaceful protest. Such gathering clearly has the attributes of a protest with the intention to harass, intimidate and threaten. In particular where it takes place within the sanctity of a private home." [Paragraph 14]

"The respondents furthermore confirm an intention to follow the journalists even to their places of worship. Such intention cannot indicate peaceful protest. On the contrary, it is indicative of an intention to harass, intimidate and threaten. …" [Paragraph 15]

"The respondents claim that their conduct and actions are directed at the racist and biased reporting of the journalists. If that is true, the protest should be directed at the profession of the journalist and the place where that profession is followed, not at the private home or place of worship of the journalist. …" [Paragraph 16]

"The use of language such as "askari" and "settler" in the particular context speaks of an intention to cause harm, whether directly or indirectly. It is emotive. The claim on the part of the respondents that an innocent understanding of such language is to be ascribed thereto is irrational, illogical and without merit. Such language is clearly a reference to the historical context thereof." [Paragraph 22]

"The assaults on the eighth and twelfth applicants are not disputed. The respondents' claim that the assault on the eighth applicant was provoked, is opportunistic and illogical. To be called a "fool" hardly warrants an attack of any kind." [Paragraph 23]

"The respondents submit that the applicants have an alternative remedy in the form of the laying of criminal charges. … Numerous case law indicate the contrary, namely that the grant of a civil injunction is appropriate relief to be granted in respect of restraining any criminal activity

committed or to be committed. ... The alleged alternative remedy is clearly not an adequate remedy in the context of the grant of an injunction." [Paragraph 27]

The applicants were held to have shown compliance with the requisites for a final interdict, and the interdict was granted. Respondents were further ordered to issue a public statement to all of the members of the first respondent that they do not condone any of the above acts directed at any journalist within 12 hours of the granting of the order.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

NET1 APPLIED TECHNOLOGIES SOUTH AFRICA AND OTHERS V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS; FINBOND MUTUAL V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS; SMART LIFE INSURANCE COMPANY LIMITED V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS; INFORMATION -TECHNOLOGY CONSULTANTS (PTY) LTD V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS (43557/16; 46024/16; 46278/16; 47447/16) [2017] ZAGPPHC 356 (9 MAY 2017)

These consolidated applications concerned the meaning and legality of amendments to regulations under the Social Assistance Act. All the applicants sought a declarator that the amended regulations, and in particular regulations 21 and 26A, did not restrict beneficiaries in the manner in which they operate their respective bank accounts.

Van der Westhuizen AJ held:

"The practical implications of the first, second and third respondents' interpretation of the said new regulations affect the operation of over 10 million beneficiary bank accounts that translate into a value of approximately R550 million per month." [Paragraph 12]

"... [I]t is clear that once the grant is transferred into the recipient's account at Grindrod, it operates as any bank account at any Commercial Banking Institution. There is clearly no difference and SASSA equally has no control over such account with Grindrod as it does not have control over any account with a Commercial Bank. For the foregoing, there is no merit in the submission on behalf of the first, second and third respondents that the Grindrod bank accounts are not bank accounts hos n by the beneficiaries, but is "a method of payment chosen by the Agency"." (sic) [Paragraph 22]

"Further support is to be found in the provisions of new regulation 21(1)(a) which stipulates that a social grant is to be paid into a bank account. The type of bank account is not defined, nor specified. Regulation 21(1)(a) clearly provides for two scenarios, either a bank account, or a payment method determined by the Agency. The latter method envisages a specific alternative

method that is not a bank account. No such determination appears to have been made ..." [Paragraph 23]

"On a purposive reading of regulation 21(1), it is clear that the prohibition in regulation 21(4) is not applicable in respect of regulation 21(1)(a). The two categories, regulations 21(a) and (b), must of necessity entail different and distinct payment methods. That much is clear from the use of the disjunctive "or" in regulation 21(1)." [Paragraph 24]

"Furthermore, I find support for the foregoing in the provisions of s 20(3) of the Act ... That sub-regulation clearly stipulates that a recipient is to receive the full grant amount before any third party may exercise any rights or enforce any claim in respect of that amount. Consequently, the full amount of the grant (bar any direct deduction of a 10% funeral subscription) is to be transferred into the recipient's bank account prior to any deduction thereof by way of a debit order. No other deductions may be made prior to the transfer of the grant amount into the recipient's account ..." [Paragraph 25]

"Neither, in my view, does s 20(1) of the Act assist in interpreting regulations 21 and 26A in accordance with first, second and third respondents' view. That sub-section clearly does not apply in respect of debit orders entered against a banking account. A debit order is nothing more than an electronic form of payment that is effected upon an instruction by the bank account holder to his or her bank in favour of a third party. In no way can it be interpreted as a "cession, pledge or other encumberment". The debit order levied against a recipient's bank account is nothing other than payment of a legitimate debt. ..." [Paragraph 27]

"The first, second and third respondents correctly concede that where recipients hold bank accounts with other commercial banking institutions, their aforesaid interpretation of sub-regulations 21 and 26A does not and cannot apply. In my view that concession puts paid to the first, second and third respondents' arguments. The procedure of payment of the grant amount into the beneficiary's account with Grindrod ... is no different to that where the grant amount is paid into a recipient's bank account with a Commercial Bank. Accordingly, the first, second and third respondents' interpretation is contrived, forced and untenable." [Paragraph 29]

"... Accordingly, the correct and appropriate interpretation of those regulations are as contended for by the applicants." [Paragraph 30]

It was declared that regulations 21 and 26A of the Regulations, read with section 20 of the Social Assistance Act 13 of 2004, do not operate to restrict beneficiaries in the operation of their bank accounts.

CRIMINAL JUSTICE

MVIMBI V S (A609/14) [2015] ZAGPPHC 43 (2 FEBRUARY 2015)

Case heard 2 February 2015, Judgment delivered 2 February 2015

The appellant was convicted in the regional Court on two counts of robbery with aggravating circumstances, and was sentenced to 10 years' imprisonment. He appealed against conviction and sentence.

Van der Westhuizen AJ (Khumalo J concurring) held:

"The court a quo dealt in detail with the appellant's version. ... That being so, there is no credible evidence before the court as to the defence of the appellant. The court a quo correctly rejected the defence of alibi. The appellant's version cannot reasonably possibly be true." [Paragraph 7]

"It was submitted on behalf of the appellant that the sentence of 10 years induces a sense of shock. What induces a sense of shock is the audacity to raise general issues of personal circumstances and to rely on the issue that the appellant is a first offender in the face of the provisions of section 51 of Act 105 of 1997, which prescribes a minimum sentence in respect of the crime under consideration of 15 years in particular where the accused is a first offender." [Paragraph 11]

"In terms of the provisions of section 51 of the Criminal Law Amendment Act ... the court is obliged to impose the minimum prescribed sentence unless the court finds substantial and compelling circumstances to exist." [Paragraph 20]

"In my view, the seriousness of the crime of which the appellant has been convicted cannot be ignored. The complainant was attacked by the appellant in a rough manner, an open wound was inflicted with the knife used in the attack, she was threatened as to her safety within her own house in no uncertain terms. ..." [Paragraph 23]

"It follows that this court of appeal is entitled to consider an increase in the sentence of the appellant. It further follows that this court of appeal is entitled to refuse the appellant leave to withdraw the appeal against sentence." [Paragraph 25]

The appeal against the conviction was dismissed and the 10 year sentence set aside and replaced with a sentence of 15 years imprisonment.

CHILDRENS' RIGHTS

D V P (82527/2016) [2016] ZAGPPHC 1078 (15 DECEMBER 2016)

Case heard 15 December 2016, Judgment delivered 15 December 2016

Applicant and respondent divorced, and the child born of their marriage, S, lived with respondent thereafter. Applicant's contact with the child become restricted when he re-married, and respondent attempted to relocate the child to a different city. Applicant sought an order restraining the respondent from relocating pending the finalisation of an expert assessment and recommendation.

Van der Westhuizen AJ held:

"… The nub of the problem in this matter lies in what is in the best interests of S. It may not be what either parent regard as being in her best interests. …" [Paragraph 9]

"The findings of the experts and their respective recommendations highlight the fact that S. is confused and disoriented, despite an outward appearance of being happy and joyful. Dr Hartzenberg reports … that S. has become what is termed a 'parenting child' towards her mother, whom she perceives as being unhappy and sad and whom she is obliged to humour. Sadly this results in an unconscious false projection upon her father as the culprit for her mother's unhappiness and sadness." [Paragraph 16]

"Applying the principles enunciated in the cases relating to the relocation of one parent slavishly to the present instance, would, in view of the particular circumstances that led to this application, lead to the inevitable rubber stamping of the respondent's decision to relocate. To my mind that would not necessarily have the best interests of S. at heart. The question is whether that decision was taken in a rational and considered manner." [Paragraph 19]

"Mr Smith submitted that in view of the respondent's Constitutional right to choose how and where to eke out a living and to move forward in life, would outweigh, or at least be in, the minor child's best interests. That logic seems constrained in the present instance. … Mr Smith further submitted that despite the Constitution prescribing that the best interests of minor children are paramount, those interests on occasion are to play second fiddle to the Constitutional right of a parent to choose where he or she prefers to live and eke out a living. No authority for that proposition was advanced and I know of none. It is certainly contrary to the

provisions of section 36 of the Constitution which provides that any right can be limited depending upon the particular circumstances." [Paragraph 29]

Van Der Westhuizen AJ ordered the respondent not to remove S from the court's area of Jurisdiction and to re-enrol and to retain the minor child at Midstream Primary School immediately. In addition, inter alia, the judge ruled to afford contact to the applicant and for the child, to make provisions for mediation, and for the child to continue receiving expert support, as well as the parents.

JUDGE RONALD HENDRICKS

BUIGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 11 December 1964

BLC, University of Pretoria (1988)

LLB, University of Pretoria (1990)

CAREER PATH

Acting Judge President, North West High Court (2012, 2014, 2016 - 2017)

Acting Judge of Appeal, Labour Appeal Court (2010)

Acting judge, Labour Court (2007)

Judge, North West High Court (2003 -)

Acting Judge, North West High Court (2003)

Acting regional court magistrate, Mmabatho (2000)

Advocate (1993 – 2003)

State advocate (1991 – 1993)

Regional Court prosecutor (1990)

Member, NADEL (2000 -)

North West Bar Association:

- Secretary (1997 – 1999)
- Vice chairman (2000 – 2001)

Member, African National Congress (1994 – 2003)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S v NKUNA 2012 (1) SACR 167 (B)

Case heard: 3 October 2005; Judgment delivered 17 November 2005.

The central question in this case was whether an accused could be convicted of murder in circumstances where the body of the deceased had not been found. No direct evidence was led and the state relied on circumstantial evidence for a conviction.

Hendricks J held:

"To require the production or discovery of the body (*corpus delicti*) in all cases would be unreasonable and unrealistic and, in certain cases, would lead to absurdities. To my mind it would lead to a gross injustice particularly in cases where a discovery of the body is rendered impossible by an act of the offender himself. … It is thus proper for a court to convict an accused on circumstantial evidence provided it has the necessary probative force to warrant a conviction, and the fact that death can be inferred from circumstances that leave no ground for a reasonable doubt. … It is not hard to think what the state of affairs would be in this country if the legal position were to be that, whenever a murder is committed and the body (*corpus delicti*) of a deceased is not found, the accused is then entitled to his acquittal; and that being so, despite the existence of overwhelming circumstantial evidence that points a finger to the accused person." [Paragraphs 111 – 113]

Hendricks J found that no evidence had been presented to suggest that the victim might still be alive [paragraph 141]. The accused was convicted of murder.

CUSTOMARY LAW

PILANE AND ANOTHER V PHETO AND OTHERS (582/2011) [2011] ZANWHC 63 (30 SEPTEMBER 2011)

Case heard: 11 August 2001; Judgment delivered: 30 September 2011

Respondents has placed a newspaper advertisement calling on members of the Bakgatla – Ba – Kgafela Royal Family to attend an urgent meeting. Applicants sought to interdict the meeting. Respondents brought a counter – application to compel the applicants to submit financial documents, and to refer the matter to the Premier to appoint a commission of inquiry into allegations of financial maladministration b the Applicants. At issue was whether respondents were members of the Royal Family, and thus whether they were entitled to call a meeting of the Royal Family.

Hendricks J found that:

"Adopting a robust approach to the issues in dispute, it is abundantly clear that the Respondents are not members of the inner circle or core of the Royal Family of the Bakgatla-Ba-Kgafela tribe and also not royalty." [Paragraph 24]

"Being debarred from holding community meetings, the Respondents holds themselves out as members of the Royal Family … and attempt to, under the disguise of being the Royal Family, to hold a meeting in an attempt to circumvent the court order prohibiting them as individuals to hold a tribal community meeting. …" [Paragraph 32]

"Whilst everybody and anybody has the right to call a meeting and enjoys freedom of association, nobody is allowed to call a meeting for and on behalf of an entity or body corporate whilst he/she does not have the necessary *locus standi* to do so. The Respondents who are not core members of the Royal Family cannot call a meeting under the guise of the Royal Family and even hold out in an advertisement that the First Respondent … is the chairperson or chairman when in fact this is not the case. Without any stretch of the imagination, the placing of this advertisement was intended to create confusion amongst members of the tribal community of the Bakgatla-Ba-Kgafela tribe who the Royal Family is and who has the right to call a meeting." [Paragraph 39]

The interdict was granted, and the counter – application dismissed. On hosts, Hendricks J held:

"[T]he Respondents weren't candid with this Court. Furthermore, it is quite apparent that the Respondents are doing everything within their means to unseat and undermine the authority of the Applicants and to litigate as often as possible in an attempt to create confusion within the tribe. This behaviour borders on being vexatious. This, to my mind, calls for a punitive costs order. In my view too, the complexity of this matter is not questionable, this was the view of counsel for both the Applicants and the Respondents." [Paragraph 55]

Respondents were ordered to pay costs on an attorney and client scale.

The judgment has been criticised by Aninka Claassens and Boitumelo Matlala ["Platinum, poverty and princes in post-apartheid South Africa: new laws, old repertoires", *New South African Review* 4 (2014), 117]:

"Judge Hendricks found that Nyalala Pilane, being 'the nominated representative of the *kgosikgolo* in South Africa, has the necessary standing and clear right as a member of the royal family, as defined in terms of Bakgatla custom and law, to bring this application.' This is a disconcerting and novel interpretation of customary law – that membership of a royal family, and chiefly status depends on the discretion of a 'paramount' based in another country. … Judge Hendricks's interpretation has far-reaching consequences for the concept and exercise of chiefly accountability. In effect it means that a traditional leader such as Nyalala Pilane cannot be held accountable by anyone in the customary community, including his royal family, apart from a more senior traditional leader. This flies in the face of a wide-ranging historical and anthropological literature about the role of councils and interlocking customary structures at various levels in mediating and shaping the exercise of chiefly power …" [page 129].

ADMINISTRATION OF JUSTICE

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

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

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

Hendricks J dismissed all three points in *limine:*

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

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

The fact that two Law Societies have concurrent jurisdiction over an attorney and exercise control over such attorney is in my view not discriminatory. Either of the two Law Societies may take action or appropriate steps against a member. … If however, these Law Societies take separate action against an attorney, for the same misconduct, such an attorney will have the appropriate remedies or defences at his or her disposal." [Pages 11-12]

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

MEDIA COVERAGE

"SKIERLIK JUDGE A HIT", *NEWS24* 23 NOVEMBER 2008 (available at http://www.news24.com/SouthAfrica/News/Skierlik-judge-a-hit-20081123)

> "Mmabatho High Court Judge Ronald Hendricks, 45, is fast becoming the darling of crime victims.
>
> …
>
> He is the same judge who sent William Nkuna to life in prison for killing Constable Francis Rasuge. The mystery surrounding her disappearance kept the nation enthralled.

Nkuna, her boyfriend, was the main suspect.

Hendricks was not afraid to label him a blatant and pathetic liar.

Rasuge's body has still not been found.

This week, all eyes were on Hendricks when he had to decided the fate of Johann Nel, 19, who went on a shooting spree at the Skierlik informal settlement and killed four people including two children aged ten years and four months.

'A no-nonsense man'

In spite of a barrage of death threats warning him not to send Nel to jail, he sentenced the teenager to 176 years in jail.

In passing sentence Hendricks confirmed that the motive for the killing was that the victims were black.

"He is a no-nonsense man," described one policeman who claimed to have had the privilege of listening to almost all of his judgments.

A security officer at the court described him as a polite and humble judge "who goes about doing his job".

"What I have noticed about him is, he doesn't forget people's names and when he passes you, he always makes sure that he greets and looks at you in the eye," said the security officer.

On Friday he restored the faith of the community of Skierlik by "delivering a bold and strong judgment".

The court manager, Simon Masisi, who has know Hendricks for 10 years described him as a versatile, not-status orientated family man and very religious."

JUDGE BULELWA PAKATI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 March 1961

Diploma Juris, University of Transkei (1986)

BJuris, University of Transkei (1988)

LLB, University of Transkei (1990)

CAREER PATH

Judge, Northern Cape High Court (2012 -)

Regional Magistrate (2004 – 2012)

Senior Magistrate (2002 – 2004)

Magistrate, Head of Office, Maclear (2000 – 2002)

Magistrate (1991 – 2000)

Member and Provincial Co-coordinator, Northern Cape, SAIAWJ (2012 -)

Member, SAWLA (2011)

Member, ARMSA (2004 – 2010)

Member, JOASA (2003 – 2007)

Member, BLA (1990 – 1991)

Member of school governing body : St Cyprian's Gramamr School (2015 -) and Kwaggasrand High School (2007)

SELECTED JUDGMENTS

PRIVATE LAW

MALAN V MINISTER OF DEFENCE (691/2011) [2014] ZANCHC 10 (5 SEPTEMBER 2014)

Case heard 13 May 2014, Judgment delivered 5 September 2014

Plaintiff, a Warrant Officer in the Human Resources division of the SANDF, sued for damages following his arrest and detention by the Military Police. It was alleged that during the course of his detention, plaintiff was assaulted, and insulted by a senior SANDF officer. During the course of the trial the unlawfulness of the arrest and detention was conceded by the defendant.

Pakati J held:

"… [I]t is clear that Gen Mpaxa was aware that she was violating the plaintiff's right to privacy. She later admitted that she was fully aware of the doctor-patient privilege and conceded that she should have respected it. … The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff's right to privacy and impugned his dignity. …" [Paragraphs 31 - 32]

"The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff's right to privacy and impugned his dignity." [Paragraph 41]

The plaintiff's claim succeeded.

MEREMENTSI V VISSER (CA&R 3/2011) [2013] ZANCHC 9 (26 MARCH 2013)

Case heard: 21 November 2011 and 11 February 2013; Judgment delivered 26 March 2013.

Appellant sued the respondent for damages for failing to sign transfer documents to transfer immovable property to the appellant. Respondent admitted not signing the documents, but claimed not to be at fault. The magistrate at first instance found for the respondent.

Pakati J held:

"… [I]t is clear that the magistrate was, unfortunately, out of her depth. She failed to focus on the law, both statutory and the common law principles. She did not consider the fact that the alleged subsequent oral and unilateral attempt to change a valid written agreement offends against the parol evidence rule. The magistrate lost sight of the fact that a matter admitted by a party need not be proved by the opponent. The judgment is also full of contradictions." [Paragraph 23]

"The Magistrate further misdirected herself when she found that the plaintiff led hearsay evidence to prove that the defendant defaulted in signing the documentation to effect transfer. It is a rule of evidence that no evidence need be adduced to prove an admitted fact. The defendant … admitted in his plea that he failed or refused to sign the transfer documentation. At that stage the purchase price had

already been paid by the plaintiff, which means that the plaintiff complied with all the terms of the agreement. The defendant also could not change the purchase price unilaterally." [Paragraph 29]

"The court a quo further committed a misdirection in having stated that the plaintiff failed to comply with the terms of the agreement in that he paid the R16 000-00 to the defendant's "guardian" instead of the municipality. The place where and to whom the purchase price was to be paid is not an essentialia of a contract of sale of immovable property. …" [Paragraph 30]

"… [T]he defendant breached the contract by not signing the transfer documents and the plaintiff was impoverished as he had to buy the property at a price much higher than the agreed price. Had the defendant performed in terms of the contract no enrichment problem would have arisen. The defendant's enrichment was at the plaintiff's expense. It must be borne in mind that the property fetched the higher price because of the improvements that the plaintiff had effected. He therefore paid twice for the improvements and was therefore impoverished. …" [Paragraph 35]

Williams J dissented, finding that the plaintiff had failed to prove damages, and that as the claim had not been based on enrichment, all references to enrichment in the main judgment were erroneous.

Kgomo JP wrote a separate judgment concurring in the judgment of Pakati J:

"Williams J does not state that the parties hereto had entered into a valid agreement of the sale of the immovable property described by Pakati J in the opening paragraph of her judgment (para 10). It is therefore incomprehensible on what basis or legal principle it is suggested by Williams J that the respondent could alter arbitrarily and orally the terms of a binding written agreement of the sale of immovable property." [Paragraph 5]

The appeal was upheld.

COMMERCIAL LAW

DU TOIT V JOODT AND OTHERS (458/2011) [2011] ZANCHC 32 (11 NOVEMBER 2011)

Case heard 12 August 2011, Judgment delivered 11 November 2011

Applicant and first respondent were directors of the second respondent (Saamwerk Soutwerke Ltd). First respondent owned 12% of the shares in Saamwerk, and held a 26% interest in the third respondent, Kalkpoort CC. Applicant was the majority shareholder in Saamwerk, and a majority member in Kalkpoort. An association agreement was entered into between applicant and first respondent, but their relationship soured.

On the return day of a *rule nisi*, Pakati AJ held:

"In his answering affidavit Roodt failed to respond to material allegations made by Du Toit … A respondent's answering affidavit is required to deal pertinently with the allegations contained in an applicant's founding affidavit. If a respondent fails to admit or deny, or confess and avoid, allegations in

the applicant's affidavit the Court will, for the purposes of the application, accept the applicant's allegations as correct. …" [Paragraph 19]

"Both Du Toit and Roodt, as directors of the company, have to exercise their powers and carry out their duties *bona fide* and for the benefit of the company. Apart from the duties imposed on a director in terms of the Act, 61 of 1973 (now repealed by Act 71 of 2008), a director is at common law subject to fiduciary duty requiring him to exercise his powers *bona fide* and for the benefit of the company and to display reasonable skill in carrying out his office. …"

"The overwhelming evidence shows that Roodt was busy destroying the good name and reputation of Saamwerk Ltd and Kalkpoort CC. He breached his duty as a director. …" [Paragraph 21]

"Roodt has shown no interest in the prosperity of Saamwerk Ltd and Kalkpoort CC. He has already indicated that he wished out of the two businesses. The Act allows Du Toit to institute a derivative action against Roodt based on the fact that he is in breach of an obligation pertaining to his fiduciary duties towards the corporation." [Paragraph 23]

"… Roodt acted in bad faith by consulting outsiders and soliciting their help to prejudice the businesses in their good name and goodwill. Roodt has essentially made bare denials. I am satisfied that the applicant … has established a proper case for a final interdict …" [Paragraph 25]

CRIMINAL JUSTICE

S V LITSILI (K/S 6/11) [2011] ZANCHC 33 (17 NOVEMBER 2011)

The accused with charged with one count of murder, one count of rape alternatively sexual acts with a corpse, and one count of theft. The victim was the mother of the accused.

Pakati AJ held:

"That the deceased was murdered is common cause. The crisp issue to be determined is the identity of the perpetrator. The accused pleads an alibi and maintains that he was not present when his mother was murdered. …" [Paragraph 25]

"The accused could not explain how deceased's blood landed on his shoes and the blue jeans he wore … He could also not explain his shoe print similar on the blood-soaked or liquid-smeared bedroom floor. He said that when he left his shoes they were clean. This implies that someone wore his shoes and his blue jeans, killed his mother, raped her and walked around the house. He stated that it was possible that the perpetrator spilt blood on his clothing and shoes to set him up. The accused's explanation is not only false but it is also laughable." [Paragraph 30]

"I am satisfied that the perpetrator who killed and had sexual intercourse with the deceased is the accused. This explains how the deceased's blood came onto his blue jeans and shoes. The accused was unable to give an acceptable explanation …" [Paragraph 37]

"Notably large amount of force was used ... The severity of the head injuries sustained by the deceased was to the extent that the deceased could not have survived because of blood found in the airspaces. It is not possible that the accused left the deceased alive as he wants the court to believe. What is clear is that the accused continued to assault the deceased after her heart had stopped beating. This is evident from the medical evidence ... The sexual act was also committed post mortem. The deceased was an elderly woman of 61 years and defenceless. The accused wanted this court to believe that she was armed with a spade when he disarmed her ...the assault on her was vicious and gruesome resulting in injuries ... which led to her death. ..." [Paragraph 40]

"The manner in which the deceased met her demise with specific reference to the injuries found during the post-mortem examination and her cause of death, satisfy me that the only reasonable inference that can be drawn is that the accused assaulted the deceased with the direct intention to kill her." [Paragraph 41]

KHAULI & ANOTHER V S [2011] JOL 26779 (GNP)

Judgment delivered: 10 December 2010

Appellant and another accused had been convicted of robbery and murder and sentenced to 15 years and life imprisonment in respect of each count. Immediately after sentence, on 30 August 2002, an application for leave to appeal was dismissed by the trial judge.

Pakati AJ (Webster and Ranchod JJ concurring) held:

"On 5 February, 2007, the appellant brought another application for leave to appeal before Shongwe DJP (as he then was). Leave to appeal was only granted on sentence." [Paragraph 3]

"The question is whether Shongwe DJP was competent to entertain the appellant's second application after leave had been refused by the trial court against both conviction and sentence." [Paragraph 4]

"... The application for leave to appeal entertained by Shongwe AJA (sic) was clearly contrary to the express provisions of [Section 316(8)(a)(ii) of the Criminal Procedure Act]. It was improperly before him as he had no power, with respect, to entertain it. ..." [Paragraph 5]

"It is clear that Shongwe DJP was not made aware that the appellant had already exhausted his appeal remedies in the High Court. The application was not supposed to have been entertained because the High Court was *officio*. The appellant's remedy was to seek leave to appeal from the President of the Supreme Court of Appeal by way of petition. This Court, sitting as a court of appeal, may therefore not entertain the appeal. ...' [Paragraph 6]

"In my view, there is no appeal before us to uphold or dismiss. In my view, the proper order is to strike the matter from the roll." [Paragraph 8]

S V JIMMY MOKGOSI, UNREPORTED JUDGMENT KS65/09 (20 MAY 2010)

In this murder case, the admissibility of hearsay evidence in terms of the Law of Evidence Amendment Act was dealt with briefly.

Pakati AJ held:

"The above Act must as far as possible be read in light of section 35(3) of the Constitution which guarantees a right to a fair trial to an accused person. It is true that Courts warned that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling reasons for doing so. ..." [Paragraph 9]

MEDIA COVERAGE

Recounted difficulties with colleagues during a previous JSC interview:

> "A bad experience on the issue of Afrikaans was recounted by another candidate for judicial appointment. She told the JSC she felt she had not been welcome when she had acted as a judge in the Northern Cape High Court, because she did not speak Afrikaans ... Magistrate Bulelwa Pakati, being interviewed for the North Gauteng High Court, said that when she arrived at the Northern Cape court, a colleague had said to her that she would 'not make it in the Northern Cape' if she did not understand Afrikaans. Later, she sat in an appeal with the same colleague. According to Pakati, the judge wrote a judgment in Afrikaans and said to her. 'Take this judgment. It's written in Afrikaans. Go and struggle with your dictionary and see whether you concur or not.' She said when Judge President Franz Kgomo went on long leave, that 'was a period that was worse for me. Because I felt that the other judges were not collegial to me.'"

- Legalbrief, no date given, available at http://legalbrief.co.za/diary/legalbrief-today/story/why-theres-no-rush-for-posts-on-johannesburg-bench/print/

JUDGE VIOLET PHATSHOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 20 November 1972

BProc, University of the North (1995)

LLB, University of the Free State (1996)

LLM, University of the Free State (1999)

CAREER PATH

Acting Judge of Appeal, Labour Appeal Court (2016 – 2017)

Acting Judge, Labour Court (2016)

Judge of the High Court, Northern Cape Division (2011 -)

Acting Judge, Northern Cape High Court (2010 – 2011)

Enrolled as notary and conveyancer of the High Court (2009)

Part time lecturer, University of the Free State (2006 – 2009)

Part time arbitrator, conciliator, CCMA (1999 – 2004)

Admitted as Attorney of the High Court (1999)

Chairperson, Phatshoane Honey Inc attorneys (2002 - 2011)

Director, Naude's Attorneys (2000 – 2002)

Professional Assistant, Naude's Attorneys (1999 – 2000)

Candidate Attorney, Naude's Attorneys (1997 - 1999)

Researcher, Supreme Court of Appeal (1996)

Member, International Association of Women Judges (2011 onwards; Vice chairperson, programmes 2012 – 2014)

Member of Council, Sol Plaatje University (2014 -)

SELECTED JUDGMENTS

PRIVATE LAW

FREEPAK BK V DURAAN AND ANOTHER (729/2013) [2013] ZANCHC 42 (18 OCTOBER 2013)

Case heard: 16 August 2013; Judgment delivered 18 October 2013.

Applicant sought to enforce a restraint of trade agreement that would interdict the respondents from being involved in a business in the Northern Cape that was involved in selling similar products (packing material) to the applicant.

Phatshoane J held:

"The Duraans make it plain that they intend to open a business which sells similar products as that of the applicant. They do not dispute that they had personal contact with the applicant's clients or that these clients had their contact details. In their own words Van Der Walt rarely visited the branch and was seldom involved in the business. This goes to show how well they were acquainted with the applicant's clients. They also do not say why is it necessary for them to open the same business as the applicant except that they have been involved in the packaging business for 15 years; there is nothing secretive or special about this industry; and that they have been out of employment since February 2013." [Paragraph 23]

"In its current form the restraint clause impedes the Duraans' involvement in any business which sells similar products as the applicant in the whole of South Africa. It does not define the territory within which the restriction is to apply. Nevertheless, the applicant seeks an order in terms of which the restraint is to operate only in the Northern Cape. Similarly the period of five years over which the prohibition is to endure is out of kilter with what would be reasonable in the circumstances of this case." [Paragraph 27]

The order was granted, with the period of operation of the restraint of trade limited to two years.

LABOUR LAW

NOOSI V EXXARO MATLA COAL (JA62/2015) [2017] ZALAC 3 (10 JANUARY 2017)

Case heard 25 August 2016; Judgment delivered 10 January 2017

This was an appeal against the Labour Court's refusal to condone a late filing of a review record, and dismissal of the review.

On the condonation issue, Phatshoane AJA (Landman JA and Savage AJA concurring) held:

"The delay of eight weeks and four days outside the six-week period provided for in s 145 of the LRA, as correctly found by the Court *a quo,* was inordinate. One of the primary purposes of the LRA is the effective and expeditious resolution of labour disputes. …" [Paragraph 29]

"In my view, failure to deal with labour disputes promptly and effectively may render the purpose of the LRA manifestly nugatory. Mr Noosi did not provide a plausible explanation for the wanton delay. He failed to provide the dates in respect of which he interacted with his union representatives and those in respect of which he instructed his attorneys of record to assist him. This would have enabled the Court to assess the legitimacy of the explanation proffered for the delay. The remissness on the part of the union officials to file the review application in time ought to squarely be imputed to him." [Paragraph 31]

The appeal was dismissed with costs.

MBS TRANSPORT CC V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS BHEKA MANAGEMENT SERVICES (PTY) LTD V KEKANA & OTHERS (2016) 37 ILJ 684 (LC)

Case heard 8 – 10 September 2015, Judgment delivered 6 November 2015.

These were unopposed applications to stay writs of execution of arbitration awards made by the CCMA, pending review. In issue was whether the Labour Court had the jurisdiction to stay such writs, and if not, what parties could do to vindicate their rights pending review.

Phatshoane AJ held:

"In general, the court has a wide discretion to stay the writs of execution of its own orders. Any decision, judgment or order of the Labour Court may be served and executied [sic] as if it were a decision, judgment or order of the High Court. The certification of an award by the Director of the CCMA … does not convert the award into an order of the Labour Court. If this was the position it follows that the powers of the court to review the award would have been stymied because the decisions of this court are not subject to any review. What is clear from the language of s 143 is that the award of the CCMA may be enforced *as if it were* an order of the Labour Court provided a writ has been issued in respect thereof." [Paragraph 9]

"On a plain reading of s 143 and rule 40 of the CCMA Rules, it is apparent that the CCMA has not been statutorily assigned the authority to issue writs. To the extent that the Practice Manual suggests that once an award is certified, it can be executed upon delivery to the sheriff, without a writ having been issued by this court, the stipulation must be ultra vires. …" [Paragraph 13]

"An application to set aside a writ can only be made to the court that issued the writ. Concomitantly, logic dictates that the application to stay the writ should similarly be made to the court that issued the writ. The CCMA is a creature of statute and is not clothed with the jurisdiction to set aside or stay its own writs. This creates an anomalous situation in that the Labour Court has jurisdiction only in respect of such matters as are specifically assigned to it by the LRA and other statutes. …" [Paragraph 15]

"A stay of a writ issued by the CCMA or by the Magistrates' Court falls outside the ambit of this court's powers. Seen in this context, the litigants are non-suited to set aside the writs issued by the CCMA which are the subject of impending review proceedings before the Labour Court. Put differently, they are without any form of relief afforded to them. Clearly, this legal conundrum could

not have been contemplated or intended by the legislature. To my mind, clarification of the practical effect of s 143 is not a judicial task but a legislative competence in view of the fact that it may necessitate some public debate and possible amendments to the existing statutory scheme." [Paragraph 16]

However, Phatshoane AJ found that as the CCMA had lacked jurisdiction to issue the writs, the writs could be set aside as a nullity.

The judgment has been criticised by Suemeya Hanif, "Fishing without a hook", *ENSAfrica* 2 March 2016, available at https://www.ensafrica.com/news/fishing-without-a-hook?Id=2127&STitle=employment%20ENSight).

The author points out that the Court found that the CCMA does not have statutory authority to issue writs. "This finding was based on the assumption that the awards certified by the CCMA in terms of the amended section 143(1) of the LRA are in fact writs." The author argues that this is incorrect, and the clear wording of section 143(1) of the LRA "indicates an intention to create a statutorily created mechanism, not for orders of the CCMA to become orders of the Labour Court in respect of which a writ has been issued, but for orders of the CCMA to be enforced as if they are orders of the Labour Court in respect of which a writ has been issued."

It is also argued that if the court's conclusion is accepted that the proper course to follow is for litigants to approach the Labour Court to issue writs of execution in satisfaction of the arbitration awards, then the words "in respect of which a writ has been issued" in section 143(1) becomes superfluous. "In the court's words, "it is settled practice" over the years that writs of execution in respect of arbitration awards made by the CCMA were issued by the registrar of the Labour Court. If the proper course to follow, after the amendment, is for litigants to approach the Labour Court to issue the writs of execution in satisfaction of the arbitration awards, then we argue that the amendment is unnecessary and irrelevant."

Furthermore, the author argues that this interpretation of the amendment is "inconsistent with the memorandum of objects on the Labour Relations Amendment Bill, 2012, which states that the amendments to section 143 of the LRA seek "to streamline the mechanism for enforcing arbitration awards of the commission and to make these more effective and accessible [by removing] the need for the current practice in terms of which parties have a writ issued by the Labour Court". In essence, the court's findings in this case are contrary to what the amendments aim to achieve."

CRIMINAL JUSTICE

SCHALKWYK V S (CA&R 119/14) [2015] ZANCHC 5 (27 FEBRUARY 2015)

Case heard: 11 December 2014; Judgment delivered 27 February 2015

Appellant was convicted in the magistrates' court on one count of murder and one count of obstructing the course of justice. On appeal ,the issue was whether the state had proved beyond a reasonable doubt that the appellant had murdered the deceased, with intention n the form of dolus eventualis.

Phatshoane J (Tlaletsi AJP concurring) dismissed the appeal:

"The appellant was convicted of an attempt to defeat or obstruct the course of justice … The appeal before us does not lie against that conviction because he did not succeed in obtaining leave to appeal against it. Therefore it cannot avail him to argue that the witnesses were untruthful that he urged them to subvert the truth. In any event, the evidence of the two State witnesses remained unshaken that the appellant was angry when he hit the deceased with the hay-bale hook. … [T]hese witnesses also gave evidence favourable to the appellant on certain aspects. Out of exasperation over the deceased's misconduct during the weekend of 12/13 February and the morning of 14 February 2011 the appellant struck him with the hay hook. The Acting Regional Court Magistrate's rejection of the accidental death is justifiable on the facts." [Paragraph 28]

"Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. On the facts, the only reasonable and inexorable inference to be drawn is that when he gave vent to his ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action." [Paragraph 35]

On appeal, in **Van Schalkwyk v S (680/2015) [2016] ZASCA 49; 2016 (2) SACR 334 (SCA) (31 March 2016)**, a majority of the SCA overturned the murder conviction and substituted a conviction or culpable homicide. Lewis JA (Tshiqi JA and Plasket AJA concurring) held that the state had failed to prove actual foresight of the possibility of death.

"As the regional magistrate said, 'by striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality'. The test, as noted by the full bench, was incorrectly stated by the magistrate. But it appeared not to worry the full bench since it found on the facts that the appellant had had actual foresight of the death of the deceased. No such finding was made by the magistrate, however, and it is far from clear to me how the full bench reached that conclusion." [Paragraph 39]

Baartman AJA and Willis JA dissented, and would have upheld the conviction for murder.

MEDIA COVERAGE

It was reported that during the sentencing stage of the trial of former ANC Northern Cape chairperson, John Block, and others in the so-called Trifecta case, Block sought a special entry and to make a complaint to the JSC over allegations that Judge Phatshoane had been influenced by her Judge President in convicting the accused:

"Earlier sentencing procedures were disrupted because of an urgent application after Block reported Phatsoane to the Judicial Services Commission. He claims she bowed to pressure to convict him in the Trifecta trial.

According to Block's legal representative, Advocate Salie Joubert SC, a judge, who is known to the defence, overheard a telephonic conversation between the presiding officer (Phatsoane) and Northern Cape High Court Judge President Frans Kgomo, indicating that she should "convict the bastards".

Joubert stated that while he did not know the judge who had overheard the conversation, a number of lawyers and advocates in the legal fraternity knew the identity of this individual.

"My client met with his attorney, Dali Mjila, and senior advocate Moses Mphaga, from the Pretoria bar, on October 24 at the Protea Hotel in Kimberley, to discuss certain issues pertaining to litigation.

"Mjila conveyed that he had received information from a reliable source where this particular judge was in the presence of the Judge President (Kgomo) when Phatsoane advised him that she had no grounds to convict Block."

He added that Kgomo was out of town when the conversation took place.

"If he admits that this conversation took place, the Judge President should be in a position to reveal who had listened in on the conversation. The nature of the application is not frivolous, neither is it an abuse of the legal process."

Joubert added that the judge, who was privy to this private discussion, shared this information with an attorney, who in turn felt that it "needed to be followed up".

"At a Black Lawyers Association meeting this year, the discussion was conveyed to Mjila in confidence."

Joubert added that it was decided that this information should be disclosed to the Judicial Services Commission as the "life of his client was at stake".

"While my client was considering an application for recusal, it is clear that Phatsoane had succumbed to pressure to convict the accused. Block has no reason to doubt the validity of this information.""

- Sandi Kwon Hoo, "It's not over yet, says ANC's John Block", *IOL*, available at http://www.iol.co.za/news/crime-courts/its-not-over-yet-says-ancs-john-block-7116795

ADVOCATE LANCE BURGER SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 19 October 1957

B.A. University of Cape Town (1978)

LL.B. University of Cape Town, 1980

LL.M. in Admiralty, Tulane University of New Orleans, 1984

CAREER PATH

Acting Judge, Western Cape High Court (2014, 2017)

Advocate, Cape Bar (1995 –)

Associate, Bauer Moynihan & Johnson, Seattle, USA (1990 – 1995)

Associate David S. Teske & Assoc. Seattle, USA (1988 – 1990)

Member of Alaska State Bar Association (1989 –)

Member of Washington State Bar Association (1988 –)

Pupillage, Cape Bar (1987 – 1988)

Articled Clerk, Attorney Fairbridge Arderne & Lawton (1985 – 1987)

Member of Louisiana State Bar Association (1984 –)

Member, Maritime Law Association of South Africa (1995 –)

Member of the Maritime Law Association of the US (1989 – 1995)

Member, Disciplinary Commission of the International Sailing Federation, served as an international judge for ISAF (2013 – 2016)

SELECTED JUDGMENTS

CRIMINAL JUSTICE

BENJAMIN V ADDITIONAL MAGISTRATE CAPE TOWN AND OTHERS [2014] ZAWCHC 115

Judgment delivered 1 August 2014

The Government of the United States of America sought the extradition of the Applicant to stand trial on various criminal charges. The charges related to the illegal importation and marketing of various drugs, including anabolic steroids, in the United States. The USA sent a request to the Government of the South Africa to extradite the Applicant. He was arrested and brought before the first respondent, the Additional Magistrate for Cape Town (the "Magistrate"), to determine whether he should be extradited. The Applicant sought to review and set aside the magistrate's decision to admit certain documents into evidence.

Burger AJ (Gamble J concurring) held:

"... [T]he question before us is whether there has been a gross irregularity of the proceedings, or whether inadmissible evidence was admitted. Gross irregularities are only alleged to have been committed in relation to the admission of the evidence. It is therefore convenient to consider the admissibility of the evidence first before considering whether a gross irregularity occurred." [Paragraph 11]

Burger AJ considered a challenge to the authentication of certain of the impugned documents:

"In light of the view I have taken of the common law and a reading of the Act I therefore conclude that "authentication" means verifying a document to be genuine, or what it purports to be, whether it be by verifying a signature on a document or by other means." [Paragraph 38]

"This interpretation of the word "authenticate" is consistent with the purpose of section 9(3) as set out above, and is also the sensible approach which will give effect to the primary purpose of the proceedings before the Magistrate. The approach of the Applicant to contend that authentication can only mean the verification of a signature ignores, firstly, the plain words of the statute, which refers to documents being authenticated, and secondly, the purpose of section 9(3) and thirdly that such an interpretation is not sensible." [Paragraph 39]

"Ms. Johnson does not state on what evidentiary basis she makes the certification but it is not necessary to state so. The fact is that she, as an Assistant Authentication Officer, authenticates all the documents in the red ribbon bundle. She might do so because she relies on the seal and signature on the red ribbon bundle, but that does not matter since here is nothing in the Extradition Act that requires an authentication to be based on any particular information." [Paragraph 45]

"It follows, that the contention that the decision of the Magistrate must be reviewed and set aside because she admitted inadmissible evidence must fail, as the evidence was admissible." [Paragraph 55]

The application was dismissed with costs.

SELECTED ARTICLES

'OBTAINING EVIDENCE FOR TRIAL IN THE UNITED STATES', DE REBUS AUGUST 1996, 529

The article discusses ways in which evidence can be presented in federal courts in the United States if a witness is unavailable to testify.

"The system to obtain the evidence of unavailable witnesses is more flexible, less expensive, and more efficient in the United States than in South Africa." [Page 529]

"There is much evidence that can be presented by agreement. For example, parties could agree to arrange for a witness to be sworn in and be examined over the telephone … and then present the transcript to the court. In the supreme court the court will probably accept such evidence, in the magistrate's court the court is likely to ask for authority, and when the practitioners are unable to provide such authority, rule it inadmissible. The problem is that attorneys will often reject such a proposed agreement. …"

"Legislation can make the taking of evidence on commission or without a commissioner easier and will save a lot of expense for parties. Legislation should shift the onus to the person trying to prevent the evidence on commission … Two attorneys with a tape recorder and/or a video camera can quite effectively record evidence just as well as a commissioner would and a lot less expensively. …"

"The legal profession should do everything to make litigation less expensive and more efficient. Legislation to make the presentation of evidence easier (without any additional burden on the fiscus) can make the process both less expensive and more efficient." [Page 531]

MR TASWELL PAPIER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 6 November 1961

Dip. Iuris, University of the Western Cape (1983)

B. Proc, University of the Western Cape (1987)

LLM, Human Rights, Harvard Law School (1995)

LLM, Commercial Law, University of Cape Town (2014)

CAREER PATH

Acting Judge, Western Cape High Court (2000, 2001, 2002, 2003, 2017)

Director / Partner, Sonnenberg Hoffmann Galombik (SHG) / Edward Nathan Sonnenberg (ENS / Ensafrica) (2004 – 2017)

Managing Director, Papier, Charles Incorporated (1997 – 2004)

Managing Partner, Papier, Charles & Associates (1993 – 1997)

Sole Practictioner, T. Papier & Associates (1992 – 1993)

Partner, MacDonald, Papier & Associates (1989 – 1992)

Associate, C.E. MacDonald Attorneys (1988 – 1989)

Prosecutor, Department of Justice (1983 – 1984)

Current director, Desmond Tutu HIV Foundation

Current Chair, Cape Law Society Pro Bono Committee

Current President, UCT Appeals Board

Fellow, College of Law Practice Management, Illinois USA (2014 – Present)

Administrator, Estate Agents Affairs Board (EAAB), Ministerial Appointee (2012)

International Lawyer of the Year, Legal Business, 2006

Cape Law Society President (2002, two terms)

Cape Law Society Deputy President (2000)

Chair, National Board for Sheriffs (1999 – 2001)

Executive member, NADEL (1991 – 2002)

Branch Secretary, NADEL (1989 - 1990)

SELECTED JUDGMENTS

ZWELETHU SUBUNZI V THE STATE, UNREPORTED JUDGMENT, CASE NO A120/2017

Judgment delivered 5 May 2017

Appeal against the conviction of an individual for rape and assault of a child.

Papier AJ held:

"This criti[c]ism [sic] of the complainant's evidence raises the question of how this court should reasonably expect a 13 year old child, who has been sexually assaulted, to act after being violently raped and throttled? Would it be reasonable to expect the complainant in these circumstances to act rationally? As indicated … the complainant's conduct manifests the extent to which she was under the appellant's control at the time. There is no indication that the complainant tried to change her evidence on this aspect in any way, even when confronted under the pressure during cross examination on this aspect. This conduct of the complainant together with her evidence provided on this aspect under the circumstances should rather be regarded as a reliability enhancing factor, as opposed to an adverse credibility finding." [Paragraph 30]

MEDIA COVERAGE

- **Aziz Hartley, 'Veteran Pro Bono Lawyer Given Top US Honour' *IOL News*, 25 November 2014** <https://www.iol.co.za/capetimes/news/veteran-pro-bono-lawyer-given-top-us-honour-1786188>

"Being recognised by this organisation is humbling," Papier says. "Being part of an international legal network opens doors to opportunities which can only benefit growth and development in our country and the continent as a whole."

"During the mid-1980s, when I started out, I was enormously privileged to work with great leaders like the late Dullah Omar – one of the founding members of Nadel … together with the late chief justice Pius Langa and many others. At the time my law firm did extensive work with community-based advice offices and other progressive organisations that served as nodes of contact for communities suffering under the apartheid regime."

"Through the many states of emergency, I was one of countless lawyers who through Nadel represented political activists. My work was almost exclusively in the field of human rights, in places like Ashton, Villiersdorp, the West Coast, Bloekombos, near Kraaifontein, and the like, and for the military wing of the ANC, Umkhonto we Sizwe."

"Within Nadel and the Cape Law Society we worked collectively to encourage provincial law societies to adopt a resolution for an obligatory pro bono rule, which is now firmly entrenched, and it is now incorporated into our Legal Practice Act," he said.

"I happened to chair the Cape Law Society and the Law Society of South Africa's pro bono committee and it was a great moment when all our provincial law societies decided to adopt the obligatory pro bono rule."

"It is always a humbling experience and it inspires you to want to do more and encourage others to continue the great work that they are doing."

"Never underestimate your ability to make a significant contribution regardless of your area of speciality – access to justice is key to building and maintaining the rule of law, facilitating access to justice, to eradicate the legacy of apartheid, poverty, unemployment and all the socio-economic challenges that continue to plague our society 20 years after democracy.

"This is the task of every person able to make a contribution towards accelerating the pace of substantive transformation in our country."

- **'Transformation Excites Administrator' Mail and Guardian Advertorial Feature, 16 October 2012** < https://mg.co.za/article/2012-10-16-transformation-excites-administrator >

"Housing is a fundamental human right and the estate agents' profession is key to giving meaning, form and content to this right."

"My perspective is that it's about the value and benefit of diversity and bringing our collective minds to bear to make decisions in the interest of the profession. And the urgency is needed to bring about legal certainty for the industry as a whole."

"There can be no substitute for continuous learning," he said. "The estate agents' profession operates in a highly regulated environment that is impacted on by a multiplicity of laws. It is the profession that is the custodian of trust for millions of people, from the very poorest to the richest. Agents must be able to respond ethically, professionally, with integrity and honesty with their clients and they need to be on top of their game all the time."

- **Marianne Merten, 'Redefining Law's Soul' *Mail & Guardian* 17 March 2006** <https://mg.co.za/article/2006-03-22-redefining-laws-soul>

  "'Racism is a reality', he said in 2004, and maintains it is still the case. 'We need to factor in issues of stereotypes and stigmas. . . often these prejudices interact with each other in our body language, in the way we speak, in the way we conduct ourselves.' . . .

  The public-interest work is about "redefining the soul of the profession", said Papier, when interviewed in the corporate pro bono offices. . . .

  "You clinch the million-dollar deals on the one hand, walk out of that consultation, and then go and resolve a bread-and-butter issue for someone who is poor and illiterate," he said. "That gives life to the soul of the profession and defines the skills of a true lawyer."

- **'Global Village: South Africa' Legal Business, *Without Prejudice*, March 2006** < http://www.withoutprejudice.co.za/publication/2006/March/articles?page=2>

  "We at SHG regard ourselves collectively as part and parcel of our society, and have elected not to sit in our ivory towers and pontificate about crime and poverty in the townships, but to do something practical about it, making ourselves accessible to those in need of legal services, but who cannot afford to pay. . . .

  Facilitating access to justice is one of the fundamental pillars of any respected democracy. As a profession, we are privileged to have the knowledge and monopoly on legal practices, and in particular the right of appearance. We do find that it does not take much, from a lawyer's point of view, to impact dramatically on the lives of many who would otherwise have had no access to the law. If we can commit to rendering pro bono services, as an international legal profession, we, as lawyers can make a difference to many of the challenges facing the world. The rendering of pro bono services is out professional and ethical duty. Regardless of our respective areas of expertise, we all have a valuable contribution to make toward building a new and better society. We want to do it with conviction, commitment, enthusiasm and pride."

MR MUSHTAK PARKER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 25 June 1954.

B.Proc, University of Durban Westville (2 years) and University of South Africa (acquired 1980)

CAREER PATH

Acting Judge, Western Cape High Court (2016 – 2017)

Parker and Khan Inc Attorneys (2005 –)

Acting Judge, Eastern Cape High Court (2005)

Founder and Sole Practitioner, Mushtak K Parker Attorneys (1992 – 2005)

Partner, E Moosa and Associates (1983 – 1991)

Associate, E Moosa and Associates (1981 – 1982)

Member, National Association of Democratic Lawyers (1985 – 1995)

National Chairperson, RAF/ MVA/ Personal Injury Sub-Committee of Law Society of South Africa (2002 – 2004)

Member, Road Accident Victims Association

Examiner, Examiners Committee, cape Law Society

Member, Wynberg Small Claims Court Advisory Committee

SELECTED JUDGMENTS

CRIMINAL JUSTICE

CEKWANA V S (A523/15) [2017] ZAWCHC 47 (10 MARCH 2017)

The appellant was a convicted of rape in the regional court, and was sentenced to 10 years' imprisonment, below the applicable minimum sentence for the offence of life imprisonment. The complainant was a 10 year-old-girl. On appeal, the credibility of the evidence of the complainant, who was single witness to the rape, was placed in issue.

The matter was initially heard by Binns-Ward J and Parker AJ, who could not agree on the outcome. The appeal was heard a second time, and Binns-Ward J (Henney J concurring) found that the evidence regarding the complaint's reporting of the alleged rape was "inconsistent and contradictory" [paragraph 8], and differed with the minority judgment's appraisal of the magistrate's reasoning:

"Parker AJ finds instead that although the magistrate's judgment did not '*necessarily reveal a very scientific approach*' and was '*robust*', he could not find that the magistrate had misdirected himself in any material respect and that his assessment of the evidence of the witnesses and his conclusions had to be presumed to be correct in the absence of such material misdirections. … I am in fundamental disagreement with Parker AJ's endorsement of the magistrate's evaluation of the evidence. The magistrate's approach was not 'robust'; it was - I am sorry to have to say - careless, superficial and misdirected." [Paragraph 29]

Henny J wrote a separate concurring judgment. Parker AJ dissented:

"On the totality of the evidence in this matter, and even though it may be conceded that the apparent failure by the Regional Magistrate to give comprehensive reasons for his judgment may be disconcerting to some, it certainly cannot be concluded that in this particular instance such failure, as there may be in his method of crafting the Court's judgment (or the lack of reasons), resulted in a failure of justice. I say this, because the evidence is available on record and a proper assessment and evaluation thereof can be made on appeal. I am of the view that if proper regard is had to the evidence on record the Regional Magistrate's findings of fact are not only understandable but, in the context, become meaningful, and rational." [Paragraph 58]

"… It is trite that a presumption exists that a trial court's findings of fact are correct, in the absence of demonstrable and material misdirections by the said court. Such findings of fact are presumed to be correct and only susceptible to be disregarded if the recorded evidence shows them to be clearly wrong. In determining whether or not the trial court's findings of fact were clearly wrong it is useful to break the body of evidence down to its component parts, but, in doing so, one must guard against a tendency to focus too leniently upon separate and individual parts of what was, after all, a mosaic of proof where the evidence ultimately needs to be assessed as a whole. … Although the Regional Magistrate seemingly had a robust approach in evaluating the evidence, I cannot find that he had misdirected himself in any material respect. His assessment of the evidence of the witnesses and his

conclusions based thereon must be presumed to be correct in absence of such material misdirections." [Paragraph 87].

The appeal was upheld.

HATTINGH V S (A307/2015) [2016] ZAWCHC 199 (28 OCTOBER 2016)

Appellant and a co-accused were convicted in the Regional Court on charges of fraud, forgery, uttering, and theft. One other accused were discharged. In written argument on appeal, the state conceded that the convictions could not be justified by the evidence.

Parker AJ (Gamble J concurring) held:

"The Regional Magistrate made factually wrong findings when he, for example, found that there was no evidence that the appellant had also invested with accused 1. There was abundant evidence from Hattingh as well as Van der Bergh, that the appellant had also invested money. He seemed confused about whether she genuinely believed , as did Hattingh and Van der Bergh, that accused had invested her money, as opposed to whether or not he had actually invested the money. … In fact the Regional Magistrate's misdirected reasoning is reflected in the fact that he had disregarded the rather strange if not somewhat bizarre evidence of Hattingh that he was convinced that the appellant was not involved and that accused 1 had acted on his own in defrauding them all until, as he said the Prosecutor not only suggested to him but convinced him that the appellant was complicit with accused 1. …" [Paragraphs 12 – 13]

"… [I]t is clear that that the Regional Magistrate misdirected himself materially with reference to this to his application of the test in determining the appellant's guilt by way of inference drawn from all the relevant and proved facts. Instead the Regional Magistrate resorted to conjecture and speculation which is not permissible." [Paragraph 24]

"I am mindful of the submissions made by Advocate Jacobs about why the respondent could not justify the convictions of the appellant on the evidence on any of the counts. We are obviously not bound by these submissions but they demonstrate that it is not the task of the prosecution to secure a conviction at all costs. Regrettably the same cannot be said about the prosecutor in the court below. …" [Paragraph 47]

The appeal was upheld.

MEDIA COVERAGE

Parker AJ was quoted as commenting, at the trial of the brutal death of Bongiwe Ninini from Khayelitsha:

"I am struck by the apparent lack of interest in the community, judging by the few people attending the trial,"

He said he knew transport was expensive, but he was concerned that a killing as brutal as Ninini's had not drawn more attention.

It worried him that Ninini's death may have been seen as “just another killing”. About 13 people, including Ninini's mother and the relatives of the four men convicted of her murder, sat in the public gallery upstairs.’’

- Jenni Evans, “Judge laments lack of interest in 'mind-boggling' Ninini murder trial”, *News24* 6 February 2017, available at http://www.news24.com/SouthAfrica/News/judge-laments-lack-of-interest-in-mind-boggling-ninini-murder-trial-20170206

ADVOCATE MARK LOUIS SHER SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 18 November 1956

B. Iur, University of Port Elizabeth (1977)

LLB, University of Cape Town 1980

CAREER PATH

Acting Judge, Western Cape High Court (2004, 2008, 2009, 2010, 2016 - 2017

Advocate, Cape Bar (1989 -)

Senior Counsel (2015)

Admitt4ed as advocate (1982)

Appointed to the Commercial Panel of Arbitrators of the Arbitration Foundation of South Africa (2000)

Member, Electoral Appeal Tribunal of Western Cape (1996)

Presiding Officer, Election Tribunal (1994)

State Advocate, High Court Cape Town (September – December 1988)

State Advocate, Supreme Court Pietermaritzburg (February – August 1988)

Prosecutor, Regional Court (1986 – 1988)

Prosecutor, Magistrate's Court (1985 – 1986)

Law Officer / Legal Adviser to SAAF (1983 – 1984)

Relief Lecturer in Commercial Law, UCT (1982)

Junior Lecturer in Commercial Law, UCT (1981)

SELECTED JUDGMENTS

COMMERCIAL LAW

BOOYSEN V JONKHEER BOEREWYNMAKERY (PTY) LTD AND ANOTHER [2016] ZAWCHC 192; [2017] 1 ALL SA 862 (WCC); 2017 (4) SA 51 (WCC)

Case heard 13 October 2016, Judgment delivered 15 December 2016

This matter dealt with certain provisions of Chapter 6 of the Companies Act, which introduced the concept of business rescue. It concerned, in particular, an interpretation of the statutory moratorium provision, and the issue of whether or not a business rescue practitioner may reserve for himself the right to amend a business rescue plan (and a creditor's claim reflected therein) unilaterally, even after it has been adopted.

Sher AJ held:

"In the circumstances, inasmuch as the provisions of s 133(1) may limit or intrude upon the constitutional right of access to court which a litigant may ordinarily enjoy, they must, in my view, be interpreted in a manner which is least restrictive of such rights and, if at all possible, I am enjoined to adopt a 'generous' construction over a merely textural or legalistic one in order to afford affected parties the fullest possible protection of such right of access." [Paragraph 44]

"… [O]ne must also bear in mind that the provisions in question must be read in the context of the statutory presumption that unless a contrary intention clearly appears from the language, the legislature did not intend "unfair, unjust or unreasonable" results to flow from its enactments and it is to be presumed that the legislation was not meant to be absurd or anomalous." [Paragraph 45]

"In the circumstances, in my view, applying a purposive and contextual interpretation to the language used in the provisions in question, there is nothing in s 133(1) which excludes the leave of the court being sought and obtained, in appropriate circumstances, either together with or subsequent to the launch of the principal proceedings or action in question. Similarly, in my view, applying a purposive interpretation with the aim of promoting the efficient, timeous and expeditious rehabilitation of a company according to its business rescue plan, where legal proceedings concern the implementation of such plan the leave of the court can and should ordinarily be obtained by way of a substantive application, but, in order to avoid unnecessary expense and formalism such application can properly be made as a part of the principal matter and can be heard in limine prior to the commencement thereof, without doing violence to the provisions of the section. To my mind, it makes little sense to compel an applicant seeking to obtain an order from a court simply directing the business rescue practitioner and company in rescue to implement the terms of a rescue plan which has been adopted, to obtain leave to do so by way of a separate and prior application and to do so would result in an unnecessary duplication of costs and would unnecessarily delay the rescue process." [Paragraph 62]

ADMINISTRATIVE JUSTICE

COASTAL LINKS LANGEBAAN AND OTHERS V MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND OTHERS [2016] ZAWCHC 196

Case heard 9 June 2016, Judgment delivered 31 October 2016

The court set aside the decision by the Minister of Agriculture, Forestry and Fisheries to impose restrictive conditions in the permits of small-scale fishers. The decision was declared to be arbitrary and irrational and to constitute unfair discrimination against the small-scale fishers on the grounds of race, and therefore unconstitutional.

Sher AJ held:

"To my mind, the respondents' rationalisation for the imposition of the condition restricting the applicants from fishing in Zone B, which is based on conservation and ecological imperatives, falls down when one tries to reconcile it with the fact that notwithstanding such imperatives, the respondents had no difficulty allowing a number of rights-holders (initially 5, now 3) who reside in Churchaven and Stofbergsfontein, to exercise commercial net-fishing rights in Zone B ever since the 1990's. Lamberth's explanation for this state of affairs, is startling, to say the least. He says these rights-holders have been allowed to fish in Zone B (for a number of years) because they have addresses adjacent to the water, and adverse environmental impact is mitigated if fishers do not have to travel through the waters in boats under power to access their fish. ... In addition, he claims (with a straight face?) that the requirement of proximity has a 'positive effect' on excluded fishers because they in turn do not have to incur petrol and other operational costs in order to be able to access their fishing grounds. This attempt to construe the applicants' exclusion from the area at the expense of other fishermen as an exercise of benevolent protection of the applicants and the environment is not only facile, but disingenuous. It also makes a mockery of the respondents' purported reliance on conservation and ecological imperatives as the principal reason for why the applicants have been excluded from fishing in Zone B. If the exclusion was really about these conservation and ecological imperatives, one would have assumed that no-one would be allowed to fish in Zone B at all." [Paragraph 79]

"In seeking to justify the applicants' exclusion from Zone B at the expense of the 3 resident fishermen from Churchaven and Stofbergsfontein, the respondents seek to rely on the provisions of the 2005 Netfishing Policy, which provide that persons who do not live "adjacent" to the fishing zone in respect of which they have applied for fishing rights, should be excluded from obtaining such rights. ... The requirement of residential adjacency appears, at face value, to be intended to protect the fishery from exploitation by persons who do not have any immediate connection with the area, and one can understand the objectives of such a policy, for example, in the context of deep-sea trawling where local fishermen need to be protected from the rapacious exploitation of marine resources by foreign fishing trawlers. However, in the context of this matter, the provisions in question serve, perversely, to exclude persons such as the applicants who are historically disadvantaged black fishermen whose ancestors used to live adjacent to the lagoon before they were forcibly removed from the area by the apartheid regime as part of its spatial planning. As it stands, therefore, the impact of these provisions in the Net-fishing policy, whilst having a laudable intention, serves to discriminate indirectly between white fishermen who now reside alongside Zone B at the expense of black, historically disadvantaged fishermen who used to live there. Although the distinction is sought to be made on a geographical basis, the effect thereof is to

discriminate unfairly, on a racial basis, between white and black fishermen, and thus on this ground too the imposition of the restrictive condition is unfair and unconstitutional." [Paragraph 85]

"In paragraph 5 of the Amended Notice of Motion, applicants seek an order granting them an entitlement to fish in terms of a "structural" interdict whereby the respondents are to be directed to enter into negotiations with the applicants in regard to the allocation of permanent fishing rights in the said zone, which process the court is requested to manage and ultimately approve. To my mind, this is not an order which, for a variety of reasons, the court can and should make. In the first place, were such an order to be granted it would effectively override the TAC and TAE which is set from time to time by the Minister, in respect of the lagoon. It is the Minister's function to determine and set these limits, and not the Court's... Any determination by the various Departments concerned as to how to accommodate the applicants as small-scale fishers, will, of necessity, require a complex equilibrium to be struck between a range of competing interests or considerations such as the ecological and conservation imperatives versus the requirments of sustainable utilisation and the imperatives of transformation, and will have to be arrived at by persons with specific and special expertise and experience in the field, and this process must be deferred to by the court lest it infringes on the separation of powers." [Paragraph 86]

CONSTITUTIONAL AND STATUTORY INTERPRETATION

AHMED AND OTHERS V MINISTER OF HOME AFFAIRS AND ANOTHER [2016] ZAWCHC 123; [2016] 4 ALL SA 864 (WCC); 2017 (2) SA 417 (WCC)

Case heard 6 June 2016, Judgment delivered 21 September 2016

The issue in this case was whether a failed asylum seeker was entitled to apply for a temporary residence permit.

Sher AJ held:

"Most importantly, at all times when interpreting the legislation concerned, the court is required to do so through the prism of the Constitution, and it is duty-bound to promote the spirit, purport and objects of the Bill of Rights, particularly where the legislative enactments implicate or affect any such rights. And where legislative enactments limit or intrude upon constitutional rights, they must be interpreted in a manner which is "least restrictive" of such rights, if the text is reasonably capable of bearing such a meaning. In addition, where constitutional rights are implicated, the Court is to prefer a "generous" construction over a merely textual or legalistic one in order to afford those affected the fullest possible protection of their constitutional "guarantees"." [Paragraph 17]

"Finally, and insofar as it is still permissible to speak of legislative intent (as opposed to textual meaning), the provisions of the Acts must be read in the context of the presumption that unless a contrary intention clearly appears from the language, the legislature did not intend "unfair, unjust or unreasonable results to flow from its enactments" and the legislation was not meant to be absurd or anomalous. And where the court is faced with two or more possible interpretations, it will not favour an interpretation which leads to "impractical, unbusiness like or oppressive" consequences that will "stultify" the operation of the legislation." [Paragraph 18]

"In my view, in stating in Directive 21 that, because s 27(c) of the Refugees Act, read together with the provisions of s 27(d) of the Immigration Act provides that a refugee with 5 years continuous residence in the country may be entitled to apply for a permanent residence permit, it "therefore follows" that the holder of an asylum seeker permit who has not been certified as a refugee may not apply for a temporary residence permit in terms of the Immigration Act, second respondent acted arbitrarily and irrationally. He jumped to a conclusion that is not borne out by a proper interpretation of the provisions in the context of the two Acts as a whole ..." [Paragraph 67]

The impugned Immigration Directive was declared to be inconsistent with the Constitution and invalid, and was set aside.

CIVIL PROCEDURE

HAFFEJEE V BYTES TECHNOLOGY GROUP SOUTH AFRICA AND OTHERS [2016] ZAWCHC 61

Judgment delivered 24 May 2016

Application for rescission of judgment.

Sher AJ held:

"In the circumstances, care should be taken not to extend considerations of justice and fairness (which are accepted considerations to have regard for in relation to whether or not good or sufficient cause has been made out for rescission of a judgement), in order to afford a court seized with a reconsideration of a judgement which has been granted by default by the Registrar, a general discretionary power to set aside such a judgment simply on the grounds that this would correct some "imbalance, oppression or injustice" which may have resulted, consequent to the judgment having been granted." [Paragraph 23]

"In my view, although considerations of justice and fairness must properly be had regard for in respect of the elements which an applicant needs to make out in order to show good or sufficient cause for rescission (ie an absence of wilful default, a reasonable explanation for his failure and a prima facie defence), where a judgment has been granted by the Registrar "regularly, properly and competently" it should ordinarily be upheld." [Paragraph 24]

CRIMINAL JUSTICE

MASUKU V S [2016] ZAWCHC 77

Judgment delivered 23 June 2016

Unsuccessful appeal against conviction and sentence, the accused having been convicted on two counts of robbery with aggravating circumstances and kidnapping.

Sher AJ held:

"In my view, neither the application for leave to appeal nor the application for condonation complied, even cursorily, with the requirements which have been laid down for such applications, and they should never have been entertained by the magistrate. I may point out, in fairness to him, that neither of the applications were opposed by the State, a matter which is cause for concern. In my view, it is incumbent upon both the prosecutor and the presiding magistrate in applications such as these, not to simply go through the motions and to concede to leave to appeal being granted where such applications are ill-founded and have no merit, and in which the relief which is sought is not properly made out." [Paragraph 13]

SELECTED PUBLICATIONS

'FROM DOMPAS TO DISC: THE LEGAL CONTROL OF MIGRANT LABOUR', Chapter 7 of Crime & Power in SA (ed Dennis Davis & M Slabbert) 1985

'A study of how the Apartheid state shifted from using "pass" and related laws to administrative control measures, in order to achieve its objective of "influx" control over the movement of black persons into urban areas.'

Review by A. Crump, "Challenging criminology" <
http://disa.ukzn.ac.za/sites/default/files/pdf_files/remar86.12.pdf>

Mark Sher's article … considers the iniquitous pass laws, the reasons why they have been instituted and the shift away from any judicial control of their implementation to control by administrative regulation, to the detriment of Black people. He also pinpoints the dismal failure of legal aid to help those it is supposed to help. The factors he discusses are closely linked to the crime rate in South Africa but have not previously been given sufficient in-depth attention by criminologists." [Page 28]

MR DEREK WILLE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 1 March 1960.

BA, University of Natal, Pietermaritzberg (1980)

LLB, University of Natal, Pietermaritzberg (1983)

CAREER PATH

Acting Judge, Western Cape High Court (2001 – 2003, 2015 – 2017)

Consultant, Thomson Wilks Attorneys (2010 -)

Director, Cliffe Dekker Hofmeyr (2007 – 2010)

Director, Smith Tabata Attorneys (1996 – 2007)

Associate / Director, Silberbauers Attorneys (1991 – 1995)

Member, Court Committee, Cape Law Society (2001 -)

Chairman, transformation committee, Metropolitan Golf Club

Member, transformation committee, Western Province Golf Union

SELECTED JUDGMENTS

PRIVATE LAW

BODY CORPORATE, SHAFTESBURY SECTIONAL TITLE SCHEME V RIPPERT'S ESTATE AND OTHERS 2003 (5) SA 1 (C)

Case heard 10 February 2003, Judgment delivered 25 March 2003

Applicant sought a final interdict, with temporary ejectment in the event of non-compliance, against respondents. At issue was whether the court could grant an ejectment order against persons who continually contravened the conduct rules of a body corporate.

Wille AJ held:

"The defences by the fourth and fifth respondents are so improbable that they can safely be rejected. The occupants of the flat admitted that they were employed as escorts. The security register at the entrance to the block of flats showed a constant stream of visitors to the flat during all hours of the day and night. The applicant was never notified of any changes in respect of the occupants of the flat and the situation grew steadily worse ..." [Pages 6 - 7]

"In my view there is a pressing 'social need' in South Africa to enable 'sectional title' owners and their controlling bodies to enforce compliance with their conduct rules and in so doing, if necessary, deprive the owner and/or occupier of the right to reside in or use of a unit in circumstances where there is a constant and deliberate contravention of the conduct rules, including the non-payment of legitimate levies imposed. I can find no authority for this Court to grant an order for ejectment in the present circumstances. Even if I am wrong in this regard, procedurally the applicant has not laid the proper foundation for such an order and the conduct rules of the applicant do not provide for ejectment under these circumstances." [Page 7]

Repondents were ordered to abide by the conduct rules.

CRIMINAL JUSTICE

S V MAQAQA 2005 JDR 0197 (C)

Case heard 28 February 2003, Judgment delivered 28 February 2003

The accused had been convicted of rape in the Regional Court, and sentenced to 12 years' imprisonment. The complainant was 6 years' old at the time of the incident.

Wille AJ (Fourie J concurring) held:

"The appellant was convicted on 3 September 2001 and sentenced on 9 October 2001. Section 52(1) of the Act was amended by section 34(b) of the Judicial Matters Amendment Act on the 23 March 2001, before the appellant was convicted or sentenced by the trial Court. The trial Court was obliged to refer

the appellant to the High Court in terms of section 52(1) (as amended), read with Schedule 2 Part I (b) (1) under the heading *"rape*". This Court does have an inherent common law right of review …" [Page 5]

"I am of the view, however, that it would be improper for this Court to exercise its common law right of review in these circumstances … Section 52(3)(a) of the Act does not provide that the judgment of a regional court becomes the judgment of the High Court upon proof of the record; it merely provides that the record of the regional court becomes part of the record of the High Court and, further, the Court is required to satisfy itself that the conviction is in accordance with justice and that if it is not so satisfied, it will have to proceed in terms of the proviso to the section and, if necessary, set the conviction aside."

"Further, this Court, an appeal Court has no right to hear evidence and summons any person to appear to give evidence or to produce any documents or other article that is provided for in section 52(3) (d) of the Act. The referral of an accused for sentencing in a High Court by a regional court in terms of section 52(1) (as amended), really in essence means that the trial of the accused is not yet completed. The conviction in the regional court is really a provisional conviction which becomes final if it is confirmed and accepted by the High Court. …" [Page 6]

MEDIA COVERAGE

Named in controversy over the son of Western Cape Judge President John Hlophe's son receiving a bursary from the firm of attorneys where he worked at the time:

> "We also know that in June 2006 the JSC was asked to investigate complaints that Hlophe's son received a bursary from a Cape Town firm of attorneys. The firm had defended the bursary on grounds that the scheme was aimed at helping "disadvantaged" students. A partner at the firm, Derek Wille, was known to have been a university friend of Hlophe's and the judge president had on several occasions appointed him as an acting judge."

- "New battle in high places", *Sowetan Live* 22 June 2009 (available at http://www.sowetanlive.co.za/sowetan/archive/2009/06/22/new-battle-in-high-places)

Criticised for conduct during the winding up of the Bathong travel agency, relating to the so-called "Travelgate" scandal:

> 'Correspondence annexed to the affidavit details an extraordinary series of evasions and apparent untruths by the liquidators and Parliament's attorney, Derek Wille, who was responsible for the plan to stop action against MPs.
>
> Wille initially told Flare and Jackson & Neethling: 'Parliament did not place the advert calling for the meeting in the *Government Gazette*. The advertisement was placed by the liquidators."
>
> The effect of this version, says the affidavit, was to suggest that Parliament played no role in calling for the meeting.

But Wille's account is directly contradicted by the record.

On March 26 he, acting on behalf of Dingani, faxed the draft resolutions to the liquidators and asked them to convene a formal meeting of the creditors.

'It is, to say the least, remarkable that the secretary to Parliament's attorney declined to disclose — the fact that the resolutions had been prepared for submission by the Secretary to Parliament and its legal advisers," Schippers says.

- "Parliament 'cover–up' in court", *Mail & Guardian* 23 May 2008 (available at https://mg.co.za/article/2008-05-23-parliament-cover-up-in-court)