
# SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORD OF NOMINEES FOR APPOINTMENT TO THE SUPREME COURT OF APPEAL AND HIGH COURT

**APRIL 2016**

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## INTRODUCTION

1. The Democratic Governance and Rights Unit (DGRU) is an applied research unit based in the Department of Public Law at the University of Cape Town. DGRU's vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by conducting applied and comparative research; supporting the development of an independent, accountable and progressive judiciary; promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and enabling scholarship, advocacy and online access to legal information. The DGRU has established itself as one of South Africa's leading research centres in the area of judicial governance.

2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, observing and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been 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. In this submission, we intend to explain the methodology of the report, and make brief submissions on some issues we feel should be considered by the JSC in exercising its constitutional mandate.

## METHODOLOGY OF THIS REPORT

4. The report set outs summaries of the nominee's judgments, as far as possible in their own words. We do not advocate for or against the appointment of individual candidates, and do not provide analysis or criticism of the judgments summarised. This is because our intention in producing these reports has always been to attempt to move beyond the partisan and personalised debates that have at times surrounded the suitability of candidates for judicial appointment. Instead, we hope to further a deeper analysis of the criteria in terms of which judicial appointments are made, and to enable stakeholders to assess how a candidate's judicial track record matches up to those criteria. The report thus does not seek to advocate, explicitly or implicitly, for the appointment of any candidate.

5. We have searched for judgments on the *Jutastat, LexisNexis* and *SAFLII* legal databases. We have attempted to focus, as far as possible, on judgments most relevant to the courts to which

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

candidates are applying. Therefore, for candidates for the Supreme Court of Appeal, we have focused mainly on judgments that illustrate how a candidate has exercised appellate powers. Regarding candidates for the various Deputy Judge Presidents' positions, we have attempted to focus on decisions that might bear in some way on leadership and administrative qualities, where such judgements are available. Therefore, in respect of some of these candidates, there may not be as wider range of cases presented as in the case of other candidates.

6. It is important to remember that this report provides a sample (we hope a fair one) of each candidate's judicial track record - not a comprehensive summary of all their judgments.

7. Several candidates have been covered in previous reports. In these instances, we have examined decisions given since our last report on the candidate, and included new judgments which we feel are of importance, in accordance with the criteria explained in this submission. We have kept judgments which have been included in earlier reports, where we feel these continue to be informative in analysing a candidate's judicial record. So, whilst there will be an overlap with the summaries in previous reports, there will in most instances also be differences.

8. In selecting judgments to include, we have continued to be guided by factors that have informed our previous reports. These include looking for evidence of the importance and ground-breaking nature of judgments; of independent-mindedness; of a depth of research and analysis; of the candidate's capacity for hard work; and of the development of a candidate's judicial philosophy.

9. We continue to present the summarised judgements in thematic groups. Our aim in doing so is to try and make the report more accessible, and also to highlight more directly the candidates' track records on issues which we believe are relevant to their suitability for appointment.

10. We have developed these thematic areas based on our observations of the JSC's interviews, and on our own assessment of issues that are relevant in appointing judges to the court in question. We recognise that this process of categorisation remains a work in progress, and that it does not necessarily cover all the themes that may be relevant. There will also often be an overlap between different themes. The categories have in large part been informed by the judgements given by the candidates for these interviews, and may be varied in future reports.

11. The themes under which judgements are grouped are the following:
    - 11.1. Private law;
    - 11.2. Commercial law;
    - 11.3. Civil and political rights;
    - 11.4. Socio-economic rights;
    - 11.5. Administrative Justice;
    - 11.6. Constitutional and statutory interpretation;
    - 11.7. Environmental Law;
    - 11.8. Labour Law;
    - 11.9. Civil Procedure;
    - 11.10. Criminal justice;
    - 11.11. Childrens' rights;

11.12. Customary law; and

11.13. Administration of Justice, within which we deal with issues such as the exercising of appellate functions and dealing with professional misconduct by members of the legal profession.

12. We list all of the categories we have identified – not all of which will necessarily be applicable to all the candidates in a particular session of interviews.

13. We hope that together, these themes will bring out a pattern that might be called a philosophy or theory of adjudication. We believe that analysing and engaging with a candidate's "judicial philosophy" ought to be a central feature of the interview process.

14. Due to constraints of capacity and resources, we have not been able to include material in languages other than English (an exception is the article included in the summary for Advocate Muller SC, where an English summary was available).

**SUBMISSIONS REGARDING THE INTERVIEW PROCESS**

15. In this submission, we wish to comment briefly on two issues: the need for greater transparency and information in instances where candidates are interviewed but no appointments are made; and the timekeeping and scheduling of interviews.

16. We also wish to register our concern that there will be no interviews for the Constitutional Court vacancy, due to their being insufficient nominees to shortlist. This has been a recurring problem since 2012, when a Constitutional Court vacancy had to be re-advertised before enough candidates could be shortlisted.

17. The Constitutional Court interviews in 2012, 2013 and 2015 have never featured more than five candidates (four candidates in 2012, five in 2013, in four in 2015). We have commented on several occasions on the undesirability of so few candidates being interviewed for a Constitutional Court vacancy, taking into account the requirements of Section 174(4) of the Constitution (which requires three candidates more than the number of vacancies to be submitted to the President for selection).[2]

18. We will not speculate here about the reasons why so few candidates are putting themselves forward for appointment to the Constitutional Court. But we urge the JSC and its relevant members to take all the steps possible to identify reasons for the problem, and take necessary and appropriate steps to remedy the situation. A shortage of candidates for the country's highest court impoverishes the South African judiciary.

[2] See our submissions for the interviews in June 2012 (http://www.dgru.uct.ac.za/usr/dgru/downloads/junereport2012.pdf) and February 2013 (http://www.dgru.uct.ac.za/usr/dgru/downloads/JSC%20submission%20print%20Feb%2013_printfinal.pdf).

**Reasons for non-appointments**

19. In the JSC's October 2015 sitting, several vacancies were left unfilled: the vacancy for the Eastern Cape High Court in Port Elizabeth, for which three candidates were interviewed; the vacancy for the Deputy Judge President of the KwaZulu – Natal High Court, for which four candidates were interviewed; and two vacancies for the KwaZulu-Natal High Court, for which four candidates were interviewed.

20. We must immediately clarify that we do not suggest that the JSC has to make an appointment every time candidates are interviewed for a position. It must be so that the JSC is able to decline to appoint a candidate who is not suitable for the position in question. Indeed, the JSC must surely decline to make an appointment of, for example, an unqualified candidate.

21. What we do submit is that it would be desirable for a brief explanation to be given for why no appointment has been made in any given instance. Bearing in mind the time and expense (to the taxpayer) taken in conducting an interview, it would further the transparency and accountability of the JSC for some explanation to be given as to why a vacancy is not filled.

22. In the absence of a formal explanation from the JSC, speculation will almost inevitably result. Such speculation may be unfair to the candidate or candidates, or the interview process and the JSC, or both. It may lead to conjecture and commentary that undermines confidence in either the appointments process or the judiciary. While in some cases, it will be readily apparent to observers of the interviews why candidates have not been selected this will not always be so. We also note that, as is illustrated in this sitting of the JSC, there will be candidates re-appearing for a vacancy for which they have previously been unsuccessful. If such a candidate is subsequently appointed, it may raise questions about why they are regarded as appointable now when on a previous occasion they were over-looked despite the fact that no other candidate was appointed.

23. We make this submission mindful of the decision in *Judicial Service Commission v Cape Bar Council*,[3] where it was held that the JSC is obliged, as a general rule, to give reasons for a decision not to recommend a candidate, if properly called upon to do so.[4] We are also mindful of the need for the JSC's deliberations to be accorded a sufficient degree of confidentiality to give space for frank and open discussion and debate.[5]

24. We therefore do not suggest that the JSC would have to give public reasons sufficient to satisfy the flexible "properly called upon" standard identified by the SCA, in every instance of a non-appointment. But we do submit that some explanation of the essential reasons why a vacancy was not filled, going beyond a simple lack of sufficient votes being obtained by any of the candidates, should be given as a matter of course. The corollary of protecting the deliberative

[3] 2013 (1) SA 170 (SCA).
[4] Paragraph 45.
[5] A point we have made in our submissions as amicus curiae in the case of *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC).

space is that there is some justification and accountability for the decisions that are taken within that space.

**The time allocated for interviews**

25. The issue of timekeeping and time allocation for interviews is one that we have frequently commented on in the past. We have suggested that there needs to be a balance struck between questioning that is rigorous enough to help assess a candidate's suitability for appointment, whilst at the same time being focused, fair and consistent.

26. In our submissions for the October 2015 interviews, we commended the JSC for its rigour in interview candidates during the April 2015 sitting, but registered our concern over interviews running well over the allocated time, and the resultant unfairness this caused for both candidates and commissioners. We suggested that it may be necessary to introduce different time allocations for interviews for different positions.

27. Some of the interviews during the JSC's October 2015 sessions further highlighted this concern. The interviews on the 8th of October provided a clear illustration of the problem. Interviews of the candidates for the KwaZulu-Natal Deputy Judge President ran way over the scheduled time, resulting in the subsequent KwaZulu-Natal High Court interviews starting long after they were scheduled to, and continuing well into the evening.

28. It is very apparent that this situation is unfair to candidates, who cannot second-guess the JSC's timing, and must be prepared to be interviewed at the allotted time. To keep some candidates waiting on tenterhooks for so long before they are interviewed is unfair and is likely to hinder their performance when they eventually come to be interviewed. There are enormous advantages, in terms of transparency and democratic accountability, to a public interview process. But it is hard to imagine that candidates for judicial office are able to do full justice to their candidature under such circumstances; waiting for a long time to be interviewed can only add to the inevitable pressures that a public interview process puts on a candidate. Equally, it is hard to imagine that Commissioners are able to do full justice to their important constitutional role if the JSC has to sit late into the evening.

29. It is instructive to note that the delay described appears to have been created by interviews for leadership positions taking longer than scheduled. This, we submit, bolsters the argument that it is necessary for such interviews to be allocated more time, and for schedules to be arranged differently.

30. The large number of candidates for appellate and leadership positions being interviewed in this session of JSC means that commissioners will again need to be mindful of the balance between rigour and focus when questioning cnadidates.

**ACKNOWLEDGEMENTS**

31. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was conducted by Chris Oxtoby, DGRU senior researcher, Musa Kika, DGRU intern, Godknows Mudimu and Sarai Chisala, DGRU research assistants, and Catherine Kruyer, DGRU junior researcher.

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

**DGRU**

**23 March 2016**

## SELECTED JUDGMENTS

### PRIVATE LAW

### CITY OF TSHWANE METROPOLITAN MUNICIPALITY V PJ MITCHELL (38/2015) [2016] ZASCA 1 (29 JANUARY 2016)

**Case heard 4 November 2015, Judgment delivered 29 January 2016**

This appeal concerned the interpretation of section 118 (3) of the Municipal Systems Act. The issue was whether security provided in favour of the municipality for monies owed for services delivered in respect of fixed property, was extinguished when the property was sold at a sale in execution and subsequently transferred to the purchaser.

Baartman JA (Mpati P, Bosielo and Saldulker JJA concurring) dealt with whether the exception to the common law invoked by the court a quo applied to the statutory hypothec created by s 118(3) of the Act:

"…In my view, the exception in Voet 20.1.13, on which the court a quo relied, does not apply to a hypothec created by a statute that places no limit to its duration. There is nothing in the Act that indicates that any exception to the application of the provisions of s 118(3) was contemplated where property is purchased at a sale in execution. On the contrary, there are indications that the exception to the common law invoked by the court a quo does not apply to the statutory hypothec created by s 118(3) of the Act." [Paragraph 15]

"No distinction can therefore be drawn between property sold either at a sale in execution or in a private sale when considering the question whether the hypothec created by s 118(3) survives transfer. It follows that the court below erred in concluding that the appellant's statutory hypothec had been extinguished by the sale in execution and subsequent transfer of the property into the name of the respondent." [Paragraph 16]

"… [T]he sale in execution and subsequent transfer of the property into the name of the respondent did not extinguish the hypothec created by s 118(3) of the Act in favour of the appellant. This means that nothing would prevent the appellant from perfecting its security over the property, should it wish to do so, to ensure payment of the historical debt. Perfecting its security would involve obtaining a court order, selling the property in execution and applying the proceeds to pay off the outstanding historical debt. In that event, the respondent might be forced to pay the debt in order to avoid losing his property. It is in that sense that the respondent, as owner of the property, could be said to be liable for the historical debt. It must be remembered, at this point, that the constitutionality of s 118(3) of the Act is not in issue in this matter." [Paragraph 23]

"As to paragraph 1.3 [of the order of the court a quo], it is unclear how, and on what basis, that order was granted. It appears … that the submission of counsel for the appellant was that 'the real issue [was]

not the opening of a new account, but the question whether the [appellant] is entitled to refuse the supply of municipal services as long as there is a debt outstanding with regard to this property'... In my view, however, the mandamus should have been sought by, or in the name of, Ms Prinsloo. The respondent never applied for and the appellant never refused him the supply of municipal services to the property. Moreover, Ms Prinsloo was not a party in the application. It is for this reason, I think, that the court a quo did not grant the mandamus sought in the notice of motion. No case was made out in the papers for the order (mandamus) sought in his name. In my view, it was not open to the court a quo to grant paragraph 1.3 of its order, whether in the alternative, which was not prayed for, or under the prayer for further or alternative relief." [Paragraph 24]

"To sum up, the court below should not have made the orders it granted and the respondent's application should have been dismissed for the reasons set out above. It follows that the appeal must succeed. As to costs, the court below ordered that '[t]here shall be no order with regard to costs'. Counsel were in agreement that that order should not be altered, irrespective of the result of the appeal. In my view, the same should apply in this court. The case involves vindication of constitutional rights relating to property." [Paragraph 28]

The appeal was upheld. Zondi JA dissented, holding that under common law, a "burden on a property does not survive the transfer of the property from one person to another where such transfer takes place pursuant to a sale in execution and the creditors holding a hypothec 'have kept silent'." Zondi JA held that s 118(3) could and should be interpreted consistently with this common law position.

## COMMERCIAL LAW

### CHEVRON SA (PTY) LTD V DENNIS EDWIN WILSON T/A WILSONS AND OTHERS (5244/2013) [2014] ZAWCHC 121 (5 JUNE 2014)

**Judgment delivered 5 June 2014**

This case involved a challenge to the constitutionality of section 89(5)(b) of the National Credit Act. Applicant had extended credit to the first respondent since 1997. Applicant instituted proceedings in the Magistrates' Court claiming amounts owed for the supply of petroleum products. During the proceedings, it emerged that, though the applicant was required to be registered as a credit provider, it had failed to do so. As a result, in terms of s 89(5)(a), the agreement in terms of which the applicant claimed against the first respondent was void, and s 89(5)(b) required that the court order a refund of all monies paid by first respondent to the applicant under the agreement.

Baartman J held:

"Section 89(5)(b) makes provision for the obligatory refund of any money with interest that the consumer has paid the credit provider under the agreement irrespective of circumstances of the matter.

… I am persuaded that the obligatory nature of the refund constitutes an infringement of section 25(1) of the Constitution …" [Paragraphs 6 - 7]

"… [C]ounsel for the third respondent [the Minister of Trade and Industry], submitted that the deprivation is arbitrary both on a substantive and procedural level. I agree. The court is denied any discretion to decide on a just and equitable order. This is problematic and leads to procedural unfairness. Similarly, on a substantive level the obligatory nature compels a court to order the refund whether or not there is sufficient reason for a deprivation." [Paragraph 8]

"The third respondent has not advanced any basis for a limitation of rights in terms of section 36 of the Constitution. In the circumstances of this matter, the factors that indicate that the deprivation is arbitrary also indicate that the deprivation cannot be reasonably justified in terms of section 36 of the Constitution. There are less restrictive means that can be employed to achieve the object - registration of credit providers that fall within the ambit of the Act. …" [Paragraph 9]

"I am persuaded that section 89(5)(b) is inconsistent with the Constitution and invalid. …" [Paragraph 10]

"When considering the appropriate remedy, I considered the following: (a) The third respondent, the relevant minister, has not defended the constitutionality of section 89(5)(b); instead, he has suggested a reformulation. (b) In the course of these proceedings, Amendment Bill [B47- B3013] to the Act was passed. The Amendment Bill awaits signature by the president. It is uncertain when this will happen. … (c) The proposed order follows the wording of the Amendment Bill soon to be signed by the president. (d) It follows that the legislature has considered the issue, agreed that section 89(5) is inconsistent with the Constitution and therefore needing to be amended, and has acted in line therewith. (e) The applicant agrees that the Amendment Bill, once signed by the president, will address its complaint against the section. The first respondent, the consumer who did not rely on the provisions of 89(5)(b) in the magistrate's court, supports the proposed order." [Paragraph 11]

"It was in issue whether the proposed order would amount to a reading-in or a reading-down of the provisions of section 89(5)(b). Regrettably, the issue received too much attention and contributed to the clouding of issues … [T]he order sought does not amount to an "intrusion into the domain of the legislature" because the Amendment Bill will soon be signed and the order sought is identical to its wording." [Paragraphs 12 - 13]

The section was found to be inconsistent with the Constitution and invalid. The Constitutional Court confirmed the finding of invalidity in Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others (CCT 88/14) [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) (5 June 2015).

**ADMINISTRATIVE JUSTICE**

**TSHABALALA V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS (18871/2014) [2014] ZAWCHC 169 (12 NOVEMBER 2014)**

**Judgment delivered 12 November 2014**

Applicant, the then chairperson of the SABC, was the subject of an inquiry by the Parliamentary Portfolio Committee for Communications, after a newspaper article alleged that she was not qualified for the position. Applicant sought a declaratory order to the effect that the inquiry was a disciplinary inquiry to which the principles of natural justice applied.

Baartman J held:

"The parties agreed, correctly in my view, that the inquiry constituted administrative action as defined in section 1 of the Promotion of Administrative Justice Act … therefore, the rules of natural justice (procedural fairness) were applicable to the inquiry." [Paragraph 10]

"Apart from the reference to legal representation … the notice [of hearing] complies with the rules of natural justice. Fortunately, the issue of legal representation has been dealt with appropriately and the applicant will, as she is entitled, be represented by a legal team of her choice and at her own cost. The applicant has further received, although some only shortly before the hearing of this application, all the particulars that she requested. She is not, however, in possession of the correspondence in which Unisa allegedly indicated that it had not awarded any academic qualifications to her. Evidently, this is a gross oversight as the respondents have not given any reason to refuse her a copy of the letter. I do not have the necessary information to make a finding in respect of the letter; however, the issue in any case should be dealt in accordance with the principles of natural justice which would in the absence of good cause dictate that the applicant be given a copy of the letter. If this is so … the applicant's rights will not be compromised in the pending hearing." [Paragraph 17]

"… [T]here is merit in the submission that she will be prejudiced by virtue of her exclusion from the process in the National Assembly. It must follow that … the applicant should have an opportunity to respond to the report prior to the proceedings in the National Assembly. In the circumstances of this matter, the rules of natural justice would demand that the applicant be given a copy of the committee's finding and a reasonable opportunity to respond thereto in writing which response should accompany the committee's report to the National Assembly and should be taken into consideration in the process leading to the adoption of any resolution." [Paragraph 18]

"In my view, the declaratory relief that the applicant seeks does not accord with the plain meaning and context of the Act in which a parliamentary process is envisaged. Evidently, the rules of natural justice must apply to the process. …" [Paragraph 20]

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

**BUTHELEZI AND ANOTHER V MINISTER OF HOME AFFAIRS AND OTHERS (22071/2011) [2012] ZAWCHC 3 (3 FEBRUARY 2012)**

This was an application by two opposition party members of parliament to have the conduct of the respondents reviewed for their delay or refusal to issue the Dalai Lama with a visa to enable him to travel to South Africa. They sought to review the refusal decision or the delay in terms of PAJA, and alleged that there was a constructive refusal to grant the visa.

Baartman J held:

"The granting or refusal of an application for a temporary visa constitutes administrative action. Thus, this court may review and set aside such action and grant an order that is just and equitable and may, in exceptional circumstances substitute, vary or correct a defect resulting from administrative action or direct the administrator to perform in terms of section 8(2) of PAJA." [Paragraph 16]

"I accept that a delay in taking a decision could, in appropriate circumstances, amount to a refusal to take the decision. The remedy in such a case would be to approach the court for an order directing the relevant authority to make the decision or such other relief as may be appropriate in the circumstances. However, in the light of the approach which I have adopted in the present dispute, it is unnecessary to determine this question." [Paragraph 19]

"... [T]here is no longer an "existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."" [Paragraph 21]

"Notwithstanding this factual situation, a court has discretion to hear an application despite it being moot." [Paragraph 22]

After referring to the case of Independent Electoral Commission v Langeberg Municipality on mootness, Baartman J held:

"Applying these considerations to the present matter, it is apparent that the withdrawal of the visa application, the absence of the Dalai Lama as an applicant in this matter, the fact that the events he intended to attend have taken place and the absence of his response to the new invitation are material factors that must influence the decision whether to consider the application, despite the matter being moot." [Paragraph 25]

"... [I]t is arguable that the profile of the Dalai Lama makes it unlikely that similar controversy will arise in other visa applications. In any event, every visa application, including any future visa application by the Dalai Lama, must be considered in accordance with the law; hence the importance of a decision that is no longer live cannot, without more, be converted into one that necessitates court intervention." [Paragraph 30]

"Allegations of disregard for human dignity and the rights entrenched in the Constitution have been levelled against the respondents in various matters before the courts. However, the courts have been unanimous in condemning such behaviour where the circumstances have justified it. But this case turns

on its own peculiar facts. Furthermore, there is therefore no reason to fear that our courts would not in future, in appropriate circumstances, come to the Dalai Lama's or any other aggrieved visa applicant's aid, should he or she approach the court. However, given the nature of this case, the relief sought would have no practical effect." [Paragraph 34]

"It follows that the interests of justice do not permit the exercise of this court's discretion in favour of the applicants to consider the matter despite its mootness... The importance of the issue is affected by the withdrawal of the application and the passage of time; the events the Dalai Lama intended to attend took place a long while ago. The criteria for granting visa applications are well-known and do not involve any complex legal issues. Although the parties have addressed this court fully on mootness and the merits, it does not justify this court giving advisory opinions on abstract propositions of law." [Paragraph 35]

The application was dismissed with costs.

**JOINT OWNERS, ERF 5216 HARTENBOS V MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE, AND ANOTHER 2011 (1) SA 128 (WCC)**

**Case heard 22 May 2010, Judgment delivered 2 September 2010**

In terms of section 24 (2) (a) of the National Environmental Management Act, the Minister had listed certain activities in respect of which any person intending to undertake them had to obtain environmental authorisation. Parties who had already commenced any of the listed activities by 3 July 2006 were exempted from obtaining the authorisation. The issue before the court was whether the applicants could be said to have commenced an activity.

Baartman J held:

"This application involves a confined question of statutory interpretation, more particularly whether the applicants can be said to have already commenced an activity listed or specified in terms of s 24(2)(a) or (b), as envisaged in s 24F(1) of the National Environmental Management Act ... (NEMA)" [Paragraph 2]

"I accept that the work done constituted partial construction of the access road. It is so that the work done on the property could only be done with the applicants' permission. I accept that the applicants granted permission because of the advantage of having the depression filled in, so that they would later be able to construct the access road over it. The applicants alleged that the filling-in of the depression was an essential part of the entire development on the property, without which the road to access the individual erven could not be built." [Paragraph 13]

"Clearly, the objective is to manage comprehensively the impact of the activity on the environment. The applicants' counsel argued that the first respondent had a long-standing practice of granting environmental approvals not on an 'activity-by-activity' basis, but with reference to the development as a whole." [Paragraph 33]

“The applicants have not attempted to show any link between the infill and compacting, and any of the listed activities they intended undertaking. Instead, they alleged that, because the filling and compacting were essential for the development, it was carried out in furtherance of every listed activity that would be undertaken in the development.” [Paragraph 35]

“As indicated above, the authorisation pertains to the 'activity', instead of the development. That has to be correct because the legislature prohibited the start of environmentally risky activities without authorisation. In this way NEMA does not interfere with economic and other activities not considered environmentally risky.” [Paragraph 36]

“As indicated above, the applicants have not attempted to show a connection between the activity and the individual listed activities; instead, they relied on a connection between the activity and the development. A development consists of many activities. I can therefore not determine whether there is a reasonably direct connection between the act of filling in the depression and any of the listed activities. It follows that the applicants are not entitled on these papers to a declaration that they are not required to apply for or be granted environmental authorisation under NEMA. The applicants require ECA authorisation.” [Paragraph 41]

“Even if I am wrong, the applicants cannot rely on the starting of the road, because they did so in contravention of Item 1(d) of Schedule 1 of the regulations promulgated in terms of s 21 of ECA. The regulations were promulgated in Government Notice 1182 dated 5 September 1997 as amended.” [Paragraph 42]

The application was dismissed with costs.

## CIVIL PROCEDURE

**INDWE AVIATION (PTY) LIMITED V THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (PTY) LIMITED 2012 JDR 1622 (WCC)**

**Case heard 4 February 2012, Judgment delivered 4 February 2012**

This was an application for a final interdict pending the conclusion of negotiations.

After considering contractual history that existed between the parties and the intentions of the parties during those negotiations, Baartman J held:

“It further appears from the documents discovered that the South African Defence Force was the first respondent's preferred service provider and that it had made every attempt to secure its services. Contrary to what the first respondent's representatives advised the applicant on 27 May 2010, the board at its meeting on 25 May considered a 1-year contract with the applicant as a fall back position in

the event that negotiations with the South African Defence Force could not be finalised timeously." [Paragraph 19]

"The requirements for a final interdict are well established. It is so that for a final interdict, the applicant must, first establish a clear right. The applicant must also establish an act of interference by the respondent and thirdly that there is no other remedy available to such an applicant." [Paragraph 21]

Baartman J then considered whether section 217 of the Constitution provided guidelines to be complied with whenever a state was procuring services:

"... The procurement of the aviation services, to my mind, is closely linked to the first respondent's primary function i.e operating and managing state assets in the petroleum industry. Therefore, the first respondent exercised public power to procure the aviation services." [Paragraph 24 (e)]

"The first respondent used public funds to procure the aviation services and is consequently accountable to the public for the contracts it concludes." [Paragraph 24 (d).]

"The first respondent was able to hold the process to ransom while engaging the South African Defence Force to provide the same service it was negotiating with the applicant to provide, without the applicant being aware that it was up against such a formidable contender. In my view, the first respondent contracted from a superior position." [Paragraph 24 (I).]

"In my view, the first respondent in procuring aviation services relevant to these proceedings had to comply with the provisions of section 217 of the Constitution. The first respondent failed to do so; the process was not open, fair or transparent. " [Paragraph 25]

"I can imagine no more appropriate circumstances for appropriate declaratory relief than in this matter. It is so that the applicant has not also sought the review and setting aside of the decision to conclude a contract with the South African Defence Force." [Paragraph 27]

"The applicant, however, in reply sought to amend its relief. I have found above that the first respondent's conduct fell foul of the provision of section 172 of the Constitution. Even in those circumstances, in my view, the applicant has to seek the setting aside and the review of the decision to contract with the South African Defence Force before a court can grant the relief sought. The Board's decision was administrative and stands until set aside." [Paragraph 32]

"In the absence of setting aside the decision to award the contract to the South African Air Force, the relief would not assist the applicant. I will accept, without finding, that the 3 December 2009 letter gave rise to a right that the applicant would continue to provide the services. However, that right ceased when the board concluded a contract with a third party." [Paragraph 36]

**CRIMINAL JUSTICE**

**S V MSIZI (A345/2011) [2011] ZAWCHC 441**

**Judgment delivered 25 November 2011**

This was an appeal against sentence, the appellant having been sentenced to 5 years imprisonment for assault with intent to do grievous bodily harm in the Regional Court.

Baartman J (Van Staden AJ concurring) held:

"By providing for correctional supervision as a sentence option, the legislature distinguished between those offenders who ought to be removed from society by means of imprisonment and those who, although deserving punishment, should not be removed from society. The Appellant clearly falls into the second category." [Paragraph 8]

Baartman J considered the best interests of minors who depended on the accused for support:

"Section 29(2) of the Constitution requires that a child's best interest has paramount importance and any matter concerning children must obviously be considered6. The fact that the Appellant was paying maintenance for his dependant child and also contributing to the household where a further minor child was living, should have persuaded the Magistrate to at least consider correctional supervision and to call for a report." [Paragraph 9]

"... I conclude that the Magistrate erred by deciding that correctional supervision was not an appropriate sentence. Subject to the input of a probation officer or a correctional officer, rehabilitation in the form of a course in anger management might have been appropriate in this case. However, since the imposition of sentence on 10 March 2011 the Appellant has been in custody for a further period of more than eight months. In all the circumstances I believe that it will not be appropriate to impose a sentence of correctional supervision at this stage. The fact of the matter is that the Appellant has been in prison for more that [sic] a year." [Paragraph 10]

"I would therefore set aside the sentence imposed and substitute it with a sentence of 3 years imprisonment of which 2 years and 6 months is suspended for a period of 3 years on condition that the Appellant is not convicted of an offence of which an act of violence is an element and in respect of which the Appellant was sentenced to unsuspended imprisonment without the option of paying a fine. I would further order that this period of the effective 6 months imprisonment be antedated in terms of Section 282 of the Criminal Procedure Act to commence on the date of sentence ... If there is no other valid reason for the Appellant to be detained in prison he should be released immediately." [Paragraph 11]

**CHILDRENS' RIGHTS**

**P P V C P (15992/2012) [2012] ZAWCHC 322**

**Judgment delivered 21 September 2012**

This application concerned the best interests of a minor whose natural parents were going through a divorce. The applicant (the father) was seeking an order to have the minor returned to Cape Town from the Free State.

Baartman J held:

"Despite the respondent's allegations to the contrary, I am of the view that the minor was not prepared for the move when it happened. The respondent alleged that she had fled the common home because she was the victim of domestic violence. I accept that the applicant assaulted the respondent during the course of the marriage. Unfortunately, the respondent did not seek the protection available to her through the appropriate legislative means; instead, she fled. In so doing she has pre-empted a court decision in respect of the minor's primary residence. It remains this court's duty to enquire into the best interest of the minor." [Paragraph 10]

"It is common cause that the applicant has never displayed any violent behaviour towards the minor, in her consultation with Smit she expressed her affection for both her parents." [Paragraph 11]

"It follows that the respondent foresees no harm to the minor in the company of the applicant. The applicant holds a different view in respect of the minor's safety in her present abode. He indicated that the respondent had been sexually molested and raped by her brother who currently resides in Paarl. The respondent's parents were aware of the sexual assault but did not act to protect her. In her opposing papers, the respondent denied the allegations, however, in her consultation with Smit she admitted that she had been molested, by her brother. This is not the brother with whom she currently resides. Despite the geographical distance between the respondent and her brother, the applicant remains concerned for the minor's safety. He has reservations about the respondent's ability to protect the minor should her brother from Paarl visit." [Paragraph 12]

"The minor has indicated … that she would prefer to stay with the respondent. In giving effect to the minor's expressed preference, it is important to assess her emotional maturity. She is 11 years old and it is apparent from the papers that both parties have tried to influence her. I am not persuaded that the minor is currently able to express a genuine preference." [Paragraph 14]

"…That submission [regarding the busy work schedule of the grandmother] loses sight of the fact that the minor would be at school during the day. She would be in no different a position than many children her age whose: parents work. In addition, the respondent has been a house wife until now but since she is about to be divorced, she will also have to find employment." [Paragraph 15]

"In my view, the available evidence suggests that it would be in the minor's best interest to return to Cape Town pending a final decision in this matter. I intend to order that the applicant vacate the

common home in the event that the respondent should elect to return with the minor. In that eventuality, the applicant should also refrain from visiting the common home pending finalisation of this matter. Should the respondent elect not to return, I P, the paternal grandmother, will stay in the common home with the applicant and the minor child." [Paragraph 16]

The respondent was ordered to return the minor to Cape Town pending finalization of the matter.

## SELECTED JUDGMENTS

### PRIVATE LAW

**ZHONGJI DEVELOPMENT CONSTRUCTION ENGINEERING CO LTD V KAMOTO COPPER CO SARL 2015 (1) SA 345 (SCA)**

**Case heard 19 September 2014, Judgment delivered 1 October 2014**

Appellant, a Chinese company, entered into a mining contract with DCP, a Congolese company. In terms of the "main agreement" between the parties, disputes would be dealt with by arbitration. Work on the contract was interrupted due to a pending merger of DCP, and an "interim agreement" concluded to tide matters over until the future of the project was more certain. The interim agreement made no provision for dispute resolution mechanisms. Appellant was ultimately given notice to discontinue work on the project. DCP later merged with the respondent. Appellant claimed various amounts owing. Respondent argued that as the interim agreement was silent on dispute resolution procedures, the dispute was not susceptible to arbitration, and furthermore South African courts lacked jurisdiction. Appellant relied on the arbitration clause in the main agreement to seek an order that respondent was bound by the arbitration clause in the main agreement, and that the disputed amounts were capable of arbitration. The High Court dismissed the application.

Willis JA (Mpati P, Mbha JA and Mathopo AJA concurring) held that there was no reason why the dispute over whether the claims were arbitrable could not be determined by the arbitrator. Once the arbitration commenced, the High Court would have jurisdiction. The application was "premature and perhaps unnecessary." [Paragraph 38].

Gorven AJA (Mpati P, Mbha JA and MAthopo AJA concurring) wrote a separate judgment:

"... The crisp issue in this appeal was whether the court below was entitled or obliged to grant the declaratory relief sought by the appellant (Zhongji). It held that it did not have jurisdiction to grant the relief and, as a result, dismissed the application with costs. ..." [Paragraph 41]

"When a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings. The reason is simple. If the court has no jurisdiction, it is precluded from dealing with the merits of the matter brought to it. Both of the parties' submissions focused on the question of jurisdiction and both treated this as the real issue in the application. But what these submissions overlooked in my view is that an arbitration clause embodies an agreement that is distinct from the terms of the agreement of which it forms a part. Sometimes the fact that it is embodied in another agreement may affect its validity because a challenge to the validity of the agreement in which it is incorporated is also a challenge to the validity of the arbitration agreement. In the absence of such a challenge, however, the arbitration agreement must be given effect in accordance with its terms. The terms of this agreement require that the parties submit disputes to arbitration in Sandton, Gauteng. In other words, the arbitration agreement fell to be performed within the area of jurisdiction of the court below ..." [Paragraph 50]

"... [O]n Zhongji's own version the very issues on which it sought judicial pronouncement fell to be dealt with by the arbitration tribunal. This was because the rules place the question of the scope of the arbitrator's jurisdiction and whether any particular dispute falls within that jurisdiction in the hands of

the arbitrator. That is entirely permissible. If the arbitration tribunal in due course makes an award concerning the disputed invoices, it must make findings on the second and third defences raised by Kamoto in the application. In doing so it would give effect to the terms of the arbitration clause relied on by Zhongji." [Paragraph 53]

"If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the province of the arbitrator ... A court is not entitled to do that unless an order has been granted in terms of s 3(2)(b) of the Act that those particular disputes shall not be referred to arbitration. No such order has been sought or granted. ... This approach, and the underlying rationale for circumscribing the powers of a court which has jurisdiction conferred by an arbitration agreement, shows appropriate deference for the autonomy of the parties to decide on the forum which should resolve their disputes. The supreme irony of the application is that Zhongji, in ostensibly seeking to enforce the arbitration clause, in effect sought to have the court act contrary to some of the terms of the agreement it invoked." [Paragraphs 54 - 55]

The application was dismissed.

## COMMERCIAL LAW

### PREMIER FOODS (PTY) LTD V MANOIM NO AND OTHERS 2016 (1) SA 445 (SCA)

**Case heard 29 September 2015, Judgment delivered 4 November 2015.**

Appellant had been granted immunity in terms of the Competition Commission's corporate leniency policy (CLP). It duly gave evidence on cartel activities (relating to an alleged bread cartel in the Western Cape) to the Competition Tribunal. The Tribunal made an order declaring the conduct of the appellant to be a prohibited practice in respect of its involvement in cartel activity (the declaration). Appellant argued that the Tribunal was not empowered to make the declaration, as the conduct in question was not included in the complaints referred to the Tribunal. Claimants wished to sue the cartel members for damages. To do so, they required a notice certifying that the conduct forming the basis of the claim had been found to be a prohibited practice under the Competition Act. Appellant sought an order declaring that such a notice could not be issued in respect of the appellant.

Gorven AJA (Maya ADP, Shongwe and Petse JJA and Baartman AJA concurring) held:

" ... [A]ll that is offered to a leniency applicant is immunity from the application of the provisions of s 59. The CLP expressly provides that leniency applicants do not enjoy immunity in civil actions. No immunity is therefore offered from a declaration because this is what gives rise to the right to claim damages. ..." [Paragraph 16]

Gorven AJA considered whether the Tribunal had the power to grant the order:

"The Tribunal is a creature of statute. It has only those powers given to it by the Act and must exercise its functions in accordance with the Act. The Commission investigates, refers and prosecutes complaints. The Tribunal determines those complaints which have been referred to it. Its power to determine a complaint only arises on referral in terms of the Act, generally by the Commission. Put another way, the

referral by the Commission is 'a jurisdictional fact for the exercise of the Tribunal's powers in respect of prohibited practices'. … The Tribunal is only empowered to make a declaration on matters falling within terms of a referral. The Commission submits that the question 'is whether a complaint against a particular party is properly referred to and before the Tribunal when that party is not formally cited as a respondent'. … My view is that the question goes beyond the issue of citation." [Paragraph 18]

"When the Commission refers a complaint to the Tribunal in terms of s 50(2)(a), it is entitled to refer only some of the particulars of a complaint. This is clear from s 50(3). If this is done, the Tribunal's power is limited to those particulars referred to it by the Commission. … In the present matter … the issue is whether the particulars of the complaint relating to Premier's conduct fell within the ambit of the referrals. The Commission and the claimants accept that Premier was not cited as a respondent in the complaint referrals. They further accept that no relief was sought against Premier in the referrals. They say, however, that the particulars of the complaint relating to Premier nevertheless fell within the ambit of the referrals." [Paragraphs 19; 22]

"… [T]he Commission neither cited Premier as a respondent nor did it seek any relief, including a declaration, against it. The referrals were covered by form CT1(1) … The forms were headed 'The Competition Commission seeks an order granting the following relief', with the explanation below '(Concise statement of the order or relief sought:)'. In the second referral … [t]he affidavit … concluded with a prayer for the relief sought by the Commission. This comprised orders against only the cited respondents, Pioneer and Foodcorp … … As I have already noted, the Commission itself said that it had deliberately not cited Premier as a respondent. …" [Paragraph 26]

"The Commission … submits that the firm against whom such an order is made need not be a party. Because Premier participated in the proceedings on the basis of its admitted involvement in the cartel activity, an order could be made against it. It says that no prejudice to Premier ensued. But this ignores the approach in Agri Wire and Senwes, both of which require the subject-matter of the order to fall within the ambit of the complaint referral, failing which the Tribunal has no power to make a declaration. As I have indicated, my view is that Premier's conduct is not covered by the referrals. The Tribunal thus had no power to make the declaration. …" [Paragraph 27]

"Premier knew that the other members of the cartel had been cited as respondents and that relief was sought against them. This does not mean that it should have anticipated that relief would be sought against it, since the referral told it the opposite. In the words of Cameron J, it was not notified that it was 'liable to the consequences of enmeshment in the ensuing legal process'. The submission that, because Premier was involved as a leniency applicant in which it clearly admitted its culpability, a finding could be made against it, attempts to invoke precisely that 'liability to legal process through oblique or informal acquaintance', which was rejected by the Constitutional Court. Citation as a party is necessary so that that person can invoke all the rights of a party against whom relief is sought. " [Paragraph 30]

Gorven AJA thus held that the Tribunal lacked the power to make the declaration, and turned to consider the consequences of that lack of power:

"… [T]he Commission says that, even if it is found that the Tribunal lacked power, the declaration must be set aside before Premier can succeed. This also accords with a long line of authority concerning the effect of invalid administrative action. In such a case the administrative decision cannot be ignored because it exists in fact and has legal consequences until set aside. … [T]he dictum relied upon by the Commission in no way detracts from the approach in Motala and the line of authorities there referred to. Premier has

not simply ignored the declaration. Nor is it contending that the Chairperson or Tribunal should do so. ..." [Paragraphs 37 - 38]

"Based on the fact that the conduct of Premier was not part of the referral to the Tribunal, the Tribunal had no power to grant any order against it. In addition Premier was not cited as a respondent. The declaration is accordingly a nullity. Premier was not obliged to have the order containing the declaration set aside. Being a nullity, it is competent for a court to find that there is simply no declaration to certify. This in turn means that, in this matter, no notice in terms of s 65(6)*(b)* should be issued. As is clear from what I have said above, however, it was necessary for Premier to approach a court. Premier, the Commission, the Tribunal and the Chairperson were not entitled to simply ignore the declaration." [Paragraph 47]

The appeal was upheld with costs, and an order issued declaring that neither first or second respondent could issue a notice certifying that appellant's conduct constituted a prohibited practice.

## CIVIL PROCEDURE

### WISHART AND OTHERS V BLIEDEN NO AND OTHERS 2013 (6) SA 59 (KZP)

**Case heard September 28, 2012, Judgment delivered November 15, 2012**

The three applicants sought to interdict the second and third respondents, who were advocates, and the fourth respondent, who was an attorney, from examining the applicants at an enquiry in terms of section 417 of the Companies Act. The basis was that the applicants were former clients of the respondents, and that the respondents were subject to conflict of interests and were privy to confidential information. In effect, however, the clients had been the companies which the applicants represented, not the applicants in their personal capacities.

Gorven J held:

"The position in English law is fairly clear. In Prince Jefri Bolkiah v KPMG (a firm), Lord Millet accepted the law [as being]...'(i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and (ii) that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client'... The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence. Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.' Only once these have been proved does an evidential burden shift to the solicitor to show that there is no risk to the former client if the solicitor acts in the matter." [Paragraph 26]

“This obligation, or legal duty, arises within one of two contexts, contract or delict. Within the law of contract, such a legal duty is implied by law as a term of the contract. The legal duty so implied can, however, be limited by agreement. When it is not founded in contract, 'it is necessary to look to the law of delict, and in particular to the principles of Aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence'” [Paragraph 35]

Turning to the facts, Gorven J held that: “It is accepted that no attorney-client contract was concluded between any of the applicants and any of the respondents. The contracts were with the companies. The contracts also related to disputes in which the companies, not the applicants personally, were involved. All communications by Loader and the first applicant were made to the respondents on behalf of the companies. There was no communication between the second and third applicants and any of the respondents at any time. The attorney-client contracts in question are no longer in existence. The companies are not asserting any right to confidentiality” [Paragraph 43]

“The first aspect to the issue as to standing is whether the applicants have the right to protect information confidential to the companies. The short answer is that the applicants do not seek any such relief. They seek to protect themselves. It is true to say that the applicants seem to confuse their own interests and rights with those of the companies. The application is largely concerned with confidential information of the companies or privileged communication supposedly made by the officers of the companies on their behalf. Very little is said of information personal to the applicants. The applicants are clearly not entitled to rely on the protection of information confidential to the companies in question, or privilege which vests in the companies. As I have said, however, they do not, in any event, make out a case that any such information was disclosed to the respondents. Privileged communication is mentioned often but nowhere particularised.” [Paragraph 44]

The first applicant then sought to be considered as an “informal client”:

“…[H]e claims that his interests are co-extensive with those of the various companies in question but does not say what he means by this. He says that nothing was discussed which was personal or confidential to him… The contact of the first applicant with the respondents differs both in quality and duration from the company in Re a Firm of Solicitors. In my view this comes nowhere near to the situation where the first applicant can be described as having been an 'informal client' or 'as good as' a client as was the case in that matter.” [Paragraph 48]

Gorven J found that no case had been made out on the papers that any confidential information personal to the applicants was disclosed to the respondents.

“This means that, applying the principles of our law as it stands at present, the issue as to standing must be decided in favour of the respondents. Properly construed, it seems to me that the right asserted by the applicants in support of their claim to a final interdict is a right not to be examined by the respondents in the s 417 enquiry. Within the context of this application on the present state of our law, proof of that right would require proof that: (1) the applicants had a previous attorney-client contract with the respondents; (2) confidential information of the applicants was imparted or received in confidence as a result of that contract; (3) that information remains confidential; (4) that information is relevant to the matter at hand; and (5) the interests of the present client of the respondents are adverse to those of the former clients. None of the first four of these requirements is met. In the present case,

therefore, no legal duty on the part of the respondents arose towards the applicants or is present now." [Paragraph 50]

In the result, the application was dismissed with costs.

This decision was upheld by the SCA on appeal in *Wishart and Others v Blieden N.O. and Others* (659/2013) [2014] ZASCA 120 (19 September 2014), with the SCA holding that the refusal to restrain a lawyer from acting against a litigant where there was no misuse of confidential information was correct.

## CRIMINAL JUSTICE

### S V JWARA AND OTHERS 2015 (2) SACR 525 (SCA)

**Case heard 12 March 2015, Judgment delivered 25 March 2015**

Appellants, officers in the South African Police Service, and members of an organised crime unit, were convicted of violations of racketeering provisions in the Prevention of Organised Crime Act (POCA). The appeal turned primarily on the acceptance into evidence of telephone conversations obtained under the Interception Act.

Gorven AJA (Brand, Ponnan and Willis JJA and Dambuza AJA concurring) held:

"Quis custodiet ipsos custodes? Thus enquired the satirist Juvenal in his poem on his attempts to enforce moral behaviour. Since Plato this phrase has been used to lament the corrosive effect of corrupt police and judicial officials. When Capt Sizane, the investigating officer in this matter, stumbled on a reference to the first appellant being involved with a suspected manufacturer of substances proscribed under the Drugs and Drug Trafficking Act (the Drugs Act), he was confronted with what appeared to be just such corrupt behaviour. This came about after he had obtained an order under the Interception and Monitoring Prohibition Act (the Interception Act) to monitor calls made to and from the cellphone of that suspected drugs manufacturer. The conversation said that the first appellant had undertaken to store the seized drug manufacturing machinery and return it to the suspect after the matter had been resolved. The first appellant was also said to have told the arrested wife of the suspect what to mention in her warning statement to the police. The first appellant was, at the time, a superintendent in the South African Police Service (SAPS) and the head of the West Rand Organised Crime Unit." [Paragraph 1]

"The court below recognised that the provisions of the Interception Act limit the right to privacy accorded in the Constitution. There was no attack on the constitutionality of the Interception Act. Therefore, evidence obtained in accordance with it would thus have been obtained without violating this or any other right. Where a right under the Constitution is impinged on by legislation, the prescripts of that legislation must be strictly adhered to. The appellants correctly submitted that the principles governing the obtaining and carrying out of search and seizure warrants apply equally to a direction under the Interception Act. …" [Paragraph 11]

"The third point of attack was directed at the finding of the court below that, even if the application did not strictly comply with the Act, the evidence obtained as a result of the direction was nevertheless admissible. A failure to obtain evidence within the strict confines of the Act means that it falls outside the protective umbrella provided by the Act and results in a violation of the right to privacy. Such evidence

may be rendered inadmissible under s 35(5) of the Constitution … On the facts of that matter there were three primary considerations. The direction had been obtained by way of false information in the affidavit supporting the application; the evidence obtained under the Interception Act was supplemented by additionally tainted evidence by way of a statement obtained by undue influence; and there were other means of investigation available. …" [Paragraphs 15 - 16]

"… The deficiencies were of a purely technical nature. There was nothing misleading said in the application. The procedure in the Interception Act was followed as closely as possible. The monitoring of the conversations was the only means to investigate. In this regard Capt Sizane testified that, since the suspects were all members of the SAPS and because of the endemic corruption therein, he could not use any other investigative tools without jeopardising the investigation. Not only was the exercise of the discretion a proper one, but in my view it was also correct and, in the circumstances of the matter, to have excluded that evidence would have led to a failure of justice. The provisions of s 35(5) therefore did not serve as a basis to exclude the evidence obtained pursuant to the directions, and the admission of the evidence by the court below cannot be impugned." [Paragraph 17]

The appeal was dismissed.

**BOOYSEN V ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2014 (2) SACR 556 (KZD)**

**Case heard 7 February 2014, Judgment delivered 26 February 2014**

First respondent issued two written authorisations to charge the applicant under the Prevention of Organised Crime Act (POCA). Applicant sought to have the decision to issue the authorisations and the decision to prosecute on the counts confronting him reviewed and set aside. The application was based directly on the Constitution and the principle of legality. Applicant also sought to interdict the first respondent from authorising his prosecution on any charge referred to in s 2(1) of POCA, without facts, under oath, being put before her implicating the applicant.

Gorven J held:

"The respondents submit that the trial court would be best suited to deal with the authorisations … However, this matter is clearly distinguishable … The issue raised … can and should be dealt with prior to the commencement of the trial since the question is whether Mr Booysen can be charged with the two POCA counts. For this to be competent, the validity of the issuing of the authorisations must be determined. If they are not valid, they may be reviewed and set aside … [B]ecause this application relates to only one of a number of accused persons, it can most conveniently be dealt with in a separate application which does not affect the conduct of the trial. … [I]n this narrow instance this court is the appropriate forum and that the appropriate procedure has been adopted. …" [Paragraphs 8 - 9]

"… In Fedsure it was said that the principle of legality expresses the fundamental idea that 'the exercise of public power is only legitimate where lawful'. It is clear that the NDPP exercised a public power in arriving at the impugned decisions. … This begs the question as to the content of the principle of legality in the context of the impugned decisions. The detailed content of the principle of legality must be worked out from the Constitution as a whole. This is an ongoing, incremental process …" [Paragraph 14]

“In turn, the principle of legality requires that the exercise of public power 'must be rationally related to the purpose for which the power was given'. This is the rationality test. It has been held that rationality is a minimum requirement applicable to the exercise of all public power. …” [Paragraph 15]

“... Mr Booysen … submits that, notwithstanding the compliance with the formalities of the legislation, the NDPP must in addition have adequately assessed 'the sufficiency and admissibility of evidence to provide reasonable prospects of a successful prosecution' ...” [Paragraph 21]

“... What is actually at issue is whether the second part of the twofold test, the rationality aspect, was satisfied. … [T]he question is whether the decision of the NDPP, viewed objectively, was rational. This decision is not a polycentric one or one involving the formulation or implementation of policy, so the rationality test is somewhat less variable. In the context of the first impugned decision, my view is that the information on which the NDPP relied to arrive at her decision must be rationally connected to the decision taken.” [Paragraph 22]

“... [T]he NDPP says that she relied on 'information under oath and the evidence as contained in the dockets' and that the instances relied on by her are 'referred to in the above-mentioned statements, which were considered together with the other information in the docket (sic) before the impugned decisions were made'. Whilst she says that she will not detail all the information placed before her prior to her making the first impugned decision, she does not say that any of that undisclosed information was relied on by her. … [T]he respondents submitted that, because correspondence annexed to the founding affidavit refers to documents which contain prosecution strategy and information concerning informers or sources contained in correspondence between the DPP and NDPP, the inference should be drawn that those documents were also relied on by the NDPP. The insurmountable difficulty … is that the NDPP does not say that she had regard to any such information or documents at the time the impugned decisions were made. ... Had she said that she had considered such documents, even if the precise contents were not disclosed, this might well have affected the outcome of this application. The provisions of POCA allow for hearsay and similar fact evidence to be led in certain circumstances. ...” [Paragraph 27]

“As regards the contents of the dockets, the respondents conceded … that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions.” [Paragraph 29]

“... [T]he NDPP is … an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. ... In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations …” [Paragraph 34]

“... Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law, and were unconstitutional.” [Paragraph 36]

"I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute ... The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. ..." [Paragraph 38]

"Prayer *(e)* ... seeks to interdict the NDPP from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booysen. A final interdict is thus sought. ... Mr Booysen ... certainly has no right at all to such a decision being taken only if affidavits connecting him to offences are in the possession of the NDPP. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA. ... [T]here is no basis for the interdict ... either in the form sought or in any other form. ... I am of the firm view that to do so in these circumstances would amount to an unjustified intrusion into executive territory and would offend the principle of the separation of powers. To make such an order would amount to fettering the discretion of the NDPP to make the decisions in question. This discretion has been given to the NDPP by the requisite legislation and there is no attack on the constitutionality of that legislative provision. ..." [Paragraph 40]

**S v MATHE 2014 (2) SACR 298 (KZD)**

**Case heard 14 – 16 August 2012; 23 April 2014, Judgment delivered 24 August 2012**

The accused, a Correctional Services official, was convicted of shooting and murdering the deceased, with whom he had an intimate relationship and a child. The deceased had, shortly before the killing, terminated her relationship with the accused, and the accused was deeply upset and emotional about the deceased's alleged infidelity. On the day in question he shot the deceased, who was sitting at the back of a taxi, during an exchange of fire between him and his work colleagues. In the process he shot another passenger in the taxi. The accused was found guilty, on his written plea of guilty and statement in terms of s 112(2) of the Criminal Procedure Act, of attempting to murder a fellow employee and of murdering the deceased. The convictions carried minimum sentences of 5 and 15 years respectively. In mitigation, the accused claimed that he had emotionally disintegrated at the time of the shooting, and hence had diminished criminal responsibility.

In considering sentence, Gorven J held:

"It is clear that diminished criminal responsibility is 'not a defence but is relevant to sentence because it reduces culpability'. .... In each case the question is the extent, or degree, to which the particular circumstances reduced the powers of restraint and self-control of the accused. This means that the facts of each case must be considered on their own merits." [Paragraph 16]

"I was invited to accept that the ipse dixit of the accused was to the effect that his criminal responsibility was diminished. He does not, however, say so in terms. What he says is that he was 'severely emotionally overwrought' and was 'emotionally disintegrated' whatever these phrases may mean. He also significantly said: 'I was still able to differentiate or appreciate between right and wrong and I was able to act in accordance with such appreciation'. I therefore need to evaluate the facts of the case to see

whether there was a reduction in the capacity of the accused to appreciate the wrongfulness of his actions and whether he acted in accordance with that appreciation." [Paragraph 17]

"Unlike in so many cases involving one lover killing another, there was no history of abuse. The history was of the deceased's infidelity. This took place while they were not yet married, even though part of the ilobola had been paid and a child had resulted from the union. The history was also of the accused's jealousy and his refusal to accept that the deceased may desire someone other than him... His primary motivation was to prevent any desire of his fiancée to have a relationship of her choice if he should die. He decided to rather kill the deceased (and risk killing the complainant in count 1) than to either simply stay in the vehicle in the hope that his assailants would stop shooting for fear of killing innocent occupants or to shoot back at them. In my view none of this establishes that the accused had 'diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of the wrongfulness'. His ipse dixit is to the contrary." [Paragraph 21]

"In the light of all the facts and the legal principles, I find that, whilst the accused was clearly emotional about the infidelity of the deceased and clearly found repugnant the thought that the deceased and Mabuyakhulu might be free to pursue a love relationship, no diminished criminal responsibility has been established... To assess whether they are present, along with his emotional state, other aspects relevant to sentence must be evaluated. These are 'the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern'." [Paragraph 26]

"The fact that he pleaded guilty is of little moment in the circumstances. He was caught red-handed with a number of eyewitnesses present, although it counts for something that he did not unduly burden the state with the need to prove the charges. He did express remorse and attempted to make some recompense. To that must be added the significant character evidence emerging from the two reports and the personal circumstances ... He has clearly been a stable, productive member of the community and engaged in uplifting actions over a long period of time. He has supported family and community members and wishes to support his child from the deceased and to take an active role in her life. He is a first offender and does not seem to display a propensity to violence. It seems clear that the accused is a candidate for rehabilitation. Of course, the emotional struggle of dealing with the infidelity and lack of honesty of the deceased must also be taken into account." [Paragraph 27]

"An aggravating factor, however, is that, whilst he was able to control his actions, the accused treated a defenceless woman as a chattel who existed purely for his benefit. He did not accord her the dignity of choice concerning her life." [Paragraph 28]

"A 2012 study by the Medical Research Council showed that, of every two women who are murdered, one is killed by her partner. This means that the proprietorial attitude of men towards women has reached extremely serious proportions in our society. This attitude makes a mockery of the right to life accorded by the Constitution ... If a person kills another, this is the ultimate negation of the right to life. This set of attitudes also fundamentally undermines, during life, many of the other rights of women, including the right to equality, the right to human dignity, the right to freedom and security of their person, the right not to be subjected to servitude, the right to privacy and the right to freedom of association contained in the Bill of Rights. This proprietorial attitude is inimical to a democratic society based on values of human dignity, equality and freedom. It is clear that, in addition to depriving the deceased of her right to life, the accused infringed at least some of these other rights afforded to the

deceased by our Constitution. It is my view that the nature of the offence and the interests of society demand that the crimes committed by the accused be severely punished." [Paragraph 29]

"...[The] legislature has distinguished between offenders who ought to be removed from society and those who, although deserving of punishment, do not...[I]t is my view that, despite the recommendation of the probation officer, the accused falls into the category of those who must be removed from society" [Paragraph 32]

"The aggravating features of the crimes of which the accused has been convicted, the need for deterrence and retribution and the interests of society that women should be able to make free and unfettered choices without fearing reprisal must be weighed against the mitigating factors arising from the 'emotional disintegration' and other personal circumstances of the accused. In addition, since the accused is a candidate for rehabilitation, it is in the interests of society that he be allowed to once more become a productive member of society after having served a sentence of imprisonment and being given the incentive to do just that. In the light of all of these I am of the view that, if I were to impose the minimum prescribed sentence of 15 years' imprisonment, an injustice would result. I therefore find that there are substantial and compelling circumstances as envisaged by s 51(3) of the CLAA." [Paragraph 33]

The accused was then sentenced to 3 years imprisonment for the attempted murder count, and 10 years imprisonment for the murder count, the former running concurrently with the later.

## SELECTED JUDGMENTS

## PRIVATE LAW

### FISHER V BODY CORPORATE MISTY BAY 2012 (4) SA 215 (GNP)

**Case heard 1 April 2011, Judgment delivered 12 April 2011**

This was an urgent application to restore the applicant's possession of and access to the affected premises. The applicant owned a house in a village complex managed by the respondent, and was alleged to be in arrears and to have defaulted on payments for levies and rates to the respondent.

Legodi J held:

"The applicant has been in peaceful and undisturbed possession of the house since 2007. Access to the village complex and thus to the respective house is controlled at the main gate that leads into and out of the village complex." [Paragraph 7]

"On 19 March 2011 the applicant attempted to gain access … by using his access disk at the security gate. … [H]e was unable to gain access to the village complex." [Paragraph 10]

"… [C]ounsel for the respondent argued … Firstly, that the applicant as a person was not barred from accessing the village complex. It was only his car that was barred, or that access was only restricted when the applicant was using his vehicle. Secondly, he contended that the respondent was entitled to impose the restricted access, based on the fact that the applicant was in arrears in respect of rates and levies." [Paragraph 11]

"It is clear … that the respondent takes the view that, because of its rules of conduct, it is entitled to suspend the access tag of the applicant, based on the latter's failure to make payment of monthly levies." [Paragraph 13]

"… [C]ounsel for the respondent wished to make this point insofar as it related to the applicant's vehicle only. He however found himself hard-pressed to explain why only 'the vehicle'. Insofar as it might have been intended to suggest that such an action did not amount to spoliation, I must immediately indicate that it does." [Paragraph 14]

"The restriction has the following effect. Assuming that the applicant drives from his house to his place of employment, he would drive up to the security gate, then be forced to leave his vehicle there, because the security boom is deactivated for the applicant's vehicle. This had the effect that he had to stop and park his vehicle at the gate, and from there exit the gate, either to look for public transport or to arrange for transport to take him to his place of employment. … Similarly, assuming the applicant comes from outside the village complex driving his vehicle, and the security boom, insofar as it relates to the applicant's vehicle, cannot be activated, it would mean he must leave his vehicle outside the main security gate and thereafter walk to his house. … All of these suggest that the applicant could no longer have peaceful and undisturbed possession and/or use of his vehicle. This is spoliation." [Paragraphs 15 - 17]

"… The statement suggests the existence of a 'rule of conduct' in terms of the respondent's rules, which entitles the respondent to suspend the access tags of those owners who fail to make payment of the

monthly levies. … [T]he two clauses referred to above make no reference to such a 'rule of conduct' for such entitlement, nor is such reference made anywhere else in the agreement. Even if there were, in my view, the respondent would not have been entitled to spoliation without due process of the law. …" [Paragraph 19]

"Access that is intended to retain possession or use of property should be found to be protected under the principle of mandament van spolie. Therefore, any limitation of access that would curtail the applicant's possession or use of the house and/or motor vehicle should be found to amount to spoliation." [Paragraph 24]

"… [T]he respondent was ordered to pay the costs of the application on an attorney and client scale. … Spoliation is a robust remedy. It is intended to secure the status quo, that is, to restore possession that was taken away by an action or conduct that amounted to a person taking the law into his or her own hands. … It is a somewhat summary remedy that is intended to express displeasure at taking the law into one's hands. The displeasure, as I see I it, could also be expressed in making a punitive order for costs. In the present case I have made such an order, in the light of the respondent's insistence till up to the hearing of this matter, that it was entitled to deny the applicant access that was required for both possession of his house and his motor vehicle." [Paragraphs 27 – 29]

"Before I conclude, I may mention something which I found very strange. Immediately after the order was given … counsel for the respondent stood up to say his instructions were to appeal or to apply for leave to appeal. … I found this to have been uncalled for. The least the respondent's counsel could have done was to wait for reasons for the order, as one would not expect a party to appeal or ask for leave to appeal before reasons are furnished. The nature of the dispute and order by this court did not warrant such an attitude." [Paragraphs 30 – 31]

The spoliation order was granted.

## COMMERCIAL LAW

**FRIEND V SENDAL 2015 (1) SA 395 (GP)**

**Case heard 5 July 2012, Judgment delivered 3 August 2012**

This was an appeal against a judgment ordering the appellant to pay R620 000 to the respondent. Appellant had acknowledged indebtedness to the respondent in writing, but raised the defence that the acknowledgment of debt was a credit agreement in terms of the National Credit Act, and therefore that the respondent was not entitled to institute the application without having given a notice in terms of s 129 of the National Credit Act. It was further argued that, inasmuch as the acknowledgment of debt amounted to a credit agreement, it was null and void as the respondent was not registered as a credit provider.

Legodi J (Fabricius and Kubushi JJ concurring) held:

"It is clear from the definition that, with the acknowledgment of debt … does not fall within the categories as set out in the definition above. [Defining a credit provider] … True, the acknowledgment of debt in question is a credit agreement as envisaged in s 8(4)(f). But, that did not automatically make the

respondent a credit provider who was obliged to register in terms of s 40. Simply put, the respondent was not a credit provider as defined, and that makes sense as appears from the provisions of the Act discussed hereunder." [Paragraphs 14 - 15]

"Counsel for the appellant strongly argued for an obligation to register as a credit provider based on the provisions of s 40(1)(b) ... According to him, ss (1)(b) envisages inclusion of a single credit transaction in respect of which the amount owed exceeds R500 000 ... Remember, the amount in terms of the agreement concluded between the appellant and the respondent is R1 225 000. ... [W]e were urged to find that the court a quo should have found that the transaction was unlawful and void ... I do not understand the provisions of s 40(1)(b) to refer to a single principal debt exceeding the threshold or to a single credit agreement in respect of which the amount exceeds the threshold as was the case here. ... The provisions of s 40(1)(b) should be interpreted as they read. It is 'the total principal debt . . . under all outstanding credit agreements' that bring on an obligation to register as a credit provider. It is the respondent's frequency of providing credits under s 40(1)(b) that is envisaged. ..." [Paragraphs 20 - 22]

"I think ... the purpose or object of the Act is also an aspect that should not be overlooked. Its main purpose is ... to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers. ... Therefore ss (1)(b) of s 40 must be seen as having been directed at those who are in the credit market and/or industry, or at those who intend to participate in the credit market and/or industry. The respondent in this once-off transaction cannot be seen as participating in the credit market." [Paragraphs 23 - 24]

"It does not matter whether or not the parties were dealing at arm's length. It would still not have been necessary to register as a credit provider in terms of s 40. It looks like the issue was intended to advance the argument that the acknowledgment of debt should have been seen in the context of the alleged oral agreement. ... However, for the purpose of the issue under discussion, it suffices to mention that the Act is in any event applicable by virtue of the acknowledgment of debt having been found to be a credit agreement ... But ... it did not mean the respondent was under an obligation to register as credit provider. In any event, I am satisfied that the court a quo correctly found that the parties were not dealing at arm's length with each other." [Paragraphs 31 - 32]

"If they were not dealing at arm's length, the provisions of the Act were not applicable to them, irrespective of whether or not the transaction amounted to a credit agreement ..." [Paragraph 37]

The appeal was dismissed with costs.

**ABSA BANK LTD V JOHNSON [2010] JOL 25433 (GNP)**

**Case heard 9 September 2009, Judgment delivered 11 September 2009**

The plaintiff sought summary judgment in its action for confirmation of the cancellation of an agreement concluded between the parties, and repossession of a vehicle. As the defendant did not file an opposing affidavit, the plaintiff brought the application for summary judgment on an unopposed basis. The court raised the issue of whether the plaintiff's notice in terms of section 129 of the National Credit Act complied with the provisions of the section.

Legodi J set out the provisions of the Act dealing with debt procedures, and held:

"Clear [sic] from what has been quoted above that, a credit provider will not be entitled … to commence any legal proceedings to enforce the agreement before first providing notice to the consumer … and meeting any further requirements set out in section 130." [Page 2]

"… The notice in terms of section 129 as I see it is intended to … draw the default to the attention of the consumer, … to propose to the consumer to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, [and] to draw the consumer's attention that such a referral is with the intention that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date. … In two respects, I am not satisfied that there has been full compliance with the requirements of the notice. … Firstly, the portion of the letter of the notice quoted earlier in this judgment, makes no reference to alternative dispute resolution agent as an option to which the credit agreement might be referred. I do not see this omission as a minor omission. It could be that a consumer may never have heard of debt counsellor, consumer court or ombudsman, but it could be that an alternative dispute resolution agent is well known to a consumer … Secondly, the whole idea of referral should clearly be spelled out to a consumer. You do not make a referral without a purpose. It is not each and every consumer that is told to go to a debt counsellor, consumer court or ombudsman that will know the purpose thereof. … Having not been satisfied that there has been a compliance with the provisions of section 129, the application for a summary judgment is destined to be dismissed." [Pages 3 - 4]

The application was dismissed, and the defendant granted leave to defend.

## ADMINISTRATIVE JUSTICE

**CHAIRPERSONS' ASSOCIATION V MINISTER OF ARTS & CULTURE 2006 (2) SA 32 (T)**

**Case heard: 19 August 2005, Judgement delivered: 8 September 2005**

The applicants, an organisation set up to promote good relationship amongst cultural, racial and religious groups, had complained to the Minister of Arts of Culture in terms of the South African Geographical Council Act about the name change of the town of Louis Trichardt to Makhado. The Minister had rejected this complaint, and accordingly applicants bought case before court to have Minister's decision set aside.

Legodi J held:

"I am … satisfied that consultation is a requirement and the first respondent was obliged to consider it in making the decision to approve the change of town name in the instant case, despite the fact that there was no specific provision under section 10 of the Act to consider consultation as a requirement. I may well add that in terms of section 4(1) of the Promotion of Administrative Justice Act … where an administrative action adversely affects the rights of the public, an administrator, being the first respondent in the instant case, in order to give effect to the right to procedurally fair administrative action, must decide amongst others whether to hold a public inquiry… All what the first respondent had to do was to satisfy himself that there has been consultation. He could not question the decision to apply for a change of town name."[Paragraphs 24,29]

"After the objections were lodged the first respondent gave his reasons for the rejection of the objection as set out in his letter … In this letter, the first respondent alluded to the fact that he rejected the objection after careful consideration of the objection and all other information brought to his attention. In his answering affidavit he stated that he considered the objections very carefully, but that he was

persuaded. The court will always be reluctant to invalidate administrative action on procedural grounds and has in this context frequently indicated the importance of not impeding the efficacy of government... In the present case, however, the first respondent did not only consider the suitability of the name Makhado town, but also considered the concerns raised by other parties. His decision in this regard was not only based on the objections lodged with him, but with the knowledge of the process which was followed by the third respondent as conveyed to him through submissions or documents. I am therefore not satisfied that the applicant is entitled to the relief sought." [Paragraphs 30.2,37]

The application was dismissed with costs. The decision was overturned on appeal: **2007 (5) SA 236 (SCA)**.

## ENVIRONMENTAL LAW

### KRUGER V MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS 2015 JDR 2598 (GP)

**Case heard 21 – 23 September 2015, Judgment delivered 26 November 2015**

This was a challenge to a moratorium on domestic trade in rhino horns, and an amendment to the Threatened or Protected Species of regulations (TOPS regulations) instituted by the Minister in the exercise of his legislative power under the National Environmental Management Biodiversity Act (NEMBA).

Legodi J (Thlapi J and Dewrance AJ concurring) dealt first with the contention that second applicant, as a major rhino breeder, should have been consulted before the moratorium was introduced:

"The Minister is empowered in terms of section 100 of NEMBA to follow a different procedure, which ... although different from the one contemplated in ... PAJA, is a fair procedure. ... [T]he Minister was under no obligation to give personal notice as envisaged in section 3(1) and (2) of PAJA ..." [Paragraph 9]

Legodi J then dealt with the question of whether there had been sufficient consultation on the moratorium:

"It is common cause that the Minister did not 'in at least one newspaper distributed nationally' give notice of the proposed exercise of the power, before putting into effect the moratorium on trade in rhino horns. What the Minister contends is that there has been substantial compliance with sections 99 and 100 of NEMBA regarding consultation and public participation." [Paragraph 13]

"It is important to scan through the intention of the legislature in sections 99 and 100. That ... should be seen in the context of section 24 of the Constitution which deals with the right to environment ... The right to the environment is a right to everyone and not to a section of the population. ...." [Paragraphs 16 - 17]

"The Minister's decision to impose the moratorium without having given a notice of such moratorium 'in at least one newspaper distributed nationally', should be found to have resulted in the invalidity of such a notice and the imposition of the Moratorium. The fact that the decision to impose the moratorium was preceded by the notice ... in the Gazette as contemplated in subsection (2)(a) of section 100 and the fact that the WRSA was consulted and that there were publications and a notice ... does not render failure to comply with the provisions of section 100 (2)(b) to be of no consequence. For the power to be exercised as envisaged in subsection (1) of section 99, all jurisdictional factors must be complied with. To want to

legitimize the notice and the Moratorium in the absence of compliance with subsection (2)(b) of section 100, will in my view, render the process … a mere formality of no consequence. … [A] power to approve the moratorium and have it completed … in the absence of compliance with subsection (2)(b) of section 100, did not exist in law. There was therefore no valid imposition of the moratorium." [Paragraph 22]

"The notice as required in terms of subsection 100(1)(a) regarding the proposed moratorium was published …. The question is whether the notice complies with section 100(2)(b) which requires notice to 'contain sufficient information to enable members of the public to submit meaningful representations or objections'. … A notice without a background and in the circumstances, without the reasons for the exercise of a power, will not enable members of the public to submit meaningful representations or objections. All along, domestic sale in rhino horns was allowed. This was despite the ban of trade in rhino horns by the Convention on International Trade In Endangered Species of Wild Fauna and Flora (CITES) to which South Africa is a signatory. However, South Africa has both an international and domestic obligation to conserve its biodiversity and to protect threatened and endangered species including rhinos. On the other hand, the state parties to CITES are required to develop national strategies, plans or programs for conservation of biodiversity and to regulate activities that are likely to have significant adverse impact on conservation and sustainable use of bio-diversity. It is for all of these reasons that the Act, NEMBA, was enacted also seen in the context of section 24 of the Constitution." [Paragraphs 25 - 26]

"The rationale behind the moratorium on domestic sale in rhino appears to be two-fold. Firstly, to curb and reduce poaching of rhinos and secondly, to comply with the international market ban under CITES. With this background in mind, I revert to the Gazette and in particular whether its contents … satisfy the requirement in subsection (2)(b) of section 100." [Paragraph 28]

"… [T]here is no information whatsoever, which enables members of the public to submit meaningful representations or objections to the Minister. Therefore, insofar as the Gazette is relied upon for the alleged substantial compliance regarding the process of consultation and participation by members of the public, I find the notice in the Gazette, has failed to meet the requirements … Furthermore, subsection (3) of section 100 entitles the Minister to allow any interested person or community to present … oral representations or objections. The notice … does not draw the attention of the public to this fact. But most importantly, the Minister should have been proactive to initiate such a dialogue regard been had to the substantial implications of the moratorium." [Paragraphs 30 - 31]

"… [C]ompliance in terms of sections 99 and 100 was not adhered to and no proactive steps were taken before the moratorium was imposed. The moratorium on domestic trade in rhino horns should be having a significant adverse impact on the employees and families of the rhino breeders … The communities and business owners in the surrounding areas where rhino breeding operations are conducted could have been engaged due to possible loss of employment benefits occasioned by the moratorium. Secondly, the notice in the Gazette did not contain sufficient information to enable members of the public to submit meaningful representations and/or objectives. All of this has a significant bearing on the decision to impose the moratorium. On this finding alone, the moratorium ought to be set aside."[Paragraph 34]

"Inasmuch as the Minister wishes to find substantial compliance in the Gazette and in the publications referred to above, and other publications referred to during oral argument, all did not meet the peremptory requirements in sections 99 and 100. To find substantial compliance … would render the provisions of sections 99 and 100 of no use and will serve to undermine and infringe everyone's constitutional right enshrined in section 24 … The decision to impose a moratorium consequently ought to be reviewed and set aside." [Paragraph 36]

In case he was wrong in his findings of non-compliance with sections 99 and 100, Legodi J proceeded to consider the merits of the challenge to the moratorium under PAJA. Legodi J held that the decision to impose the moratorium was not irrational [paragraphs 38 – 53], unlawful [paragraphs 58 – 59], or ultra vires [paragraphs 60 – 62]. It was held to be unnecessary to make a final finding on issues of reasonableness [paragraphs 54 – 57] and unconstitutionality [paragraphs 63 – 76]. Challenges to certain regulations were also rejected [paragraphs 79 – 86]. The moratorium was reviewed and set aside.

**TURNSTONE TRADING CC V DIRECTOR-GENERAL ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF AGRICULTURE, CONSERVATION & DEVELOPMENT AND OTHERS [2006] JOL 16554 (T)**

The applicant, owner of a petrol filling station, applied for the review of decision to erect another filling station in the vicinity. Applicant relied on the fact that the development was not socially, environmental or economically sustainable.

Legodi J held:

"The respondents want to separate consideration for the socio-economic requirement from other environmental considerations. The suggestion being that such a consideration for socio-economic aspect is not specifically provided for in the Act. I cannot agree with this suggestion, especially in the light of the provisions of the Act referred to earlier in this judgment requiring development under NEMA to be socially, environmentally and economically sustainable. Having found that they were indeed obliged to consider socio-economic factors, it is also important to deal with the issue whether or not the first and second respondents should have considered its own guidelines... Although the respondents were not obliged to consider these documents, in my view, especially in the light of the complex nature of the legislative measures relevant to the issue of authority in terms of section 22 of ECA, the respondents were entitled to consider not only guidelines within its area of jurisdiction but also those outside its area and in appropriate cases those outside the country." [Paragraphs 18-19]

"However, if the first and second respondents were not obliged to have considered the socio-economic requirement it would have been incumbent also on the applicant to specifically raise and substantiate the socio-economic requirement. The applicant did not do this and I don't think failure on its part is vital especially in the light of my finding that the first two respondents were under obligation to consider the socio-economic requirement." [Paragraph 2])

Legodi J set aside the decision authorising the construction of the petrol filling station.

## CRIMINAL JUSTICE

**S V CHIPAPE 2010 (1) SACR 245 (GNP)**

**Case heard 12 October 2009, Judgment delivered 12 October 2009**

On an automatic review from a conviction for stock theft, the High Court raised a question as to whether the court a quo had considered correctional supervision as a sentencing option. In their comments, the magistrate and the Director of Public Prosecutions emphasised the need for strong sentences to prevent the public from taking the law into their own hands, citing the prevalence of stock theft in the area in question.

Legodi J (Phatudi J concurring) held:

“In sentencing, one has to consider the nature, magnitude and effect of the offence itself, the interest of the society, the interests of and circumstances surrounding the offender, and circumstances under which the offence was committed. In appropriate cases the sentencing court should also take into account an element of mercy.” [Paragraph 7]

“All of these factors have to be considered on an equal basis without overemphasising or underemphasising the one against the other.” [Paragraph 8]

“In the instant case I think that stock theft as an offence in rural areas was unduly overemphasised and by so doing, the court disregarded every other option of sentencing other than direct imprisonment.” [Paragraph 9]

“I think that our judgments, if well motivated to deal with all the relevant factors and communicated in a manner that will make the community understand, should be sufficient to dispel any idea of any person taking the law into his or her own hands. … To allow the community to dictate to our courts as to what kind of sentences ought to be imposed, would, instead, bring the administration of the criminal justice system into disrepute.” [Paragraphs 10 - 11]

“While the public is entitled to protection against any one individual, one cannot sacrifice the individual entirely in offering that protection to it. The most the court can do consistently with justice is to protect the public for as long a period as seems commensurate with the accused's desserts. … 'For as long a period', referred to in Mkize's case supra, I do not understand to mean direct imprisonment at every given time where the offence is serious and rife. If this was to be the case, then other relevant factors might be unduly overshadowed by the approach.” [Paragraph 13]

“… [W]here the nature of the offence and interest of society are considered, the accused to a certain extent is still in the background. But, when he as a culpable human being is considered, the spotlight must be focused fully on his person in its entirety, with all its facts. He is not regarded with a primitive desire for revenge, but with humane compassion which demands that mitigating factors be investigated in each case, however serious the offence might be. ” [Paragraph 15]

Legodi J then considered the personal circumstances of the accused, and continued:

“The accused pleaded guilty to the charge and he was convicted on his plea. By this he indicated a sign of remorse, which … required an element of mercy to be considered. Remember, mercy in a criminal court means that justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation. …” [Paragraph 17]

“The trial court … was faced with an accused person who had shown remorse, a first offender, but even more importantly, an accused person who at the age of 23 years was still doing grade 11. He failed to register for 2009. This should have prompted the trial court to probe for more information regarding the accused's social and home background. For example, why would a young man like the accused steal in order to buy food and clothing? An enquiry regarding his family background could have been important. Failure to seek this information has the effect of prejudicing the accused. This must immediately bring me to consider correctional supervision as a sentencing option.” [Paragraph 22]

"The trial court should deal during its judgment with correctional supervision as a sentencing option, so that it appears clearly that it was truly considered as such. In the instant case there was no probation officer's report ... Therefore, the assertion that it so considered such an option could not have been based on any facts." [Paragraph 25]

"The accused ... was sentenced to 18 months' direct imprisonment, the trial court having found that this was the only sentence the community would accept. I have very serious problems with this finding. ... Had the trial court truly considered correctional supervision as a sentencing option, it would have required a probation officer's report. A well motivated and considered report could as well have advised the trial court to send the accused into the community, to serve people there. ..." [Paragraph 30]

Legodi J finally considered the question of judicial notice:

"... Considering what the trial court said in its response to the queries raised, the trial court appears also to have taken judicial notice of black people's attitude regarding cattle farming." [Paragraph 31]

"... [T]he presiding officer has a duty to inform the parties of his intention to make use of personal knowledge or to take judicial notice of facts, as well as the notice of the knowledge. This is especially so where use of such knowledge will adversely affect sentence as far as one of the parties is concerned. The party concerned must be afforded the opportunity to address the court on the fact or facts which will be taken judicial notice of and to lead such evidence as he or she deems necessary. It will be irregular merely to take into account the information without affording the party the opportunity of dealing with such facts. ..." [Paragraph 33]

The conviction was confirmed, but the sentence of 18 months imprisonment was set aside, and replaced with a sentence of six months' imprisonment, post-dated to the date on which the accused was sentenced.

**KRUGER V MINISTER OF CORRECTIONAL SERVICES AND OTHERS [2006] 3 ALL SA 448 (T)**

**Judgement delivered 2 March 2005**

The plaintiff had been sentenced to 22 years imprisonment for murder. He had escaped twice from prison, and so on the third occasion was sent into a maximum-security (C-Max) prison and had most of his privileges forfeited. Plaintiff claimed the *audi alteram partem* principle was violated as a result of correctional services not granting him a hearing prior to the decision being made to transfer him to a C-Max prison. Plaintiff also claimed damages for inhumane treatment in the C-Max prison, including actions which harmed his privacy and sense of dignity.

Legodi J held:

"I am not convinced that the fact that the defendants took no steps to follow the procedure and had the plaintiff re-admitted at C-Max could be the basis to find that the defendants' actions in initially transferring the plaintiff to C- Max were unlawful. Whilst the actions of the defendants were not procedurally fair, the grounds upon which the decision was taken were, in my view, lawful and reasonable." [Paragraphs 32.16-32.17]

"... [W]hilst the Commissioner of Correctional Services is entitled to determine the security measures applicable at different prisons ... the plaintiff as a prisoner was entitled to all his personal rights and personal dignity not temporarily taken away by law. ... The keeping of the plaintiff in solitary confinement

for 23 hours per day, in my view, did not accord with the principle of decency and may have infringed the plaintiff's fundamental rights to be treated like any other citizen except those rights taken by law expressly or by implication or those necessarily inconsistent with the circumstances in which the plaintiff as a prisoner was held." [Paragraphs 36–37]

"The plaintiff was regarded as an escape risk. He escaped from custody twice. There were allegations of a third escape. The issue therefore is whether or not the prison officials were entitled to keep watch from the catwalk above the cells either whilst taking a shower or at any time. The plaintiff was not in a position to say the officials deliberately picked up at him any given moment whilst in the toilet or taking a shower nor could he say every time when he took a shower or in the toilet the officials would then walk above his cells. There was a mechanism in terms of which any complaint could be registered. Given the complaint mechanisms in place, as well as a range of medical help and comparatively improved prison facilities, plaintiff's claim for damages was dismissed" [Paragraph 39]

## SELECTED JUDGMENTS

## ADMINISTRATIVE JUSTICE

### RED ANT (PTY) LTD V MOGALE CITY MUNICIPALITY AND OTHERS (16813/2012) [2013] ZAGPJHC 301 (22 MARCH 2013)

**Case heard 4 – 6 March 2013, Judgment delivered 22 March 2013**

Three companies, including the applicant, had applied for a tender that had been advertised by first respondent. The tender was awarded to Mafoko Security Patrols. Initially, Red Ant and Fidelity Security Services, the unsuccessful tenderers, took the decision to award the tender to Mafoko on review. Despite this, applicant went on to enter into an agreement with Makoko wherein Mafoko ceded 35% of its business in the tender to Red Ant, and Red Ant withdrew its review application. Fidelity, however, proceeded with its challenge, and also challenged the validity of the subsequent agreement between Mafoko and Red Ant. The court had to decide whether to condone procedural irregularities associated with the manner in which Fidelity brought its application, and to review the award of the tender.

On the question of whether to condone the procedural irregularities, Meyer J held:

"Neither party was alive to the issue that Fidelity ought to have enforced its claim against Mogale City by way of a separate application until I raised it with counsel during the course of the hearing. The entire matter was argued over three court days. There is no prejudice to Mogale City if heed is not taken of the procedural irregularity in this matter. Doing so will interfere with the expeditious and more inexpensive present decision of this matter on its real merits. Any further delay in the finalisation of this matter may drastically reduce or even defeat the granting of effective relief. … I am in all the circumstances of the view that the interests of justice require me to exercise my inherent jurisdiction by overlooking the procedural irregularity in order to avoid injustice. …" [Paragraph 10]

On the question of the review of the decision to award the tender to Mafoko, Meyer J held that:

"One of Fidelity's grounds for review is that its disqualification was unlawful. A stated reason for disqualifying Fidelity was that it had not responded to queries … regarding the blacklisting of Jack [one of its directors]. The evidence, however, reveals that during November 2011, and before the decision to disqualify Fidelity had been taken, it appraised Mogale City of the facts that it only became aware of the blacklisting of Jack on 4 September 2011; that he amicably resigned on 6 November 2011; and that Mahlangu was appointed as a new director of Fidelity in his stead. Fidelity also furnished Mogale City with supporting documentation … The inescapable conclusion on all the evidence presented in this application is that members of the BEC received Fidelity's response and the documents which Fidelity furnished to Mogale City and that such information and documents served before and were considered by the BEC and the BAC in connection with the bidding process in question. The fact that Mogale City initially requested the information and that it was furnished by Fidelity in connection with the contract concluded between them pursuant to another tender … do not advance the case of Mogale City." [Paragraph 26]

"Mogale City's counsel submitted that … Mogale City had no power to take Jack's resignation into account when it considered Fidelity's bid since his name was listed as a director of Fidelity at the time when Fidelity's bid was submitted. Mogale City's counsel submitted that 'Fidelity's submission of the bid

was void ab initio by operation of law.' There is, in my view, no merit in these submissions. The clear and unambiguous language used in paragraph 38(1)(c) of the SCM Policy and in regulation 38(1)(c) of the Municipal Supply Chain Management Regulations … refutes the contention … that a bidder is to be disqualified ab initio if it or any of its directors was listed on the National Treasury's database at the time of the submission of its bid. The National Treasury's database must be checked 'prior to awarding any contract' and this must be done to ensure that no 'recommended bidder or any of its directors' is listed as a person prohibited from doing business with the public sector. The accounting officer is accordingly obliged to check the National Treasury's database at any stage prior to awarding the contract. A recommended bidder will not be disqualified if its name or that of its director has been removed from the National Treasury's database prior to the contract being awarded." [Paragraphs 27-28]

"Mogale's City's counsel submitted that for the decision makers to have considered Fidelity's bid in the light of Jack's resignation would have constituted a material amendment to the bid that would have amounted to unlawful administrative action. I disagree … It is not Mogale City's case that the directorship of Jack was in any way material in Fidelity having been chosen as one of the front runner bidders or that the appointment of Mahlangu as a director of Fidelity would have adversely affected Fidelity's position as such or that such circumstances would have had any impact on the points awarded to Fidelity in the assessment of its bid. … [S]uch information in the circumstances amounted to no more than an update regarding the personnel and directors of Fidelity. The 'ever-flexible duty to act fairly' entitled the BEC in the unusual circumstances … to have requested Fidelity to clarify the position with regard to Jack's directorship and it enjoined the BEC to take the information it had obtained in consequence thereof into account in its deliberations. …" [Paragraph 29]

"Fidelity, to the knowledge of the BEC and BAC, did not have a director whose name was listed on National Treasury's database at the time when the decision to disqualify Fidelity was taken. … The BEC's final report in which it recommended the disqualification of Fidelity was dated March 2012. In Oudekraal Estates (Pty Ltd v City of Cape Town and Others … the Supreme Court of Appeal held that until invalid administrative action – and the consequences thereof – '… is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.' … The order of the North Gauteng High Court that set aside the decision to place Jack's name on the National Treasury's database of restricted suppliers and in terms whereof his name is for all purposes deemed never to have been included on the National Treasury's database of restricted suppliers, in my view, removes the decision to list his name and the legal consequences thereof from the range of the principle that invalid administrative action 'exists in fact and has legal consequences that cannot simply be overlooked.' The decision to disqualify Fidelity for the reason that Jack's name was listed on the National Treasury's database of restricted suppliers was accordingly premised on an error of fact even though the decision makers were ignorant of the true factual position. I am accordingly of the view that the decision to disqualify Fidelity was based on a failure to take relevant considerations into account and that it should be reviewed .. . Such decision was also based on material mistakes of fact and it falls to be reviewed for that reason. …" [Paragraphs 30-32]

"I am in all the circumstances of the view that the decision to award the tender to Mafoko and the contract that was concluded between Mogale City and Fidelity pursuant to such decision should be reviewed and set aside and that an order … should be granted remitting the matter for reconsideration by Mogale City." [Paragraph 38]

The application was granted.

**CONSTITUTIONAL AND STATUTORY INTERPRETATION**

**MAHANO AND OTHERS V ROAD ACCIDENT FUND AND ANOTHER 2015 (6) SA 237 (SCA)**

**Case heard 9 March 2015, Judgment delivered 20 March 2015**

This was a challenge to regulation 3(1)(b)(iv) of the Road Accident Fund Act Regulations. The provision in question dealt with the Fund's liability to pay general damages to a claimant, and provided that the threshold requirement for liability for general damages was that the Fund had to be satisfied that the injury had been correctly assessed as serious, in accordance with the method prescribed in the regulations. This required the American Medical Association's Guides to the Evaluation of Permanent Impairment Sixth Edition (AMA Guides) to be applied. The issue in the appeal was whether the regulation made the application of the AMA Guides dependent on the existence of 'operational guidelines'

Meyer AJA (Lewis, Shongwe and Willis JJA and Gorven AJA concurring) held:

"With reference to the language used in reg 3(1)(b)(iv), the appellants contend that it envisages and requires the publication of operational guidelines, which 'must' be applied in order to apply the AMA Guides. The injunction, they contend, is peremptory. They contrast the language of reg 3(1)(b)(iv) with that used in reg 3(1)(b)(i) prior to its amendment … The appellants contend that those provisions are plainly discretionary whereas reg 3(1)(b)(iv) by contrast is peremptory. The words 'if any' used in reg 3(1)(b)(iv), so they contend, only qualify and apply to the publication of amendments and not to the publication of both amendments and operational guidelines" [Paragraph 12]

"Regulation 3(1)(b)(iv) must be interpreted in accordance with the established principles of interpretation. … The meaning … as contended for by the appellants is not sensible and has no basis in its language or in context. The language used clearly confers a discretion on the minister to publish operational guidelines and the application of the AMA Guides is not dependent on the existence of operational guidelines. Reference to the context supports this legislative intent." [Paragraph 13]

"… [T]he words 'if any' in reg 3(1)(b)(iv) denote that the publication of 'operational guidelines' or of 'amendments' thereto is discretionary. An alteration of the punctuation used in reg 3(1)(b)(iv) is required in order to sustain the interpretation contended for by the appellants: the insertion of a comma after the words 'operational guidelines' and the deletion of the comma after the word 'amendments'. … The distinction which the appellants seek to draw between operational guidelines and amendments is artificial: once operational guidelines, if published, are amended, they remain operational guidelines in accordance with which the AMA Guides must then be applied. The obligation created in reg 3(1)(b)(iv) by the use of the word 'must' is one placed conditionally upon the medical practitioner: the AMA Guides 'must' be applied by the medical practitioner in accordance with 'any' operational guidelines or amendments 'if' published. No obligation is placed on the minister. The publication of operational guidelines is clearly not a condition precedent to the application of the AMA Guides in the assessment whether an injury is 'serious'." [Paragraph 14]

"The same legislative intent is reinforced when reg 3(1)(b)(iv) is considered contextually. The use of the permissive or facultative word 'may' in the other regulations referred to by the appellants and not in reg 3(1)(b)(iv) is no indication that the publication of operational guidelines is peremptory. The statutory provision … is not couched in words which have an affirmative or imperative character, such as 'shall' or 'must'. There is also no other provision in the regulations, or in the Act, which imposes an obligation on

the minister to publish operational guidelines in order for the AMA Guides to find application." [Paragraph 15]

"There is nothing in the other provisions of the regulations and of the Act which lends any weight to the interpretation contended for by the appellants. On the contrary, that interpretation will result in the absurdity that the AMA Guides, which take centre stage in the administrative determination of whether an injury is 'serious' to qualify for an award of general damages in terms of s 17(1) of the Act, cannot be applied until such time as the minister publishes operational guidelines, even though the minister may consider the publication of operational guidelines not necessary or expedient. Furthermore, there is no impediment … to the practical application of the AMA Guides in the absence of operational guidelines." [Paragraph 16]

"… The interpretation contended for by the appellants, without intending to be unkind, is rather opportunistic and seems to be an attempt to avoid compliance with the regulations despite the clear and unambiguous wording… [T]he construction contended for by the appellants is linguistically and contextually untenable. I am, therefore, not persuaded that the circumstances of this case warrant a deviation from the general principle that costs should follow the event." [Paragraph 18]

The appeal was dismissed with costs.

## ENVIRONMENTAL LAW

### HARMONY GOLD MINING CO LTD V REGIONAL DIRECTOR, FREE STATE DEPARTMENT OF WATER AFFAIRS, AND OTHERS 2014 (3) SA 149 (SCA)

**Case heard 25 November 2013, Judgment delivered 4 December 2014**

The acting regional director of water affairs issued a directive under s 19(3) of the National Water Act (NWA) to various mines conducting operations in an area of the North West Province, directing them to take anti-pollution measures in respect of ground and surface water contamination caused by their gold mining operations. Appellant argued that the directive was only valid as long as the person to whom it was issued owned, controlled or occupied the land in question, and that the directive became invalid and unenforceable against it from the date on which the land was transferred to another company (Pamodzi). The appellant's application to have the directive set aside failed in the High Court.

Meyer AJA (Navsa ADP, Brand and Shongwe JJA and Zondi AJA concurring) held:

"… Harmony exercised control over and used the land from September 2003 until 27 February 2008. It was indisputably a person within the meaning of ss (1) who controlled, occupied and used land on which an activity was performed or undertaken which caused or was likely to cause pollution of a water resource at the time when the regional director issued the directive. It was not the owner of the land in question and its contention that it remained a landowner until the land was transferred to Pamodzi on 6 January 2009 is obviously wrong." [Paragraph 17]

"In Harmony supra this court held that '(t)he task of construing s 19 must commence with reference to s 24 of the Constitution'. It confers on everyone the right 'to an environment that is not harmful to their health or well-being' and 'to have the environment protected, for the benefit of present and future

generations, through reasonable legislative and other measures that — (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. ..." [Paragraph 20]

"The limitation contended for by Harmony is not expressly provided for in ss (3) and will thus have to be read into it by implication. ... I am of the view that effect can be given to the NWA 'as it stands' without the need to limit the Minister's wide discretionary powers under ss (3) as Harmony would have it." [Paragraph 22]

"The wording of ss (3) makes it plain that the legislature intended to vest the Minister with wide discretionary powers and to leave it to him or her to determine what measures a defaulting landholder must take and for how long it must continue to do so. I find nothing in the wording of ss (3) or in the other provisions of s 19 which warrants the conclusion that the Minister's powers under ss (3) are intended to be limited in that he or she may only order the landholder to take anti-pollution measures for as long as it remains a landholder. ..." [Paragraph 23]

"The rationale of ss (3) is to direct the landholder to address the pollution or risk of pollution however long it may take to do so. That rationale does not fall away when the landholder ceases to own, control, occupy or use the land. The limitation of the Minister's power as contended for by Harmony is not only unnecessary to give effect to the purpose of ss (3), but on the contrary defeats its purpose and renders it ineffective. ... Harmony's restrictive interpretation ... would result in the absurdity that a polluter could walk away from pollution caused by it with impunity, irrespective of the principle that it must pay the costs of preventing, controlling or minimising and remedying the pollution." [Paragraph 24]

"An interpretation that does not impose the limitation ... contended for by Harmony is consistent with the purpose of the NWA (reducing and preventing pollution and degradation of water resources); accords with the NEMA principles that pollution be avoided or minimised and remedied and that the costs of preventing, minimising, controlling and remedying pollution be paid for by those responsible for harming the environment; and gives expression and substance to the constitutionally entrenched right of everyone to an environment that is not harmful to health or wellbeing and to have it protected through reasonable measures that, amongst others, prevent pollution and ecological degradation." [Paragraph 25]

"Harmony at the hearing of the appeal for the first time argued that on its own terms the directive was not envisaged to operate against a 'non-landholder' and that it ceased to have effect vis-à-vis Harmony when it severed its ties with the land. ... There is no merit in this argument. The obligations arising from the terms of the directive do not address the issue whether they can only be performed by a landholder. I have referred to the decision of this court in Harmony supra, that the measures imposed on the landholder by ss (1) and (2) are not confined to the landholder's land. In my view the same holds true for measures required in terms of a directive issued under ss (3). In any event, Harmony has thus far complied with its obligations arising from the directive, even though it had not been the landholder since 27 February 2008." [Paragraph 28]

"The court a quo correctly dismissed Harmony's application. Makgoka J was also correct in following 'the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise'. Each party should also bear its own costs of the appeal." [Paragraph 31]

The appeal was dismissed.

**LABOUR LAW**

**MAROGA V ESKOM HOLDINGS LTD AND OTHERS (A5021/11) [2011] ZAGPJHC 171 (16 NOVEMBER 2011)**

**Case heard 31 October 2011, Judgment delivered 16 November 2011**

Appellant appealed against the judgment of the court *a quo* dismissing his application for specific performance of his employment contract – for re-instatement as the Chief Executive Officer of Eskom - or for the payment of damages. The Court *a quo* had found that appellant had made a clear and unequivocal resignation offer to the Eskom Board, that the Board had accepted, and that the consensual termination of his contract of employment had been effective once the acceptance of his offer of resignation had been communicated to him during the evening on 28 October 2009.

Meyer J (Makhanya and Coppin JJ concurring) held:

"… On Eskom's version, Mr Maroga informed the board members present at the Eskom Board meeting on 28 October 2009 that he had thought long and hard about the matter and that he had concluded that he could not continue to work with Eskom's Chairperson, Mr Godsell. He then made an offer to resign. Following his offer to resign, Mr Godsell also offered to resign. Mr Maroga and Mr Godsell later recused themselves … so that the remaining members of the board who were present could decide whose offer of resignation to accept. … [T]he Eskom Board resolved unanimously to accept Mr Maroga's offer of resignation. Two directors were mandated by the Eskom Board to convey its decision to Mr Maroga and to Mr Godsell. A dinner was arranged with them that evening at a hotel. The Eskom Board resolution was communicated to them and Mr Maroga did not object to the communication that the board had accepted his resignation. The four directors, including Mr Maroga, parted ways fully recognising that Mr Maroga's employment contract had been terminated by the Board's acceptance … and it was agreed that the calculation of his final payout would be done later. The next morning … Mr Maroga handed out copies of his letter to the Eskom directors present at the resumed board meeting and to the Minister, who joined the meeting, wherein he stated that, upon reflection overnight, his 'remarks of frustration' could not be construed as an offer to resign." [Paragraphs 3 - 4]

"Mr Maroga … chose for the matter to be argued on the conflicting affidavit evidence. …**'"** [Paragraph 5]

"… [T]he Court a quo would, in my view, not have been justified in rejecting Eskom's version as not raising 'real, genuine or bona fide' disputes of fact or that its allegations and denials are 'so far-fetched or clearly untenable' that they could confidently be rejected on the papers as 'demonstrably and clearly unworthy of credence. I am satisfied that the affidavits of Eskom extensively, 'seriously and unambiguously' addressed the facts that are disputed by it. … The reasons given by the Court a quo for accepting Eskom's version and rejecting that of Mr Maroga are convincing and lead me to conclude that the veracity of the disputes raised by Eskom can at face value not be questioned. It is clear … that the Court a quo was, correctly in my view, not satisfied as to the inherent credibility of the appellant's factual averments on the disputed issues …" [Paragraph 7]

"It was submitted on behalf of Mr Maroga that even if Eskom's version is accepted the offer of resignation made by Mr Maroga was not clear and unequivocal and is accordingly not legally effective or that it was conditional. Counsel referred to decided cases … in support of the legal propositions that a voluntary resignation, which is accepted by an employer, brings about the termination of the

employment contract by mutual and voluntary agreement between the parties, but to be legally effective, an employee, either by words or conduct, has to evince a clear and unambiguous intention not to go on with his or her contract of employment - the employee has to lead a reasonable person to the conclusion that he or she does not intend to fulfill his or her part of the contract - and resignations in the heat of the moment have been held not to be effective. … On Eskom's version, which must in these proceedings be accepted, there is no room for finding that Mr Maroga's words and conduct did not evince a clear and unambiguous intention on his part not to go on with his contract of employment should his offer of resignation be accepted or that the Eskom Board's conclusion that he did not intend to fulfill his part of the contract in such event did not meet the reasonable person requirement or that Mr Maroga's offer to resign had been made in the heat of the moment. The undisputed facts also do not support the contention that Mr Maroga's resignation offer had been a conditional one …" [Paragraph 8]

"I now turn to the next question, which is whether the Eskom Board had the authority to accept Mr Maroga's offer to resign. It was contended … that the Eskom Board did not have the power in law to terminate his contract of employment. The high water mark of this contention was that Article 10.4 of the Eskom Articles of Association vests the power to appoint its CEO in the Minister and, because the Eskom Articles are silent on the power to terminate the CEO's contract of employment, the principle laid down by the Constitutional Court in *Masetlha v President of the Republic of South Africa and Another* … finds application, which is that the person who has the power to appoint also has the power to dismiss. This contention, which was in my view correctly rejected by the Court *a quo*, is refuted by the provisions of the Eskom Articles of Association … by the conclusion of a contract of employment between Eskom and its CEO, by the distinction between the CEO's capacity as a director and his or her capacity as an employee … and the unreported decision of Malan J in *Daloxolo Mpofu v South African Broadcasting Corporation Limited (SABC) and Others* … and by the fundamental distinguishing features between *Masetlha* and the present matter. [Paragraph 8]

"Article 10.4 … empowers the Minister to appoint a CEO. This is a power given to the shareholder to appoint a CEO to the board of directors. The Minister is not empowered to appoint a CEO as employee of Eskom or to conclude an employment contract with a CEO. Article 16.1 vests the board, and not the shareholder, with all the powers of the company, except those expressly reserved to its members in general meeting. The powers to appoint, implement, enforce and terminate contracts of employment form part of the usual management and control powers of a board of directors, the exercise of which powers have not in this instance been conferred upon the shareholder, which is the Minister in his representative capacity. The CEO of Eskom enjoys a dual status of director and of employee. His or her appointment as Chief Executive/ Managing Director of Eskom falls within the prerogative of the member, who is the Minister, after consultation with the board of directors and his or her appointment as such is followed by the conclusion of a contract of employment between Eskom and the CEO. The Eskom Articles of Association do not contemplate that the Republic of South Africa, or its representative, the Minister, becomes the employer of the CEO. Masipa J, in my view, correctly emphasised the fact that the contract of employment upon which Mr Maroga's cause of action is founded was one concluded between him and Eskom." [Paragraph 13]

"In conclusion … there would not have been any valid basis for the Court *a quo* to have rejected the version of Eskom or of the Minister in these motion proceedings on the materially disputed issues of fact. The Eskom Board … had the authority to accept Mr Maroga's offer to resign. Masipa J … correctly accepted the version of Eskom that Mr Maroga had made a clear, unequivocal, and unconditional offer to resign to the Eskom Board, which offer had been accepted by the Eskom Board, and that the consensual

termination of his contract of employment had been effective once the acceptance of his offer of resignation had been communicated to him at the dinner during the evening of 28 October 2009." [Paragraph 15]

## CRIMINAL JUSTICE

**NDWAMBI V S (611/2013) [2015] ZASCA 59 (31 MARCH 2015)**

**Case heard 11 March 2015, Judgment delivered 31 March 2015**

Appellant and a co-accused were convicted of fraud, following the sale of a fake rhinoceros horn in a police trap. Appellant was sentenced to six years' imprisonment. On appeal, he argued that the elements of the crime of fraud had not been proved.

Meyer AJA (Navsa ADP, Leach JA and Schoeman AJA concurring) held:

"The appellant's counsel conceded that the trial court correctly rejected the evidence of the appellant and that of his co-accused. That concession was correctly made. The appellant's exculpatory version was so wholly improbable as to be plainly untruthful and palpably false. …" [Paragraph 8]

"… Intent to defraud has two principal aspects: intention to deceive and intention to induce a person to alter or abstain from altering his or her legal position. The intention to defraud can be with direct intent or by dolus eventualis. …" [Paragraph 13]

"The appellant found himself on the horns of a dilemma … saying that he honestly believed the imitation was real could potentially have exposed him to conviction of attempt on the alternative statutory charge … whilst saying that he did not hold such belief, would have exposed him to a conviction of fraud. Instead, he falsely distanced himself from the transaction. He denied knowledge of what was contained in the bag or wrapping that his co-accused carried … and he testified that to his knowledge his co-accused was going to meet a client in connection with her works of art. His evidence and that of his co-accused having been rejected left the trial court without the benefit of credible evidence from either of them and, with only the State evidence to determine their respective guilt or innocence of the charges they faced. It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it. …" [Paragraph 16]

"… The prima facie inference, unless gainsaid by credible and reliable evidence, is that the false representation had been made knowingly, or without belief in its … or without knowledge whether it was true or false but knowingly exposing Oberholzer or the State to a risk that it may be false and deceitfully leaving him ignorant of the exposure. Any suggestion that they did not know that the representation was false lacks a factual foundation and would therefore amount to impermissible speculation or conjecture. It lay exclusively within the power of the appellant and his co-accused to show what the true facts were but they failed to give an acceptable explanation. The prima facie inference became conclusive in the absence of rebuttal." [Paragraph 17]

"… The appellant contends that because the State's evidence was to the effect that the police had no intention to pay for the rhino horn there could be no prejudice. This contention, however, ignores the

longstanding principle that the law looks at the matter from the point of view of the deceiver and not the deceived." [Paragraph 18]

"In the present case, an intention to deceive was proved. It was calculated to prejudice. Objectively, some risk of harm could have been caused. It need not be financial or proprietary or necessarily even to the person it was addressed ... In assessing prejudice it is significant to note that even though the transaction in question involved fake rhino horn it must indubitably be so that transactions of this kind contribute to the illegal trade in rhino horn, which we as a country must all be concerned about. The appellant was thus rightly convicted of fraud." [Paragraph 22]

The appeal was dismissed. Willis JA dissented, holding that the accused should have been convicted on the alternative charge of contravening the Nature Conservation Ordinance.

## CHILDRENS RIGHTS

### CENTRAL AUTHORITY OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER V B 2012 (2) SA 296 (GSJ)

**Case heard 5 December 2011, Judgment delivered 7 December 2011**

This was a case brought under the Hague Convention on the Civil Aspects of International Child Abduction, whereby the second applicant mother sought the return to Australia of her 13 year old son (K), then residing with his father (respondent) in Johannesburg. The mother and father had married in Australia, and on their divorce entered into a settlement agreement whereby the son would reside with the mother, with the father having reasonable rights of contact. The agreement was made an order of the Family Court of Australia.

Meyer J held:

"The respondent's retention of K in South Africa is wrongful within the meaning of art 3 of the Hague Convention and I must order his return to Australia pursuant to the provisions of art 12, unless the respondent or K establishes the defence raised, which is provided by art 13. The defence raised in this instance, that K objects to being returned to his mother in Australia, requires an interpretation of art 13 ..." [Paragraph 4]

"It is clear from the words used that the exercise of a discretion arises under art 13. It provides that, notwithstanding the provisions of art 12, which require in mandatory terms that the child wrongfully abducted or retained be returned, the court 'may also refuse to order the return of the child' if it is found that the stated requirements have been met. Such discretion is also fortified by the provisions of art 18. It seems to me from my reading of many decided cases of foreign jurisdictions that it is generally accepted that an exercise of a discretion arises under art 13." [Paragraph 6]

"Ms Mansingh submitted that, in the exercise of the discretion arising under art 13, the court may not have regard to welfare considerations, but must only balance the nature and strength of the child's objections against the Hague Convention considerations. There is ... no merit in counsel's submission ... It is not consistent with the obligation to treat as paramount, in every decision affecting a child, the wellbeing or best interests of that child — the paramountcy principle — which is enshrined in s 28(2) of

our Constitution. Counsel's submission is also in conflict with clear authority of the Constitutional Court. ..." [Paragraph 7]

Meyer J considered English and Scottish case law on the exercise of a court's discretion under article 13, and continued:

"... [I]t is not disputed that K objects to being returned to Australia. I return to his objections. The second question, whether or not he is of an age and maturity at which it is appropriate to take account of his views, should in my view also be answered in the affirmative. ... K's legal representative, Mr *Baer*, informed this court that K impressed him 'as an intelligent young man, who understands the nature of the present proceedings and knows what he wants'. ... I interpolate to add that I observed K carefully during the hearing, which lasted several hours. He sat listening attentively throughout. My subsequent interview with K in chambers confirmed to me the recommendation of the family counsellor and the observations of K's counsel ... K ... was nervous, but confident, and he addressed me appropriately. He is articulate. He answered my questions appropriately and directly without touching on unrelated matter. When I required elucidation, he furnished it without hesitation. His views are firm and cogent. He fully appreciates that the present proceedings are only jurisdictional in nature. I have no hesitation in finding that he is of above-average intelligence, despite his academic performance at school. It is, in my view, not only appropriate to take K's views and strength of feelings into account, but they should be given considerable weight." [Paragraph 11]

"The second applicant infers that K's objection to returning to Australia has been influenced by the respondent. This is denied by the respondent. Ms Mansingh submitted that the content of an email that a former girlfriend of the respondent had sent to the second applicant in which allegations of undue influence and of manipulative conduct on the part of the respondent are made, confirms the second applicant's suspicion of undue influence. The respondent agreed to the admission of the email into evidence. No weight should, however, in my view be given to the content of this email. The author thereof refused to depose to an affidavit. She and the respondent were involved in what appears to have been a stormy relationship that ultimately ended and their present relationship seems to be very acrimonious." [Paragraph 13]

"K has maintained his objection to returning throughout this year. He raised his objection to his parents, to the family counsellor, to his counsel and ultimately to me during my interview with him in chambers. His reasons are consistent and of substance. ... " [Paragraph 15]

"The active involvement and participation of the respondent in the life and activities of his son do not amount to undue influence of the child. Such involvement and participation form part of parenthood. Such involvement and participation might have influenced K's objection, but cannot be said to have manipulated or unduly influenced him." [Paragraph 16]

"K has settled well and to move him back to Australia now would be a disruption in his life, physically and emotionally. The assumption of the Hague Convention is that the return of a child to a foreign jurisdiction, if concluded within a very short time, will not ordinarily cause irreparable harm to the child. The longer the delay, the greater the potential for harm to the child. ..." [Paragraph 17]

"A balancing of all the relevant considerations leads me to conclude that this is a matter in which the child's objection should prevail." [Paragraph 20]

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

## SELECTED JUDGMENTS

## PRIVATE LAW

### ESKOM HOLDINGS SOC LTD V NORTON (464/13) [2014] ZASCA 94 (26 JUNE 2014)

**Case heard 22 May 2014, Judgment delivered 26 June 2014**

This case dealt with the interpretation and application of a clause in a Deed of Servitude, in terms of which the appellant was granted the right in perpetuity to convey electricity across property owned by the first respondent. First respondent successfully applied to the High Court for an order declaring the servitude to have been duly cancelled by her, and for the removal of the cables and wires traversing the property.

Mocumie AJA (Navsa, Lewis and Shongwe JJA and Hancke AJA concurring) held:

"That brings me to the change of ownership that did occur and which is material to the outcome of this appeal. Norton took transfer of the property … on 23 July 2010. She did not produce her title deed to Eskom as envisaged in clause 9. Nonetheless, on 8 October 2010 Eskom's attorneys … wrote to Norton [offering to capitalise the yearly lease amount of the servitude in full and final settlement of any monies payable to Norton in respect of the servitude] … Norton did not respond to the offer for more than a year. During that time the consideration due in terms of the deed of servitude was in arrears. On 30 April 2012, purportedly acting in terms of the notice clause … Norton gave notice of her intention to cancel the notarial agreement. … Eskom failed to pay Norton the rental which it did not dispute was due. …" [Paragraphs 7, 9]

"In opposing Norton's application Eskom adopted the view that Norton's failure to present to it a copy of her title deed, as required by clause 9, was fatal to her case. It was contended … that presentation of a copy of the title deed was required to enable the transfer of ownership t be recorded in its register for payment of the consideration due … [I]t was submitted that the acknowledgement of Norton's ownership of the property by Eskom's attorneys … was not one that could be construed as an acknowledgement for the purposes of clause 9 but rather for capitalization purposes only." [Paragraph 11]

"… [T]he clear purpose of clause 9 is to protect Eskom from being prejudiced by a change of ownership of which it is unaware. It places the burden of ensuring certainty on the new owner by way of the production of a title deed. I agree with the court below that when Eskom became aware, with certainty, of the identity of the new owner then the object of clause 9 was met. What is more, on Eskom's own version it had a copy of the title deed in its possession. Beyond that it addressed Norton as the property owner when it made an offer to capitalize the consideration. Eskom cannot be heard to say that the acknowledgement of ownership was one that can simply be regarded as an acknowledgement purely for the sake of the offer of capitalization. It cannot regard Norton as owner for one purpose but not another, especially when both relate to the servitude. … " [Paragraph 16]

"Norton's reliance on her registration with Eskom, as a consumer of electricity, is, however, unhelpful to her cause and counsel on her behalf did not contend that it could be said to strengthen her case nor could any correspondence addressed merely to the homeowner be of any assistance. But … the letter from Eskom's attorneys is pivotal as is the assertion that Eskom was in possession of a copy of the title deed. Whereas it might be said that Norton was opportunistic, she acted well within her legal rights and

Eskom … did little to protect itself. The cancellation was proper and Norton was entitled to the relief granted by the court below." [Paragraph 17]

"It is common cause that the electrical power lines in question have not yet been electrified. Furthermore, we were informed by counsel on behalf of Eskom that the power lines were intended to be back-up lines. There is thus no question that the local or national grid is at risk." [Paragraph 18]

The appeal was dismissed with costs.

**DN V MEC FOR HEALTH, FREE STATE 2014 (3) SA 49 (FB)**

**Case heard 22 October 2013, Judgment delivered 23 October 2013**

Defendant raised a special plea to plaintiff's claim. Plaintiff was a paediatric registrar employed by defendant at a hospital. While on duty she was attacked and raped on the hospital premises by a man who was neither a patient nor employee at the hospital, and was not authorised or permitted to be within the confines of the hospital. Defendant alleged that the attack and rape were not foreseeable, and argued that plaintiff was barred from instituting a claim against defendant by the Compensation for Occupational Injuries and Diseases Act (COIDA), arguing that the incident did not constitute an "accident" in terms of COIDA. The issues to be determined were whether the incident was an accident as contemplated by s 35 of COIDA, and whether the incident arose out of and in the course of employment.

Mocumie J held:

"In deciding whether an incident is an 'accident' which 'arose out of or in the course of employment' in the seminal decision of Minister of Justice v Khoza … the Appellate Division developed two tests. The first is posed by the majority concurring in the judgment of Rumpff CJ. It is that an injury from an assault at work is not an accident where the motive or reason for the assault is unrelated to the job. The second is posed by Williamson JA in a concurring minority judgment. It is that an injury from an assault at work is an accident where the fact of employment brings the employee within the range or zone of the hazard that gave rise to the injury." [Paragraph 8]

"The essence of the Khoza decision, and the cases that follow it, is the following: • an accident may be said to arise out of a workman's employment, when, in a broad sense, there is a causal connection between the employment and the accident; • as a general rule there is a causal connection between the employment and the accident where the accident happens at work; • it is not an injury arising out of and in the course of employment where an employee is injured as a result of criminal conduct such as an intentional and unlawful assault by another person, that is unrelated to the job of that employee — even if it happens at work; • this means an injury resulting from an assault that is unrelated to the job does not arise 'out of or in the course of' employment. …" [Paragraph 9]

"I am inclined to adopt the approach set out in Khoza, not only because the approach is objective, but also because this judgment has not been set aside by any court … The judgment is still good law." [Paragraph 17]

"Applying the guidelines set out in Khoza … I agree … that the incident was not an accident. Although the assault/incident was unexpected, it was also intentional and deliberate, which cannot be an 'accident' in

the ordinary and grammatical sense and as courts have interpreted it to mean. ... In relation to the second question, whether the incident arose out of and in the course of the plaintiff's employment as a paediatric registrar, again I have to agree ... that there was no causal connection between the plaintiff's employment and the incident, because she was deliberately injured by another person who was not supposed to be or authorised to be on the employer's premises, 'and the motive for the attack bears no relationship to the duties of the workman'. (See Rumpff JA's qualified proposition in Khoza.) In any event, the risk resulting in the injury (ie the assault and the rape) was not a risk that was a usual from natural incident of the job or which came with the territory of the job. " [Paragraph 18]

Mocumie J declined to follow two High Court judgements, and concluded:

"I am accordingly satisfied on the facts, as presented, that the intentional criminal act of the perpetrator of the incident was not an 'accident' as contemplated in s 35 of COIDA, and that the plaintiff did not sustain an occupational injury that resulted in her injuries and damages. The provisions of s 35 of COIDA are accordingly not applicable, and the plaintiff is not precluded from claiming damages from the defendant." [Paragraph 22]

The special plea was dismissed with costs. The decision was confirmed on appeal by the SCA: MEC for Health, Free State v DN 2015 (1) SA 182 (SCA).

## COMMERCIAL LAW

### HENNIE LAMBRECHTS ARCHITECTS V BOMBENERO INVESTMENTS (PTY) LTD 2015 (6) SA 375 (FB)

**Case heard 25 November 2013, Judgment delivered 20 February 2014**

This was an appeal against the dismissal of the appellant's application that the respondent, a private incola company registered under South African law, be ordered to furnish security. Under section 13 of the Companies Act of 1973 (the old Companies Act), a court could require a corporate entity to give security for a defendants' costs if it appeared tat the entity would be unable to pay those costs if the claim was unsuccessful. There was no similar provision in the news Companies Act of 2008.

Mocumie J (Lekale J concurring) held:

"The fact that the new Companies Act does not have a similar provision as s 13 of the old Companies Act has raised a lot of debate and drawn divergent views. Section 13 conferred discretion upon courts to order the payment of security for costs by a plaintiff company if there were reason to believe that the company would be unable to pay the costs of its opponent. It is a long-standing provision in our law, and indeed mirrors provisions in other countries. The provision constitutes an exception to the ordinary common-law rule that plaintiffs who reside in South Africa may institute actions in our courts without furnishing security for costs. ... [T]here are exceptions to this common-law rule, ie actions by insolvents, vexatious actions and cases where a plaintiff is a man of straw who litigates in a nominal capacity ... Although there is a general acceptance by courts that the principles of the common law prevail in applications of this nature, to date we have at least four categories of judgment from which divergent views can be discerned." [Paragraph 7]

Mocumie J set out the different approaches in these judgments, and continued:

"... [I]n considering the judgment of the court a quo it is clear that it did not take into consideration the principles laid down under the former s 13 as set out in cases referred to above. Nor did it properly and adequately take into account the nature of the claim, the financial position of the respondent company at the time of the application for security, and the probable financial position if it should lose the action. The court a quo made no reference nor did it attach any weight to the respondent's lack of bona fides in the application for security. Importantly, the respondent company did not establish that the order for costs might well result in it being unable to pursue the litigation. Neither did it indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success." [Paragraph 26]

"The main thrust of Mr Snellenburg's [counsel for the appellant] argument was from the outset that the common law was simply inadequate and not aligned to the demands of the modern commercial world. It was appropriate for this court, having considered the development of the jurisprudence under the old Companies Act, to develop the common law. The issue was never raised in the cases referred to in the above paragraphs with reference to the new Companies Act. ... I am in agreement ... that, in the light of the circumstances of this case and so many divergent decisions, this is a typical case in which the common law should be developed beyond existing precedent, as the Constitutional Court has stressed in similar circumstances. ..." [Paragraphs 27 - 28]

"South Africa, like the rest of the world, has evolved commercially to the extent that the Companies Act had to be amended in its entirety to deal with inter alia new entities and issues, such as mergers of companies and international companies existing in their own right in the Republic of South Africa. All these phenomena were previously unknown to South African law, but have now become part thereof." [Paragraph 32]

"Companies consist of natural persons, directors, who, when sued, can hide behind the corporate veil and not furnish security, well knowing that the company they run is actually or commercially insolvent and will not afford the costs of an award in favour of the respondent. It cannot be 'just or equitable' to equate companies to what the Supreme Court of Appeal referred to as 'widows and orphans'. More so where there have been instances where even such 'widows and orphans' were ordered to furnish security, depending on the circumstances of the particular case." [Paragraph 33]

"A finding, as a general rule, that an incola company, regardless of the peculiar facts which scream out for the furnishing of security, is not bound to provide security would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who would be gravely prejudiced by another's refusal to furnish security because of the unfortunate absence of the equivalent of s 13, would be without remedy, and thus left to suffer the considerable financial consequences of such an absence, which eventuality would in turn offend against the principles of equality and of 'just and equitable decisions'." [Paragraph 34]

"The approach in an application in terms of rule 47 should be that in the case of an incola company, unlike a natural person, the respondent should adduce all the evidence which will convince the court that it has sufficient funds to pay costs in the event that costs are granted against it. Courts should insist on more details and not the say-so of the incola company. As a precautionary measure to protect its own process and to protect the rights of the other party, it should make such order of security as is reasonable in the particular set of facts. This approach is evidenced by s 158(a) of the new Companies Act, which compels a court to 'develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act'." [Paragraph 35]

"What also makes a strong case for the development of the common law … is that the courts have always had the discretion, depending on the circumstances of each case, and in line with the grounds set out in s 13 of the old Companies Act and those pronounced upon by courts as illustrated above, to determine whether to order the respondent to furnish security." [Paragraph 36]

The appeal was upheld, and the respondent was ordered to furnish security. Moloi J dissented, on the basis that the inclusion of an equivalent to the old section 13 would violate section 34 of the Constitution, and therefore the exclusion of such a section was a deliberate drafting choice.

## CRIMINAL JUSTICE

**S V MKHIZE 2014 JDR 0771 (SCA)**

**Case heard 27 February 2014, Judgment delivered 14 April 2014**

The appellant had shot and killed the deceased, and shot and severely injured the deceased's uncle, following an altercation at a bar. He was convicted of murder and sentenced to twelve years' imprisonment. On appeal, it was argued that he had been incorrectly convicted of murder.

Mocumie AJA (Maya, Shongwe, Willis and Saldulker JJA concurring) held:

"To secure a conviction, the State had to prove beyond a reasonable doubt that the appellant unlawfully and intentionally killed the deceased. The State must show that he did not act in private defence or in terms of a putative private defence. … The test that applies, and what was required to be shown by the appellant in order to avoid a conviction on culpable homicide is that a reasonable person in the same circumstances in which he found himself would have believed that his life was in danger and would have acted as he did. The only issue was whether the State had proved beyond reasonable doubt that the appellant did not, subjectively, entertain an honest belief that his life was in danger and thus not justified to act in putative private defence." [Paragraphs 13, 15]

"The trial court committed several material misdirections which, to my mind, led to the wrong conclusion that the appellant was guilty of murder. These misdirections were, furthermore, completely overlooked by the court a quo. Both the trial court and the court a quo found Mbanjwa to be a neutral, reliable witness. … [H]is evidence was that the assault on the appellant did not stop; he merely freed himself from his assailants. He stated further that the appellant shot the deceased at close range, within three to four metres, indicating that the deceased was right in front of the appellant. This was corroborated by Steyl's uncontradicted expert evidence that, judging from the gun powder residue on the deceased's body; the gunshots were at close range. This was supported by the doctor's findings in the post mortem report that the gunshots were intermediate. Both Steyl's and the doctor's findings corroborated the appellant's version that the deceased was within very close range to him as he turned his back to flee. …" [Paragraph 17]

"A further aspect that remains for determination is whether, despite the appellant's subjective belief that if he did not react as he did he would have been killed, it was necessary for him to shoot the deceased three times. The first shot would, in all probability, have had the desired effect to ward off the unlawful attack on him. In my view, the appellant, especially as a long serving police officer with considerable

experience in handling firearms, ought to reasonably have realised that he was using excessive force beyond the legitimate bounds of private defence. In the circumstances, he should have been convicted of culpable homicide. Counsel for the State fairly and correctly conceded that the evidence viewed in its totality, failed to establish that the appellant had the requisite intention to kill the deceased. The appeal against the conviction ought, for the aforesaid reasons, to succeed." [Paragraph 19]

"In my view, correctional supervision, which was recommended by the probation officer, although appropriate even in cases of murder in the right circumstances, would not be appropriate ... The incident occurred some ten years ago. Thus, its rehabilitative element of punishment is no longer relevant and would not serve any purpose. A sentence based on principles of restorative justice ... was also suggested. But much as it has been lauded and accepted in South Africa, albeit at a slow pace, to consider it under the circumstances of this case, where a life has been lost, in a country where the level of violence is so high would send the wrong message to society. Furthermore, it would be hollow as the appellant is unemployed." [Paragraph 21]

"Taking into account all the mitigating factors ... a term of imprisonment, wholly suspended on appropriate conditions will adequately serve the interests of justice. It will serve as a deterrent on the appellant ad hang over him like a sword of Damocles. " [Paragraph 22]

The appeal was upheld, and the appellant was found guilty of culpable homicide and sentenced to five years' imprisonment, conditionally suspended for five years.

**MPINDO V S (A317/2011) [2013] ZAFSHC 136**

**Case heard 29 July 2013; Judgment delivered 1 August 2013**

The appellant challenged sentences of 15 years' imprisonment on rape and 5 years' imprisonment on assault with intent to do grievous bodily harm.

Mocumie J (Molemela J concurring) held:

"In his defence, the appellant had called his brother who informed the trial court that although the appellant was indeed young, at that young age, he was disrespectful towards his family, in particular his mother and brother. The brother depicted him as a person who did what he wished to do regardless of whether his own mother approved or not. For instance, as he made an example, the appellant came to his parental home at any time of the day including during the night with different girlfriends and slept with those girlfriends, that's why at his age he had already fathered one child. Thus, correctly so as observed by the trial court, the appellant was not conducting himself as youthful as he wanted to portray himself during the trial and during the hearing of this appeal." [Paragraph 4]

"The aggravating factors of this case are the following:. The second complainant was badly injured to the extent that he sustained a fractured skull. The first complainant was raped repeatedly. An older man at the house where the first complainant fled to just after their encounter with the appellant, tried to persuade the appellant from forcing himself on the first complainant as was evident he had all the intention to do. He ignored this man and took the complainant away to his home. This means the appellant had at least two distinct opportunities to withdraw from proceeding with this unlawful conduct but he simply continued. The appellant was not remorseful throughout the trial. The appellant's conduct

was so brazen that after raping the complainant the next day he took her to a house she pointed out as her home and threatened to deal with her if she reported the incident to the police." [Paragraph 5]

"What the trial court can be faulted on, perhaps, is the fact that it is not clear on record that it took into account the fact that the appellant had spent almost nine months awaiting trial. It is now settled that a sentencing court has to take this factor into account when it imposes sentence." [Paragraph 6]

"However, in my view, taking into account all the aggravating factors of this case, particularly the fact that the second complainant was assaulted so badly just so that his girlfriend could be taken from him and be raped repeatedly, justified the imposition of severe sentences in respect of both counts. The circumstances of this case are such that, even if the nine months awaiting trial period was taken into account, the sentence which was imposed was still appropriate not only to send the right message to the appellant but to society at large that in cases such as these, courts will not shirk their responsibility to protect society, particularly women, against rape and any form of violence. In my view, the sentence was not only appropriate but fitted the crime(s) and the appellant's personal circumstances." [Paragraph 7]

"It bears to be repeated that the prosecution as the *dominis litis* has a responsibility to ensure that charge sheets/indictments are properly drafted. The failure of the prosecutor in this matter to include the provision of s51 of Act 105 of 1997 left the trial court with no option but to avoid imposing life imprisonment in this case, which was a case that really justified life imprisonment to be imposed. The second complainant was seriously injured after being stabbed on the head with a knife and hit over the shoulders and head with a panga until he lost consciousness. That was clearly an attempt to kill the second complainant, yet, instead the prosecutor concerned, charged the appellant with assault with intent to do grievous bodily harm. That also restrained the trial court from imposing the appropriate sentence for attempted murder which could range between eight and ten years' imprisonment." [Paragraph 9]

**GODLA AND ANOTHER V S (A140/2012) [2013] ZAFSHC 61**

**Case heard 15 February 2013; Judgment delivered 25 April 2013**

The appellants challenged their 10-year sentences for robbery with aggravating circumstances on the ground that the trial court had under-emphasised their personal circumstances and over-emphasised the seriousness of the offence and the interests of the society, culminating in a sentence that was shockingly inappropriate.

Mocumie J held:

"It is settled law that a youthful offender should not be deprived of his or her liberty except as a measure of last resort and, if incarceration is unavoidable, then his incarceration must be for the shortest possible period …" [Paragraph 7]

"I am alive to the fact that the two appellants were not first offenders. They had a previous conviction which had an element of violence. Thus, they were not entitled to be treated as first offenders and the court *a quo* correctly took their previous conviction into account. This, however, does not detract from the fact that the second appellant was a juvenile at the time of commission of the offence. As for the first appellant, at 18½ years of age, he was indeed already an adult. Having achieved the age of majority a

mere six months prior to commission of the offence, few can quarrel with the fact that he was still a youthful offender. I am of the view that all things considered, including the principles laid down in the afore-mentioned cases, as well as the value of the items the complainant was robbed of, a proper consideration of the triad of sentence ought not to have resulted in the sentence imposed on the appellants by the court *a quo.* The court *a quo* thus committed a material misdirection." [Paragraph 9]

"The misdirection committed by the court *a quo* is thus of such a nature as to warrant interference with the sentence it imposed, thus necessitating a fresh consideration of an appropriate sentence. Given the lapse of time between the conviction and the appeal, I do not deem it prudent to remit the matter to the trial court for purposes of acquiring a pre-sentencing report." [Paragraph 9]

The appeal was upheld, and the sentences reduced to 7 years.

**S V MOCHOCHONDNO (2013) JDR 1583 (FB)**

**Case heard: 25 April 2013; Judgment delivered: 25 April 2013**

The magistrate seized with the matter requested special review in terms of section 304 of the Criminal Procedure Act on the basis that she had exceeded the penal jurisdiction when sentencing the accused on a charge of contravening section 49(1 )(a) of the Immigration Act.

Mocumie J (Molemela J concurring) held:

"Contravention of s49 (1) (a) is by its very nature a very serious offence. Lately it is an offence that is generally committed in conjunction with other serious offences such as trespassing, coupled with theft of minerals such as gold on old mines which have been shut down due to safety concerns on them or exhausted resources. It is also sometimes linked to stock theft or more serious offences such as murder and drug trafficking." [Paragraph 6]

"It has to be acknowledged upfront that the penalty prescribed in the Act can be quite frustrating for presiding officers as it limits them from imposing heavier sentences in appropriate cases in order to send the right message to society and illegal immigrants, taking into consideration the consequences that usually flow from its contravention as highlighted above: that entering the Republic of South Africa illegally is regarded in a serious light and will be dealt with severely. However, until the legislature intervenes by increasing the penal jurisdiction to suit the seriousness of this offence, courts are duty-bound to impose a fine or to imprisonment not exceeding three months." [Paragraph 7]

"It is therefore clear that the trial magistrate exceeded her jurisdiction when she imposed six months imprisonment instead of three months as the section prescribes and as she correctly acknowledged in her request for review. However, in my view, this is not an error to be corrected as if it is a typing error. It is a material irregularity which vitiates the proceedings." [Paragraph 8]

"In the circumstances and based on that material irregularity the sentence imposed in respect of count 2 ought to be set aside and substituted…" [Paragraph 9]

The sentence was reduced accordingly to a fine of R 1 500.00 or three months imprisonment.

**CHILDRENS' RIGHTS**

**V V T (325/2015) [2015] ZAFSHC 86 (9 APRIL 2015)**

Applicant and respondent, who were both South African citizens, had been and had two minor children. They were subsequently divorced. The applicant was granted primary residence and care of the minor children, with the respondent being granted contact rights. Applicant later informed the respondent that she was marrying a Namibian man, and would relocate with him to Namibia. She simultaneously applied to the court for permission to remove the children from its jurisdiction, and relocate with them to Namibia.

Mocumie J held:

"... [A]pplicant alleged that she had to take the minor children as she was relocating to Namibia for better living prospects. She further averred that during the divorce proceedings the respondent had agreed that she was a fit and proper person to be the primary care giver and that was still the case. Because she was living in Luderitz she had to make provision for the children's schooling in time for the commencement of the school year. She refuted all the allegations made by the respondent in his counter claim that she was not a fit and proper person to be the primary care giver." [Paragraph 6]

"... The Family Advocate, and all experts referred to in his report were all ad idem that applicant should remain the primary care giver. The children too were asked for their view and they indicated their preference: To stay with the applicant regardless of where she resided. ... Respondent, based on the report, subsequently withdrew his counterclaim." [Paragraph 7]

"South Africa ... has ratified the Hague Convention on the Civil Aspects of International Child Abduction (1980... One of the objects of the Hague Convention is 'to ensure that the rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States'. Article 21 of ... deals with rights of access- 'an application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of the child.' The Central Authorities of the Contracting States are obliged to cooperate with each other to 'promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which to which the exercise of such rights may be subject' ... In a proper case, Central Authorities are obliged 'to make arrangements for organising or securing the effective exercise of rights of access.'" [Paragraph 8]

"In this case, unfortunately, Namibia has not yet ratified the Hague Convention. As a result there is no Namibian Central Authority through which the Family Advocate as the Central Authority in SA could apply for assistance in investigating the wellbeing of the children or, should applicant ultimately attempt to thwart the exercise by respondent of his contact rights in respect of the children, to assist the respondent in organising or securing the effective exercise of such rights in Namibia. ..." [Paragraph 9]

"... [T]he consent given to applicant to remove the children from South Africa was only granted until 29 January 2015. The children were not returned to South Africa before that date. Had Namibia ratified the Hague Convention, the failure by applicant to return the children would have constituted 'wrongful retention' of the children in terms of article 3 of the Convention, viz retention in breach of respondent rights of custody' under South African law, being the law of the State in which the children were habitually resident immediately prior to the wrongful retention. Respondent could then have applied to

either the South African Central Authority or the Namibian Central Authority for assistance in securing the return of the children. He could have instituted Hague proceedings in Namibia for the return of the children to South Africa." [Paragraph 10]

"I deemed it necessary under paragraph 3.2 of the order to include that 'respondent should bear the travelling costs of the children to be with him during the 2015 September school holidays.' This was so ordered to enhance the enjoyment of respondent's contact rights and to enable him to make proper arrangements prior to the commencement of the school holidays. I am mentioning this because before this judgment could be delivered, respondent filed a Request for Reasons notice in respect of this particular paragraph. In the event that this paragraph is of no consequence to respondent, as he would in any event be ordinarily responsible for the children's travelling expenses when they visit him, in terms of Rule 42 of the Superior Courts Practice, the paragraph will be deleted in the amendment that I will make in this regard. ..." [Paragraph 11]

"This case should serve as a clear indication to the Namibian government that it should seriously consider ratifying the Hague Convention." [Paragraph 13]

Primary residence and care of the minors was awarded to the applicant, with specific parental rights and responsibilities granted to the respondent.

## SELECTED JUDGMENTS

## COMMERCIAL LAW

### NULANDIS (PTY) LTD V MINISTER OF FINANCE AND ANOTHER 2013 (5) SA 294 (KZP)

**Case heard 20 February 2013, Judgment delivered 24 May 2013**

The applicant had obtained a judgment against Greenacres Management Services. Before the judgment debt was paid, Greenacres was deregistered as a company for failing to submit annual returns. Applicant sought an order to restore Greenacres to the companies register in terms of section 83(4)(a) of the Companies Act of 2008, and to declare that the assets of Greenacres were not to be bona vacantia to the state.

Pillay J began by considering the distinction between deregistration and dissolution, and comparing their treatment under the Companies Act of 1973 and the 2008 Act:

"The old Act delinked deregistration from dissolution. …. Deregistration terminated the legal status of the company. Dissolution by winding-up and liquidation terminated the company. After deregistration and before dissolution the company existed as an association of members who remained personally liable for its debts. Its assets vested automatically in the state represented by the Minister of Finance." [Paragraph 9]

"Manifestly, the old Act distinguished clearly between, on the one hand, dissolution and when and how it could be avoided and, on the other hand, deregistration and when and how a company could be restored to the register. Although the circumstances that triggered both applications and the requirements to succeed differed, both applications could be made to the court. For both applications the old Act gave the court wide discretion. … Restoration automatically voided dissolution. By statute, the company was 'deemed to have continued in existence as if it had not been deregistered'" [Paragraphs 14 - 15]

"The new Act differs materially ... Firstly, deregistration and dissolution of companies are conflated in ss 82 and 83(1) ... Section 82(2) requires the Commission, on receiving a certificate of winding-up of a company to record the dissolution of the company and remove the company's name from the companies register. This section anticipates dissolution followed by deregistration as the natural consequences of a company being wound up. … [S] 82(3) empowers the Commission to remove a company from the companies register if the company has failed to file an annual return for two or more years in succession. This section does not anticipate dissolution as an automatic consequence of deregistration. But s 83(1) does." [Paragraphs 20 - 21]

"… [B]etween entrusting to the Commission the exclusive power to reinstate registration administratively in terms of s 82(4) and to the court the exclusive power to void dissolution in terms of s 83(4), the power to reinstate registration for causes other than administrative and because 'it is just' (the old s 73 power), has fallen between the cracks. This lacuna is structurally entrenched and practically enforced by the Commission …" [Paragraph 34]

"The Commission must be aware of the difficulties creditors would have in complying with the requirements for reinstating registration ... Still, the Commission insists on compliance with its reinstatement requirements. This fortifies my view that compliance with the requisites for registration is

not a mere procedural formality but a substantive necessity for efficient management of the companies register. … In these circumstances the court cannot order the reinstatement of registration when the Commission's requirements are not fulfilled, moderated or waived … It would be trenching on the powers of the executive and administrative arm of government in the face of clear evidence of what the Commission's strict requirements are for restoring registration. It will also undermine the principle of the separation of powers." [Paragraphs 39 - 40]

"However … reinstatement of registration is neither a prerequisite for nor a consequence of avoiding dissolution under the new Act. Section 83(4) is confined to voiding dissolution only without referring to deregistration. All that creditors require is an order voiding dissolution because s 83(4)(b) enables proceedings to be taken against the company as if it had not been dissolved. … [W]hen a company is deregistered but not dissolved, it exists as an association of members. The same position must obtain on avoiding dissolution and before reinstatement of registration. On dissolution being avoided the bona vacantia … reverts to the association of members of the deregistered company. Such an association exists for the limited purpose of remedying the harm or adversity for which the voiding application was granted. …" [Paragraphs 41 - 42]

Pillay J then compared the position under the United Kingdom Companies Act, then continued:

"… [W]ith the conflation of deregistration and dissolution in s 83(1) and the clear text of ss 82(2), (3) and (4) and s 83(4)(a) I cannot, with respect, agree with the opinion [of the Western Cape High Court] in Absa Bank … that s 83(4)(a) of the new Act is reserved for voiding dissolution following a winding-up … and not deregistration … when a company has failed to file its annual returns. Accordingly, I respectfully disagree with the interpretation … that s 83(4)(a) of the new Act: '(P)rovides for the type of situation envisioned by section 420 of the old Act i.e. it gives a possible remedy to an interested party when a company is dissolved following a winding up in the circumstances set out in section 82(1) and (2).' Such an interpretation leaves creditors without a remedy following dissolution after an administrative deregistration … Leaving creditors without a remedy would have the effect of denying them a right they had under the old Act. … My interpretation is that s 83(4) empowers a court to declare the dissolution of a company to be void. However, the discretion to make any order that is 'just and equitable' does not go far enough to confer power on the court to order the reinstatement of Greenacres on the register of companies. That power remains exclusively within the realm of the Commission. … Any other interested person who considers reinstatement of registration to be necessary may apply under s 82(4) to the Commission to reinstate the registration of Greenacres. …." [Paragraphs 58 - 60]

Finally, Pillay J considered whether it would be just and equitable to void the dissolution of Greenacres:

"Importantly, the effect of vesting the assets as *bona vacantia* in the Treasury would be unfair expropriation of the right of creditors to be paid if they do not have a right to recover their claims. … [T]hat has not been our practice under the common law and should be even less so under our constitutional democracy. A creditor's right could be a real right such as a loan secured by a bond over immovable property … Because of the manifest unfairness of denuding creditors of their right to have their claims paid, the new Act has to provide the means for them to recover payment from a deregistered and dissolved company. On the basis that dissolution is an instrument of injustice it is just and equitable in the circumstances to avoid dissolution." [Paragraph 65]

The dissolution of Greenacres was declared void, and it was revived as an association of its members. Its assets were declared no longer to be bona vacantia.

**STANDARD BANK OF SOUTH AFRICA LTD v DLAMINI 2013 (1) SA 219 (KZD)**

**Case heard 6 August 2012; 14 August 2012, Judgment delivered 23 October 2012**

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

Pillay J held:

"Mr Dlamini is functionally illiterate and does not understand English. … Mr Dlamini completed schooling at standard one. At 52 years, he is an unsophisticated African male. He had difficulty in the witness stand engaging with the documents …He did not expect the Bank to deduct a high amount that left him without the means to support himself, his wife and his two little children … He trusted his bank." [Paragraph 23]

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

"In its Preamble the Constitution recognises the injustices of our past. It commits to healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens. The founding values of the Constitution include human dignity, achieving equality, advancing human rights and non-racialism … The right to equality declares everyone equal before the law and has the right to equal protection and benefit of the law." [Paragraph 28]

"Section 3 elaborates that the purposes of the NCA are to promote and advance the social and economic welfare of South Africans, to promote a fair transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by, amongst other things, promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers" [Paragraph 34]

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

"The Bank gave Starlight no mandate to report vehicles that were returned within five days in terms of the termination clause 10.6. Such a business practice makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund." [Paragraph 44]

"… Accordingly, the Bank should have had better measures in place to ensure that its historically disadvantaged customers are aware of their rights and responsibilities. Pitched as consumer rights, ss 63 and 64 impose the onus on credit providers to inform their consumers of their rights and responsibilities." [Paragraph 49]

"Institutions such as the Bank should welcome the framework proffered by the NCA and the CPA for bridging the socio-economic inequalities substantively and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business … It should have been clear when the Bank issued summons … that consumer relations was no longer business as usually practised over its 150 year history in South Africa. Disappointingly, the Bank remained unresponsive to the CPA and its aspirations before it became enforceable." [Paragraph 78]

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

## CIVIL AND POLITICAL RIGHTS

### MAKWICKANA v ETHEKWINI MUNICIPALITY AND OTHERS 2015 (3) SA 165 (KZD)

**Case heard 26 November 2014, Judgment delivered 17 February 2015**

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

Pillay J held:

"The requirement that no one but the permit-holder may trade on the street inconvenienced the applicant and other street traders seriously. They were unable to leave their goods unattended or attended by another person, even temporarily, while they went out to purchase new stock or even to feed and relieve themselves." [Paragraph 11]

"... As invasive as s 35(1) [of the bylaw] is, impoundment may nevertheless be a necessary measure in the informal sector to curb some contraventions. ... [N]ot all infringements of the bylaw harm the public in a way that requires impoundment immediately or at all. Section 35(1) is overbroad in that it permits impoundment for all contraventions without differentiating between serious absolute contraventions and less serious, formal non-compliances, such as trading without producing proof of a permit, that do not pose a threat to the public " [Paragraph 81]

"... Compounding the prejudice of removing the street traders' property without a hearing is the power of the first respondent's officials to sell, destroy or otherwise dispose of perishable goods and foodstuff not fit for human consumption. ... [T]he property of street traders is sold without notice to the owners and the street traders and without a reserve price. Non-perishable goods are sold by the first respondent if the owner does not or cannot pay the impoundment fee within one month of the date of impoundment. Wastefully, goods not sold are destroyed" [Paragraph 82]

"... Only as a result of access to the court via this application did the applicant eventually elicit from the first respondent at the hearing a possible tender of compensation. The luxury of litigation is not an option for every street trader whose property is impounded" [Paragraph 85]

"Notwithstanding our constellation of constitutional rights, the systemic obstacles in the dispute-system design deprived the applicant of an opportunity to recover his goods before they were disposed of. Having legal representation (unusual for street traders) to recover the goods did not improve his position either, once the goods were disposed of." [Paragraph 86]

"But for the assistance of the LRC and similar aid organisations, this right of access to courts is theoretical and illusory for street traders generally. ... Street traders are required to be at their stands for three to five days in the week, according to an arbitrary rule of the first respondent... The meagre income they generate goes to sustaining their large families. Employing legal assistance is not realistic. ..." [Paragraph 88]

Pillay J thus found that s 35 of the bylaw limited the right of access to courts under s 34 of the Constitution, and proceeded to consider the issue of deprivation of property in terms of s 25 of the Constitution:

"Deprivation of their property is so invasive of their property rights that it impacts on the welfare of the street traders and their large families. For most the impounded goods are their only assets and means to a meal. Impoundment is therefore serious, irrespective of the commercial value of the goods. Deprivation also impacts on their identity and dignity as people with property, however little that is." [Paragraph 98]

"Having found that s 35 arbitrarily deprived street traders of their property, it follows that such deprivation also impairs their right to trade. When goods are impounded and the impoundment becomes permanent, as it does when the goods are destroyed, become perished or are sold on auction, the right of informal traders to exercise their freedom to trade is annihilated temporarily and even permanently if they have no other resources to resurrect their trade. Confiscation can result in shutting down trade altogether and not merely regulating it." [Paragraph 102]

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

"Street traders are such because of their socioeconomic status. Not only Africans and other black people are street traders. White street traders may also be discriminated against on the ground of their socioeconomic status. On the face of it the bylaw is racially neutral. However, apartheid layered poverty over race. The degree of coincidence or intersectionality of race with socioeconomic status results in the greatest impact being on Africans. As the population group with the largest component of poor people the impact is deeper and more expansive than on any other race group. Race and socioeconomic status are cemented together tightly, though not inextricably." [Paragraph 116]

"The power of the first respondent to remove, impound and dispose of informal traders' goods in s 35 of the bylaw discriminates against street traders as members of a depressed socioeconomic class, and not any other group. Street traders are such because their socioeconomic status or race or both are barriers to better opportunities. Effectively, the impoundment provisions compound their historical disadvantages. … [The bylaw's] effect is to discriminate directly and indirectly against poor and mainly African people." [Paragraph 125]

Pillay J held that s 35 of the bylaw constituted discrimination under s 9(3) of the Constitution, and could not be saved by the limitations clause. Regarding the appropriate remedy, Pillay J held:

"This application is a consequence and reflection of the deficiency in our dispute-system design. It exposes the scheme of the bylaw as incapable of giving effect to important constitutional rights and values." [Paragraph 139]

"...Why no meaningful engagement occurred in this dispute must have its roots in our adversarialism cultivated by litigation being the only form of state-sponsored dispute resolution" [Paragraph 140]

"The facts in this case show that the remedy for eliminating the flaws in the implementation of s 39 of the bylaw lies in the first respondent managing its officials effectively. Failing to account, as the fourth respondent did, and contradicting herself on affidavit must be treated as misconduct and possibly criminal offences such as perjury and theft of the impounded goods. Without a firm hand on officials who misbehave, conflict with street traders will persist as respect for law enforcers wanes." [Paragraph 145]

Pillay J therefore ordered that the removal and impounding of the applicant's goods was unlawful; awarded compensation of R775 for the value of the goods, plus interest at the prescribed rate; and declared sections 35 and 39 of the Informal Trading Bylaw to be unconstitutional and invalid [paragraph 149].

## CRIMINAL JUSTICE

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

**Case heard 06 February 2013, Judgment delivered 10 May 2013**

This was an appeal against the sentence imposed by the High Court, where the accused was sentenced to life imprisonment for the two counts of rape and to 15 years imprisonment for robbery with aggravating circumstances. On appeal, the main issue was whether the trial court's reliance on provisions of the

Criminal Law Amendment Act were appropriate given the nature of the notification to the appellant that those provisions were to be applied. For the majority, Koen J (Ploos van Amstel J concurring) held that it was not to be assumed that, because an accused had been represented, the provisions of the Act had been pertinently brought to his attention and that the accused must from the outset know what the implications and consequences of the charges were. The majority held that as there had been no indication in the charge-sheet or at the beginning of proceedings that the state might seek to invoke the provisions of the Act in respect of the count of robbery with aggravating circumstances, the court a quo had erred in proceeding on the premise that the prescribed minimum sentence should follow. The majority imposed an effective sentence of 20 year's imprisonment.

Pillay J dissented:

"The variances [in a range of decisions on rape sentencing] are a predictable and natural consequence of democracy at work. They evidence judges exercising their judicial discretion independently of other arms of government and of each other. It frees the discretion of the lower courts, which then have a wider choice of appellate authorities on which to peg their decisions." [Paragraph 24]

"Although sentencing cannot be such that it amounts to inflexible rubber-stamping of the legislation, it cannot undermine the legislative intent to impose consistently tougher sentences. Furthermore, the degree to which a sentence deviates from the prescribed minimum correlates with the extent to which the sentence serves to assuage the harm to the complainant." [Paragraph 25]

"... The memorandum accompanying the Act explains that its purpose was to create 'a legal regime of discretionary minimum sentences in respect of certain serious offences which it categorised in terms of their degree of seriousness and listed them in the four parts of the schedule to the Act" [Paragraph 26]

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

"Another consequence of rape that distinguishes it from the other serious crimes for which minimum sentences are prescribed is the propensity of the victim to become suicidal. *S v N ...* is one of the many cases in which the complainant attempted suicide and testified to being suicidal and depressed. Others simply do not make the law reports. Few crimes are as dignity- and soul-destroying as rape is." [Paragraph 36]

"The socialisation of the offenders in all four racism cases above was to treat other human beings who were different and vulnerable as inferior. The same is true of every rapist and his victim. The total and absolute abhorrence of racial discrimination must apply with equal and uncompromising vigour to all forms of unfair discrimination, and especially to gender and sex which rank second and third after race in s 9(3) of the Constitution, 1996. ..." [Paragraph 37]

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

"… The clearest demonstration of how serious rape is lies in the sentence itself. At the same time rapists as human beings 'ought to be treated as ends in themselves, never merely as means to an end'." [Paragraph 43]

"The test is whether the accused knew what the charges were and what possible sentence he would get if he were convicted. The charge-sheet must not mislead him into believing that the state is relying on a different charge or sentencing regime. … Where an accused is legally represented and the charge-sheet refers to the Act there is no duty on the trial court to ensure that the accused is aware of the gravity of the conviction of a minimum sentence charge. Furthermore, whatever sentence is imposed must be proportional to balance all the rights and values. In a constitutional democracy based on rights and values of human dignity, equality and freedom, a sentence of 25 years for raping the complainant twice is proportional." [Paragraph 56]

"For all these reasons I am satisfied that the appellant had a fair trial. Even if I am wrong on this issue, and the Act does not apply, sentencing is entirely a matter for the discretion of the court, as long as the sentence is not one that no reasonable court would impose. " [Paragraph 63]

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

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

**Case heard 28 June 2012, Judgment delivered 6 August 2012**

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

Pillay J (Mbatha J concurring) dealt first with the trial court's failure to apply s 170A of the Criminal Procedure Act (CPA) [which allows a witness under eighteen to give evidence through an intermediary]:

"The CC [in Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development] urged that this procedure should ordinarily be followed in all matters involving child complainants in sexual offences to meet the objectives of s 170A(1) of the CPA and s 128(2) of the Constitution which promotes the best interests of the child to be of paramount importance." [Paragraph 4]

"The CC's judgment, issued on 1 April 2009, should have been fresh in the minds of the learned magistrate and prosecutor in September 2009 when this trial commenced. Clearly, neither s 170A nor the CC's judgment featured in the proceedings at all." [Paragraph 5]

On the failure by the trial court to apply s 153(5) of the CPA [allowing for in camera proceedings when witnesses under eighteen testify], Pillay J held:

"The learned magistrate muddled the requirements for in camera proceedings. Instead of affording the child witnesses the comfort and support of their family when they testified, he aggravated their mental

stress and suffering already accompanying the daunting atmosphere of a court by exposing them to not only the accused but also his family to the exclusion of their own." [Paragraph 7]

"In this case the child witnesses were sworn in without the presiding officer first ascertaining their competence to testify. Nor did he admonish them to speak the truth. … Swearing in the child witnesses is no assurance that they understand the oath and their obligation to speak the truth. … In this case credibility was tenuously balanced between single witnesses on each side. Consequently, compliance with the procedural hoops that check for veracity was vital for determining credibility. " [Paragraph 14]

"Although this definition [of a "child justice court" under the Child Justice Act (CJA)] does not cater specifically for child witnesses but child accused, there is no good reason why child witnesses should not similarly be afforded the protection of s 63 above of the CJA." [Paragraph 15]

"… [T]he proceedings were conducted by an all-male team of magistrate, prosecutor and defence attorney. It is not clear from the record whether the interpreter was also a male. If he was, this would have aggravated the child witnesses' ability in communicating effectively. … Rape victims, adults and children alike have great difficulty in expressing their experiences dispassionately and coherently. The role of the interpreter to communicate empathetically in such cases is vital. In S v S … the Zimbabwe court's criticism was that the trial court personnel were all male. This despite the fact that they knew well in advance that a female juvenile would be appearing in that court on that day as a complainant in a serious rape case. … Although this is a Zimbabwean court decision, its observations about the behaviour and psychology of female and child victims of sexual offences have universal appeal." [Paragraph 17]

"… Even if non-compliance with ss 170A and 153(5) can be waived as rights protecting the complainant and therefore not prejudicial to the appellant, and even if non-compliance with s 164(1) is a formal procedural defect that can be remedied, the prejudice for the appellant arising from the learned magistrate's omission to invite questions arising from his questions is inescapable." [Paragraph 25]

"… The fact that the appellant has not been found guilty or innocent leaves a cloud over the credibility of the complainant and the appellant. It will forever remain a cloud of uncertainty for both sides unless it is cleared up in some way, be it mediation, a retrial or some other process. …" [Paragraph 26]

"… [T]o refer the matter for retrial would subject her to the secondary trauma again. On the other hand, she may want to re-testify to vindicate herself. … A retrial might also violate the appellant's right to a speedy trial and possibly the protection against double jeopardy. The prospects of success for a retrial are a matter within the discretion of the prosecution after consulting the complainant and her witnesses." [Paragraph 27]

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

## SELECTED ARTICLES

### PAJA V LABOUR LAW (2005) 20 (2) SAPR/PL 413

This article discusses the debate over the link between administrative law and labour law. It begins by looking at the history of labour legislation in South Africa.

"In 1979 amendments to the Labour Relations Act ... introduced an unfair labour practice jurisdiction to the Industrial Court ... Until the amendment, administrative law principles had no application to private contracts of employment ... The erstwhile Industrial Court seized the opportunity ... to apply principles of natural justice to hold that employers had an obligation to give employees a hearing". (Page 413)

"Inspired by the developments in the private sector and the prevailing trend at the time of creating political space for democratic values by challenging state authority through the courts, a spate of cases in the public service ensued. Administrative law principles were tweaked and twisted to secure gains for public employees."

The author notes that that constitutional entrenchment of a fair labour practice clause is unique, and that it is also unusual to constitutionalise the right to administrative action. "Not many constitutions have it probably because it is regarded as superfluous as the very purpose of a constitution is to regulate the exercise of power by the state or other public authority" (citing the *Bato Star* decision). (Page 414)

The author then examines labour law under the constitution, beginning with an examination of the purpose of labour laws, arguing that this is "to give effect to and regulate the fundamental rights to fair labour practices" in the Constitution. To do so, rights and procedures are codified in detail. Labour laws "represent a delicate balance between what each of the social partners considered acceptable to meet the socio-economic challenges of the new democracy." (Page 415)

"Labour rights and protections have been accessed from the Constitution directly. The right is available to 'everyone' ... Thus where the LRA has excluded certain categories of workers ... or disputes ... the Constitutional Court has extended the constitutional right to them".

The author notes criticisms of these cases, on the basis that they "encourage parallel jurisprudence; one under the Constitution and the other under the LRA." (page 416). The author then deals with conflict between labour law and administrative law in relation to decisions of the CCMA.

"The reference to 'award' in the definition of 'decision' cannot be a reference to labour arbitration awards issued by the CCMA and bargaining councils. Nor can acts and omissions of any person or body performing any functions in terms of the LRA be regulated by PAJA. I say so because their exclusion from the application of PAJA is implicit from sections 145 and 158(1)(g) of the LRA which already provide for the review of such awards and functions. If PAJA did apply there would be a duplication of legislation."

"If PAJA applies to labour law decisions the rigidity of section 6(2) of PAJA will clash with the flexibility of the grounds of review in sections 145 and 158(1)(g) of the LRA." (Page 419)

The author argues further that the standard of review of CCMA and bargaining council decisions "would widen and become more complicated if consideration were also to be given to PAJA", and further blur the distinction between appeal and review. (Page 420)

The article goes on to suggest that PAJA and the LRA also conflict in respect of review of purely administrative or ministerial acts, particularly in relation to the registration of organisations.

"Promoting freedom of association and collective bargaining are not set as objectives of PAJA. They could be easily missed if the PAJA grounds of review were to apply to the registration of organisations." It is argued further that, in this respect, PAJA and the LRA also conflict regarding their procedures and remedies.

The author argues that proceedings to challenge action by a public employer against its employee may be brought under either PAJA or the LRA, with resulting duplication of processes, cost and inefficiency.

"The LRA's objective of effective dispute resolution could therefore be defeated by its own provisions. The labour courts are established as courts of law and equity ... The High Court which has powers arising from PAJA, is not a court of equity. Labour disputes should be heard in the labour courts." (Page 424)

The author goes on to discuss possible conflicts with other statutory systems.

"Overlapping legislation is disastrous for public administration in general and dispute resolution in particular. ... Under the current dispensation public employees are more privileged than private employees. ... The objective of equality between public and private employees is thwarted." (Page 425)

**GIVING MEANING TO WORKPLACE EQUITY: THE ROLE OF THE COURTS (2003) 24 ILJ 55**

The article begins with a historical analysis of the concept of equity in labour jurisprudence, starting with an analysis of the 1979 amendments to the previous Labour Relations Act. The article then deals with changes brought by the new constitutional dispensation, starting with a consideration of judicial interpretation under the new constitution.

"The intention of the Constitutional Assembly was to place some matters exclusively within the control of the judiciary. ... Section 39 of the Constitution structures judicial discretion precisely. Whereas in the pre-constitutional era adjudicators had to strain the interpretation of the law for egalitarian effect, our Constitution now directs that the interpretation must be based on values. Such values must also be those that underlie an open and democratic society based on human dignity, equality and freedom. The concept of values embraces equity as one of many universally desired ideals. ... Adjudication is dynamic and adjudicators fulfil a transformative role. The Constitution therefore provides the legal basis for the judiciary to make law in certain circumstances." (Page 57)

The author goes on to discuss how the courts have developed jurisprudence on judicial interpretation:

"A 'narrow, artificial rigid or pedantic' interpretation should yield in favour of an interpretation that is 'purposive' having regard to 'contemporary norms, aspirations, expectations and sensitivities of the population as expressed in the Constitution'. ... Judicial interpretation, however, must begin with an interpretation of the express language of the written text. Otherwise the law may come to have whatever meaning one wants it to have. Adjudicators have a duty to develop jurisprudence based on principle." (Page 58).

"Commissioners and judges must apply the law and follow relevant and binding precedents. However, insofar as there arises a novel question of law, or if the law is ambiguous, vague or otherwise unclear, or if there is no precedent, or if there are conflicting authorities, or if the precedent predates the Constitution or legislation and is inconsistent with these instruments, then adjudicators may create law by exercising their discretion consistently with the Constitution, legislation, the common law and customary law". (Page 59)

"I wish now to look at some extracts from reported decisions of [CCMA] commissioners to illustrate the inappropriate use of the word or concept of equity. I distinguish between the use of the word and the concept of equity because in some situations the word is used merely as a convenient catch-all to mean whatever the commissioner wants it to mean without reflecting the conceptual depth that the word acquires in a constitutional context. The purpose of the exercise is not to embarrass commissioners or the parties but to learn from the mistakes made." (Page 60)

"Dissent amongst adjudicators is predictable. Controversy and dissenting judgments are a reminder of our plurality and a demonstration of our democracy in action. They attract public participation to the discourse about rights. This reinforces the dialogue that is constitutionally structured, on the one hand, by the interpretation clause insofar as it extends a law-making function to adjudicators and which, on the other hand, is limited by the principle of the separation of powers. This tension triggers the dialogue."

The article concludes by discussing cases to illustrate these observations about judicial interpretation.

## SELECTED JUDGMENTS

### PRIVATE LAW

**HANSA SILVER (PTY) LTD AND OTHERS V OBIFON (PTY) LTD T/A THE HIGH STREET AUCTION CO 2015 (4) SA 17 (SCA)**

**Case heard 3 March 2015, Judgment delivered 30 March 2015**

At issue in this case was the validity of sale agreements entered into pursuant to a public auction, and whether they had been invalidated by bids of the auctioneer on behalf of the sellers. The purchasers (first and second appellants) had demanded refunds of commission from the respondent auction house.

Van der Merwe AJA (Navsa ADP, Shongwe and Saldulker JJA and Meyer AJA concurring) held:

"In this court the purchasers relied on two grounds for the claim that the sale agreements and the first addenda were invalid. The first was that because of non-compliance with the regulations, the auctioneer was not permitted to bid at the auction at all. The second ground was that the auctioneer was obliged to identify his bids on behalf of the sellers, but failed to do so." [Paragraph 19]

"… The auctioneer must ensure compliance by prospective bidders. Their [auction regulations] purpose is clearly to identify bidders in order to enable communication with successful bidders for purposes of matters such as delivery of the goods and securing payment of the purchase price. In this context the ordinary meaning of these provisions makes good sense. Everybody at an auction knows or could easily ascertain the identity and location of the auctioneer and the auction house, where applicable. Regulation 21(2)(b) provides that the rules of an auction must contain the full names, physical address and contact details of the auctioneer and, where applicable, of the auction house. I find therefore that regs 26(3) and 26(4) are not applicable to an auctioneer who intends to bid on behalf of a seller." [Paragraph 22]

"… Auction bids by or on behalf of the seller (vendor bidding) must be distinguished from sham bidding. Instances of sham bidding are bids in terms of an underhand arrangement to artificially raise the sale price or a non-existent bid represented as a real bid. Sham bidding is of course unlawful. In terms of the common law vendor bidding is prohibited at auctions without reserve. …" [Paragraph 23]

"It is common knowledge that the auctioneer is the agent of the seller and that the purpose of the auction is to obtain the best possible price for the benefit of the seller. It is not intended to provide the public with the opportunity to obtain bargains. Vendor bidding is only permitted in case of prior notice thereof. No person is compelled to bid at such auction nor to bid higher than what the bidder is willing to spend. A vendor bid up to the reserve price does not deprive a bidder of a sale below the reserve price. That is the result of the reserve price itself. And the acceptance of a bid below the reserve price is, in any event, within the control and province of the seller." [Paragraph 25]

"… [T]he enquiry should centre on whether the non-disclosure of a vendor bid in any given case constituted a misrepresentation. That question must of course be decided on the facts and circumstances of each case. If the failure to identify a vendor bid as such does constitute a misrepresentation … an auction sale may in terms of general principles of contract be avoided if the misrepresentation was material and induced the sale." [Paragraph 26]

"... [T]he purchasers did not show that the auctioneer's bids on behalf of the seller constituted material misrepresentations that induced the sale agreements. The rules of the auction made clear that the auctioneer was entitled to bid on behalf of the seller up to the reserve price. Mr Ichikowitz [second appellant] is an experienced businessman who had in the past purchased several properties on auction. It is very unlikely that a person in his position who had been made aware of the possibility of vendor bidding by the auctioneer, would be misled by the vendor bids in question. Mr Ichikowitz has only himself to blame for ignorance of the possibility of vendor bidding by the auctioneer. What is more, he took a deliberate decision to raise his bid to meet the reduced reserve price of R20 million. Any prior misrepresentation therefore in any event did not induce the sale agreements." [Paragraph 28]

The appeal was dismissed.

## COMMERCIAL LAW

### LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA V RYTON ESTATES (PTY) LTD AND OTHERS 2013 (6) SA 319 (SCA)

**Case heard 20 May 2013, Judgment delivered 13 September 2013**

At issue in this case was whether the respondents, respondents, who were in mora in regard to contractual obligations to pay interest, were liable to pay mora interest on the unpaid interest.

Van Der Merwe AJA (Brand, Theron, and Majiedt JJA and Mbha AJA concurring) held:

"The respondents are all commercial farmers. The appellant lent and advanced funds to the respondents in terms of various written loan agreements, for present purposes all secured by mortgage bonds. .... Each loan agreement provided that interest at a stipulated annual rate would be calculated on the balance of the capital outstanding from time to time. Yet, each agreement authorised the appellant to vary the stipulated interest rate without notice to the borrower at any time. It is common cause that in terms of this provision the appellant adjusted interest rates on the loans from time to time." [Paragraph 3]

"In terms of each loan agreement the loan and interest were repayable in equal instalments annually in arrears. The first instalment was payable one year after the registration of the mortgage bond. In this way each instalment consisted of capital and interest and the date on which each instalment was due and payable was fixed by agreement. It follows as a matter of law that, in the event that any instalment was not paid in full on the due date, mora operated ex re. It is common cause that in many instances instalments were not paid on the due date by the respondents. ..." [Paragraph 4]

"As to the question of mora interest, the position taken by the respondents was that the appellant was entitled to charge simple interest on capital only and that no interest on interest could be charged in any way. The case for the appellant, on the other hand, was that, apart from simple interest on capital, it was also entitled to levy mora interest on the unpaid interest, calculated on a simple-interest basis only, but at the rate then applicable on the balance of the capital outstanding ...." [Paragraph 9]

"In deciding this issue it is helpful to keep the following principles in respect of interest in mind. Interest remains interest and no method of accounting ... can change its nature. Contractual interest may be

compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement. Mora interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora debitoris." [Paragraphs 11 - 12]

"I respectfully agree that there is no principle that stands in the way of a finding that in the absence of agreement in this respect, a creditor should be compensated by an award of mora interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. Clearly it must similarly be assumed that the interest would have been productively employed had it been paid on the due date. Also, no consideration of public policy points the other way. On the contrary, taking into account that interest is the 'life-blood of finance' it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date." [Paragraph 19]

"I accept that parties may by agreement exclude liability for mora interest. The effect of such agreement would be, as I have said, to exempt a party from common-law liability for damages for breach of contract. Such agreement must be clear and unambiguous. … This judgment therefore lays down that in the absence of agreement to the contrary, mora interest at the prescribed rate is payable on unpaid interest which is due and payable." [Paragraphs 22 - 23]

"Counsel for the respondents argued that the parties hereto did agree to exclude liability for mora interest. In this regard he relied solely on the fact that the loan agreements provided only for interest on capital and not for interest on interest. But these provisions have to do with contractual interest only. They do not deal with breach of contract and therefore cannot be understood to constitute an agreement to exclude common-law liability for damages in the form of mora interest." [Paragraph 24]

The appeal succeeded. The matters were referred back to the High Court to determine the amounts payable.

## CIVIL AND POLITICAL RIGHTS

### KOALANE AND ANOTHER V SENKHE AND OTHERS (2854/2012) [2012] ZAFSHC 165 (6 SEPTEMBER 2012)

**Case heard 16 August 2012, Judgment delivered 6 September 2012**

The first applicant was the mayor of the second applicant, a local municipality. Applicants sought an order that they be granted access to a video recording which was in the possession of the first respondent. They based their application on provisions of section 32 (access to information held by private persons) of the Constitution, and section 9(a)(ii) of the Promotion of Access to Information Act. The applicant claimed that the video recording made by the third respondent at the funeral of the daughter of the first and second respondents, *inter alia* portrayed a speech made by Mr Kobane. They alleged that during this speech the first applicant was defamed and all other council members of the second applicant were "… insulted and possibly defamed". The applicants stated that access to the video recording is required in order to exercise their rights against Mr Kobane.

Van Der Merwe J held:

"I do not understand what rights the second applicant could exercise against Mr Kobane, but do not find it necessary to make any finding in this regard" [Paragraph 4]

"It cannot be found on the evidence that the third respondent is in possession of a video recording as described above and in any event he appears to have made the recording on behalf of the first and second respondents. I do accept however, that the second respondent is in possession thereof. For the reasons that follow however, the application can in my view not succeed, despite the absence of opposition thereto." [Paragraph 5]

"PAIA … only provides for access to recorded information in the possession or under the control of a public body or a private body. The definition of "record" is the following: "… of, or in relation to, a public or private body, means any recorded information: regardless of form or medium; in possession or under control of that public or private body, respectively; and whether or not it was created by that public or private body, respectively." Section 3 provides that PAIA is applicable to a record of a public body and a record of a private body, regardless of when the record came into existence. Part 2 of PAIA deals with access to records of public bodies and Part 3 thereof with access to records of private bodies. Each part *inter alia* contains chapters in respect of the right of access, manner of access and grounds for refusal of access to records." [Paragraph 8]

"Private body" is defined as: "(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business of profession; or (c) any former or existing juristic person, but excludes a public body." [Paragraph 9]

"It follows that PAIA does not provide for access to a record of a person such as the second respondent, namely a private individual other than in the capacity of carrying on or having carried on a trade, business or profession. This is in my judgment the result of the limitation and/or balancing of rights envisaged in section 9(b) of PAIA. In terms of the principle of constitutional subsidiarity, where legislation has been enacted to give effect to a constitutional right, a litigant who does not challenge the legislation as being inconsistent with the Constitution, should rely on that legislation and cannot circumvent that legislation by attempting to rely directly on the constitutional right. …" [Paragraphs 10-11]

The application was dismissed.

## ADMINISTRATIVE JUSTICE

### DIPHETOHO SCHOOL GOVERNING BODY AND OTHERS V DEPARTMENT OF EDUCATION AND OTHERS (4218/2010) [2012] ZAFSHC 3 (12 JANUARY 2012)

**Case heard 8 December 2011, Judgment delivered 12 January 2012**

Applicants sought to have the decision of the first respondent to appoint a Principal for the school set aside. Applicants also challenged the validity of the decision by the first respondent to withdraw the functions of the first applicant, the school governing body. A panel established by first applicant to appoint a Principal set criteria for the shortlisting of candidates such that only a person who had acted as the principal of the school and was from Bothaville would be shortlisted. Only a Mr. Majoe met these criteria. These criteria encountered opposition and the process stalled. Subsequently, the head of the Department advised the governing body that because they had failed to appoint a principal, he would make an appointment in terms of the Employment of Educators Act, and that he was proceeding to

withdraw the functions of the school governing body in terms of the South African Schools Act. The court had to decide on the validity of the decision to withdraw the functions of the school governing body; and the validity of the decision to appoint a principal by the first respondent.

On the validity of the decision by the first respondent to withdraw the functions of the first applicant Van Der Merwe J held:

"The head of the department says that he orally granted the governing body a reasonable opportunity … and that he acted on reasonable grounds. The applicants attack the decision … on two grounds, namely that the governing body was not granted a reasonable opportunity to make representations relating to the withdrawal of its functions and that the decision was not reasonable. (In respect of the last mentioned aspect the real test of course is whether the decision to withdraw the functions of the governing body was a decision that a reasonable decision maker could not make.) To my mind however, the first question for decision is whether the head of the department was in the circumstances entitled to invoke the provisions of section 22 at all." [Paragraph 13]

"In HEAD OF DEPARTMENT, MPUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER v HOËRSKOOL ERMELO AND ANOTHER … (CC) three matters were decided that are important for the determination of this question. First, it was decided that any function of a governing body may be withdrawn in terms of section 22 of the Schools Act. Second, it was explained that there is no direct connection of interrelation between section 22 and section 25. Section 25 regulates failure by a governing body to perform its functions. The jurisdictional requirements or the invocation of section 25 are that the governing body must have ceased or failed to perform one or more of its allocated functions. The two provisions regulate unrelated situations and may not be selectively or collectively applied to achieve a purpose not authorised by the statute. … Third, the following was said … in respect of section 22: "*Section 22 regulates the withdrawal of a function, but only on reasonable grounds. Its purpose is to leave the governing body intact, but to transfer the exercise of a specific function to the HoD for a remedial purpose. This means that the HoD must exercise the withdrawn function, but only for as long as, and in a manner that is necessary, to achieve the remedial purpose. That explains why s 22(3) (sic) provides that the HoD may, for sufficient reason, reverse or suspend the withdrawal."* In my view, it is a power which may be exercised only to ensure that the peremptory requirements of the Constitution and the applicable legislation are complied with." [Paragraph 14]

"I accept that more than one function or even all functions of a governing body may be withdrawn in terms of section 22, provided that it is done on reasonable relevant grounds and for a remedial purpose, only for as long as and in a manner that is necessary to achieve the remedial purpose. It is clear that the head of the department came to the conclusion that the governing body failed to perform all or most of its functions. There appears to be reasonable grounds for such determination, but it is in the circumstances not necessary to make a finding in this regard. Points 1, 2, 3 and 6 of the letter of the head of the department … expressly refer to failures to perform specific functions. The reference to poor administration and management of the school's finances is just another way of saying that the governing body failed to properly administer and manage the finances of the school. Division amongst the members of the governing body on the one hand constitutes a reason for the failure to perform its functions and on the other hand amounts to a failure to perform its fiduciary duties in terms of section 16(1) of the Schools Act. A reading of the answering affidavit confirms that the decision to withdraw the functions of the governing body was essentially based on failure of the governing body to perform its functions." [Paragraphs 16-17]

"In my judgment, in such a case, the head of the department is obliged to invoke section 25 and cannot act in terms of section 22. Section 25 provides that if the head of department makes a determination that the governing body has ceased or failed to perform one or more of its functions, the head of department must appoint sufficient persons to perform all such functions for a period not exceeding three months. The head of department may extend the period of three months by further periods not exceeding three months each, but the total period may not exceed one year. The express purpose hereof is to build the necessary capacity of the governing body. If a governing body has however ceased to perform its functions, the head of the department must ensure that a governing body is elected within a year ... Section 22 is intended to deal with situations other than cessation or failure to perform functions. ... Essentially such decision can be based on any reasonable ground other than cessation or failure to perform functions by the governing body. A possible example of such instance is afforded by the ERMELO-case, namely the adoption by the governing body of an admission policy that is unconstitutional. The understandable frustration of the head of the department with the inaction of the governing body could therefore not form the basis of a decision to withdraw functions, but should have been dealt with in terms of section 25. My conclusion therefore is that the head of department did not in the circumstances have the power to act in terms of section 22." [Paragraph 18]

"But there is another ground for concluding that the head of the department could not exercise the power in terms of section 22. ... [T]he purpose of section 22 is the temporary withdrawal of a function of a governing body for a remedial purpose. The head of the department at no stage articulated that he withdrew the functions of the governing body temporarily or for a remedial purpose or what the remedial purpose would be. On the contrary, a close reading of the answering affidavit of the head of the department shows that the purpose of the head of the department was to dissolve or disband the governing body, permanently or indefinitely. This is unlawful. The Schools Act contains no provision for the dissolution or disbandment of a governing body. A public power may not be used for a purpose other than that it was intended for. ... Whilst I have no doubt that the head of the department was *bona fide*, his action was not authorised by section 22." [Paragraphs 19-20]

On the question of the decision to appoint a principal by the first respondent, Van Der Merwe J held that:

"It is common cause that Mr. Legopo was appointed by the head of the department without the involvement of the governing body. The head of the department states that this was justified by section 6(3)(l) of the Employment of Educators Act. It is trite law that a real factual dispute in an application must be determined on the version of the respondent, unless that version can be rejected on the papers as farfetched or clearly untenable. The evidence of the respondents is that the governing body was requested to make a recommendation on 23 November 2009 and/or on 1 December 2009. This evidence can certainly not be rejected out of hand and must be accepted for present purposes. It is common cause that the governing body made no such recommendation within two months and had not made a recommendation by 19 February 2010. In this regard the governing body relies on what took place at the meeting of 1 December 2009 as well as a letter directed to the head of the department by the governing body, dated 3 December 2009. This is to no avail. The meeting of 1 December 2009 and the process for making a recommendation for the appointment of a principal failed either because the panel of the governing body did not have the capacity to handle a relatively simple matter or because it insisted on criteria for shortlisting of candidates that were clearly objectionable. In neither case the governing body is provided with a lawful excuse for the failure to make a recommendation. The respondents deny that any of them received the letter of 3 December 2009 and that denial cannot be rejected on the papers. ..." [Paragraphs 23-26]

"In conclusion, The subsequent use by the head of the department of an independent panel to make a recommendation to him cannot be faulted in the circumstances. The applicants fail on the question of the appointment of the principal of the school. They succeed on the question of withdrawal of powers, but on a ground not relied upon. The grounds that the applicants did rely upon, do not appear to be clearly established, to say the very least." [Paragraph 28]

## CRIMINAL JUSTICE

**MOLALHEHI V S (A33/2010) [2014] ZAFSHC 6 (13 FEBRUARY 2014)**

**Case heard 10 February 2014, Judgment delivered 13 February 2014**

This was an appeal against both the conviction and sentence. The appellant had been convicted of rape in the regional court and sentenced to life imprisonment. The appellant and the mother of the complainant had lived together for a number of years, and had two children together. The complainant alleged that she was raped by the appellant on many occasions. The trial court, however, convicted the appellant only of rape that took place on either 11 or 12 June 2008.

Van De Merwe J held:

"It is common cause that on the morning of 12 June 2008 the appellant accused the complainant of being involved in a housebreaking that took place at the house where the family resided. This resulted in an altercation between the appellant and the complainant. ... " [Paragraph 4]

"The complainant was a single witness. The essential question therefore is whether despite the shortcomings, defects or contradictions in her testimony, the trial court should have been satisfied that the truth had been told. The evidence of the complainant contains serious defects. The most important illustration hereof is that in her initial evidence the complainant made it very clear that her mother had no knowledge of the alleged continuous rapes at all. In later evidence however, she testified that on these occasions her mother in fact encouraged the appellant to have sexual intercourse with her and that on occasion her mother held her down and opened her legs to enable the appellant to rape her as well as closed her mouth to prevent her from screaming. This and other defects in her evidence were not satisfactory explained." [Paragraph 5]

"Relying on the evidence of the forensic examination, the trial court nevertheless convicted the appellant. In my judgment the trial court erred. The regional magistrate said that expert evidence given in other cases indicated that normally injuries would not be noted where a person had been raped more than 72 hours before the time of the examination and that it can therefore be safely assumed that the injuries were inflicted within 72 hours before 16h45 on 12 June 2008. This is not permissible. It is trite that unless judicial notice can be taken of a fact, a court can only rely on the evidentiary material in the specific case before it. The exact nature of the injuries and the time of infliction thereof certainly are not notorious facts of which judicial notice could be taken. It is also trite that the verdict in a criminal case must account for all the evidence in the matter. In this regard the trial court failed to take into account that despite the allegation of the complainant that she had been raped on several occasions and that there had been deep penetration, there was no injury to the hymen at all. This casts considerable doubt on her evidence. In addition, on her own evidence, the complainant was clearly not raped on either the 11th of the 12th June 2008. It appears from the evidence that during the week the appellant stayed on

another farm. According to the complainant the appellant arrived at home early on the morning of Thursday 12 June 2008 whereafter the said altercation took place and no sexual intercourse took place" [Paragraph 6]

"In the result, whatever the merits or demerits of the appellant's denial of the charge against him, the trial court should have at least entertained a reasonable doubt as to the appellant's guilt." [Paragraph 7]

The appeal was upheld and both the conviction and sentence were set aside

## ADMINISTRATION OF JUSTICE

**SH V GF AND OTHERS 2013 (6) SA 621 (SCA)**

**Case heard 10 September 2013, Judgment delivered 30 September 2013**

At issue in this case was whether the SCA should interfere with the sanction for contempt of court imposed on first respondent by the High Court. The parties had been married, with two children, but the marriage did not endure and was dissolved by order of the High Court. In terms of the settlement agreement, appellant was awarded custody of the children, subject to reasonable access rights for the respondent.

Van Der Merwe AJA (Mthiyane AP, Theron and Petse JJA and Zondi AJA concurring) held:

"… [W]ithin a few years disputes arose between the parties in respect of the payment of maintenance for the children. Despite attempts at settlement, these disputes and the acrimony between the parties escalated and … the appellant obtained a writ of execution against the movable goods of the respondent …, consisting of alleged arrear maintenance in terms of the maintenance order … The respondent responded … by issuing an application for setting aside the writ of execution on the ground that he was not in breach of his obligations … The appellant in turn filed a counter-application in which she, inter alia, claimed an order declaring the respondent to be in contempt of court, in that he wilfully and mala fide breached the provisions of the maintenance order, and an order committing the respondent to imprisonment or imposing an appropriate suspended sentence." [Paragraphs 5 - 6]

"When the court a quo imposed the sanction, it did so in the exercise of a discretion in the strict sense. This court can therefore only interfere with the exercise thereof if the court a quo had been influenced by a wrong principle of law, or a misdirection of fact, or if it failed to exercise a discretion at all. …I am prepared to accept that if the amount of arrear maintenance at the relevant date should have been determined by the court a quo at a substantially greater amount … a material misdirection would be established. I therefore turn to this question. " [Paragraphs 9 - 10]

"Both parties were acutely aware of the non-variation clause and the requirement that a variation of the maintenance order must be in writing and signed by both parties or ordered by a competent court. … In context the parties in my judgment did not intend the arrangement of 11 August 2008 to constitute a variation of the maintenance order. What was envisaged was clearly that if the trial period should prove to be successful, a formal variation would be brought about and, until that takes place, there is no variation of the maintenance order. If the respondent complied with the arrangement during the trial period, he would of course not be in mala fide disregard of the maintenance order. I find therefore that the court a quo erred in concluding that the maintenance order was in fact varied." [Paragraph 15]

"In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution. ... Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in Shifren. ..." [Paragraph 16]

"... The court a quo correctly found that on his own version the respondent failed to comply with para 4 of the maintenance order for the period February to October 2010. Even though I have found that the maintenance order was not varied, the question remains whether it could be determined on the papers whether the respondent was in arrears in respect of para 4 of the maintenance order as at the end of January 2010, and/or in respect of para 5 thereof as at the end of October 2010 and, if so, in what amount." [Paragraph 17]

"... [T]he papers reveal material disputes of fact. ... It is trite that in the case of factual disputes in motion proceedings the version of the respondent must be accepted for purposes of determination thereof, irrespective of where the onus lies, unless that version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. ..." [Paragraph 18]

"... I am not persuaded that the evidence of the respondent can be rejected out of hand. The respondent detailed specific amounts allegedly paid during each month for the period from May 2008 to March 2010 ... It appears unlikely that this is a fabrication. In my view it cannot be said that the respondent will not be able to establish these payments at a trial. ..." [Paragraph 20]

"In terms of s 28(2) of the Constitution the best interests of the children are of paramount importance in this matter. It is unfortunate therefore that it cannot presently be determined which amount remains owing in respect of the maintenance of the children for the period up to October 2010. The appellant and the children are however not without remedy in this regard. The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in s 28 of the Constitution, and to uphold the dignity and equality of women. ... The Maintenance Act ... provides for measures in this respect, dealt with fully below. These measures are available on the basis of the finding of this court that the maintenance order was not varied." [Paragraph 22]

"...It is clear that the court below intended by the sanction in question to enforce arrear maintenance only. I am not persuaded that that constituted an improper exercise of its discretion. ..." [Paragraph 23]

The appeal was dismissed.

## SELECTED JUDGMENTS

## COMMERCIAL LAW

### JANSE VAN RENSBURG AND ANOTHER V GRIFFITHS (2101/2002) [2014] ZAECPEHC 20; [2014] 2 ALL SA 670 (ECP)

**Case heard 12-13 August 2013, Judgment delivered 25 March 2014**

The trustees of an insolvent trust brought action proceedings against the defendant, who was a creditor of the trust and had been paid R224 000.00 in four instalments within 6 months prior to the sequestration of the trust. Prior to sequestration, the trust had been conducting a pyramid scheme arrangement, and the defendant had been an investor who withdrew his funds out just before the sequestration, to the disadvantage of other investors. The plaintiffs sought to have the disposition set aside as being a voidable preference in terms of s 29 of the Insolvency Act.

Brooks AJ held:

"The test as to whether a disposition is made in the ordinary course of business is an objective test. It amounts to a consideration of whether having regard to the terms of a transaction and the circumstances under which it was entered into, the conclusion can be reached that the transaction was one which would normally have been entered into by solvent business persons. … [T]he test is a wide one, in which regard must be had to all the circumstances under which the disposition under scrutiny took place. …" [Paragraph 16]

"… [A] disposition made in the ordinary course of business of a business such as that run by Usapho Trust, in the context of s29 (1) of the Insolvency Act, means a "lawful" disposition made in the ordinary course of a "lawful" business." [Paragraph 23]

"It follows further that I am of the respectful opinion that if I am wrong in discerning the intention of the Supreme Court of Appeal, and if by saying that what is required "is a close scrutiny of the dispositions itself (sic), viewed against the background of its (sic) causa" the Supreme Court of Appeal indeed intended to restate what the principle of law is to be applied in the approach to the question of whether a disposition falls within the ordinary course of business, then, with respect, it erred." [Paragraph 29]

"I am of the respectful opinion that the explanation for the apparent contradiction is more prosaic. In my view … the ratio of the decision in Gazit Properties v Botha & Others N N O 2012 (2) SA 306 (SCA) must be limited to a finding that on the agreed facts of that case, and the narrow contentions relied upon, the disposition in question was one in the ordinary course of business. If this is correct, the decision is innocent of … a departure from the well-entrenched application of the broad approach maintained in the earlier judgments of the Supreme Court of Appeal … In my view, that is as it should be. I find the well-established principle of the broad approach to remain intact and to be applicable in this matter." [Paragraph 30]

"… I am readily persuaded that the dispositions made to defendant in this matter cannot be said to have been made in the ordinary course of business by or on behalf of Usapho Trust. The illegality of the business operations, the manner in which participation therein was secured and the exorbitant returns on "investment" alone are features which militate against a different conclusion. Taken together with the

other factors, these features make the decision that the dispositions were made other than in the ordinary course of business of Usapho Trust, irresistible." [Paragraph 31]

The action succeeded and each disposition made by the Trust to the defendant was set aside.

## CIVIL PROCEDURE

### SIJEKU V MOTOR FINANCE CORPORATION A DIVISION OF NEDBANK LIMITED 2015 JDR 2299 (ECM)

**Case heard 15 October 2015, Judgment delivered 15 October 2015**

Applicant had sought recession of a default judgment. Respondent filed a notice of intention to oppose and an answering affidavit. Applicant filed no replying affidavit and did not take steps to obtain a date for the hearing of the matter.

Brooks AJ held:

"According to the applicant's founding affidavit, the applicant only became aware of the default judgment against her on 24 March 2014. On this date, a notice of acting was filed by the applicant's attorneys of record. In accordance with the provisions of Rule 31(2)(b) of the Uniform Rules of Court, the present application should have been launched within twenty days, i.e. by 24 April 2014. This was not done. The applicant's only explanation for the fact that the application was launched five months after she became aware of the default judgment was that she needed to raise funds to pay her attorney of record. No details are given about the conduct of this process." [Paragraph 13]

"The applicant's reasons for default must be fully and sufficiently set out so that the court can assess the applicant's conduct and motives and the applicant must prove, not only allege, a good cause for a recission. Good cause includes but is not limited to a substantial defence. … The grounds of the applicant's defence must be set forth with sufficient detail to enable the court to conclude that there is in fact a bona fide defence and the application is not merely for the purpose of harassing the respondent. 4" [Paragraph 16 - 17]

"In her founding affidavit, the applicant fails to explain why it took five months to collect the funds required to approach her attorney and what was specifically done during those five months. There is also no explanation for the fact that the notice of acting was filed by the applicant's attorneys of record on 24 March 2014, the same day as the applicant alleges that she became aware of the existence of the default judgment. The contradiction between the activity of the attorneys and the need for the applicant to place them in funds, leading to a delay of five months, is readily apparent. It suggests, as does the unexplained coincidence of the notice of acting emerging on the very day that the applicant became aware of the default judgment, that the applicant has been less than candid with the court in explaining the circumstances of her default and the delay in bringing her application." [Paragraph 18]

"The applicant has also failed to set out clearly and fully the nature of the defence which she claims to rely upon ... The action has to do with the cancellation of a vehicle finance agreement and the concomitant return of a motor vehicle. The applicant admits that she was in default of her obligation to make regular payment ... She claims that she had the wrong account number and that she had spoken

with "a Toyota finance lady" about the problem. She stopped paying because she expected to sign a new contract and she wanted the respondent to attend to the problem." [Paragraph 19]

"In my view, the applicant's allegations relating to a defence are vague and insufficient to enable the court to accept that she is bona fide in bringing the application. … The entire application is characterised by substantial delays on the part of the applicant. These combine with the applicant's failure to file a replying affidavit and her failure to apply to the registrar for the allocation of a date for the hearing of the application, to create the impression that the applicant is not bona fide in bringing the application and wishes simply to delay the finalisation of the respondent's claim. In these circumstances the respondent has been prejudiced by the unreasonable delays which have occurred and has been put to additional legal expenses which should have been avoided. The applicant's conduct of the application is deserving of the censure of the court." [Paragraphs 20 - 21]

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

**FUTSHANE V KING SABATA DALIDYEBO MUNICIPALITY AND OTHERS (1529/2013) [2014] ZAECMHC 38**

**Case heard 11November 2014, Judgment delivered 14 November 2014**

This was an application to have warrants of execution declared unlawful and set aside. The applicant also sought an interdict preventing the respondents from issuing future writs of execution. Applicant also sought an order prohibiting the sale in execution of her immovable property, advertising of such sale or transfer of the property as a consequence of an unlawful sale.

Brooks AJ held:

"… [R]espondents filed a notice … setting out their objection to the application on a point of law. No answering affidavit was filed of record. The respondents appear to rely exclusively on the notice in terms of the subrule. In such circumstances, the allegation in the applicant's founding affidavit must be taken as established facts by the court. …" [Paragraph 5]

"The underlying principle of the defence of lis alibi pendens is well established. Both the defence of lis alibi pendens and the defence of res judicata have the common underlying principle that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit should generally be brought to its conclusion before that tribunal and should not be replicated. So too will a suit not be permitted to revive once it has been brought to its proper conclusion. …" [Paragraph 7]

"… Whilst special procedures are in place for the initial enrolment of an urgent application, the roll onto which it is placed is not a special roll, but the ordinary roll; only the circumstances peculiar to any application which may render it urgent clothe it with any form of special status." [Paragraph 10]

"Consequently, I am of the view that it cannot be said of a matter which is struck from the roll that it remains pending thereafter. The state of dormancy which shrouds any matter which has been struck from the roll militates against any further attention being given to that matter in the absence of special steps being taken … to reinvigorate the matter and to secure its return to the roll. It seems to me to be an irresistible and logical requirement that for a matter to qualify for consideration under a plea of lis

alibi pendens it must be a matter which is pending in the sense that it remains enrolled and requiring the attention of the tribunal before which it has been placed, or at least can simply be re-enrolled by either party without any special step being required to reinvigorate the matter." [Paragraph 11]

"It follows that I am of the view that the dormant status of the application brought under case number 941/2012 disqualifies it for consideration under the plea of lis alibi pendens which is effectively raised by the respondents' notice ..." [Paragraph 12]

"Even if I were wrong … the plea of lis alibi pendens must fail in this matter for other reasons. Whilst it is so that the parties in both matters are the same, in my view there are significant differences in other areas. Firstly, central to the applicant's cause of action in this matter is the complaint that the warrants of execution and re-issued writs which have been issued against her immovable property have been issued without the issue of a pre-requisite order from a judge declaring that immovable property to be executable. It is well established that this is a necessary precursor to any execution process against immovable property. ... The absence of this jurisdictional requirement was not a feature in the cause of action relied upon in the application brought under case number 941/2012. Moreover, that application concerned itself with issues arising out of reliance by the respondents upon a single warrant of execution; the present matter is concerned with issues arising from their reliance upon the same warrant of execution, but the scope of the application is broader in that it targets reliance upon that warrant of execution, together with other writs which were issued and served well after the date upon which the application under case number 941/2012 was commenced. In addition, the relief claimed in the present matter is much broader than the scope of the relief in the earlier application. Accordingly, it cannot be said that the same suit between the parties has now been duplicated." [Paragraph 13]

"… [E]ven if I were wrong on both points upon which I have determined that the plea of lis alibi pendens cannot succeed, that plea does not constitute an absolute bar to the present application proceedings. The court remains vested with a discretion to allow the present application to proceed if that would be more just and equitable in the circumstances. ..." [Paragraph 14]

"Were I to be called upon to exercise that discretion, I would be inclined to allow the present application to proceed. In my view, that would be more just and equitable in the circumstances than requiring the applicant to file an explanatory affidavit in a quest to reinvigorate and re-enrol the application brought under case number 941/2012, to then seek leave to amend the notice of motion in that matter and to file a supplementary affidavit dealing with all the events that have occurred subsequent to the date of issue of that application and to introduce the central cause of action which is absent therefrom." [Paragraph 15]

"Accordingly, from whichever perspective, I am of the view that the complaint of lis alibi pendens raised by the respondents in their notice … is without merit and falls to be dismissed." [Paragraph 16]

"No answering affidavit having been filed, the allegations made in the founding affidavit are to be accepted as the correct factual basis upon which consideration must be given to the entitlement to the relief claimed. ... In my view, all the activity on the part of the respondents which is identified in the founding affidavit is tainted by the single allegation that no order of court declaring the applicant's immovable property executable was obtained before a warrant of execution was issued against that property. In light of this all pervading condition of illegality, it becomes unnecessary to analyse the factual matrix in any greater detail. ..." [Paragraph 17]

The application succeeded.

**NJOMANE V EXECUTIVE MAYOR KING SABATA DALIDYEBO MUNICIPALITY AND ANOTHER (24426A/2013) [2014] ZAECMHC 41**

**Case heard 13 November 2014, Judgment delivered 14 November 2014**

The applicant sought the variation of a previous court order, alternatively the payment of a sum of R2.3. million. The respondents opposed the application on the ground that the relief sought relied on an agreement, the validity of which was in dispute.

Brooks AJ held:

"… [T]he approach adopted by the applicant in his replying affidavit and the argument advanced on his behalf make it clear that the applicant understood the respondents' intentions. No prejudice accrues to the applicant by virtue of the respondents' failure to include a formal notice of motion in their answering papers. … [T]o ignore the application for rescission on this ground alone would be emphasising form over substance in a manner which pays no heed to the clearly expressed intentions of the parties and which would operate against serving the interests of justice in this matter. In light of the long history of litigation between the parties, it is in the interests of justice that consideration should be given to the application for rescission as it manifests itself in these application papers, rather than to require that a fresh application be brought. …" [Paragraph 10]

"The question which arises is whether the respondents have given a reasonable and satisfactory explanation for their default which demonstrates that their failure to file a notice of opposition was not caused by wilful or gross negligence on their part. In my view, in the peculiar circumstances of this matter … the prospect of vested interests leading to a failure on the part of those who were notified of the launch and outcome of the proceedings commenced under case number 2426/2013 to bring those events to the attention of the respondents cannot be ruled out. The application's [sic] choice to proceed under a new case number rather than to continue to utilise the same case number with which the extra curial agreement would be more readily associated was also of little assistance in ensuring that the proceedings came to the notice of the respondents. Accordingly, I am of the view that the respondents have given an adequate explanation for their failure to file a notice of opposition." [Paragraph 12]

"Consideration must also be given to the nature of the opposition or defence which the respondents claim they wish to advance … I am of the view that the demonstration of a lack of authority … to conclude an extra curial settlement agreement on behalf of the municipality would constitute a valid defence. This is raised pertinently by the respondents in the answering affidavit. … [I]t is not an allegation which amounts to a bald or uncreditworthy denial, or which raises a fictitious dispute of fact, or which is palpably implausible, far-fetched or clearly untenable, justifying the rejection of the allegation merely on the papers. … [T]he respondents demonstrate therein a proper defence which is not raised simply to delay the applicant's claim." [Paragraph 13]

"These proceedings are about the resolution of legal issues based on common cause facts. They cannot be used to determine factual issues because they are not designed to determine probabilities. The applicant would only be entitled to final relief if the facts averred in the applicant's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify an order for final relief. Plainly, on an application of this principle to the affidavits which have been filed in this matter, the

applicant cannot succeed in obtaining final relief. The applicant relies on an agreement to which a challenge of invalidity has been raised. No common cause facts support the grant of relief in favour of the applicant." [Paragraph 14]

The application was dismissed.

**VRM BOERDERY CC AND ANOTHER V VAN ZYL (3554/2013) [2014] ZAECGHC 46**

**Case heard 15 May 2014, Judgment delivered 28 May 2014**

This case arose from an action proceeding in which the plaintiffs sought transfer of certain portions of immovable property from a farm owned by the defendant to the first plaintiff. The plaintiff's claim was based upon an oral agreement, which was never reduced to writing. Defendant raised an exception to the plaintiff's particulars of claim, arguing that plaintiffs lacked locus standi, and that the particulars failed to disclose a cause of action.

Brooks AJ held:

"… In order to succeed on exception, the excipient has the duty to persuade the court that upon every interpretation on which the pleading is based, no cause of action or defence is disclosed. The principle that for purposes of determination of the exception the facts in the relevant pleading must be accepted as correct does not extend to inferences and conclusions not warranted by allegations of fact. The court is not obliged to stultify itself by accepting allegations of "fact" which are manifestly false i.e. allegations which are so removed from reality that they cannot possibly be proved." [Paragraph 6]

"In my view, the end result of an objective consideration of the manner in which the terms of the agreement entered into by Van Rensburg and defendant on 15 October 1994 have been expressed in the particulars of claim, leads irresistibly to the conclusion that the agreement relates to an initial contribution as contemplated by the provisions of s 50 of the Close Corporations Act." [Paragraph 11]

"The principle that in appropriate circumstances a member of a close corporation may institute proceedings on behalf of the close corporation … is emphasized … in the provisions of s 24(5) of the Close Corporations Act. …" [Paragraph 12]

"… [O]n a plain reading of the provisions of s 24(5) of the Close Corporations Act, to the extent that second plaintiff pleads … that she instituted proceedings against defendant personally, her claim must fail. " [Paragraph 13]

"Two issues arise. The first relates to the nature of the right created by the oral agreement concluded on 15th October 1994 in respect of the farm Harmonie. The second relates to the extent to which the right can be enforced on behalf of first plaintiff." [Paragraph 17]

"In my view, it is the real right in the farm Harmonie which plaintiffs seek to enforce. If it accrues at all, this real right accrues to first plaintiff. The inability of second plaintiff to enforce this real right in her personal capacity has already been identified earlier in this judgment." [Paragraph 19]

"It is trite law that the effect of non-compliance with the requirements of s 2(1) of the Alienation of Land Act … is that the contract "shall not be of any force and effect. …" [Paragraph 20]

"It is a well-entrenched principle of our law that a future right or spes (the hope or expectation that a right in future materialize) [sic] is capable of cession. If the cession of a spes is taken at face value, the right, when it does accrue, will vest in the cessionary. In terms of the transfer agreement in anticipando it passes to the cessionary forthwith. It is a two stage procedure. To be effective as a cession in anticipando the agreement must comply with all the substantive and formal requirements of a transfer agreement, including, where applicable, the Alienation of Land Act ..." [Paragraph 21]

"In my view, the argument against plaintiffs on the point must succeed. No agreement which purports to extend the date of performance of any obligation arising out of the association agreement beyond the 90 day period referred to in s 24(4) of the Close Corporations Act is permissible. Such agreement is expressly prohibited by the provisions of s44 of the Close Corporations Act." [Paragraph 26]

"Moreover ... the requirement that the transfer of the real right in the farm Harmonie to first plaintiff could only be accomplished by due compliance with the provisions of s 2(1) of the Alienation of Land Act ... produces the inevitable conclusion that ... the oral agreement between van Rensburg and defendant concluded on 15th October 1994 was void ab initio." [Paragraph 27]

"It follows that the exception based on the assertion that the particulars of claim do not disclose a cause of action must also succeed." [Paragraph 29]

The exception was upheld.

## CRIMINAL JUSTICE

**PLAATJIES V S (CA & R 25/14) [2014] ZAECGHC 108**

**Case heard 5 November 2014, Judgment delivered 11 December 2014**

This was an appeal against sentence, the appellant pleaded guilty to a charge of fraud in terms of s112 (2) of the Criminal Procedure Act.

Brooks AJ (Plasket J concurring) held:

"It is trite that a court of appeal is not free to interfere with the sentencing discretion of a trial court. It will do so only in circumstances where there has been a material misdirection by the trial court in the exercise of its sentencing discretion or where the disparity between the sentence imposed by the trial court and the sentence which the appeal court would have imposed had it been the trial court, is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"." [Paragraph 5]

"As a direct consequence of the misdirections demonstrated in the magistrate's approach to the evidence, he concluded that a non-custodial sentence is therefore not necessary to ensure the nurturing of the minor children. He stated further that a custodial sentence will not inappropriately compromise the best interests of the children. Moreover, he stated that none of the reports before court, or the evidence, suggest that the fundamental needs or the basic interests of the children will be neglected if their mother were to be incarcerated. In my view, these conclusions find no foundation in a proper analysis of the various reports in the light of the evidence led." [Paragraph 21]

"As a result of the substantial misdirections on the part of the magistrate, this court is entitled to interfere with his sentencing discretion and to revisit the identification of a sentence which is appropriate in all the circumstances of this matter." [Paragraph 22]

" … [T]he facts in this matter differ remarkably from those usually present in cases involving charges of fraud. The fact that the appellant derived no personal financial benefit from her fraudulent activity and was motivated solely by a desire to ensure a secure stream of funding for Ethembeni are strong mitigating factors. They provide a strong foundation for finding that a non-custodial sentence would be appropriate in the circumstances of this matter. However, the direction taken in the proceedings in the court below concentrated on the appellant's personal circumstances, and particularly the effect which her imprisonment might have upon her two minor children. In my view, it is desirable, for the sake of completeness, to retain most of the resultant evidence for consideration by this court of what would be an appropriate sentence." [Paragraph 23]

"The Constitutional Court has described correctional supervision as: "an innovative form of sentence, which is used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can serve to protect society without the destructive impact incarceration can have on a convicted criminal's innocent family members"." [Paragraph 26]

"It is also clear from S v M (Centre for Child Law Intervening as Amicus Curiae) that primarily, the question whether the appropriate sentence is a custodial one must be determined with reference to the triad identified in S v Zinn consisting of the crime, the offender and the interests of society. Where it is determined that there could be more than one appropriate sentence, the children will weigh as an independent factor to be considered." [Paragraph 27]

"… The elements identified as the role of Kila in the manipulation of the appellant, the appellant's ongoing desire to make a contribution to society, her lack of benefit derived from her fraud and her status as a first offender, in my view, are factors which favour the imposition of correctional supervision as an appropriate sentence. Adopting the approach expressed in S v M (Centre for Child Law Intervening), to this consideration must now be added the paramountcy principle concerning the interests of the two minor children. In my view, this approach identifies correctional supervision as the sentence best suited to all the circumstances of this matter." [Paragraph 28]

"Given the full range of reports placed before the magistrate and the nature and extent of the evidence led, it is not appropriate to remit the matter to the sentencing court to impose sentence afresh. This court is in a position to impose an appropriate sentence. It is in the interests of all concerned to bring the matter to finality." [Paragraph 29]

The Appeal was upheld. The appellant's sentence was set aside and replaced with one placing her under correctional supervision.

## SELECTED JUDGMENTS

### PRIVATE LAW

**MNQUBENI V RAF [2008] JOL 21842 (CK), CASE NO. 250/07**

**Case heard 21 December 2007, Judgment delivered 22 May 2008**

The plaintiff sued the Road Accident Fund after her grandson (Xolani) was injured in a collision with a motor vehicle whilst riding his bicycle. She claimed damages in her capacity as her grandson's guardian for bodily injuries incurred by him. The parties agreed to separate from merits from quantum.

Cossie AJ held:

"In this matter we are dealing with two mutually destructive versions. The defendant has conceded being liable, but contends that Xolani also contributed to the collision, he having been negligent, *inter alia*, in riding into the path of travel of the insured driver at a dangerous and inopportune time. I must determine whether the collision occurred solely as a result of negligent conduct on the part of the insured driver or whether Xolani also contributed, through negligent conduct on his part, as well. Where a court is faced with two mutually destructive versions the rule as set out in the judgment of Eksteen JA in *National Employer's General Insurance Co Ltd v Jagers*... should be followed, namely, a plaintiff can only succeed if: '...he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version... is therefore false or mistaken and falls to be rejected'" [Paragraph 10]

"I prefer the version of the plaintiff to that of the defendant. There are a lot of improbabilities in the latter version, whereas the version of the plaintiff is clear and straightforward. The witness for the plaintiff was credible despite his age. He gave straightforward evidence and was not shaken in any manner under cross-examination. However, the same cannot be said about the witness for the defendant..." [Paragraph 11]

"On the defendant's version it is evident that reasonable care was not exercised by the driver of the insured vehicle and in the circumstances there can be no degree of contributory negligence on the part of the plaintiff and there is also no scope for damages on the plaintiff's version... I am satisfied that the plaintiff has discharged the onus resting on him to prove liability and that the insured driver's negligence was the sole cause of the collision. On the facts I cannot find that Xolani was negligent either in causing the collision or by failing to avoid it." [Paragraph 12-13]

The application succeeded and the defendant was to be held liable for the plaintiff's proven damages.

**ADMINISTRATIVE JUSTICE**

**NTSHIBA V MEC, ECONOMIC AFFAIRS, ENVIRONMENT & TOURISM, EASTERN CAPE PROVINCE & ANOTHER [2008] JOL 21481 (Ck)**

**Judgment delivered: 14 February 2008**

The applicant was appointed as Chairperson of the Eastern Cape Provincial Liquor Board, in which position he served for a period of about 4 years. Having not obtained any compensation, he sought compensation for rendering duties in that position. The issue in dispute was whether the applicant was entitled to be remunerated for services he rendered to the Liquor Board.

Cossie AJ first stated the material facts that were common cause in the matter:

"The applicant is employed as senior legal administration officer in the Shared Legal Services section in the office of the Premier of the Eastern Cape Province in Bisho… was appointed as Chairperson of the Eastern Cape Provincial Liquor Board ("the Liquor Board") on or about 19 June 2000 and served in that capacity continuously until August 2004…" [Paragraph 1-2]

"Before his appointment as Chairperson…the Chairperson then being one Mr Lukwango-Mugerwa ("Mugerwa") who was employed in a rank and post equivalent to his own and who had in addition been remunerated for serving as Chairperson…The applicant was not remunerated for his services as Chairperson…The applicant over an extended period of time made numerous representations to various functionaries and officials for him to be remunerated for services he rendered to the Liquor Board without success. Eventually…Mr Godongwana, the MEC then in office, approved the payment of such remuneration per memo dated 26 February 2002…" [Paragraph 4-6]

"Despite such approval and the legal opinion supporting such approval the second respondent, the Head of Department at the time these proceedings were instituted, ignored calls to pay the applicant for services rendered as Chairperson of the Board hence this application… The remuneration sought by the applicant, which in fact is "top up" payment, amounts to R799 199,27." [Paragraph 7-8]

Cossie AJ then held:

"The applicant's contention is that his claim is based on sections 41(1)(i), 41(3)(a) and 28 of the Public Service Act ("the Act") read together with Public Service Regulations …In terms of *B5* of Part VII of the Regulations an employee is entitled to compensation for acting in a higher vacant post. This is commonly known as 'top up'." [Paragraph 11-13]

"In the present case a decision was made by the respondents' predecessors that applicant should be remunerated for services rendered to the Liquor Board and that decision has not been withdrawn or cancelled…The decision was made by an executing authority within the powers delegated to him both in terms of the Public Service Act and the Public Finance Management Act read together with prescripts applicable thereto." [Paragraph 35-36]

" There are no allegations made that the decision was unlawful or that steps were being taken to set it aside or that the approved remuneration purportedly due to the applicant constituted an unauthorised expenditure....In the absence of such allegations the decision to pay applicant the approved remuneration remains valid and enforceable. " [Paragraph 37- 38]

"In my view, the applicant is an employee in terms of section 8(1) of the Public Service Act ... and the prescripts that govern the public service are also applicable to him and is therefore entitled to rely on them. His appointment to the Liquor Board as a "serving office bearer" that is, a person in the employ of the State did not preclude him from such benefits." [Paragraph 39]

"There is no doubt that the applicant had a legitimate expectation that he would be paid as per approval by both offices of the predecessors of the respondents." [Paragraph 41]

"In reviewing the second respondent's decision not to pay the applicant the additional remuneration it is necessary to analyse her reasons for such a decision to determine whether they measure up to her powers as provided for in the statutes empowering her to do so, having regard to the fact that there is prior approval for payment of such additional remuneration by her predecessor and the then MEC responsible for Liquor Board matters. " [Paragraph 43]

"Furthermore it would be necessary to determine whether such decision constitutes an "administrative action". The second respondent's action falls squarely within the definition of administrative action as contained in section 1 of Promotion of Administrative Justice Act ..." [Paragraph 44]

"In the present case a decision was taken by the respondents' predecessors to pay applicant "top up" remuneration and that constituted an "administrative action". The decision was based on legal framework and delegated authority applicable at the time. I am of the view that applicant is entitled to have the decision of the second respondent judicially reviewed in accordance with the provision of PAJA" [Paragraph 46]

"For the reasons set out above, I have come to the conclusion that the applicant was successful in establishing a case for judicial review of the second respondent's decision not to pay the applicant such additional remuneration as he was entitled to, in terms of the applicable prescripts in the public service for performing duties as Chairperson of the Provincial Liquor Board." [Paragraph 49]

The decision taken not to pay the applicant such additional remuneration as he was entitled to in was reviewed and set aside and declared unlawful, unconstitutional, void and without legal force and effect. The respondents were ordered to pay to the applicant all outstanding remuneration plus interest that should have been paid to him *qua* Chairperson of the Provincial Liquor Board from 19 June 2000 to September 2004.

**CRANKSHAW & OTHERS V MEC, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE & OTHERS [2008] JOL 22704 (Ck)**

**Judgment delivered 11 November 2008**

As representatives of certain independent schools, the applicants instituted proceedings against the respondents, seeking the review of the respondents' decision to reduce the applicants' subsidy (originally granted in terms of section 48(2) of the South African Schools Act ("the Schools Act")) for the years 2003, 2004 and 2005 in contravention of the provisions of the National Norms and Standard published by the third respondent in the *Government Gazette* ("the Norms and Standards"). The amount of the subsidy had to be determined each year by reference to the variables set out in the formula provided in the Norms and Standards by the Provincial Department of Education. The issues for determination were whether the decision by the respondents to pay a reduced subsidy to the applicants constituted "administrative action"; and, if so whether the respondents were obliged to give the applicants a hearing prior to the decision to reduce the subsidy and whether the respondents did give the applicants a hearing before reducing the subsidy.

Cossie AJ held:

"The first issue, that is, whether payment of subsidies in terms of section 48(2) of the Schools Act constituted administrative action was considered by Leach J in *Ed-U-College* (*PE*) *Incorporated v Permanent Secretary*, *Department of Education & Welfare*, *Eastern Cape*... The conclusion reached by the Constitutional Court in this regard in the matter of *Permanent Secretary*, *Department of Education*, *Eastern Cape & another v Ed-U-College (PE)* was consistent with that reached by the court a quo. The Constitutional Court ... observed that section 48(2) of the Schools Act empowered the MEC to grant subsidies to independent schools from monies allocated for that purpose by the Legislature. The determination which schools should be afforded subsidies and the allocation of such subsidies were primarily administrative tasks....Accordingly, this Court following both decisions of Leach J and the Constitutional Court in *Ed-U-College* (*PE*) *Inc*, holds the view that the decision of the respondents to pay less subsidy to the applicants constitutes an "administrative action" within the meaning of section 33 of the Constitution." [Paragraph 30-32]

"The second question to be determined by this Court is whether the respondents were obliged to give the applicants a hearing prior to reducing the subsidy and whether the respondents gave the applicants such a hearing...The respondents argued that it is not the case of the applicants that prior to 2003 they were receiving full subsidy in terms of Norms and Standards...there is no basis for the applicants to harbour any legitimate expectation because the granting of a subsidy to an independent school is subject to the availability of funds from the provincial Department of Education. The applicants' legitimate expectation could not be based on the legislative framework and Norms and Standards promulgated by the respondents." [Paragraph 33-34]

"In the matter of *Premier*, *Mpumalanga* the concept of legitimate expectation was dealt with at length. Corbett CJ in *Administrator*, *Transvaal & others v Traub & others* considered in detail the origins and development of the concept of legitimate expectation in English law. He ruled that a legitimate expectation must have a reasonable basis and in considering what conduct would give

rise to a legitimate expectation, he cited the speech of Lord Roshill… *Service* as follows: 'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.'" [Paragraph 35]

"Corbett CJ also recognised that a legitimate expectation might arise in at least two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing, and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made." [Paragraph 36]

"In the present matter the applicants rely on the legislative framework and Norms and Standards promulgated by the respondents. However the granting of a subsidy to an independent school depends on the availability of funds in the Provincial Education Department and furthermore it is not the case of the applicants that prior to the 2003 financial year they were receiving full subsidies. There was also no promise or undertaking by the respondents that subsidies will always be paid in full." [Paragraph 37]

"In all these circumstances the applicants have failed to establish that they had a legitimate expectation that they would receive subsidies in the amounts claimed and calculated in terms of the formula applicable under Norms and Standards. This matter must be distinguished from the *Premier*, *Mpumalanga & another v Executive Committee*, *Association of Governing Bodies of State-Aided Schools*, *Eastern Transvaal…*matter. In that case the court was concerned with a retroactive termination of bursaries already granted whereas this Court is concerned with a decision to allocate subsidies in circumstances where the amount available for distribution has been reduced by the Legislature." [Paragraph 38]

"The next question that arises is whether the payment of less subsidy to the applicants was procedurally unfair because they were never given a hearing by the respondents prior to such decision being taken. In the *Premier*, *Mpumalanga* case it was held that:

'. . . if a legitimate expectation has arisen concerning the grant of subsidies then any decision to alter or vary subsidies granted must be taken with due regard to procedural fairness. Procedural fairness will not require that a right to a hearing be given to all affected persons simply because a decision is to be taken which has the effect of reducing the amount to be paid. Subsidies are paid annually and given the precarious financial circumstances of education departments at present, schools and parents cannot assume in the absence of any undertaking or promise by an education department that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the Legislature has reduced the amount allocated for distribution.'" [Paragraph 40]

"The other matter that has to be considered by this Court is the submission made by the respondents that it would not be appropriate for this Court to grant an order directing the respondents to pay to the applicants the monies set out in the notice of motion …I …conclude that this argument is not valid. If a court arrives at a conclusion that the government owes money to a

litigant, the fact that the government has not budgeted for such payment cannot deprive the court of the power to make an appropriate order…This conclusion is consistent with that reached by Leach J in the court of the first instance and O'Regan J in the Constitutional Court in the matter of *Ed-U-College*." [Paragraphs 41-42]

"The courts have also taken a decision in this regard, namely, that a person whose legitimate expectation has not been considered is limited to a procedural right to be heard and not a legal right to seek specific performance. …" [Paragraph 43]

The decision taken by the first and second respondents to decrease the subsidy to the applicants was reviewed and set aside. The matter was referred back to the respondents to give applicants a hearing.

## SELECTED JUDGMENTS

### PRIVATE LAW

**MAHLANTSI V MINISTER OF SAFETY AND SECURITY AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO.: 1731/10. (HIGH COURT, EASTERN CAPE, MTHATHA.)**

**Case heard 16 May 2014.**

Plaintiff claimed for damages as a result of an alleged assaulted by a police officer (the second defendant) in the employ of the first defendant and while on duty. The plaintiff alleged that, upon alighting from his employer's vehicle on a certain day, he was ordered to drop his belongings by the second defendant and a fellow colleague (who were dressed in civilian clothing while on duty), and was thereafter chased on foot, and sustained a gunshot wound to the left thumb during the pursuit.

Msizi AJ held:

"As a result of the denial of the allegation of assault upon him by the defendants, the onus rests upon the plaintiff to establish that he was assaulted by the [sic] Bebeza and that such assault was unlawful. The standard of proof is on a preponderance of probabilities. To succeed the plaintiff has to satisfy this Court that his version is true and accurate and therefore is acceptable, and that the version advanced by the defendant is false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities." [Paragraph 15]

"… Bebeza confirmed that the plaintiff had told the captain in his presence that it was Bebeza who had shot him - this also corroborates the plaintiff's version. Bebeza also testified that he had kept his firearm in his waist a further corroboration of the plaintiff's version that he saw Bebeza move his arm to his waist." [Paragraph 24]

"I conclude that the plaintiff was a credible witness who gave his evidence in a convincing impeccable manner and whose evidence was also corroborated by objective evidence intra – curial and extra – curial." [Paragraph 26]

"I am therefore amply satisfied that the considerations of the probabilities in this case indicate that the Plaintiff is telling the truth. I am therefore satisfied that he has discharged the onus resting on him that he was wrongfully and unlawfully assaulted by Bebeza. I therefore find both defendants liable for the assault upon the plaintiff, the first defendant being vicariously liable for the deeds of the Bebeza who is in his employ." [Paragraph 27]

"The onus to prove quantum of damages lies with the person claiming same. …" [Paragraph 29]

"In determining the quantum of general damages in personal injury cases the trial court essentially exercises a general discretion which is not fettered by an inexorable tariff drawn from previous similar awards." [Paragraph 30]

"The action for personal bodily injury, embracing aspects such as shock, pain and suffering, disfigurement, disabilities and loss of amenities - is not an extension of Aquilian liability which results

from actual patrimonial loss in respect of damage caused unintentionally but negligently. It is a distinct and sui generis action derived from Teutonic tribal law. …" [Paragraph 31]

"The question of costs is never easy. Whilst damages are never meant to be punitive, there is no reason that the court should not consider the issue of violation of constitutional rights in determining an award for costs. Also there is no reason why the basic principle that "costs follow the cause" should not apply." [Paragraph 39]

The claim succeeded. The defendants were ordered to pay R100 000 in damages to plaintiff jointly and severally, in addition to the costs of suit.

## COMMERCIAL LAW

### PRIMO PLANT HIRE CC V BUYAKITHI GENERAL TRADING CC, UNREPORTED JUDGEMENT, CASE NO.: 2323/13/10

**Case heard 9-10 October 2014, Judgment delivered 14 October 2014**

This was a claim for payment of a sum of R1 700 000.00, to which the respondent replied with a plea of bare denial. The respondent had a tender with Transnet to remove a large quantity of dollosse from a port. The respondent however could not perform their obligations under the contract, so the plaintiff was called in to do the work that respondent should have done. The plaintiff and respondent agreed on the amount to be paid to the applicant upon successful completion of the work. The plaintiff duly completed what needed to be done, and claimed payment in terms of their agreement. The respondent refused to pay.

Msizi AJ held:

"… It is an established principle of our law that one who alleges must prove and the standard of proof is a preponderance of probabilities. To succeed the plaintiff has to satisfy this Court that its version is true and accurate and therefore is acceptable, and that the other version advanced by the defendant is false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities." [Paragraph 10]

"The versions of the plaintiff and the defendant are mutually destructive and cannot be reconciled by any amount of ingenuity. It is trite law that to hold that an onus resting upon a plaintiff has been discharged, where there are two stories that are mutually destructive, the court must be satisfied upon adequate sound and substantial grounds that the story of the litigant upon whom the onus rests is true and the other is false." [Paragraph 11]

"I am struck by the high probability in the case of the plaintiff. I have also found its witnesses to be credible." [Paragraph 17]

"I consider the defendant's version as highly improbable. In addition to this Ntuli was a bad witness in court who gave the impressed [sic] he was reneging on an agreement he entered into without any justification. … Defendant was also unable to explain why he did not pay the plaintiff the sum of R900

0000 which according to him is what he had offered the plaintiff. He also could not explain the payment of the two sums of R45 000 and R50 000 to the plaintiff instead. His explanation was that he is the one who had the contract with Transnet. It is highly improbable that as astute business man would stand by when works commence before there is agreement on price. ...” [Paragraph 19]

“I emphathise with the defendant's legal representative Mr Mabetshu when he advised the court that he was not in a position to advance any argument in court in support of the defendant as the defendant had presented a self - conflicting case. In the circumstances, he accepted that the plaintiff had made out its case for payment.” [Paragraph 20]

The action succeeded. Judgement in favour of the plaintiff was given, the respondent was ordered to pay the outstanding amount and interest thereon.

## ADMINISTRATIVE JUSTICE

### SALDOSOL INVESTMENTS (PTY) LTD AND ANOTHER V EASTERN CAPE PARKS AND TOURISM AGENCY, UNREPORTED JUDGMENT, CASE NO.: EL 197/2014 / ECD 497/2014

This was an urgent application seeking an interim interdict to prevent the respondent from going ahead with a tender process for leasing new office premises. The applicants alleged that improper considerations were at play to ensure that the respondent would award the tender to the same joint venture partnership it had awarded it to previosuly. One way this was illustrated was by adducing evidence that in 2013 the respondent had a staff compliment of 119 and required 2000 square meters, whereas for 2014 the staff compliment had reduced to 114, but the minimum useable area requirement was increased by 600 square meters. This increase in useable area was argued to be arbitrary and solely made as specification criteria to favour the previosly selected applicant who could match those exact specifications.

Msizi AJ held:

“To decide whether the interim interdict should be granted or not this Court should first deal with the question of whether the applicants made out a prima facie case for the relief sought. ...” [Paragraph 31]

“An analysis of case law shows that actions relating to procurement and licensing ordinarily qualify as administrative action under the Consitution. In the case of Umfolozi Transport (Edms) Bpk v Minister van Vervoer [1997] 2 All SA 548 (A) the court having held that the award of a state tender amounted to administrative action the SCA went further to hold that the steps that had preceded the conclusion of the contract were administrative decisions taken by public officials, and that public money was being spent by a public body in the public interest.” [Paragraph 34]

“In my view, it if for this reason that ... the SCA qualified its statement to what invitations to tender to tender [sic] are by the words, "seen in isolation". The words in quote, (my own) signify that that is an exception to the general position articulated and settled earlier by that Court in its previous decisions. There is no reason advanced by the respondent for why the invitation of a 2014 tender and RFQ should, in the present case be seen in isolation. This is crucial because, as abundantly clear from the what the applicants have raised in their affidavits, the issues they complain of ar enot [sic] limited to the inivaton

for of [sic] the tender and RFQ. They include the very decision on how what is to be tendered for was determined by the respondent e.g. the location of the offices sought." [Paragraph 36]

"... I am ... satisfied that the applicants have made out a prima facie case for the interim order they seek herein. I am further satisfied that ... if for any reason not apparent to this court they [applicants] would fail, then they would have a recourse under the principle of legality. ..." [Paragraph 37]

"I reject the alternative arguments advanced on behalf of the respondents as not having been substantiated. I am not convinced that this is a case in which the Court should remit the matter back to the respondent as an administrator. Unfortunately, the respondent failed to provide this Court with reasons to sustain this argument." [Paragraph 39]

"This Court is satisfied that the applicant has made out a case for the grant of the interim interdict sought herein hence I made the order contained in paragraph 1 hereto." [Paragraph 40]

The application was successful, and the interdict was granted.

## CRIMINAL JUSTICE

**GXAGXISA V S (CAR4/16) [2016] ZAECBHC 4 (11 MARCH 2016)**

**Case heard 9 March 2016, Judgment delivered 11 March 2016**

This was an appeal against a refusal of bail. The accused was charged with attempted murder, and various firearms offences.

Msizi AJ held:

"The record reveals ... that court a quo had considered the provisions of section 60(4). Furthermore, in determining whether the grounds listed in section 60(4) the court a quo also considered the factors listed in section 60(5)(a) and (b). ... Section 60(5)(a) enjoins the court to consider the degree of violence towards others implicit in the charge against the accused. In this regard the learned magistrate considered the evidence of the investigating officer that the state witnesses has submitted corroborating evidence on how the crime had been committed. As already mentioned, the complainant in charge one, attempted murder had been shot at five times." [Paragraphs 21 - 22]

"Section 60(5)(b) further enjoins the Court to consider the threat of violence made to any person by an accused. The Magistrate referred to the threats which had been meted out on the appellant's landlord and her daughter. It also considered that the appellant was familiar with the complainants and the evidence they may bring against him. ... The court a quo also addressed the fact that the appellant is a member of the South African Police Service and the case has created a lot of interests and induced shock in the community. The learned magistrate considered that the community has to be assured that the appellant would also be dealt with evenly not with undue favour." [Paragraphs 23 - 24]

"On the reading of the record, consideration of the conspectus of the evidence before the Court a quo I cannot agree with the appellant's representative that that Court ignored section 60(5). On the contrary, I have found that the learned magistrate was directed by the provisions of sections 60(4);60(5) and 60(11)

in adjudicating upon this matter. … I am unable to find that the magistrate erred or misdirected herself in any of the issues raised." [Paragraphs 25 - 26]

The appeal was dismissed.

**BOOI V S [2014] JOL 32183 (ECG)**

**Case heard 6 August 2014, Judgment delivered 12 August 2014**

This was an appeal against a conviction for attempted murder. The appellant argued that the trial court had erred in relying on the evidence of the complainant, which was marked by inconsistencies and contradictions.

Msizi AJ (Goosen J concurring) held:

"It is settled that a court of appeal will not interfere with a finding of fact and credibility made by the trial court. The reason for this is simply that the trial court sees and hears the witnesses and is steeped in the atmosphere of the trial. It is in a position to take into account a witness' appearance, demeanour and personality. In the absence of factual error or misdirection on the part of the trial court, its finding is presumed to be correct." [Paragraph 4]

"As a consequence … the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witnesses' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court regarding the facts that are found to be correct by the trial court." [Paragraph 5]

"Using the approach described above, it cannot be said that the court a quo committed an error or misdirection when it accepted the evidence of the complainant to justify the conviction of the appellant. Therefore this ground of appeal should be rejected." [Paragraph 7]

"The danger of relying exclusively on the sincerity and perceptive powers of a single witness evoked a judicial practice that such evidence should be treated with utmost care. That practice emanated from the comments made in the case of R v Mokoena 1932 OPD … where the Court addressing itself to the predecessor of section 208 of the Criminal Procedure Act … ("the CPA"). In that case a warning was sounded that the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction in terms of section 284 of Act 31 of 1917, but that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. That section ought not to be invoked where, for instance, the witness has an interest or bias to the accused, where s/he has made a previous inconsistent statement, where s/he contradicts herself/himself in the witness box, where s/he has been found guilty of an office involving dishonesty, where s/he has not had proper opportunities for observation, etc." [Paragraph 9]

“In the present case, the appellant has failed to advance any cogent reasons for the rejection of the evidence of the complainant. I am satisfied that the court a quo adopted the approach in the Sauls matter. I am further satisfied that the evidence pointed to the guilt of the appellant. In the circumstances appeal must fail.” [Paragraph 11]

The Appeal was dismissed.

## SELECTED JUDGMENTS

### PRIVATE LAW

**THOBILE GLADSTONE NEER V MINISTER OF POLICE, UNREPORTED JUDGEMENT, CASE NO.: 62/2011 (EASTERN CAPE HIGH COURT, BHISHO)**

Plaintiff claimed damages from defendant for wrongful arrest and detention by members of the South African Police Service. The case concerned the merits only. The body of a dead woman had been found by police, and the plaintiff had been arrested after a security guard had identified a similar make and colour of car to his as having been in the area shortly before the body was found.

After setting out the facts of the case, Nomjana-Ndzondo AJ held:

"In casu, Njongo was the peace officer, rape and murder are schedule 1 offences. The issue that I am called to decide is whether on the facts outlined above Njongo formed a reasonable suspicion that the plaintiff had committed the offence of rape and murder." [Paragraph 22]

"The term "reasonable grounds to suspect" has enjoyed considerable attention by our courts. … [citations to case law] … It is clear that the test of reasonableness contemplates a thorough and critical assessment and evaluation of all the relevant and available information by the arresting officer." [Paragraphs 23, 26]

"Our new constitutional order places a high premium on individual freedom and liberty. Accordingly, it must follow that any attempt to restrict such freedom and liberty should naturally be subject to strict and exacting but not unreasonable standards. While the scourge of crime and violence represents a significant threat to our democracy, it cannot serve as a justification to depart from the norms and standards that characterize ours as a constitutional state committed to fairness and justice. What is required is a suspicion that is based on substantial grounds not arbitrary." [Paragraph 27]

Nomjana-Ndzondo AJ then turned to consider whether the actions of the arresting officer had satisfied the criteria of reasonableness in terms of s 40(1)(b) of the Criminal Procedure Act:

"The discovery of a woman's body … after a yellow Toyota Corolla was observed … raises a suspicion. However, it is difficult to contemplate that any reasonable person will just arrest the plaintiff without verifying his explanation. Njongo did not investigate the other Yellow Toyota Corolla. She arrested the driver of the first available Yellow Toyota Corolla." [Paragraph 31]

"[After referring to the case of Mabona & Another] I therefore find that Njongo's conduct falls short of the conduct expected of a reasonable man and her suspicion was not based on solid grounds. …" [Paragraph 33]

The plaintiff's action succeeded.

## CUSTOMARY LAW

### MGUZULWA V XULUBANA AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 1340/2012 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

**Case heard 6 September 2012, Judgment delivered 31 January 2013**

Applicant had successfully brought an urgent application and been granted an interim order, requiring the second respondent (a child of the deceased and the executor of his estate) to lodge a liquidation and distribution account in terms of the Administration of Estates Act with the third respondent (the Master of the High Court). The applicant had lived with the deceased at his parental home, and then at a house bought be the deceased. The deceased had sent representatives to the applicant's parental home to pay lobolo on his behalf. The deceased passed away approximately six months after lobolo had been paid. Second respondent disputed the existence of a customary marriage between the deceased and the applicant. Both the second and first respondent (the deceased's mother) took the position that the applicant was only engaged to be married to the deceased.

Nomjana-Ndzondo AJ, after identifying the issues for decision as being whether there was a customary marriage between the applicant and the deceased, and whether the second applicant should be removed as executor, held:

"To decide whether there was a customary marriage between the deceased and the applicant, one has to look at the Recognition Act [Recognition of Customary Marriages Act] which defines a customary marriage as "a marriage concluded in accordance with customary law" Customary law means customs and usages traditionally observed among the indigenous Africa [sic] peoples of South Africa which form part of their culture." [Paragraph 20]

"… [T]he only requirement of the Recognition Act which will need scrutiny … is section 3 (b) which provides that "the marriage must be negotiated and entered into or celebrated in accordance with customary law." It is not in dispute that the marriage was negotiated by the two families. The question is whether it was "entered into"." [Paragraphs 22 - 23]

"In my view the meaning [having referred to a dictionary definition of "enter into"] shows that when you enter into something you become involved in it, you come into it. I therefore do not agree with the interpretations by both counsel." [Paragraph 28]

"According to the Recognition Act this requirement [that the marriage be celebrated] is an alternative to the negotiation and entering into marriage requirement. This is evident by the word 'or' in the same provision …" [Paragraph 30]

After discussing principles of statutory interpretation and the Constitutional Court decision in *Gumede v President of South Africa*, Nomjana-Ndzondo AJ continued:

"… I find it absurd that the validity of a marriage will depend on the rituals to be held because: (i) There was no set date after the negotiations for the rituals to be held. This means that the applicant could have waited indefinitely. (ii) For celebrations or festivities to be held there are financial implications involved, however small. With the present economic climate it would be unfair to

require that every customary marriage be celebration. [sic] (iii) The ritual of utsiki is held at the instance of the husband and his family members, the woman and her family have no role to play. I am … of the view that it was never the intention of the legislature to give such unfair and unequal treatment to women." [Paragraph 34]

"To find now that the applicant was not married to the deceased would be to humiliate and discriminate against her because her marriage was never celebrated in accordance with customary law. This would be contrary to the Bill of Rights." [Paragraph 35]

Nomjana-Ndzondo AJ thus found that there had been a valid customary marriage between the applicant and the deceased.

The rule nisi was confirmed and a final order granted, declaring that the applicant had been lawfully married to the deceased, and removing the second respondent as executor of the estate.

## CRIMINAL JUSTICE

### MASITHEMBE GXALATHANE V THE STATE, UNREPORTED JUDGEMENT, CASE NO. CA&R 13/07 (EASTERN CAPE HIGH COURT, BHISHO)

**Case heard 3 June 2011, Judgment delivered ? October 2011**

Appellant and a co-accused (Thandile Saule) had been convicted in the Regional Court on three counts of robbery, one count of possession of a firearm, and one of possession of ammunition. Appellant was sentenced to an effective term of 24 years imprisonment. The appeal was against conviction and sentence.

Nomjana-Ndzondo AJ (Hartle J concurring) held:

"[Regarding the argument that the accused was wrongly convicted of robbery with aggravating circumstances, having not been charged on that basis] It is not in dispute that the appellant and his co-accused were never charged with robbery with aggravating circumstances. The charge sheet also did not allege that the State would seek a conviction on the basis that aggravating circumstances accompanied the commission of the offence. … Although it is desirable that the State should refer t aggravating circumstances in the charge sheet, a failure to do so does not constitute a fatal irregularity." [Paragraph 7(a)]

"The appellant contends that the failure by Thandile Saule to give evidence impacted on him detrimentally. According to him Thandile Saule would have given evidence favourable to him. Even if that was the case … the evidence of the State was found by the Magistrate to be very strong … Thandile Saule filed an appeal against his conviction and sentence which was upheld … on the grounds that he did not received a fair trial. The grounds of appeal were, however, peculiar to him and have no application to the matter before me. … " [Paragraph 7(b)]

"[Regarding the question of whether the state witnesses had enough time to identify their robbers, after reference to the Appellate Division judgement in S v Mthethwa] In this case, the robberies took

place during the day. The robbers did not hide their faces. They came to the schools, conversed with the victims … They left immediately thereafter and robbed the complainants. The victims had ample time to identify the robbers. There were few people at the scene. The scene was not a moving one. " [Paragraph 7(c)]

"[Regarding the submission that the sentences were inappropriate] It is a trite proposition that an appellate court's powers to interfere with a sentence on appeal are circumscribed. It may do so only if the sentence is vitiated by irregularity, misdirection, or is one to which no reasonable court would have come. … [citation to S v Malgas] … I cannot find any irregularity or misdirection in the sentence of the Regional Court." [Paragraph 7(d)]

"[Regarding the submission that no substantial loss had been incurred, and no injuries inflicted during the robbery] I agree with … counsel for the State that robbery is a traumatic and serious offence irrespective of the value of the items … The injuries need not be visible … There were no injuries because all the victims were defenceless women who did not offer any resistance to the demands of the robbers. …" [Paragraph 7(e)]

"[Regarding the submission that the magistrate should have obtained a pre-sentence report] A pre-sentence report is peremptory only in cases where a correctional supervision type of sentence is to be imposed and where a person is to be committed to a treatment centre … In all other cases the presiding officer has a discretion to obtain a pre- sentence report … It is therefore clear that a pre-sentence report should be obtained whenever the presiding officer feels the need to be better informed about the character and the possible future of the offender. In this case, the Magistrate found the appellant guilty of a serious crime. Having so found, he was correct in not asking for a pre-sentence report as he was not considering he question of rehabilitation. The object of a long term sentence is not rehabilitation, but the removal of the offender from society and deterrence … " [Paragraph 7(f)(i)-(ii)]

"Given the current levels of violence and serious crime in this country, it seems proper that in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive" [Paragraph 7(f)(iii)]

Finally, it was held that the Magistrate had been correct not to find substantial and compelling circumstances. The appeal was dismissed.

**SELECTED JUDGMENTS**

**PRIVATE LAW**

## LANGEBAAN RATEPAYERS' AND RESIDENTS' ASSOCIATION V DORMELL PROPERTIES 391 (PTY) LTD AND OTHERS 2013 (1) SA 37 (WCC)

**Case heard 22 November 2011, Judgment delivered 8 May 2012**

The applicant sought an interdict against the first respondent, as well as declaratory relief that a public servitutal right of way, constituted by ancient use or immemorial use, existed in favour of the public along the route followed by the "White Road" ("the gravel road") in Langebaan. First respondent argued that the section of the road in question was private property, and the public was therefore not entitled to its use. It was common cause that the first respondent had closed the gravel road and refused to allow the public access, and that the road had long been used as a thoroughfare by the general public. But it was disputed whether there was a servitutal right of way. First respondent argued that it had been terminated in 1991 following the diversion and deproclamation of the gravel road under a 1976 ordinance.

Saba AJ held:

"... [I]t is common cause that the only route which forms the basis of this application is the gravel road. Secondly, the principle in Bergh supra is that 'a specific right of way along a specific route, based upon immemorial user, can only be obtained if the immemorial user has been exercised along a specific route' ... Thirdly, Mr MacWilliam [counsel for respondents] has not dealt with the applicant's averments relating to the maps and the manuscript containing the history of the use of the White Road — the said averments therefore remain unchallenged. Fourthly, both Mr and Mrs Makka in their affidavits state clearly that they used the gravel road regularly since they were children — they did not require any permission to use it from anyone and had used it without any hindrance. They are now 78 and 72 years old, respectively. In my view, their evidence meets the requirements of 'immemorial use'. ... From the evidence placed on record, I am satisfied that the applicant has succeeded in proving on a balance of probabilities that a public servitude of right of way existed." [Paragraph 27]

"I find Mr Irish's argument [that if a road is deproclaimed and no longer needed as a public road, the servitutal right of way is not affected] to have merit ... The first respondent's argument that the public obtained their rights due to the proclamation of the gravel road in 1968 is not substantiated by any facts. Nowhere in the Ordinance is it stated that, upon deproclamation or diversion of a public road, the rights of the general public to the use of that road terminate. Section 21 of the Ordinance (dealing with the right of the public to use a diverted public road) and s 22 (dealing with ownership of public roads after diversion) are silent about the rights that were exercised before the gravel road was proclaimed to be a public road. ... [W]hen the White Road was proclaimed a public road ... the first respondent was not the owner of the land where the gravel road is. Without any evidence to the contrary, he is, in my view, not in a position to argue that there was never a public servitutal right of way created by immemorial use over the gravel road." [Paragraph 30]

"Mr Irish further argued that the closing of the gravel road subjected the general members of the public who do not own cars to a longer walk ... in the extreme heat (normally experienced in Langebaan) if they want to access the beaches. ... There was no counter-argument ... regarding this issue. This is without any

doubt against the idealistic notions of 'ubuntu', translated as 'humaneness' by Mokgoro J in S v Makwanyane ...” [Paragraph 31]

“I am of view that the evidence relating to the maps, the affidavits ... as well as the manuscript, establishes on a balance of probabilities that the public had access to the gravel road long before it was proclaimed as a provincial road in 1968. It also establishes that the access to the gravel road was without any hindrance. ...” [Paragraph 33]

“... In the circumstances, I find that a public servitutal right of way existed in favour of the public over the gravel road.” [Paragraph 35]

The interdict was granted, and the first respondent ordered to reopen the gravel road.

## COMMERCIAL LAW

**NOBEL CREST CC V KADOMA TRADING 15 (PTY) LTD 2012 JDR 0706 (WCC)**

**Case heard 26 October 2011, Judgment delivered 24 April 2012**

Applicant sought the confirmation of a rule nisi, whilst respondent sought to have the rule set aside and the application dismissed. Respondent also sought a declaratory that various Sale and Franchise agreements were null and void. The applicant had been deregistered, but was restored the day before respondent gave notice demanding restitution of the contractual purchase price, due to applicant's deregistration. The issues were the validity of the two agreements entered into while the applicant was deregistered; whether the agreements were validated by the applicant's re-registration; and whether the respondent was entitled to repayment of the purchase price paid to the applicant.

Saba AJ held:

“Mr de Waal submitted that since the applicant had been deregistered at the time the two agreements in question were concluded, as a juristic person it had ceased to exist and could not conclude a contract. He contended that both the Sale and the Franchise Agreements were null and void ab initio. He submitted further that there is no indication in the Act that the re-registration of a close corporation has the effect of curing nullities committed during the non-registered phase of the Close Corporation, while it was not authorised to act within the provisions of the Act. ...” [Paragraph 12]

“... In my view the facts in Sengol and Mouton ... are distinguishable from those of the current case in that in both cases no agreements were entered into while the company or the close corporation was deregistered. ... In terms of section 1 of the Act deregistration is defined as the cancellation of the registration of the founding statement of a close corporation. Henochsberg ... states that the effect of deregistration of a corporation is that its existence as a legal person ceases.” [Paragraphs 16 - 17]

“Section 26 of the Close Corporation Act makes provision for the enforcement of liabilities which were outstanding at the time the close corporation was deregistered. It is silent on the validity of the agreements concluded after deregistration but before the ... registration is restored. In terms of section 73 (6) (b) of the Companies Act ... of 1973 (currently section 83 of the new Companies Act...), the court ordering a restoration of a company to the register of companies is empowered to give directions which would safeguard or place the company or other persons in a position they would be if the company had

not been deregistered/ Section 26 (7) does not empower the Registrar to give any directions with regard to the rights and obligations of a close corporation and/or other parties on restoration. The fact that there is no such provision does not mean the Legislature had intended to disregard the rights of innocent parties who concluded agreements in circumstances similar to … this case." [Paragraph 20]

"It is a well-known rule of construction that words used in a statute should be read in the light of their context. The best approach under these circumstances is to look at was the intention of the Legislature when it enacted section 26 … of the Act. [citation to the Appellate Division decision in Jaga v Donges N O] … In my view, the intention of the Legislature in incorporating the following wording in s 26 (7) of the Act – 'and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered', was to ensure that the obligations of a close corporation which could not be enforced because of deregistration are revived on restoration and can be enforced. Personal liability imposed on members of the close corporation after deregistration in terms of section 26 (5) … is, in my view, another indication that the Legislature had intended to protect parties against any prejudice which could result as a result of deregistration. " [Paragraphs 21 - 22]

"It is my considered view that the purpose and object of the deeming provision in section 26 (7) is to validate agreements concluded on behalf of a close corporation while it has been deregistered. I therefore conclude that the defect in the validity of the two agreements entered into on behalf of the applicant while it had been deregistered was cured by the later re-registration … Had that not been the case, the purpose of the deeming provision in section 26 (7) would be defeated. The argument that the two agreements are void ab initio should fail in the circumstances " [Paragraph 23]

"In terms of clause 12… [T]he respondent could only exercise its right to cancel the agreement and claim restitution if the applicant had failed to remedy the breach within seven days after receiving a written notice calling it to do so. In casu, … the respondent failed to comply with caluse 12 … I am therefore persuaded … that the respondent is not entitled to claim full restitution in the circumstances as the contract was not validly cancelled. in the even the failure on the part of the applicant" [Paragraph 27]

The rule nisi was confirmed, and the counter-applications dismissed with costs.

## CRIMINAL JUSTICE

**S V PHILLIPS 2012 (1) SACR 466 (WCC)**

**Case heard 20 May 2011, Judgment delivered 3 June 2011**

The appellant had pleaded guilty to driving a motor vehicle while under the influence of intoxicating liquor. He was convicted on his plea of guilty, and was sentenced to three years' correctional supervision in terms of the Criminal Procedure Act. He appealed against his sentence.

Saba AJ (Hlophe JP concurring) found that the Magistrate had failed to give the accused's counsel the opportunity to address the court on the contents of the probation and correctional officer's reports before imposing sentence, and held further:

"Section 35(5) of the Constitution provides that, every person has a right to a fair trial which includes, inter alia, the right to legal representation and the right to adduce and challenge evidence. In S v Tshabalala ... Patel J ... stated the following:
'Section 35(3) of the Constitution forms the bedrock of the right to a fair trial. Inherent in that right is that criminal trial must be conducted in accordance 'with the notions of basic fairness and justice'..." [Paragraph 8]

"... In casu Mr Mihalik did not expressly waive his client's right to address the court on the reports of the probation officer and the correctional officer.....it can never be said that in such case the accused person had a fair hearing. This is because the right of the legal representative to address the court is not just a useless formality. Such right is so fundamental to the right to be heard fairly such that failure to accede to such a request is grossly irregular." [Paragraph 10]

"... [I]n De Beer NO v North-Central Local Council and South-Central Local Council ... the Constitutional Court said the following about the purpose of the fair hearing component in section 34 of the Constitution: 'A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair'" [Paragraph 14]

Saba AJ noted that the fact that the sentencing recommendations in the two reports were different would have given the appellant's counsel and opportunity to seek to persuade the court as to the appropriate sentence, and continued:

"The constitutional right of the accused to a fair hearing must be real and not illusory. The accused person has a right to a proper and effective hearing. ... Failure to allow Mr Mihalik an opportunity to address and or challenge what was contained in the reports before sentence was imposed was a serious irregularity which resulted in a failure of justice. It resulted in the magistrate not taking into account all the factors pertaining to sentence." [Paragraph 16]

The appeal was upheld. Saba AJ held that as the appellant had already undergone a thirteen week rehabilitation programme, he had "already served his sentence pursuant to the order of the court a quo and therefore, further punishment is unwarranted." [Paragraph 17].

**S V KRUGER, UNREPORTED JUDGMENT, CASE NO: SS 31/ 2009 (20 FEBRUARY 2011)**

The accused was charged with attempt to commit a sexual offence, assault with intent to do grievous bodily harm, and murder.

Saba AJ held:

"The complainant is a single witness regarding what took place before and during the time she was in the toilet. Section 208 of the Criminal Procedure Act ... provides that an accused may be convicted of any offence on the single evidence of any competent witness. It goes without saying that the single witness must be credible. A trial court should, therefore, guard against inherent in accepting the evidence of a single witness. With this in mind, I evaluate the evidence tendered." [Page 31 – paragraphs 10-15]

Saba AJ then considered the first count, of attempt to commit a sexual offence:

"The complainant gave a clear account of what took place at the accused's house, despite the fact that she had consumed liquor. Her version was consistent and corroborated to a large extent ... I find her to be a competent and credible witness ..." [Page 31 paragraph 20 – page 32 paragraph 5].

"From the evidence tendered, it is my respectful view that when the accused asked the complainant to take off her panty, he inspired the belief that sexual violation was going to take effect. I, therefore, find that the state has succeeded in proving the guilt of the accused on the second alternative count to count 1 and the accused is, therefore, found guilty of contravening section 5(2) of the Criminal Law Sexual Offences & Related Matters Amendment Act 32 of 2002, which is the second alternative to Count 1." [Page 34 paragraph 1 – 10]

Saba AJ then dealt with the charge of assault with intent to do grievous bodily harm.

"...It is so that the complainant's evidence is that the accused chased her with a panga. The accused did not do anything else beyond chasing the complainant. He did not inflict any injuries on the complainant ..." [Page 34 paragraph 15]

"...I am of the view that had the accused wanted to cause any grievous bodily harm on the complainant, he could have done so while they were locked in the toilet. I am, therefore, not satisfied that he had an intention to cause grievous bodily harm on the complainant when he chased her to the backyard of the house. I, therefore, find that he merely inspired the belief that an impairment of her bodily integrity was immediately going to take place. In the circumstances he is not found guilty of assault with intent to do grievous bodily harm, but guilty of assault common." [Page 35 paragraph 5 – 10].

Saba AJ turned finally to deal with the count of murder, noting that "there is no direct evidence before court. The state relies on circumstantial evidence." After citing Appellate Division authority on assessing circumstantial evidence, Saba AJ rejected the accused's evidence as "lies, improbable and irreconcilable":

"... I find that all the evidence points to the accused as the murderer. The only reasonable and possible inference this court can draw from the aforementioned facts is that it is the accused who killed the deceased ..." [Page 40 paragraph 5]

Saba AJ found that the murder was planned, and convicted the accused on the count of murder.

**S V KRUGER, UNREPORTED JUDGMENT, CASE NO: SS 31/ 2009 (SENTENCE 18 MARCH 2011)**

This is the sentencing judgment in respect of the case summarised above.

Saba AJ held:

"In determining an appropriate sentence this Court has to take into account the well-known triad ... consisting of the crime, the offender and the interests of society. These three elements must be judicially and equilaterally applied without over emphasizing one to the detriment of the other. The Court will not forget the aims of punishment which are retribution, prevention, deterrence and rehabilitation." [Pages 1 -2 paragraphs 20 – 5]

"I do not need to emphasise that the crimes the accused has been convicted of are very serious. They were committed on young and defenceless women, the accused used very dangerous weapons in executing these crimes. Both victims looked upon the accused as their father ..." [Page 6 paragraphs 1 – 5]

"Section 51 of the Criminal Law Amendment Act ... prescribes a life imprisonment if a High Court has convicted a person of an offence referred to in part 1 of schedule 2. In our case murder found to have been planned or premeditated and where the victim was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act ..., that is unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence" [Page 6, Paragraphs 10 – 15]

"Both victims ... were below 18 years during the commission of the offences. Section 28 (2) of the Constitution of the Republic of South Africa 1996 provides that a child's best interest is of paramount importance in every matter concerning a child. This right definitely has to be taken into consideration for purposes of sentence" [Page 11 – paragraph 20]

"... [T]he health of the accused alone cannot serve as a substantial and compelling circumstance justifying a departure from the minimum sentence. ... [T]he aggravating factors outweigh the mitigating factors in this case. I could also not find any factors that could be relied upon as constituting substantial and compelling circumstances justifying the imposition of a lesser sentence that the life imprisonment for murder." [Page 12, paragraphs 15 -20]

The accused was thus sentenced to 3 years imprisonment on count 1 (incitement to commit a sexual offence), 12 months imprisonment on count 2 (common assault), and life imprisonment on count 3 (murder), the sentences imposed on counts 1 and 2 to run concurrently with the sentence on count 3.

## SELECTED JUDGMENTS

## CONSTITUTIONAL INTERPRETATION

### LE SUEUR AND ANOTHER V ETHEKWINI MUNICIPALITY AND OTHERS (9714/11) [2013] ZAKZPHC 6 (30 JANUARY 2013)

**Case heard 14 November 2012, Judgment delivered 30 January 2013**

This was a challenge by a private property owner against certain amendments introduced by the municipality to the Ethekwini Town Planning Scheme. The amendments included upgrading the legal status of the Durban Municipality Open Space Systems (D-MOSS), a management plan for the protection of biodiversity and ecosystem services in and around the municipal area. One of the grounds on which the D-MOSS Amendments were attacked was that the municipality lacked authority in terms of either the Constitution or any other law of general application to legislate on environmental issues.

Gyanda J held:

"The applicants contend that in introducing the D-MOSS Amendments, the Municipality had acted ultra vires its powers as it did not have the authority to legislate in the sphere of the environment which it contends is the exclusive sphere of the National and Provincial Government. In attempting to legislate on issues in relation to the environment therefore the applicants contend, that the Municipality had acted unconstitutionally and illegally … The applicant contends that the "environment" is listed in Schedule 4, Part A of the Constitution as a functional area of the current National and Provincial competence, excluding Municipalities at Local Government level from such area of activity. … It is argued by the applicants that the functions of the environmental authorities (Provincial and National) and the functions of the Municipality are different and distinct. Accordingly, the Constitution sets out the executive authority of Municipalities which are the matters set out in Part B of Schedule 4 and Part B of Schedule 5 or "any other matter assigned to it by National or Provincial legislation". In Section 156(1) of the Constitution and, by virtue of the provisions of Section 156(2) of the Constitution, the Municipalities power to make bylaws is limited to these fields or areas exclusively which does not include the environment. This is notwithstanding the provisions of Section 152 which lists as one of the objects of Local Government as "to promote a safe and healthy environment"." [Paragraph 16]

"I am in total agreement with … the first respondent that the approach adopted by the applicant is unduly narrow and incorrect. In the first place, Section 72 of the Bill of Rights provides: "The State must protect, promote and fulfill the rights in the Bill of Rights". Clearly, the "State" includes the Local Government in the form of the Municipality and hence the first respondent. In as much as the Government is constituted by National, Provincial and Local spheres of Government which are distinctive, interdependent and inter-related as provided for in Section 40(1) of the Constitution. It is clear therefore that functional areas of Constitutional competence … are not the only provisions dealing with Governmental responsibilities and duties. Section 24(b) of the Bill of Rights provides that everyone has the right to have an environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: "(i) Prevent pollution and ecological degradation; (ii) Promote conservation; and (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable, economic and social development". It is therefore correct … that there is nothing in the Bill of Rights itself to suggest that the protections offered by Section 24 of the Constitution

are only binding on National and Provincial spheres of Government. Quite evidently these obligations apply to all three spheres of Government. Municipalities may not legislate in conflict with Section 24 of the Constitution. It is evident that Section 152(1)(d) of the Constitution requires that Local Government "promote a safe and healthy environment". Together with the reference in Section 24 of the Constitution to reasonable legislative and other measures to promote ecologically sustainable development, justifiable economic and social development as well as the promotion of conservation is also binding on a Municipality when it exercises its powers and performs its functions as set out in Parts B of Schedules 4 and 5 of the Constitution and those allocated to it in terms of Section 156(1)(b) of the Constitution and Section 156(4). …" [Paragraph 19]

"It is submitted by the first respondent that it is within this context that Municipal powers including the function "Municipal Planning" … must be assessed and interpreted. Section 156(1)(b) provides that a Municipality has the executive authority and the right to administer not just matters listed in Parts B of Schedule 4 and 5 but also:- "Any other matter assigned to it by National or Provincial legislation". Accordingly, Section 156(4) of the Constitution provides indications that even matters reserved for National and Provincial legislative authority in Parts A of Schedules 4 and 5 may be dealt with at Municipal level. …Section 156(5) provides that "a Municipality has the right to exercise any power concerning a matter reasonably necessary or incidental to, the effective performance of its functions." It is apparent that although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of National and Provincial responsibility that Local Governments in the form of Municipalities are in the best position to know, understand, and deal with issues involving the environment at the local level. The first respondent correctly submits … that the framers of the Constitution did not intend thereby to allocate legislative powers amongst the three spheres of Government in hermetically sealed, distinct and water tight compartments. …This introduced a "new philosophy" to the constitution, namely that of co-operative Government and its attendant obligations. … [A]ll spheres of Government are obliged in terms of Section 40(2) to observe and adhere to the principles of cooperative Government … [T]he environment is an ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4." [Paragraph 20]

"Municipalities under the banner of "municipal planning" have historically always exercised executive legislative responsibility over environmental affairs within a municipal area. The drafters of the Constitution were aware of this fact and recognized this fact in the manner in which the newer Constitutional dispensation was formulated. " [Paragraph 21]

"It is clear that both at the time that the Constitution was enacted and since then Municipalities have been allocated by national legislation and provincial legislation and policies, a legislative and executive mandate with respect to environmental matters, placing such matters squarely within the concept of municipal planning." [Paragraph 22]

"… I am satisfied that the first respondent has proved that prior to the advent of the Constitution "Municipal Planning" involved the power to regulate land use whilst taking into account, amongst other things, the need to protect the natural environment. It is clear that the term "Municipal Planning" encompassed that meaning when used in the Constitution. I am accordingly in full agreement … that it is impossible to separate environmental and conservation concerns in town planning practice from a "municipal planning" perspective." [Paragraph 33]

"... [A]lthough environmental matters stood as the apparently exclusive area for National and Provincial governance at those levels, it is clear that the authority of the Municipalities at Local Government level to manage the environment at that level has always been and is still recognized. It is inconceivable that the drafters of the Constitution intended ... to exclude Municipalities altogether from legislating in respect of environmental matters at the local level. In any event, it is clear that national and provincial legislation in respect of environmental issues recognizes the part to be played by Municipalities at the Local Government level in managing and controlling the environment." [Paragraph 39]

"... I am satisfied that Municipalities are in fact authorized to legislate in respect of environmental matters to protect the environment at the local level and that the D-MOSS Amendments in no way transgress or intrude upon the exclusive purview of the National and Provincial governance in respect of environmental legislation. I am, therefore, satisfied that the D-MOSS Amendments introduced by the first respondent is not unconstitutional and invalid on the basis contended for the by applicants, namely, that the first respondent did not have the authority to legislate in this regard." [Paragraph 40]

The application was dismissed.

**UMVOTI MUNICIPALITY V ANC UMVOTI COUNCIL CAUCUS AND OTHERS 2009 (2) SA 388 (N)**

**Case heard 8 September 2008, Judgment delivered 16 September 2008**

The applicant sought confirmation of a rule nisi declaring that certain resolutions taken by the council of the applicant municipality were void and of no force and effect because they were taken without the speaker being present. The respondents contended that the speaker of the council did not have the authority to bring the application and should therefore be ordered to pay the costs on de bonis propriis.

Gyanda J held:

"... [S] 53 dealing with the removal of office of members of the executive committee provides: "A municipal council may, by resolution remove from office one or more or all the members of its executive committee. Prior notice of an intention to move a motion for the removal of members must be given..." It was common cause before me that no such prior notice of an intention to move a motion for the removal of Alderman PM Ngubane as mayor was ever given. For this reason Mr Kuboni was constrained to concede that the resolution purportedly taken removing Alderman PM Ngubane from office as mayor of the municipality and the appointment of councillor TZ Ngubane as mayor in his stead was clearly void and of no force and effect." [Paragraph 7]

"I understood Mr Kuboni to have argued that the further resolution taken at this meeting which is complained of, namely in relation to the budget, was a good and proper resolution. ... I am constrained to agree with the argument by ... the applicant that inasmuch as both these resolutions, namely the removal of Alderman PM Ngubane as mayor and the resolution in relation to the budget were taken at a stage when there was no speaker in charge of the meeting of the council, both these resolutions are therefore irregular. It cannot be argued, by any stretch of the imagination, that the purported continuation of the meeting in the absence of the speaker, which is common cause, was regular in the circumstances. ... The presence of a speaker therefore is obligatory for the proper and regular conduct of council meetings. It is clear from these provisions that the absence of a speaker or an acting speaker in his stead rendered the

meeting irregular and therefore any resolutions passed were likewise tainted by the irregularity" [Paragraph 8]

"What then ought to be done in circumstances where a faction in the council of the Umvoti Municipality are intent on 'ramrodding' and pushing through two resolutions which are clearly null and void. Should these irregular resolutions merely be ignored in the hope that some sort of amicable solution may eventually be achieved in a council meeting in due course? … [I]t does not appear that such an eventuality was a realistic one, and in the circumstances … the applicant was entitled to approach this court for a declaratory order setting aside the irregular resolutions that had been passed, so that there could be no confusion whatsoever in this regard. In this regard reference is made to the case of Oudekraal Estate (Pty) Ltd v City of Cape Town and Others … In this matter the Supreme Court of Appeal decided that until invalid administrative action is set aside by a court in proceedings for judicial review, it exists in fact and has legal consequences that cannot simply be overlooked. … In any event I am in full agreement … that, in the interests of achieving a certainty, he was obliged to approach this court for a declaratory order." [Paragraph 11]

Turning to the respondent's contention that the applicant lack authority to bring the application, Gyanda J held:

"It has also been argued by the respondents that the municipal manager did not have the authority to authorise the speaker, Mr Maharaj, to represent the applicant in these proceedings. … It is apparent from this provision that the municipal manager, in the event of there being difficulties in the administration of the municipality occasioned by deadlock, such as in this case where the speaker (and other councillors) takes the view that certain resolutions purportedly passed by the council are irregular, whilst other councillors are of the view that such resolutions are good and proper, in these circumstances, would be entitled to approach the court to avert the deadlock. It is inconceivable, in this regard, that anyone would expect the municipal manager to first seek the authority of council to conduct any litigation when it is the conduct of council members that occasions the application itself." [Paragraph 15]

"In these circumstances I am persuaded that the applicant was not only entitled, but obliged in the circumstances, to bring the present application to avoid the deadlock that very well may have ensued if it did not. I am accordingly satisfied that the rule nisi falls to be confirmed. As regards the question of costs, Mr Kuboni had initially argued that the speaker ought to bear the costs of this application de bonis propriis on the basis that the application was ill-conceived in the first place. In his further argument, and in the event of the court finding against the respondents, he argued that the respondents, being public officials acting in their capacity as such, ought not to be mulcted in costs because they were doing their public or civic duty, and not acting personally. It would seem in the circumstances that what is a 'sauce for the goose' is not, in the view of the respondents, a 'sauce for the gander'. Quite clearly they sought costs to be paid de bonis propriis by the speaker while, on the other hand, and in the event of this court holding against them, they seek that the applicant bear the costs, as they are acting in their capacities as public officials. In what capacity then was the speaker, Mr Maharaj, acting? Clearly he acted in his capacity as a public official." [Paragraph 16]

"It is distressing that politics, even in municipalities such as the applicant, are still based on confrontational party lines, in consequence of which the public officials have lost sight of their primary purpose, namely to serve the community from which they come. … It is the duty of the court to ensure that public money is not frittered away on unnecessary applications such as the present one, which was clearly caused by what I have described as the opportunistic conduct of the eighth respondent and the

other respondents who joined forces with him. In the circumstances there does not appear to be any good or valid reason to order the applicant to bear the costs of this application and, inasmuch as the applicant had asked for costs against such respondents as opposed the application, I am inclined to make that order. …" [Paragraph 17]

The rule nisi was confirmed and the respondents were directed to pay the costs of the application. An appeal against the decision was dismissed in ANC UMVOTI COUNCIL CAUCUS AND OTHERS v UMVOTI MUNICIPALITY 2010 (3) SA 31 (KZP), but the costs order was reversed.

## CRIMINAL JUSTICE

### S v MBATHA 2012 (2) SACR 551 (KZP)

**Case heard 18 November 2011, Judgment delivered 23 September 2012**

This case was about the meaning of the word 'cultivation' in the definition of 'deal in' in s 1 of the Drugs and Drug Trafficking Act. The accused was convicted by the trial magistrate of dealing in dagga, although he only had a single dagga plant which he alleged was for personal use. The case came on automatic review and was referred for argument before the Full Court.

Gyanda J (Ntshangase J concurring) considered South African authorities on the meaning of "cultivation" in previous legislation, and held:

"…The Provincial Division [in S v Kgupane] had to deal with the selfsame query as in the case under consideration, namely whether or not the possession of one dagga plant amounted to dealing in the substance which the Transvaal Provincial Division answered in the affirmative and confirmed the conviction and sentence. …" [Paragraph 8]

"… [T]he decision in State v Guess … where the Appeal Court had to deal with the definition of the word "cultivate" or "cultivation" as they appeared in the preceding Act … Joubert, AJA stated: "In cases dealing with "cultivation" of dagga plants, our Courts have accepted the word, "cultivate" as ordinarily meaning "to promote or stimulate or foster the growth of a plant by any person"." The learned Judge of appeal thereafter referred to various decisions in which this definition was accepted and applied." [Paragraph 9]

"In the light of the aforegoing it must be presumed, therefore, on the so called "Barras" Principle, that the legislature, when they enacted current Drugs and Drug Trafficking Act … must have been aware of the definition accorded to the word "cultivate" in the decisions referred to above, more especially the decision of the Appellate Division in S v Guess and, therefore, they must have accepted that that definition would apply to the word "cultivation" as it appears in Section 1(1) of the present Act or they would have stated otherwise. The "Barras" Principle, as it has become to be known, is the decision in the House of Lords and the Privy Council in the case of Barras v The Aberdeen Steam Trawling and Fishing Company, Limited…." [Paragraph 11]

"I am of the view therefore, that in spite of the sympathy that may be felt for a user of dagga planting a single dagga plant for his own use to be convicted of dealing in dagga rather than possession thereof, as stated by Bekker, J, in S v Kgupane en Andere it is quite clear that the intention of the Legislature was

that in its pursuit of the sharks that unfortunately some minnows may be caught in the same net." [Paragraph 12]

"It has been argued that a proper interpretation to be attached to the word "cultivate" would be the Oxford dictionary one, meaning: "raise or grow (plants) especially on a large scale for commercial purpose" on the basis that such a definition would do justice to the case of a dagga user who grew a solitary plant to satisfy his own needs and cannot really be deemed a dealer. This in my view, is merely based on the sympathy felt for a user who is not in actual fact a dealer. To put into perspective this attitude one would have to, in due course, extend this "extended definition" to the situation of a manufacturer of mandrax or cocaine who has a laboratory at home and manufactures small amounts for his own consumption. This could definitely never have been the intention of the Legislature. It is abundantly clear that the intention of the legislature was to stop the production and supply of drugs when it enacted Act No. 140 of 1992 and defined "deal in" as it did in Section (1) of the Act. The circumstances in relation to drug users found in the position of the accused herein are factors that may be relevant only to the question of the sentences to be imposed." [Paragraph 14]

The conviction and sentence were confirmed.

**S v KORALEV AND ANOTHER 2006 (2) SACR 298 (N)**

**Case heard 18 May 2006, Judgment delivered 6 June 2006**

The appellants were convicted in a regional magistrates' court on charges relating to the commission of indecent acts involving minors and to the creation or possession of child pornography. The Appellants contended, inter alia, that certain photographs and video images received in evidence had not met the requirements for admissibility.

Gyanda J (Baqwa AJ concurring) held:

"In the court a quo and before us in argument it was contended that the photographs and video images were not admissible in evidence against the appellants inasmuch as they fell foul of the requirements for admissibility as set forth in S v Ramgobin and Others 1986 (4) SA 117 (N) by Milne JP ... where that Court held that for audio tape recordings and video tape recordings to be admissible in evidence in a criminal trial it must be proved that the exhibits sought to be put in (a) are the original recordings and (b) that on the evidence as a whole there exists no reasonable possibility of 'some interference' with the recordings. ... Milne JP contended that these were not the only requirements for admissibility as the Court in Singh's case did not intend to lay down an exhaustive set of rules for admissibility. He held, further, that the State must also prove that the tape recordings (and video recordings) do relate to the occasion to which it is alleged they relate, and that they are faithful and prove the identity of the speakers. He went on, further, to hold that in regard to the need for proof of accuracy, there must be a witness to the event purportedly recorded on the tape who testifies that it accurately portrays that event. It need not be the person who made the recording, but may be anyone who witnessed the event. This latter requirement was specifically criticised by Van Dijkhorst J in S v Baleka and Others (3) 1986 (4) SA 1005 (T)" [Page 305 E-J]

"In the light of the aforegoing it was quite correctly advanced on behalf of the appellants that: (a) Before the images in question could be admissible in evidence against the appellants there had to be some proof

of their accuracy in the form of corroboration that the events depicted therein actually occurred. (b) Corroboration in the sense required must be found in some independent source of evidence, which makes the evidence constituted by the images in the photographs and video recordings more acceptable in that it supports an aspect or aspects thereof." [Page 306 H – 307 B]

"Captain De Beer's evidence does not supply any corroboration in respect of the reliability and accuracy of the images allegedly found on the hard drive of the first appellant's computer. His only evidence that the images in question were not tampered with in any form relates to the absence of any tampering during the process in which he transferred the images in question from the hard drive of the computer into the format in which it was placed before the court. ... In fact from his evidence it is clear that at least one image ... was in fact tampered with. ...In the light of the fact that in this day and age images such as those relied on for the conviction in this case can and are tampered with such ease because of modern technology, it is essential for evidence in relation to such images to be approached with extreme caution. The acceptance of and reliance on such evidence can only occur where due and proper compliance with the requirements therefor has taken place." [Page 307 B-F]

"What is more, in the present case it is clear that the computer in question from which it is alleged the offending material emanated was accessible to both the appellants and at least one other adult male. ... It is for this further reason extremely unsafe to rely solely on the evidence constituted by the visual material to convict the appellants." [Page 307 F-H]

"One final aspect that needs to be dealt with is the apparent finding by the court a quo that the first appellant was well aware of the images showing the second appellant in compromising positions as set out in exh 'C' and that by virtue of his possession of the images he acted as an accessory in that he associated himself therewith. In the first place, there is no evidence that the first appellant was aware of those specific images being present in his computer and from the fact that they were found on his computer it cannot be said that the only reasonable inference to be drawn is that he was aware of these images thereon. ... In relation to count 2 (indecent assault) therefore the trial court, having found that it could not conclude that the first appellant took these photographs, or was even at the scene at the time that they were taken, wrongly found that the first appellant, by his mere possession of the images on the computer, associated himself with the commission of the indecent act therein depicted." [Page 307 I-308 D]

The convictions and sentences were set aside.

## SELECTED JUDGMENTS

### CIVIL PROCEDURE

**JAFFIT V GARLICKE AND BOUSFIELD INC (PFK (DURBAN) INCORPORATED AND OTHERS AS THIRD PARTIES) AND OTHER CASES [2012] 2 ALL SA95 (KZP)**

**Case heard 5 December 2011, Judgement delivered 27 January 2012**

Third parties (Robert and Nerak) joined to the main action by the defendant excepted to the defendant's third party notice. The plaintiffs in the main action sought to recover monies allegedly advanced in terms of loan agreements purportedly entered into with the defendant through one Cowan. Defendant denied concluding such agreements and denied the representative authority of Cowan. The basis of the exception was that the facts alleged did not establish grounds on which any legal duty of care on the third parties could be established.

Madondo J held:

"The existence or otherwise of the legal duty is a conclusion of law which must be reached upon objective consideration of all relevant circumstances. It has been argued on behalf of the defendant that such a consideration entails policy decisions and value judgments and that is an exercise which must be carried out in accordance with the spirit, purpose and objects of the Bill of Rights. …" [Paragraph 33]

"In the present case it has been submitted that the relevant factors for consideration are, *inter alia*, the value to society of combating white-collar crime; the foreseeable of harm resulting to the defendant; the unusual characteristics of the manner in which Cowan conducted the operations in question; Nerak's status as an "authorised financial services provider" in terms of the Financial Advisory and Intermediary Services Act (FAIS) … and Roberts status as a "key individual" and a duly authorised representative of Nerak; the fact that reasonably practicable measure were available to Robert and Nerak to avert the loss; the fact that, had Robert and Nerak taken such measures, the loss would have been averted and the fact that no harm could have resulted to Robert or Nerak had either of them informed the defendant that Cowan was conducting the "operations" in question." [Paragraph 36]

After considering SCA case law, Madondo J continued:

"In the present case, the defendant's loss complained of can only arise in the event of the finding that the defendant was contractually liable to the plaintiff or is estopped from denying the representative authority of Cowan. Our law does not under those circumstances recognise a delictual duty towards a party such as in the position of the defendant. … If the defendant is held liable to the plaintiff, it seeks to recover from Robert and Nerak only in the event that the defendant is estopped from denying the authority of Cowan to represent it. In the circumstances, the defendants' liability arises not from contract but from estoppel. Where there is estoppel there could have been no consensus between the parties and therefore no contract. …" [Paragraphs 46 – 47]

"In the circumstances, Robert knew very well that the undertakings were not intended to protect investors but only to deceive them into believing that they had some kind of assurance in the event of anything went wrong in the operation of the finance bridging scheme. Therefore, it follows that Robert

foresaw the possibility of Cowan's conduct causing the defendant economic loss in the event of claims by investors against the defendant arising out of such operations." [Paragraph 57]

"I now, turn to decide whether Robert and Nerak can be had liable under Aquilian action for pure economic loss sustained by defendant as a result of the irregular and unlawful operations of Cowan. ... I am not satisfied that a reasonable person in the position of Robert possessed the knowledge of irregularity and unlawfulness inherent in the operation of Cowan would have kept silent and continued participating in the operation of the scheme in question. Obviously, a reasonable person in the position of Robert will have taken steps to avert the loss occurring to the defendant. This would have been a simple matter had Robert complied with the statutory responsibilities imposed on him and Nerak by the provisions of FAIS. ..." [Paragraph 58]

"The next question to decide is whether Robert's negligent and wrongful conduct is actionable. In *Woodcock Street Investments* (*Pty*) *Ltd v CAG* (*Pty*) *Ltd* (*formally Cardno Davies Australian* (*Pty*) *Ltd*) [2004] HCA 16, vulnerability to risk was held to be a critical issue in deciding whether Aquilian liability should be extended in a particular situation. In *Trustees, Two Oceans Aquarium Trust* case ... it was held that the concept of vulnerability developed in Australian jurisprudence will only be satisfied where the plaintiff could not reasonably have avoided the risk by other means, for example, by obtaining a contractual warranty or cession of rights. In this case it was held that the Aquilian remedy should not be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means but who failed to do so. The facts of the present case show that there was no contractual nexus between the plaintiff and the defendant and that the defendant can only be held liable on the basis of estoppel. It, therefore, stands to reason that the defendant in the circumstances could not have avoided the harm by contractual means. The defendant did not know and was not aware of the irregularity and unlawfulness of the operations conducted by Cowan and it was in the circumstances, more vulnerable to risk. Accordingly, this case is distinguishable from the *Trustee, Two Oceans Aquarium Trust* case ..." [Paragraph 60]

"Where necessary this Court has jurisdiction to develop the common law so to cover the present situation and to extend the Aquilian liability in order to afford the defendant a remedy. Section 39(2) of the Constitution provides how the common law should be developed; not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its paradigm." [Paragraph 63]

"I now turn to determine whether the conduct of Robert and Nerak was wrongful and actionable at the hands of the defendant. In *AB Ventures* ..., it was held that such question is quintessentially decided on exception. The conduct of Cowan acting in concert with Robert exposed the defendant to the risk of pure economic loss. Since the defendant was not aware of the operations of Cowan it could not have protected itself from such risk. The social and legal policy as well as the legal convictions of the community in the circumstances of this case calls for the extension of Aquilian remedy for the protection of persons in the position of the defendant. ... This would, I feel, accord with the spirit and purport of the Constitution." [Paragraph 65]

The exception was dismissed.

**CRIMINAL JUSTICE**

**SAVOI AND OTHERS V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER (8006/12) [2013] ZAKZPHC 19; [2013] 3 ALL SA 548 (KZP) (17 MAY 2013)**

**Case heard 5 March 2013, Judgment delivered 17 May 2013**

Applicants sought an order declaring the definitions of "pattern of racketeering activity" and "enterprise" in the Prevention of Organised Crime Act (POCA) unconstitutional and invalid, on the grounds of vagueness and over-breadth. They also sought the invalidation of numerous sections of POCA predicated on those definitions; of Chapter 2 of POCA due to retrospective operation; and of section 2(2) for violating the right to a fair trial.

Madondo J held [extensive references to relevant United States law]:

"The elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. ... Legislation must be drafted in such a way that the readers know what the law expects of them. Legal certainty and comprehensibility are not mutually exclusive. The law cannot fulfil its role to regulate and to order if it cannot be understood. The law must, therefore, be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations. ... [I]t is difficult or even impossible for a person to know in advance precisely what kind of conduct is punishable if the definitions of crimes are vague or their content is problematic. There is a connection between the principle of legality and a democratic form of government." [Paragraphs 31 - 32]

"POCA is of general application in that everyone who has engaged in the prohibited act involving one of the offences referred to in Schedule 1 ... before the effective date of the legislation is on prior notice that only one more act may trigger an offence of racketeering ... Therefore, an accused is given a fair warning that the subsequent act will combine with prior racketeering activity act to produce the racketeering pattern activity against which the definition section is directed. The second act creates a separate offence based on the commission of predicate act. In the premises, upon proper construction the definition of "pattern of racketeering activity" in section 1 of POCA is not vague, but clear and precise, instead. It adequately warns an accused that an on-going and continuous or repeated commission of more than one criminal act listed in Schedule 1 will expose him to conviction on a charge of a more serious offence of racketeering." [Paragraph 41]

Madondo J then turned to the argument regarding over-breadth, and held:

"In terms of the purpose – orientated approach, the purpose of the legislature is the prevailing factor in interpretation. The context of the legislature as well as social and political policy directions is taken into account to establish the purpose of the legislation. ..." [Paragraph 44]

"It is evident ... that common law remedies could not resolve the increased problems of organised crime and POCA seeks to provide enhanced sanctions and drastic remedies to assist the State to combat intolerable situation of a large increase in organised crime. The main objective of the POCA is to prevent criminals from benefiting from the proceeds of crime and to discourage the use of property for criminal purposes. ..." [Paragraph 50]

"The fundamental principle in statutory interpretation is that the purpose of the legislation must be determined in the light of the spirit, purpose and objects of the Bill of Rights in the Constitution. Where the law is clear and unambiguous, and in keeping with the spirit of the Bill of Rights, the court must give effect to its meaning. … The most important principle is to determine and apply the purpose of the legislation in the light of the Bill of Rights. The ordinary meaning must be attached to the words. …" [Paragraph 52 - 53]

"It is the very nature of organised crime that those who are responsible for planning and orchestrating criminal activities are not persons who carry out the activities and it is very difficult to trace those who are in leadership positions and ultimately benefit from the greater part of the spoils of crime. It is also a feature of organised crime that its organizational reach is wide and tentacles of the organization stretch into many areas of commercial and governmental activity. The concept of "pattern of racketeering activity" seeks to prohibit connections between conducts that might otherwise seem disparate but are in fact connected through the orchestrated activities of an organised criminal organization." [Paragraph 60]

"A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutional protected conduct. … The question then arises whether under POCA the definition of "pattern of racketeering activity" sweeps within its prohibitions what may not be punished under the constitution. …" [Paragraph 65]

"… Upon proper construction, in its general application, the definition of ''pattern of racketeering activity'' is not overbroad. In the present case, in the absence of the reality of the conduct alleged to have interfered with the constitutionally entrenched rights to fair trial or freedoms of the applicants, it is difficult and even impossible to determine whether or not the definition of "pattern of racketeering activity" sweeps within its prohibitions what may not be punished under the constitution. …" [Paragraph 75]

"POCA extends the scope of the meaning of the concepts of "pattern of racketeering activity" and "enterprise" in order to promote adequate protection to the victims of organised crime. However, such wider ambit should be restricted to acts referred to in Schedule 1 of POCA and organised crime activities. The facts of this case do not show that the definitions of "pattern of racketeering activity" and "enterprise" have been applied to such an extent that they sweep everything broadly within their prohibition so to invade constitutionally protected rights. The purpose of defining the concepts of "pattern of racketeering activity" and "enterprise" is to protect the public by preventing, restricting or disrupting involvement by the person concerned, and by facilitating proof of the committed organised crime. A single enterprise may engage in a pattern of racketeering and invests the fruits in itself." [Paragraph 80]

Regarding the retrospectivity argument, Madondo J held:

"Upon proper construction the primary purpose of Chapter 2 of POCA is not punitive in that it does not attract liability to conviction for the past acts, but it merely refers to the past conducts as the predicates of racketeering activity. In essence, Chapter 2 only punishes the current conduct of racketeering charged and in so doing it incorporates the past conducts by reference into the current offence of racketeering charged, as its elements. …" [Paragraph 109]

"In order to secure conviction under section 2(1)(e) of POCA the State must do more than merely prove the underlying predicted offences. It must also demonstrate the accused's' association with an enterprise

and a participatory link between the accused and enterprise's affairs by way of a pattern of racketeering. In essence a POCA conviction requires proof of a fact. The previous offences in a charge of racketeering are only used to show that the predicate acts are part of an on-going entity regular way of doing business. The attribution of predicate acts to an accused operating as part of a long-term association that exists for criminal purposes, does not constitute punishment. As a necessary consequence Chapter 2 does not attach any legal consequence to past acts, and as such, it is not retrospective in its operation. …" [Paragraph 111]

The constitutional challenge was rejected, save for findings of unconstitutionality in respect of certain provisions to the extent of the inclusion of the words: "ought reasonably to have known", which were declared unconstitutional and invalid to that extent. The Constitutional Court rejected an appeal by the applicant, and declined to uphold the High Court's findings of invalidity: **Savoi and Others v National Director of Public Prosecutions and Another (CCT 71/13) [2014] ZACC 5 (20 March 2014).**

**S V DLADLA 2011 (1) SACR 80 (KZP)**

**Case heard 25 May 2010, Judgment delivered 25 May 2010**

Appellant had been convicted on a charge of assault with intent to do grievous bodily harm, based on the evidence of single witness (the complainant), who was a mental patient.

Madondo J (K Pillay J concurring) held:

"This court is called upon to decide two issues raised on behalf of the appellant: firstly, whether the complainant, suffering from mental illness and a schizophrenic, was a competent witness. Secondly, whether the accused had any onus to discharge in order to be acquitted. … [I]t is … necessary to decide … whether the acceptance of the complainant's evidence, and placing an onus on the accused, constituted an irregularity, having an effect of vitiating the proceedings." [Paragraph 2]

"… [B]efore he could finish his testimony, the complainant indicated to the court that he was tired … and … the proceedings were adjourned to another date. On the said date the complainant was not in attendance. The investigating officer … informed the court that the complainant had, prior to the adjournment date, signed a withdrawal statement which was countersigned by the nurse on duty, and asked to be excused from further attendance at court. …" [Paragraph 4]

"Six months after the last date of hearing, the complainant attended court to finish his testimony. Under cross-examination the complainant changed his earlier version …" [Paragraph 5]

"Without hearing any medical evidence on the mental condition of the complainant, the learned magistrate ruled that the complainant was in a lucid interval and that he was therefore a competent witness. She based her decision on the note the doctor, who examined the complainant nine days after the alleged assault incident, had made … that the complainant was at the time lucid, and she dismissed the defence's application for a discharge. However, the said doctor had not been called as a witness …" [Paragraph 7]

"Mental illness may be of a permanent or temporary nature. Incompetence is relative and only lasts for so long as the mental illness lasts. The fact that a person suffers from a mental illness or defect is not itself sufficient to warrant a finding that he or she is not a competent witness. The mental illness or

defect must have a certain effect on his or her abilities. The words 'while so afflicted' or 'disabled' [in s 194 of the Criminal Procedure Act] make it clear that a person is incompetent only while the mental affliction or disablement continues. What must be considered, with the words 'who is thereby deprived of the proper use of his reason', is the witness's ability to observe, to remember what he or she has observed and to convey this to the court" [Paragraph 13]

"Whether the witness was or is suffering from a mental illness or mental defect must be determined with the aid of psychiatric evidence. ... In the present case, the learned magistrate, without hearing any medical evidence as to the mental faculties of the complainant, both at the time of the commission of the alleged assault and at the time of testifying, held the complainant to be in a lucid interval, and such decision was merely based on the J88 form which was completed nine days after the alleged assault. However, the medical practitioner who completed the form was not called as a witness. As a result, it was not established whether the complainant at the time of the commission of the alleged assault was not afflicted with mental illness, and that he had sufficient ability to observe and to remember what he had allegedly observed. ... Without medical evidence it could not be established with certainty that the complainant was at the time of testifying not afflicted with mental illness, or not labouring under imbecility due to the medication he was then taking." [Paragraph 16]

"Since no medical evidence was tendered to prove the complainant's capacity at the time of the commission of the alleged assault and at the time of testifying, it could not be assumed from his behaviour in court that he was in a sane interval. A court would be undertaking an impossible and even dangerous task if it were to seek a general symptom which would enable it to identify a mental abnormality as a 'mental illness' or 'mental defect'. ..." [Paragraph 18]

"The learned magistrate in the present case held that the complainant was not suffering from any mental disorder. It is trite that a court cannot reach a decision that a witness is not suffering from mental illness without hearing evidence by a psychiatrist. ... Instead, in the present case the learned magistrate took it upon herself to define the medical phrases 'mental illness', 'mental retardation' and 'schizophrenia', and she also analysed medication given to the complainant nine days after the alleged assault incident, and the effect thereof. Obviously, she assumed the role of a medical expert witness." [Paragraph 19]

"Nor were the parties afforded an opportunity to question the complainant on his mental faculties. As a result, it was not psychiatrically established whether or not the complainant was suffering from mental illness or whether, at the time of the alleged assault incident, he was not afflicted by mental illness, and whether, when he testified, he had sufficient capacity to testify in a rational and intelligible manner." [Paragraph 20]

"Before a trial court can convict upon such evidence it is necessary that the trial court must fully appreciate the dangers inherent in the acceptance of such evidence, and, where there is a reason to suppose that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. ... [T]here is absolutely nothing, in the learned magistrate's reasons for judgment, from which it can be inferred that she appreciated the dangers inherent in the acceptance of the evidence of the complainant..." [Paragraph 22]

"With regard to the second question, whether the accused in criminal proceedings has an onus to discharge in order to be acquitted, it is a general principle of our law that in criminal proceedings the accused is not obliged to convince or persuade the trial court of anything, and the suggestion to that effect was misplaced. ..." [Paragraph 24]

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

**LE ROUX V MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009 (4) SA 491 (N)**

**Case heard 22 August 2008, Judgment delivered 17 March 2009**

This case was an appeal against the dismissal of the appellant's claim for damages for his alleged wrongful arrest and detention. The appellant had been questioned by the second respondent (an employee of SAPS) regarding allegations of reckless and negligent driving. Second respondent had initially chosen not to arrest the appellant, instead warning him to appear in court the following day, and to return to her office to be formally charged. Once the appellant reported to the second respondent's office, he was detained in holding cells pending his appearance in court [paragraphs 4 – 5]. The magistrate found that the arrest was lawful as the second respondent had complied with section 40 of the Criminal Procedure Act, and that her actions were not mala fide or unreasonable in the circumstances.

Madondo J held:

"This court has to decide whether due compliance with the provisions of s 40(1)(b) of the Act alone is sufficient to render an arrest and subsequent detention lawful and whether the second respondent's arrest of the appellant in the circumstances of this case was reasonably justifiable, and a genuine response to the situation." [Paragraph 8]

"At common law the infliction of bodily restraint forms part of the law of delict and gives rise to a claim for damages. Every interference with physical liberty is wrongful in the absence of a valid ground for justification. ..." [Paragraph 16]

Madondo J examined the pre- and post-constitutional approach of South African courts, and continued:

"The mere compliance with s 40(1)(b) [of the Criminal Procedure Act] does not render an arrest lawful; more care and diligence are required of the arresting officer. ... R v Waterfield; R v Lynn [1964] ... is a leading English Court of Criminal Appeal decision establishing the common-law authority of a police officer to stop and detain individuals. This case produced what is known as the Waterfield test (also called the common-law 'ancillary power doctrine') to determine the limit of police authority to interfere with a person's liberty or property." [Paragraphs 20 - 21]

"While it is no doubt right to say in general terms that police officers have a duty to prevent crime and a duty ... to bring the offender to justice, it is also clear from the decided authorities that, when the execution of these general duties involves interference with the liberty of a person, the powers of the police officers are not unlimited. ..." [Paragraph 22]

"... [T]he arresting officer must have good and sufficient grounds for suspecting that a suspect is guilty of the offence for which he or she seeks to arrest him. He must analyse and assess the quality of the information at his disposal critically. ... It is only after an examination of this kind that he must allow himself to entertain a suspicion which will justify an arrest. ... However, this does not mean that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is guilty. ..." [Paragraph 24]

"In my view, since arrest is a drastic interference with an individual's rights to freedom of movement and to dignity, the court must look further than due compliance with the requirements of s 40(1)(b) of the Act to constitutional principles and the rights to dignity and to freedom as enshrined in the Constitution ... I fully subscribe to the view that the arrest must be justified according to the demands of the Bill of Rights. ... The State action must be such that it is capable of being analysed and justified rationally." [Paragraph 27]

"Prior to the advent of the Constitution our courts were duty-bound to give effect to the legislation even when it was destructive of liberty. Section 39(2) of the Constitution now permits our courts to ensure that all legislation is interpreted in such a way as to ensure that liberty is protected, except in the circumstances in which the Constitution sanctions its deprivation. ..." [Paragraph 29]

Madondo J then proceeded to analyse conflicting High Court decisions in *Louw v Minister of Safety and Security* and *Charles v Minister of Safety and Security*, as well as a SAPS Standing Order relating to arrests, before continuing:

"Although the drastic method of arrest could be necessary to procure the appellant's attendance before court, the second respondent on good grounds shown during the questioning of the suspect decided not to arrest the appellant, ... However, before the appellant could appear in court the second respondent decided to arrest and detain him in the police holding cells pending his appearance in court for fear of being accused by black members of the South African Police Service of being racially prejudiced in favour of the appellant, since he was also white. ... Such a change in the decision the second respondent had earlier taken, not to arrest the appellant, should, in my view, have been based on or actuated by a constellation of objectively discernible facts giving the second respondent reasonable cause to believe that the appellant would evade justice if he were not to be arrested." [Paragraph 39]

"The detention of the appellant ... was not necessary to secure his attendance before the court or to protect the public, but to demonstrate to black members of the police service that she did not have racial prejudice in favour of the appellant. ... In the premises, there was no rational connection between the detention of the appellant and the purpose the second respondent intended to achieve. ... The appellant's detention could therefore not be said to be lawful and a reasonable interference with his liberty and fundamental dignity. ..." [Paragraph 41]

"It is not sufficient, in my view, to determine whether the arrest has been made in circumstances falling within the provisions of s 40(1)*(b)* of the Act, and, if it did, to conclude that the arrest was lawful. There must be a just cause before the arresting officer derogates from the protection afforded by s 12 of the Constitution." [Paragraph 43]

"The 'just cause' ... boils down to whether a demonstrable rationale has been given which is sufficiently reasonable to have justified the detention. The notion of 'just cause' involves a compromise between the rights of the individual and the interests of the rest of the community. ..." [Paragraph 45]

"In my view, where the police officer has on reasonable grounds decided not to arrest the suspect, he or she cannot arbitrarily change such decision. He or she must establish reasonable and probable grounds justifying a change of the decision. The absence of the rational connection between the arrest and the purpose of arrest has the effect of rendering the arrest of the suspect, albeit falling within the purview of s 40(1)*(b)* ... arbitrary and without just cause. [citation to the Canadian case of *R v Hall*]" [Paragraph 46]

The appeal was thus upheld, and the matter referred back to the court *a quo* to "consider all relevant constitutional factors pertaining to the case ... and to deal with the matter to finality." (Msimang J concurred in the order and the reasons, and wrote a separate judgment giving further reasons).

## SELECTED JUDGMENTS

### PRIVATE LAW

**SOHCO PROPERTY INVESTMENTS (COMPANY INCORPORATED UNDER SECTION 21) V RAMDASS AND OTHERS (14264/10) [2013] ZAKZDHC 4**

**Case heard 17- 26 April 2012 and 22 August 2012, Judgment delivered 15 January 2013**

The applicant, a non-profit company and a social housing provider, sought to evict the respondents from a social housing complex, on the ground that it had validly cancelled the relevant lease agreements because of a failure to pay rent. The respondents argued that they never agreed to pay the rentals specified.

Mnguni J dealt first with several points in limine:

"The second point in limine is predicated on the notion that the immovable property constitutes a dwelling place as contemplated by the Prevention of Legal Eviction from and Unlawful Occupation of Land Act … (PIE). The applicant is, therefore, obliged to comply not only with the form of PIE but also with the substantive provisions contained in Section 4(7) and (8) … The applicant has simply served the notice in terms of Section 4(2) of PIE without having served the application upon the respondents. The respondents asserted that the applicant has failed to place before the Court any evidence or even a bald allegation to enable the Court to consider the factors raised in Section 4(7) and/or (8) of PIE … The applicant's evidence on the issue of service is that … the respondents were legally represented and it was agreed … that, given the voluminous nature of the application papers … Mr Nkosi would accept service … on behalf of all the respondents represented by him. In accordance with that agreement, service of the application papers was duly effected on all the respondents, by service upon their attorneys of record. … I find it idle to contend against the applicant's evidence in this regard. … This point in limine has no substance and it fails." [Paragraph 9]

"In the third point in limine, the respondents contend that the applicant instituted these proceedings as an urgent application. They submitted that in doing so, the applicant has failed to serve the application on the respondents, in compliance with the requirements for urgent applications in terms of the section 5 (1) of PIE and to address any of the issues raised in the said subsection. … [I]t does not seem to me that the application was brought on urgent basis. …" [Paragraph 10]

"The final point in limine concerns the alleged failure of the applicant to join, as the necessary parties, the member of the Executive Council for Housing, KwaZulu-Natal and the EThekwini City Council … The respondents' contention is premised on the allegation that the applicant receives subsidies from the Local Government for each individual who qualifies for housing …" [Paragraph 11]

"… A similar point was raised before Swain J in the matter between the applicant and Prudence Sindisiwe Hlophe and 95 others … and was dismissed. … Swain J held: 'The fact that the National Department of Housing provides the applicant with a subsidy does not give it a direct and substantial interest in a dispute between the applicant and the respondents, as to the entitlement of the respondents to remain in occupation of their respective homes. There is consequently no merit in the point in limine.' This finding, in my view, applies with equal force … and the point in limine therefore falls to fail." [Paragraph 12]

Mnguni J then moved to deal with the merits.

"… The applicant's description of the respondents' conduct as a 'rent boycott' was found by Swain J [in the case referred to above] to be a correct one. I have also assessed and considered the circumstances surrounding the non payment of the rent in this matter and I find myself in agreement with my brother's finding in this regard. In my view, such conduct amounts to the kind of self help that is inimical to our legal order." [Paragraph 14]

"… Despite the mountain of evidence from the papers, the respondents deny the breach of the leases and consequently deny that the applicant was entitled to terminate the leases in respect of each of the respondents. I have considered this denial and it seems to have no merit. In the result, I am satisfied that the applicant has established that the respondents became unlawful occupiers by no later than 12 October 2010." [Paragraph 15]

"Notwithstanding the letters of cancellation … the respondents remain in occupation … and are in unlawful occupation thereof. … I am satisfied that the applicant validly cancelled the lease agreements and that it has satisfied the procedural requirements provided for in PIE. … I am satisfied that … the additional requirements provided in section 4(7) of PIE are not applicable." [Paragraph 16]

"In instances where the occupation was originally lawful, the time at which the occupation became unlawful, has important consequences in relation to the time within which steps are taken to evict the unlawful occupier. The period of occupation is calculated from the date the occupation becomes unlawful … The PIE distinguishes between unlawful occupiers who have occupied for less than six months (section 4(6)) and those who have occupied for more than six months (section 4(7)). The distinction … lies in that in terms of section 4(7) of PIE, when the proceedings are initiated, an additional consideration is whether the land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and household headed by women." [Paragraph 17]

"If the requirements of section 4 of the PIE are satisfied and no valid defence to an eviction order has been raised, the Court must, in terms of section 4(8) of PIE, grant an eviction order. …" [Paragraph 19]

"… [T]he evidence points to the fact that the respondents have arrogated to themselves the decision as to when, where and how to pay the rentals due in terms of their respective leases. Importantly, they have defied the finding of the [Rental Housing] Tribunal and have embarked on a deliberate strategy of non payment of the rent in order to force the applicant to reduce same. … I can find no traces of facts which justify the referral of the matter for mediation. I am, therefore, satisfied that the path of travel chosen by the applicant is indeed the correct one." [Paragraph 24]

"… [T]he respondents have been in occupation of the immovable property for less than six months, and consequently the Court is not expressly obliged to investigate whether the City can reasonably make land available for the occupiers who might be evicted …" [Paragraph 26]

"… [M]ost of the respondents have now been in arrears for at least the whole of 2010, an organised 'rent boycott' having been in place for the best part of that year and continues to date. The [unemployed respondents] have filed PIE affidavits in which they intimate that they are now unemployed. The question, therefore, is whether the unemployed respondents' factors as contained in their PIE affidavits should be considered and measured differently from those of the other respondents. I do not think so …

There is no evidence placed before me that the circumstances in which the unemployed respondents are living indicate the likelihood that at least some of them might be rendered homeless as a result of their eviction. For that reason, I find that it is unnecessary to engage the City in the process before granting an eviction order." [Paragraph 28]

"I am mindful of the fact that the Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interest and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result. Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern …" [Paragraph 30]

"… The PIE affidavits of the respondents, save of those of the unemployed, demonstrate clearly that they are still gainfully employed. … Having carefully balanced the competing interests … and bearing in mind the Constitutional vision as set out in Port Elizabeth Municipality … I am driven to conclude that the respondents have failed to disclose sufficient facts to persuade me that the interests of the applicant should yield to those of theirs. I have satisfied myself that it is just and equitable that an eviction order be granted against all the respondents …" [Paragraph 31]

All the respondents were directed to vacate the property, and were interdicted and restrained from entering the property at any time after they vacated. Respondents were directed to pay the costs of the application.

## ADMINISTRATIVE JUSTICE

**SOOKRAJ V MEC FOR TRANSPORT, KZN 2012 JDR 0454 (KZP)**

**Case heard 17 October 2011, Judgment delivered 22 March 2012**

The applicant, a professional driver of heavy duty vehicles, was convicted for contravening section 65(2)(a) of the National Road Traffic Act ("the Traffic Act") in 2007. He sought to review and set aside the decision of the first respondent refusing to issue him with a Professional Driving Permit (PDP).

Mnguni J held:

"… [I]t is clear from the evidence presented by the first respondent that he did not adopt a one dimensional approach in the exercise of his discretion … I am therefore satisfied that the first respondent weighed up the information submitted by the applicant against the interests of the public, and correctly took into account the policy considerations of his Department, statistical information concerning intoxication as a cause of accidents, death on the roads, the prescripts of the Traffic Act and all other relevant information pertaining to his department on the matter." [Paragraph 19]

"The second issue … relates to the report of the convictions in terms of Regulation 118(4) of the National Regulations which provides that If the driving licence testing centre is satisfied that the application is in order, it shall request the officer in charge of the nearest South African Police Station for a report of the convictions identified in Regulation 117(c) if any, recorded against the applicant and for the purpose of

such report, any member of the South African Police Service may take the finger and palm prints of the applicant." [Paragraph 20]

"… The applicant did not disclose the conviction … The first respondent contends that from the applicant's answer an irresistible inference could be drawn that the applicant intended to conceal his previous convictions in the hope that they would have gone undetected by his Department. In the exercise of his discretion … this is one of the factors that he had to consider. …" [Paragraph 23]

"In my view, the applicant's explanation … is drivel. The other factors which, in my view, militate against this explanation and drove me to agree … that the applicant is not entirely honest can be gleaned from his affidavit in support of his request for a recommendation for him to be issued with PDP where … he described himself as a sole breadwinner, contrary to the averments contained in his founding affidavit in these proceedings in which he records that his wife is also employed and earns a salary of R 2400 per month. This is further perpetuated by the applicant's attorneys during the address in mitigation of the sentence before the Magistrate in which he (the attorney) informed the Court on behalf of the applicant that he earned R 2000 per month as a driver, which was not correct." [Paragraph 25]

"… Regulation 117 of the National Regulations prescribes more onerous minimum requirements for an applicant for a PDP as opposed to an applicant for an ordinary driver's licence in view of the very real risk that such driver would otherwise pose to innocent members of the public … It is apparent from the provisions of regulation 117 of the National Regulations that whether an applicant for a PDP has been convicted of an offence specified … such conviction results in the same penalty or sanction in that such an applicant will not be issued with a PDP." [Paragraph 26]

"In … his replying affidavit, the applicant deals with his previous conviction of 29 December 1994 contending that was not a previous conviction because there is no such offence as reckless and negligent driving and that it could only have been reckless driving or negligent driving. Section 120(1) of the Road Traffic Act which was contravened by the applicant resulting in such previous conviction provides that no person shall drive a vehicle on a public road recklessly or negligently. … [T]he fact that the word 'and' instead of 'or' was used in the SAP 91 does not mean that the applicant did not commit the offence of either reckless or negligent driving. … This argument is untenable." [Paragraph 27]

"The third issue … is whether the second respondent was obliged to indicate in his recommendation the factors that were taken into consideration in deciding not to recommend that the applicant's application for a renewal of his PDP be reconsidered. The decision of the second respondent constituted an administrative action … and it was incumbent upon the applicant to request reasons in terms of section 5 of PAJA if he required same. … I incline to find that, there is no obligation on the first respondent to require a more detailed motivation for the recommendation …" [Paragraph 28]

"The fourth issue … is whether there exists a conflict between section 34 of the Traffic Act and regulation 117 of the National Regulation. … [P]rovisions of section 34 of the Traffic Act are of general application and it empowers a Magistrate, after holding an enquiry, to exercise his discretion to suspend or cancel a licence or permit. On the other hand, Regulation 117 … peremptorily directs a driver's licence testing centre not to issue an applicant with a PDP if he has been convicted or has paid an admission of guilt fine on any one of the offences referred to in Regulation 117 (c) of the Nation Regulations. Regulation 117 (c) … specifies particular kinds of offences which disqualify an applicant from obtaining a PDP. … [T]he regulation is aimed at ensuring that an applicant with a conviction is not automatically entitled to obtain a PDP from an administrative body such as a driving licence testing centre, unless the MEC approves of

his application notwithstanding such applicant's previous conviction. The applicant's argument on this issue is unsustainable. … Regulation 117 … serves to protect the public interest at the time that an application is made to an administrative body such as a driving license testing centre in the sense that it is barred from issuing a PDP to a driver who has been convicted of any of the offences specified in that Regulation whereas s 34 of the Act confers upon the Magistrate a judicial discretion to suspend or cancel a licence or permit, on conviction." [Paragraph 29]

"… The decision to refuse the applicant's application for a PDP infringes on his right to practice his occupation of a professional driver. The applicant found comfort for this contention in section 22 of the Constitution Act. This section provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. .... It is evident from the proper reading of section 22 read with section 36 of the Constitution that the right to choose a trade, occupation or profession cannot be limited but the practice thereof may be regulated by law. …" [Paragraph 37]

"It must be accepted that the Constitution does not mean whatever we wish to mean and, furthermore, that cases fall to be decided on a principled basis. … I incline to find that the relevant regulations do not infringe the rights in section 22 of the Constitution" [Paragraph 38]

The application was dismissed with costs.

## CIVIL PROCEDURE

### JACOBS AND ANOTHER V UPWARD SPIRAL 1196 CC (AR 539/09) [2012] ZAKZPHC 9

**Case heard 26 February 2010, Judgment delivered 27 February 2012**

This was an appeal against a judgment granted in favour of the respondent cancelling a lease agreement between itself and the appellants. The respondent (plaintiff in the court a quo) raised an exception to the appellants' (respondents in the court a quo) plea, which was provisionally accepted by the court. The defendants' legal representative subsequently filed a notice in terms of Rule 51(1) of the Rules of Court, but the defendants did not pursue the matter and the plaintiff applied for default judgment. The court a quo granted default judgment cancelling the lease. After the default judgment had already been granted, defendants filed a notice of intention to amend their plea. The defendants also brought an application to rescind the default judgment. Both applications were dismissed by the Magistrate. The defendants noted an appeal against that judgment. Soon afterwards, the defendants filed a second amended notice of appeal in terms of which they now also appealed against the magistrate's initial ruling upholding the exception, and the default judgment he granted against the defendants.

Mnguni J (Koen J concurring) held:

"In so far as the second amended notice of appeal is concerned, it is to be observed that the exception brought by the plaintiff was predicated on the ground that the defendants' plea was a bare denial of liability and did not disclose any defence … That a decision upholding such an exception is not appealable has been authoritatively pronounced … Importantly, the defendants pursuant to the ruling upholding the

exception, attempted to amend their plea which in my view, was a clear indication that they elected to abide the decision of the court a quo." [Paragraph 12]

"It is common cause that the defendants brought an application to rescind the default judgment entered against them on 29 April 2008 which was subsequently dismissed with costs on 2 September 2008. The judgment of 2 September 2008 … is the subject matter of the notice of appeal dated 15 December 2008 and therefore, to deal with it separately would be superfluous. It therefore follows that the appeal falls to be decided on the basis of the notice of appeal dated 15 December 2008." [Paragraph 13]

"The first issue which arises is whether the court a quo had jurisdiction to grant the order for cancellation of the lease agreement. Mr Seedat, for the defendants, contended that the order sought by the plaintiff is a claim for specific performance and that the plaintiff did not seek an alternative prayer for damages. He submitted that the court a quo did not have jurisdiction to hear the matter in the first place as it was irregular ab initio. Not so, contended Mr Crampton. … There is, in my view, considerable substance in Mr Crampton's submission. It seems to me that the cancellation of the agreement is an election which the aggrieved party makes to either insist on performance as set out in the agreement or to cause the agreement to terminate. … Ordinarily an order of cancellation nullifies the duty to perform in terms of the contract and any resultant loss is usually dealt with by way of a claim for damages. Essentially, cancellation deprives the party of the option to claim specific performance. The court a quo had by virtue of S 29(1)(g) of the Magistrates Court Act … a general jurisdiction in respect of actions where the value of the subject of the dispute is within the jurisdictional limit … I am unable to find any substance in Mr Seedat's contention on this issue and it is therefore unsustainable." [Paragraph 14]

"The second issue raised … was that because a request for default judgment … contained a typographical error in that it read that 'the plea was upheld whereas it ought to have been stated that the exception was upheld,' the court a quo ought not to have entered default judgment … [T]he proper reading of the request by any lawyer would have enabled him to discern the real intention of the request. The error, therefore, does not constitute a material defect in the request. The third issue … was that when Magistrate Munillal granted the ruling upholding the exception … he did not specify the time period within which the defendants were required to file their amended plea. Generally when an exception is upheld, the unsuccessful party is granted leave to deliver an amended pleading within a stated period of time. In casu, the Magistrate did not do so and he also did not refuse such leave nor did he grant judgment in the action when upholding the exception." [Paragraph 15]

"… [T]he defendants ought to have taken steps to amend their plea on 12 December 2007, when the exception was upheld, or within a reasonable time thereafter. … [B]y 29 April 2008, more than four months had passed since the date that the exception was upheld and more than a month had passed since the court a quo had supplied reasons for its ruling in terms of Rule 51(8). … [T]he only plausible inference is that until 29 April 2008 the defendants did not intend to amend their plea and it was competent for the Court a quo to enter default judgment against the defendants on that date." [Paragraph 17]

"The final issue raised … was that the court a quo erred in refusing the rescission of the default judgment … " [Paragraph 18]

"I am unable to fault the reasoning and conclusion reached by the court a quo and can find no misdirection on the issue. It is so that even if one takes a benign view, the inadequacy of this explanation alone may well have justified a refusal of rescission, unless, perhaps, the weak explanation is cancelled

out by the defendants being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success … It was … apposite for the court a quo to determine whether the defendants' explanation for being in default when finely balanced with the circumstances of their proposed defence carried a reasonable or good prospects of success on the merits which might have tipped the scale in their favour in the application for rescission. …" [Paragraph 21]

"… [I]it was fair and reasonable for the Magistrate to conclude that the case for rescission was not strong and that, for the defendants to deserve condonation for the late filing of the rescission application, they had to set out substantial and satisfactory reasons for the delay. In this regard, the delay between 29 April 2008, when defendants became aware of the default judgment to 4 August 2008, when the founding affidavits were signed, is hardly explained." [Paragraph 24]

"… It is trite that when a magistrate grants or refuses condonation and/or grants an application for rescission he or she exercises a judicial discretion. A court of appeal can only interfere with the exercise of such discretion in circumstances where the magistrate committed a misdirection or where he made a decision that would not have been made by a reasonable decision maker. This is not such a case." [Paragraph 25]

The appeal was dismissed.

**ASCON TRADING CC V ANIX TRADING 401 CC T/A SHE SAND AND OTHERS (7309/2011) [2012] ZAKZDHC 32**

**Case heard 15 May 2012, Judgment delivered 8 June 2012**

This was an application for the rescission of a default judgment granted by the Registrar of the Court. The applicant alleged that it did not receive summons in respect of the default payment. When the applicant failed to enter an appearance to defend within the prescribed period, the matter was placed before the Registrar who granted a default judgment for the amount stated above, interest and costs.

Mnguni J held:

"… [T]his court will be entitled to exercise its discretion to rescind a judgment against the applicant provided that sufficient cause has been shown. Miller JA defined the term 'sufficient cause' in Chetty v Law Society, Transvaal … as follows: 'The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. … But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are: (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. …" [Paragraph 6]

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. …" [Paragraph 7]

"… [I]t is not disputed that the summons was never received by the applicant, and that it only learnt of its existence after the default judgment had been granted. The first respondent's contention is that the applicant failed in its founding affidavit to give explanation why it did not receive the summons despite the fact that it was served at its registered address. The applicant's counsel conceded that the service of

the summons … complies with Rule 4 of the Uniform Rules of this Court. He, however, submitted that the proper service of a summons is not a bar to an application for rescission of a default judgment." [Paragraph 8]

Mnguni J found that the applicant had provided a satisfactory explanation for its default, and proceeded to deal with the requirement of a *bona fide* defence:

"… [I]t is to be observed that the applicant had merely made a bald averment lacking in detail concerning its defence. …" [Paragraph 11]

"It is clear that the defences raised in the founding affidavit relate only to the issue of the first respondent's price in respect of the goods sold and delivered and that the sale and delivery of the goods are not in issue. Whereas the defences raised in the replying affidavit place in dispute the subject matter of the sale between the parties …" [Paragraph 13]

"I am mindful of the fact that it is trite that an applicant must make out a case in its founding affidavit and not in reply … As was stated by Nestadt J in Shephard v Tuckers Land and Development Corporation (Pty) Ltd …: "This is not however an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances."" [Paragraph 14]

"The exercise of such discretion calls for the taking into account of the variety of factors, bearing in mind the underlying principle that the applicant should not be permitted to make a case in the replying affidavit when no case at all was made out in the original application …" [Paragraph 15]

"The explanation advanced by the applicant for its failure to disclose in its founding affidavit the defences which now appear in its replying affidavit is that the first respondent instituted its action on simple summons which, it alleged, lacked in particularity. One of the factors which are usually found to be compelling in exercising the discretion in applicant's favour in these matters is lack of prejudice. I have already granted the first respondent leave to deliver a further affidavit to deal with new matters raised in the applicant's replying affidavit, thus eliminating the existence of prejudice." [Paragraph 16]

"… [I]n both the letters … the applicant did not deny that it was indebted to the first respondent but only gave the reasons for the delay in payment of the account." [Paragraph 15 (sic)]

"The applicant does not deny that the invoices which form annexures to the first respondent's answering affidavit were furnished to it. Importantly, it does not explain what happened to the sand that the first respondent delivered to it, and which the applicant had not ordered. Also, it does not tender the return thereof to the first respondent." [Paragraph 16 (sic)]

"Counsel for the applicant sought to argue that the first respondent did not account for the payment of R233 611.00 made on 24 December 2010. Therefore, he submitted, the default judgment ought to have been granted in the sum of R64 642.65. I have considered this submission, and it seems to me that it overlooks the evidence contained in annexure "A" to the first respondent's answering affidavit. This submission is therefore unsustainable. I am accordingly not able to find that the applicant has shown any defence to the first respondent's claim, let alone the one carrying a prospect of success." [Paragraph 17 (sic)]

The application was dismissed with costs.

## CRIMINAL JUSTICE

**KLAAS V S (AR 587/12) [2013] ZAKZPHC 29**

**Case heard 29 May 2013, Judgment delivered 11 June 2013**

The appellant was convicted of contravening sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act by the Regional Court, for unlawfully and intentionally committing an act of sexual penetration with the complainant without her consent. The victim was stabbed with a knife during the incident, resulting in her suffering grievous bodily harm. Appellant was sentenced to 20 years' imprisonment. The appeal was against conviction and sentence.

Mnguni J (Gorven J concurring) held:

"The main thrust of the appellant's attack against the conviction … concerned the question whether the state had proved beyond a reasonable doubt that the appellant committed the offence … The court a quo was mindful of the fact that the complainant was a single witness in respect of the rape incident … Section 208 of the Act provides that a single witness' evidence is adequate to sustain a conviction, provided that it is satisfactory in all material respects. The evidence reveals that the complainant was attacked on the day in question. This finding is supported by the injuries and the state of her dress as described by the witnesses. The court a quo, correctly found that the motive for the attack was sexual assault because at the time when she arrived at home she had been substantially undressed." [Paragraph 14]

"Counsel for the appellant submitted that the court a quo failed to consider that the medical evidence did not substantiate the complainant's version. …" [Paragraph 15]

"It is common cause that the complainant had started consuming liquor with her friends from 22h00 the previous night until at least 04h00 the following morning. The court a quo pertinently dealt with this issue and concluded that even though she had consumed liquor, she was able to see what was happening. Importantly, the evidence reveals that the complainant observed even the minute detail during the incident such as the fact that the appellant and Ms Khumalo "spoke to each other as if they were familiar to each other". Indeed the evidence demonstrates that the appellant is the uncle of Ms Khumalo. In my view, this observation speaks to the fact that the complainant was aware and in control of her faculties when she was sexually assaulted. Importantly, she was able to direct her mother to the place where sexual assault was perpetrated on her." [Paragraph 16]

"Counsel for the appellant raised the identification as an issue in her heads of argument. The evidence reveals that the complainant first saw the appellant after he had uttered the word "hela". At that time the appellant was walking behind her. The complainant's evidence is that she turned and looked at him. When the complainant approached Ms Khumalo for the direction to Sobantu Village, the complainant came and joined them. She was also able to see him when he approached and attacked her. In any event, the appellant and Ms Khumalo are not disputing that they were at the scene and had come across the

complainant at some point during that morning, albeit their version being that she had already been assailed at the time. I am therefore satisfied with the reliability and dependability of her observation on the issue of the identification. In my view, the court a quo, correctly found that the appellant was the person who sexually assaulted the complainant on 16 January 2010." [Paragraph 17]

"It seems to me that before convicting him, the Regional Magistrate satisfied himself not merely that his exculpatory evidence and that of his witness was not true but also that every element of the offence was established by evidence that was truthful and reliable beyond a reasonable doubt. … [T]he reasons and findings of the Regional Magistrate … are unassailable and he was correctly convicted." [Paragraph 19]

Regarding the appeal against sentence, Mnguni J held:

"… [A] sentence must also, in fitting cases, be tempered with mercy. Circumstances, however, vary and the punishment must ultimately fit the nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence, but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to objects of punishment …" [Paragraph 21]

"The crime of rape is an extremely serious and prevalent offence. …" [Paragraph 22]

"… [E]ven if the court finds that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than that prescribed by the Legislature, a court should take into account the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided. …" [Paragraph 23]

"It follows that it is incumbent upon the judiciary to always keep the said bench mark in mind when deciding on appropriate sentences for the crimes contained in the said schedule and in so doing, send a message to the community that rape will be visited with severe punishment." [Paragraph 24]

"Having carefully considered the judgment of the court a quo on sentence, I am satisfied that it comprehensively considered and weighed all the competing interests on sentence and made findings that were well grounded in the record. I can find no error in its analysis of the evidence on sentence and I am satisfied that it took all the factors … in mitigation of sentence. … [T]he sentence of 20 years' imprisonment is just and proportionate to the crime, the appellant and the needs of the society, and no injustice has resulted in imposing of same." [Paragraph 25]

The appeal was dismissed.

## SELECTED JUDGMENTS

### COMMERCIAL LAW

**NEDBANK V OOSTHUIZEN (6588/2012) [2014] ZAKZPHC 9 (28 FEBRUARY 2014)**

**Case heard 17 February 2014, Judgment delivered 28 February 2014**

The applicant sought an order declaring certain immovable property executable. Previously, the Applicant had obtained default judgment against the respondent. A writ of execution was issued. The Sheriff found no moveable property and returned a *nulla bona* return. The Applicant wished to proceed against the immovable property, a house which was being used by the respondent as his primary residence.

Bezuidenhout AJ held:

"Before a primary residence can therefore be declared executable the court must first consider all relevant circumstances. The question arises whether the authorisation of a writ in the present circumstances must be dealt with as in the case of a bondholder in terms of the practice directive. If not, would a creditor who is not a bondholder not be placed in an advantageous position as the burden of proof would be less strenuous but the effect the same in that a debtor loses his primary residence." [Paragraph 10]

"In *Standard Bank of SA Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) referring to the decision of the Constitutional Court in J*aftha v Schoeman and Others*, *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) it held ...:

"Nor did the Constitutional Court decide that s26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her s26(1) rights and would therefore need to be justified as contemplated by s36(1).""[Paragraph 11]

"From the above quotations it is apparent that before any primary residence is declared executable there are many factors to be considered to ensure that there is no abuse of the execution process. At all times the provisions of the Constitution must be considered and applied" [Paragraph 14]

"Commercial activity must be allowed but as the Constitution demands that every citizen is entitled to adequate housing, this factor must be considered before declaring a person's primary residence executable. The harm that both parties may suffer must be weighed up in an attempt to arrive at a just and fair decision" [Paragraph 15]

"It would appear to me that when a writ of execution is to be authorised in respect of the primary residence of a debtor, the same principles must be applicable whether it is a bondholder or a creditor of other sorts wanting to declare the property executable. This requires that all relevant facts be placed before court. Judicial oversight is required irrespective whether the application to declare immovable property executable results from a bond or any other debt. There is however a distinction between a bondholder declaring a property executable and a non-bondholder in that in the latter case there must be a nulla bona return from the Sheriff in respect of movables, or that there are insufficient movables. Accordingly the immovable property is the only remaining asset of the debtor. The bondholder does not have to first proceed against moveable property. However if a primary residence of a debtor is to be

declared executable by a creditor who is not a bondholder a valuation of the property concerned would be of assistance and if there is a bond registered against the title deed of the property the outstanding amount in respect of the bond would also assist the court in exercising the judicial oversight required. An attempt should be made by applicant to provide such information. If it is not provided the reasons therefore must be set out in applicant's affidavit." [Paragraphs 16-18]

"In the present case respondent was present at court on previous occasions and the notice of set down … was served on him personally. Respondent elected not to appear or to place any facts before court why his property should not be declared executable. He was in the papers specifically informed that he had the right to do so. Standard Bank, the bondholder, also placed no facts before the court. In those circumstances there was nothing more that applicant could do. [Paragraph 19]

The application to declare the house executable was granted.

## CIVIL PROCEDURE

### RAHIM KHAN NO V MAXPROP HOLDINGS (PTY) LTD AND GARLICKE AND BOUSEFIELD INC, UNREPORTED JUDGEMENT, CASE NO. 5419/2012 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

**Judgment delivered 17 December 2013**

The applicant had previous obtained a court order in which the first respondent was interdicted from withholding the January 2013 salary of the applicant. Applicant argued that the first respondent had failed to fully comply with the order. The court had to decide two legal questions. One was whether the second respondent had properly been joined in the proceedings. Relying on the State Liability Act, applicant added the second respondent (as the accounting officer who should effect the payment sought) to the application (as a second respondent) without any order authorizing such joinder. The second question was whether the first respondent was indeed in contempt of court for failure to comply with the court order which interdicted him from withholding the applicant's salary for the month of January 2013.

On whether the second respondent had been properly joined, Bezuidenhout AJ held:

"It is indeed so that the State Liability Act which I have been referred to indicates the accounting officer of that specific department who is the second respondent herein must ensure that the payment is made. Accordingly, from the reading of the Act, the second respondent should have been joined as a respondent in these proceedings to make any order sought effective" [Paragraph 9]

"However the Rules make it very clear that in the event of any party having to be joined as a respondent an application to that effect should be brought. This is to entitle the party which is sought to be joined as a respondent to place before the court any facts or circumstances or points of law why they may object to being joined as a respondent. That procedure was not followed neither was there consent to be joined as already stated."

"Accordingly it is necessary for an application to be brought to join the second respondent as a party to these proceedings" [Paragraph 10]

On whether the first respondent was in contempt of court, Bezuidenhout AJ held that:

"However … there is no proof of service of the order which applicant contends is the correct one upon the first respondent and further in the letter on behalf of the first respondent it was specifically stated that they do not have knowledge of the registrar." [Paragraph 16]

"There is no proof of service of the order that applicant is relying on the first respondent, and further there is clearly a dispute as to what the correct order was which was granted." [Paragraph 18]

"It has not been proved beyond reasonable doubt that the correct order was served on first respondent and it failed to complied therewith." [Paragraph 19.1]

"In the case of Jayiya v MEC for Welfare, Eastern Cape 2004 (2) SA 611(SCA) … it states "Save for one exception, an order for the maintenance of one whom the judgement debtor is liable to maintain, a money judgement is not enforced by contempt proceedings but by execution….It is accordingly apparent from the decision of Jayiya referred to above that monetary claims cannot be enforced by way of contempt proceedings. In my view, the payment of salary is a monetary claim and cannot be enforced by contempt proceedings. [Paragraph 20.3]

In conclusion the court ruled that there was no joinder of the second respondent and that the application for the first respondent to be held in contempt was dismissed.

## CRIMINAL JUSTICE

**SHEZI V S (AR 254/2014) [2015] ZAKZPHC 4 (17 FEBRUARY 2015)**

**Case heard 12 February 2015, Judgment delivered 17 February 2015**

The accused appealed against a sentence of life imprisonment for housebreaking with intent to commit murder, and murder.

Bezuidenhout AJ (K Pillay J concurring) held:

"… In S v Matyityi … it was held that parliament had ordained minimum sentences for certain specified offences and that these were to be imposed unless there were truly convincing reasons for the departure thereof. Further that a person of 20 years or more has to show by acceptable evidence that he was immature to the extent that the immaturity was a mitigating factor. No such evidence was placed before the court a quo. On the contrary the conduct of appellant on the day in question showed the opposite. Appellant was upset because he had been charged. As a result he attacked and killed the deceased at his home together with his two accomplices. The manner in which the attack was conducted proves that it was indeed premeditated. It is clear that appellant together with two others approached the home of the deceased with the intention to kill him. It was a brutal attack upon the deceased, during the evening, at his home where he should have been safe. Appellant together with the others took the law into their own hands." [Paragraph 4]

"Mr Barnard appearing on behalf of appellant submitted that the learned magistrate misdirected himself by referring to the rehabilitation of appellant but then imposing a life sentence. Even if this is so it must still be established whether the sentence imposed by the court a quo was a just sentence in the circumstances. We were referred to the following cases where less than life imprisonment were imposed: S v Sangweni … where it was held that the fact that appellant was relatively young being 30

years of age, was gainfully employed and a first offender, weighed in his favour. However, in the case of Matyityi referred to above … the Supreme Court of Appeal held that courts should not resort to concepts such as "relative youthfulness". …" [Paragraph 5]

Bezuidenhout AJ distinguished other cases referred to be counsel, before concluding:

"… [A]ppellant was 21 years of age at the time of the incident and attacked the deceased for no other reason that the deceased had caused him to be charged. Appellant and his cohorts conducted themselves that evening with utter disregard for the sanctity of human life. The age of appellant at the time of the commission of the offence together with the fact that he was a first offender in my view do not amount to substantial and compelling circumstances justifying a lesser sentence. … In this case the prescribed minimum sentence is not unjust and is not disproportionate to the crime and the needs of society and the personal circumstances of appellant. It cannot be said that the magistrate did not exercise his discretion judicially and properly in determining the sentence. There is no justification for a deviation therefrom. The sentence is in my view appropriate in the circumstances." [Paragraph 6]

The appeal was dismissed.

**SELECTED JUDGMENTS**

**CRIMINAL JUSTICE**

**S V KHUBISA, UNREPORTED JUDGMENT, CASE NO.: CC24/15 (KZD)**

**Judgment delivered 27 October 2015**

A mother was charged with the murder of her 20 month old child, it being alleged that she drowned the child in a hole filled with water.

Maphumulo AJ held:

"You admitted that you knew that what you were doing was actually unlawful. You also knew or foresaw that through what you were doing the child was actually going to drown. So the court is satisfied that there is an act of taking the child and putting it in a situation where the child was likely to die." [Page 1 lines 20-24]

"… The child was a minor, an infant, and could not fend for him or herself … You knew very well what you were doing, as you have already indicated, that it was unlawful and you have got no valid defence in law." [Page 2 lines 2-6]

"… [T]he Court also takes into account that this charge of murder is read with section 51 Part I of Schedule 2 of the Criminal Law Amendment Act … as there was premeditation. … It was not an action done on the spur of the moment." [Page 2 lines 7-13]

"So the Court is satisfied that there is the act, the unlawfulness, the intention, and that which then resulted in the death of the child, a human being. …" Page 2 Line 14-16]

The accused was found guilty of murder. Maphumulo AJ moved on to deal with sentence:

"… [T]he accused herself … testified … indicating the circumstances which prevailed at the time she committed the offence, namely financial problems which she was having and the fact that the father of the four children, including the late infant, was having a new lover and felt humiliated because it was a local girl." [Page 3 lines 2-8]

"She testified that she has got Grade 6 education. The reason for such low level of education was because she had fallen pregnant with her first child …. At the time of the commission of the offence she was unemployed. " [Page 3 lines 13-16]

"The Court did observe her when she was on the stand and her demeanour. At certain stages she also broke down. When she was tackled on this issue that what really motivated her to commit this offence, let us look at these factors. The one which prompted her to commit this offence was just temptation on her part. She said that it was the devil which made her to do it and that actually she could even not fault the father of the children." [Pages 4 lines 22-25 and page 5 lines 1-3]

"The father of the child … also did testify and confirmed that he was maintaining the children and helping the accused in this matter. …" [Page 5 lines 4-6]

"According to him he didn't see any overwhelming problem between them at the time this offence was committed but he was aware that the accused had not received child support grant. Accused had also testified to that effect … further owed her sister rental for two months thus not in speaking terms with her sister." [Page 5 lines 15-20]

"He did not say anything nor were any questions put to him relating to the supposed love relationship, which could have caused a misunderstanding or for the accused not to trust him." [Page 5 lines 21-23]

"… [Counsel] were arguing, the other for lenient sentence and the other for a severe one. The defence was saying the State should deviate from the minimum sentence. The State was saying that the Court should not, there are no compelling and substantial circumstances, they should impose it, and that if not, if the Court then were to find that there are compelling and substantial circumstances then a lengthy time of imprisonment." [Page 6 lines 19-25; page 7 lines 1-3]

"… [W]hen the Court has to deal with the issue of sentence, one has to bear in mind the purpose or object of punishment. … [T]he principles or the rational or the justification developed over a period of time would include that sentence must include retribution, prevention, deterrence and also reformation or rehabilitation." [Page 7 lines 4-12]

"Murder … the society looks with disapproval and with disgust. There was an outcry against murders perpetrated in our country and that as a result the legislator stepped in and enacted a legislation, the Criminal Law Amendment Act … The legislature … prescribed some minimum sentences. This one where there has been premeditation or planning then punishment is life sentence imprisonment." [Page 12 lines 14-22]

"The Court has a duty to impose a fiercely appropriate and fair sentence, even if such a sentence would not satisfy public opinion. … [T]here is a requirement to ensure that justice is done but justice also includes mercy. …" [Page 14 lines 2-6]

"… [L]egislation still leaves the discretion to the Court in dealing with the case, circumstances of a particular case, whether it calls for a departure from the prescribed sentence and that all the factors which are traditionally taken for purpose of sentence will then still be considered. Then it would depend whether they diminish the moral guilt or not, so those factor will still play a role." [Page 24 lines 12-17]

"… [A]fter consideration of the circumstances of a particular case they would render a prescribed sentence unjust in that it will be disproportionate to the crime, the criminal and the needs of the society so that an injustice would be done by imposing that sentence. In such a case the Court therefore is entitled to depart from minimum sentence … In other words, it is also saying that the traditional factors considered for purpose of sentence, if cumulatively looked it then they can constitute substantial and compelling circumstances justifying the departure from the minimum sentence." [Page 24 lines 18-25 and page 25 lines 1-3]

"The court has accepted that she has shown and verbalised remorse and that also this will stay with her for the rest of her life, that she has taken her own flesh and blood by her own hands. …" [Page 28 lines 8-10]

"So also if you look at all the factors cumulatively, the Court in its discretion and feel that balancing all the factors that actually this is an appropriate case where the Court should depart from imposing the minimum sentence prescribed in this case." [Pages 28 lines 23-25 and page 29 line 1]

"... So the Court is deviating from imposing life imprisonment, therefore the accused is SENTENCED TO TWENTY (20) YEARS' IMPRISONMENT, HALF OF WHICH IS SUSPENDED FOR A PERIOD OF FIVE (5) YEARS on condition accused is not convicted of murder, culpable homicide, attempted murder, assault, assault with intent to do grievous bodily harm or infliction of a dangerous wound during the period of suspension. In terms of section 103 of the Firearms Control Act ... no order is made. The effect thereof is that the accused is automatically DEEMED UNFIT TO POSSESS ANY FIREARM." [Page 29 lines 2-11]

**SELECTED JUDGMENTS**

**PRIVATE LAW**

**EXTRA DIMENSIONS 121 (PTY) LTD V BODY CORPORATE OF MARINE (9015/2014) [2016] ZAKZDHC 1**

**Case heard 11 November 2015, Judgment delivered 5 February 2016**

The Applicant sought an order declaring the first respondent (body corporate's) amended conduct rules invalid. This followed a special resolution whereby the first respondent resolved to modify contributions by owners, according to a document titled Annexure "B".

Masipa AJ held:

"The issue to be decided as agreed to by the parties is the meaning/interpretation of the words 'adversely affected' as referred to in section 32(4) of the Act. The question is whether the applicant is adversely affected by the special resolution … and whether it is envisaged from the Act that his written consent be obtained prior to the passing of such resolution. If the Applicant was adversely affected, then the resolution is contrary to the legal provisions and falls to be set aside." [Paragraph 9]

Masipa AJ referred to ***Natal Joint Municipal Pension Fund v Endumeni Municipality,*** **where Wallis JA dealt with the approach in interpreting written agreements, and *Algar v Body Corporate of Thistledown & Others,*** which interpreted the words 'adversely affected':

"Theron J found that section 32(4) of the Act reduced the requirement to that of a special resolution which required a 75% majority and the consent of an owner who was adversely affected by the resolution. The court rejected the argument by the applicant that the fact that he had to pay an increased monthly levy, it meant that he was 'adversely affected'. It held that if that was the interpretation to be placed on the words adversely affected, it would have been difficult to envisage any special levy changing the basis upon which levies were calculated. The result would be that the situation would be the same as that which existed under the 1971 act. The court found that the result would 'render the provisions of section 32(4) nugatory' which could not have been the intention of the legislature." [Paragraph 14]

"The court's view was that the philosophy underlying the Act is for owners of the units to be treated fairly and that this is reflected in the scheme of the Act as legislature in section 32(4) recognised that when it comes to determination of levies, each scheme may be different. … [T]he court concluded that in order to arrive at the meaning of the terms 'adversely affected' within the meaning of section 32(4) … all facts and circumstances must be taken into account and not only the fact that a member has to pay more levies." [Paragraph 15]

"Although the decision in Thistledown was taken prior to the Natal Joint Pension Fund matter, the Court's interpretation fails within the principles set out by Wallis JA. In Thistledown, the Court took into account the ordinary grammar syntax of the word adversely affected and considered several cases where the word was used." [Paragraph 37]

"However … no person can give consent to reasonable paying more money [sic]. The result of this interpretation would be that there can never be a levy increase. In Thistledown the court took into account the fact that when the legislature drafted the provisions of S32(4), it had at its disposal the

provisions of S24(3) of the 1971 Act where the resolution could only be passed by unanimous vote of members. This provision made it difficult if not impossible for body corporates to change the basis upon which levies could be increased." [Paragraph 38]

"Having considered the earlier provision and the challenges it had introduced to body corporates legislature, it could not have intended for a similar context in the subsequent provision." [Paragraph 39]

"Another factor is that legislature being aware of the earlier provision, could not have intended for absurdity in the subsequent Act. It would be absurd to suggest that legislature intended that there be no change in levies unless an owner consents. … In any event, the applicant accepted in his affidavits that all members must contribute equally to levies. If this is the case, then he cannot be complaining about the increase of his levies." [Paragraph 40]

"Although the result of the impugned resolution is that the applicant pays more money… it cannot be said that he is adversely affected since he now gets to pay for what he uses or benefits from. … [T]he applicant conceded that all members had to contribute equally to levies regardless of the extent of benefit. To achieve this, the Body Corporate had to increase his levies. … [I]t is improbable that the Applicant would have given his consent to pay more. He evidence this through his objection even prior to the meeting. A consideration of fairness … becomes relevant since it is unfair that one owner benefits from the use and enjoyment of the common property at the expense of others." [Paragraph 41]

"It could not have been the purpose of the Act … that one owner benefits from the use and enjoyment of the common property at the expense of others. This would lead to an insensible and un-business like result. Further, legislature could not have enacted legislation allowing for the value attached to a vote of each one to be amended by special resolution on the one hand while on the other it restricts this by requiring consent by an adversely affected owner to the detriment of all other owners. The context within which the phrase was used can only give effect to the intention of legislature …" [Paragraph 42]

"In order to arrive at a sensible and business like meaning taking into consideration the context of the phrase, it cannot be said that the applicant is adversely affected by the resolution." [Paragraph 43]

The application was dismissed with costs.

## LABOUR LAW

### GALATIS V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION 2014 JDR 1468 (LC)

**Case heard 10 July 2013, Judgment delivered 5 March 2014**

This was an application to review the Second Respondent's (the commissioner's) arbitration award. The issue was whether the Third Respondent (an Oral Hygienist) was an employee of the Applicant (a Dentist) as opposed to an independent contractor, and if so, whether she was dismissed, and whether the dismissal was substantively and procedurally unfair. The Second Respondent found that the Third Respondent was an employee; that her dismissal was substantively and procedurally unfair and ordered the Applicant to compensate her. In the Labour Court, the only issue for determination was whether the decision of the Second Respondent, finding that the Third Respondent was an employee and not an independent contractor, was that of a reasonable decision maker [paragraph 6].

Masipa AJ held:

"… Second Respondent extensively analysed the issue … The Second Respondent considered the definition of employee in terms of section 213 of the LRA. He found that in terms of section 213(a), for the Applicant to be classified as an employee, three factors must be shown being that the Third Respondent worked for the Applicant, she received or was entitled to receive remuneration from the Applicant and was not an independent contractor." [Paragraph 14]

"He found that he could not place much reliance on the unsigned contract produced by the Applicant as it could not be said to be reflecting the meeting of the minds of the two parties." [Paragraph 16]

"The Second Respondent also took into account the provisions of item three of the Code of Good Practice on who is an employee. He found that in terms of the code, any person interpreting or applying one of the following Acts must take this Code into account for the purpose of determining whether a particular person is an employee. The Second Respondent had regard to the dominant impression test and took into account six factors set out by the Appellate Division to distinguish a contract of employment from a contract of service." [Paragraph 17]

"… [T]he Second Respondent found that the evidence before him illustrated the actual agreement and the dominant impression created to be that the Third Respondent was an employee and not an independent contractor. He found that it was never the intention of the parties to put in place a commercial arrangement but that the true nature of their relationship was an agreement of employment." [Paragraph 19]

"In terms of the issues raised by the parties in court, I had to review the Second Respondent's decision that the Third Respondent was an employee. This issue limits the review to whether the First Respondent had jurisdiction to determine the matter before the Second Respondent. …" [Paragraph 21]

"In National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others, Nugent JA stated that it is trite that an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere." [Paragraph 27]

"… It is only in exceptional circumstances that this court sitting as a court of review can hear new evidence which was not placed before the arbitrator. The Applicants has not set out any reasons why it sought to introduce new evidence in its founding affidavit. There is, therefore, no case made out to suggest the existence of any exceptional circumstance for the admission and/or consideration of such evidence. I will therefore not take the evidence into account." [Paragraph 28]

"On a consideration of the criteria set out in the SA Rugby matter, the following is apparent on the issue of the employer's right of supervision and control: 1. It is a legal requirement that Oral Hygienists be supervised by Dentists; 2. The Third Respondent could not apply her own skills in whitening/bleaching teeth as the Applicant instructed her not to do so; 3. She could not take leave when she pleased and had to seek permission from the Applicant; 4. She was instructed not to use the phone except for work related purposes; 5. She paid no rent; 6. The purchase of her supplies/consumables was done and approved by the Applicant; 7. She performed her services on the Applicant's friends with no payment; 8. She was obliged to submit to the Applicant's wishes in respect of time, date and venue for the meeting 9. She was obliged to phone clients of the practice to generate business for the Applicant and herself." [Paragraph 38]

"In view of the above, it is unclear why Advocate Hutchinson argued that she did not testify as to why she alleged she was supervised when there was clear evidence in this regard." [Paragraph 39]

"It cannot be said that because she worked for another dentist for one day, then she did not form part of the Applicant's organisation since her evidence that this was after obtaining consent from the Applicant was unchallenged. Further … there is no law prohibiting an employee to be employed by more than one employer." [Paragraph 41]

"The last point relates to the extent to which the employee was economically dependent upon the employer. The evidence of the Third Respondent was that: 1. She was paid 50% commission from the work she performed. She worked four days for the Applicant; 2.The Applicant was responsible for purchasing her supplies/consumables; 3. She did not directly contribute towards rent; 4. She did not directly contribute towards salaries of the Applicant's employees but utilised their services." [Paragraph 42]

"I find that the Second Respondent, in analysing the evidence before him, found that the Third Respondent was subject to the supervision and control of the Applicant, formed part of the organisation and was economically dependent on the Applicant. On a consideration of all facts which were before the Second Respondent, it is clear that the real relationship which was between the Applicant and the Third Respondent was an employment relationship. The Second Respondent's award should therefore stand." [Paragraph 43]

The application was dismissed and the Applicant was ordered to pay the Third Respondent's costs.

**SOUTH AFRICAN MUNICIPAL WORKERS UNION V SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL AND OTHERS (JR 409/12) [2013] ZALCJHB 261**

**Case heard 12 July 2013, Judgment delivered 8 October 2013**

The Applicant and the Fourth Respondent were registered trade unions and the only recognised trade unions in a Bargaining Council. The Applicant referred a dispute to the First Respondent regarding the Third Respondent's refusal to accede to a demand to accept a Job Evaluation Agreement. Third Respondent contended that the parties were precluded by legislation and by the First Respondent's Main Collective Agreement from negotiating about the content of a Job Evaluation Agreement, and therefore that the First Respondent lacked jurisdiction. The Applicant sought an order declaring a dispute of mutual interest over which the First Respondent had jurisdiction, and for an order to review and set aside the advisory award issued by the Second Respondent.

Masipa J held:

"The Applicant … averred that the Second Respondent recorded the dispute as relating to the Third Respondent's refusal to bargain on the terms of the draft job evaluation collective agreement. This, the Applicant said, was manifestly incorrect and averred that it was apparent … that the dispute was about the Third Respondent's refusal to accede to a demand it made together with the Fourth Respondent to accept the Job Evaluation Agreement from the two trade unions." [Paragraph 7]

"The Applicant further averred that it was pointed out both during the oral and written submissions that the parties had in fact bargained about the issue further that this was not disputed and was recorded as such in the advisory award." [Paragraph 8]

"The jurisdictional challenge raised before the Third Respondent was that the subject matter on which the Applicant sought to bargain on was regulated by legislation being the Municipal Systems Act and the Municipal Systems Amendment Act ..." [Paragraph 9]

"The issue which the Second Respondent dealt with was a point in limine on whether or not the Bargaining Council had jurisdiction to deal with the nature of dispute referred by the Applicant. ... At no stage was the Second Respondent required to issue an advisory award. It is apparent from a reading of the 'advisory award' that although it was termed as such, it is clearly a jurisdictional ruling. ..." [Paragraph 25]

"... [A]n advisory award seeks to give advice/opinion to the parties and is not binding on the parties. The nature of the Second Respondent's ruling is such that the parties cannot proceed further with the dispute. It is binding on them. In view of this, despite naming it an advisory award, I find that it is in fact a jurisdictional ruling." [Paragraph 26]

"... [T]he next issue that arise is whether the ruling falls to be reviewed or set aside. ..." [Paragraph 27]

"Despite the Applicant recording the nature of dispute as a mutual interest dispute, in his analysis, he recorded it as a refusal to bargain. The basis for this is unclear as it is apparent from the referral papers that the Applicant's case related to an issue of mutual interest. It was common cause that the parties had already bargained on the matter and could not reach agreement, hence the demand by the Applicant." [Paragraph 29]

"In view of the Applicant's categorisation of its dispute, it is proper to consider what is meant by the term 'matter of mutual interest'. ..." [Paragraph 31]

"Pillay AJ, (as she then was) said in De Beers Consolidated Mines Ltd v CCMA and Others, that the term mutual interest must be interpreted literally to mean any issue concerning employment. The term would include dispute of rights as well as of interest. It follows that some disputes about matters of mutual interest may be referred to arbitration or to the Labour Court while others may be resolved through industrial action. This view is fortified by reference to section 51(1) and (3)(iv) of the Act which contemplates that a council may arbitrate a dispute about a matter of mutual interest if the Act requires arbitration." [Paragraph 31]

"The Labour Appeal Court has ... described a dispute of mutual interest as one relating to proposals for the creation of new, or fresh rights, or the diminution of existing rights." [Paragraph 32]

"The Applicant's dispute relates to the employer's refusal to accede to a demand to accept their proposed Job evaluation Agreement. The agreement is one which, if concluded, would create new or fresh rights or reduce existing rights.... I find that the Applicant's dispute is a mutual interest dispute." [Paragraph 33]

"The general aim of the LRA is to encourage employers and unions to regulate their affairs as comprehensively as possible by collective agreements. While certain rights conferred by the LRA and the BCEA may be overridden by collective agreement, such powers are limited. " [Paragraph 40]

"I am satisfied that the Applicant's case meets the requirements for a review in terms of Section 158(1)(g) …" [Paragraph 45]

"On a consideration of all facts which were before the Second Respondent, it is clear that the dispute between the parties is a mutual interest dispute. The Second Respondent's ruling therefore failed to adequately consider the facts before him and can therefore not stand." [Paragraph 46]

"In respect of costs, I believe that the matter concerns an important issue. In the circumstances, I do not think costs should follow the result." [Paragraph 47]

The dispute was declared to be a matter of mutual interest over which the first respondent had jurisdiction. The advisory award by the second respondent was reviewed and set aside.

## CRIMINAL JUSTICE

### S V NXUMALO 2015 JDR 1627 (KZP)

This was an appeal against a sentence of life imprisonment for the rape of a nine year old minor girl. The Appellant had pleaded guilty in the Regional Court, and was convicted as charged. He was initially sentenced to 15 years' imprisonment by the Regional Court. After an appeal, a sentence of life imprisonment was imposed by the High Court. This was an appeal from that sentence.

Masipa AJ (Lopes and Sishi JJ concurring) held:

"The accused appealed against both his conviction and sentence. Leave to appeal was granted by Levinsohn J and Ndlovu AJ in respect of sentence, but the conviction was confirmed. The court found that the crime that was committed fell within the ambit of Part 1 of Schedule 2 of the Criminal Law Amendment Act … ('the CLA Act') and referred the matter to the High Court for sentencing." [Paragraph 2]

"In terms of the CLA Act, the minimum prescribed sentence for the rape of a minor is life imprisonment. It is a requirement in terms of the CLA Act that upon conviction of the Appellant by the Regional Court, the Appellant should have been committed to the High Court for sentencing. The Regional Court did not do this and, as such, failed to take cognizance of the CLA Act." [Paragraph 3]

"… Kruger J … sentenced the Appellant to life imprisonment as prescribed by the CLA Act. The court … found that there were no substantial and compelling circumstances to deviate from the prescribed sentence." [Paragraph 4]

"The Appellant appeals against this sentence on the basis that it is so grossly impropriate as to induce a sense of shock. This is because the Court a quo failed to inform him of the applicability of the CLA Act before his conviction and the charge sheet made no reference to it. Reference to the CLA Act was only made by Counsel in mitigation of sentence and was applied by Kruger J in passing sentence." [Paragraph 5]

"In S v Ndlovu 2003 (1) SACR 331 (SCA) the court held that an accused person should have requisite knowledge so as to appreciate 'in good time' the charges he faces as well as their possible consequences. … [T]he court in S v Makatu … (SCA) … stated that the charge sheet should contain sufficient information

to enable the accused decide whether to conduct his own defence or apply for legal representation, what plea to enter, whether to testify, which witnesses to call and other factors affecting his right to a fair trial." [Paragraph 6]

"Gorven J in S v Langa ... having regard to Makatu (2006) found that the decisions to be taken by the accused could not be taken after conviction if the right to a fair trial were to be taken heed of. The court found that 'good time' could only mean at a stage prior to the accused pleading guilty. The court found in Langa that, since the provisions of the CLA Act were only expressly mentioned to the accused after conviction, it was insufficient time." [Paragraph 7]

"... The provisions of the CLA Act can ... not be applied if due regard is to be given to the Appellant's right. I find that the Court a quo misdirected itself in material respects and find that the sentence of life imprisonment falls to be set aside." [Paragraph 9]

"It was submitted ... that since the charge related to the rape of a minor, upon convicting the Appellant, the Regional Magistrate should have referred the matter for sentencing to the High Court instead of sentencing him. Ms Anasatsiou argued that the Magistrate was correct in sentencing the Appellant since the CLA Act was not applicable. This proposition cannot be correct since the matter comes before court not as an appeal against the decision of the Magistrate's Court but in respect of the sentence by the High Court." [Paragraph 10]

"... Gorven J found that since the CLA Act was not applicable, considerations of sentence should exclude the 'substantial and compelling circumstances' requirement. I agree with that approach." [Paragraph 11]

"... The nature of the offence in this matter is so heinous that the legislature deemed it necessary to prescribe the harshest sentence being that of life imprisonment. The Appellant only escapes this sentence due to the lack of diligence and conscientiousness on the part of the prosecution. This is so because the charge sheet failed to make reference to the CLA Act thereby advising the Appellant of a possible life sentence. Sexual offences are violent and invasive in their nature threatening the morality and socialization of society. Such crime committed against a trusting minor is an atrocity that has become prevalent in society. The sentence imposed must therefore reflect the Court's discontent" [Paragraph 12]

The appeal against the sentence was upheld, and the life sentence was replaced by a sentence of 20 years' imprisonment.

## SELECTED JUDGMENTS

## PRIVATE LAW

### NETCARE ST AUGUSTINE'S HOSPITAL (PTY) V EEG & SLEEP LABORATORY, UNREPORTED JUDGMENT, CASE NO.9088/2013 (KWAZULU-NATAL LOCAL DIVISION)

**Case heard 29 May 2015, Judgment delivered 01 July 2015**

This was an application for eviction. Topping JA held:

"The dispute between the parties …revolves around a proper interpretation of what is meant by "no sooner than six calendar months before the expiry of the initial period of lease, nor later than six calendar months before expiry of period of lease. The parties are in agreement that should the Respondent have wished to exercise the option to renew the sublease, it would have had to have done so within the time period stipulated within the provisions … as properly interpreted." [Paragraph 10]

"In order to test the Applicant's submission regarding the proper interpretation … one has to ignore, albeit for the moment, that there is a difference between the "initial period of lease" and the period of lease". One has to assume that they are the same thing … and then endeavour to determine a specific point or period in time when the sub-lessee is obliged to give notice, having regard to the fact that it must be done no "sooner than" nor "later than" six calendar months before the expiry of that specified date. The operative phrase being "six calendar months before"." [Paragraph 12]

"… In the present instance, there is nothing to indicate that the parties intended that an "inexact moment" ought to be calculated in determining the period of notice. It would follow therefore that no account ought to be taken of "broken units" and that the "whole or the first and fast [sic] days ought to be taken into account when calculating the interest period. That being the case, a day corresponding to "six calendar months before" the 1st of April 2013 can be calculated. I accordingly do not agree with the Respondent's … submission that, upon … the Applicant's contention of the proper interpretation of clause 7.2, an actual date could not be ascertained." [Paragraph 13]

"It makes business sense that the parties would have intended that advance notice of the Respondent's intention to exercise the option needed to be given so as to forewarn the parties and to place them in a position to be able to engage in meaningful negotiations so as to agree upon the rental for the option period within the 30 day period before the lease would come to an end …" [Paragraph 19]

Topping AJ then considered the intention to exercise the option to renew:

"… [I]t has to unequivocally convey to the recipient, using ordinary reason and knowledge, that it was intended to be such an exercise of the option. It has to leave no room for doubt and the

recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of what is conveyed in the notice." [Paragraph 28]

"When the intention to exercise the option is conveyed in a written document, the actual but uncommunicated intention of the person addressing such writing is irrelevant. It is only the intention as expressed in that written communication itself that must be considered." [Paragraph 29]

"I therefore come to the conclusion that the Respondent is in unlawful occupation of the leased premises and that the Applicant is accordingly entitled to the relief sought in this application." [Paragraph 32]

The eviction order was granted.

## CIVIL PROCEDURE

### ETHEKWINI MUNICIPALITY V BHARDWAJ (3135/2015) [2015] ZAKZDHC 80

**Case heard 25 June 2015, Judgment delivered 11 September 2015**

Applicant sought an order declaring the respondent to be in contempt of an order granted in the main application, where the applicant sought an order interdicting and restraining the respondent from undertaking any building construction work upon his immovable property. The relief was sought on the grounds that the respondent had failed to comply with certain town planning and statutory building provisions.

Topping AJ held:

"It is common cause that according to the Applicant's South Town Planning Scheme, "all erven", except where otherwise stated, are subject to a 7,5m building line. It is also common cause in these proceedings that the Respondent has failed to obtain the Applicant's "special consent" … for a relaxation of the building line. The effect of such failure in the present instance is that no building may be constructed within a 7,5m distance of the Respondent's south-western boundary. I shall refer to this area as the "prohibited area"." [Paragraph 7]

"Once the Applicant has proved the grant of the order, the service thereof on the Respondent or that it has come to the Respondents notice, the Respondent's non-compliance with the provisions of that order and wilfulness and mala fides on the Respondent's part, an evidentiary burden then rests upon the Respondent to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and mala fides. Should the Respondent fail to advance such evidence, contempt will have been established beyond reasonable doubt." [Paragraph 13]

"The grant of the order … and that he had notice thereof is admitted by the Respondent. What needs to be analysed therefore is whether the Applicant has proved, on the papers before me, that the Respondent has not complied with the order by continuing with building works subsequent to the grant thereof and that he acted wilfully and mala fide in doing so." [Paragraph 14]

"…The Respondent has been prohibited from undertaking any construction work which is contrary to the approved plan. No prohibition is imposed in the order regarding any construction work taking place over the building line." [Paragraph 17]

"Should such comparison reveal that the Applicant has established on the papers that construction work has been undertaken on the property that was not "foreshadowed by the plan", one then has to take the enquiry further and determine whether the Applicant has established that such construction work took place after the grant of the order on the 26th of February 2015." [Paragraph 16]

"… [From] the pictorial evidence put up by the Applicant in its founding affidavit, and the admissions made by the Respondent in response thereto, it is clearly evident that the Respondent has proceeded with the construction of a building on the prohibited area from a state where it consisted of the outer boundary wall, still in a state of construction as at the 5th of March 2015, to a state where a structure, inclusive of a roof, a concrete floor and doors, had been completed by the 17th of March 2015. I am therefore satisfied that the structure that presently stands on the prohibited area, save for the rear retaining wall, the concrete pillars running along its centreline and a portion of the outer boundary wall, were constructed after the grant of the order on the 26th of February 2015. I am therefore satisfied that the Applicant has proved that such structure was constructed by the Respondent in contravention of the provisions of that order." [Paragraph 20]

"… It is also admitted by the Respondent that he addressed an email to the Applicant on the 4th of February 2015 wherein he acknowledged receipt of the summons as aforesaid, contended that he had an approved plan, with reference to the plan forming the subject of this application, admitted that he had deviated therefrom, contended that he had submitted a "deviation plan" to the Applicant, but that such "did not pass"" [Paragraph 21]

"…It must also not be forgotten that the Respondent was represented by his attorney of record during all relevant times to these proceedings. I am therefore of the view that his assertion that he was labouring under a misapprehension that he was entitled to proceed with the building works after the 5th of March 2015 is "clearly unworthy of credence" and ought to be rejected." [Paragraph 23]

"…The Applicant was duty-bound to approach this court in the main application to seek an interdict to prevent the Respondent from continuing with the illegal construction of the structure on the prohibited area of the property. The unauthorised and illegal conduct of the Respondent cannot be condoned by this court. I am of the view that a lenient approach in the present instance would also lead to an open invitation to members of the public to follow the

course adopted by the Respondent and to continue with the construction of buildings and structures in circumstances where the authority therefor has not been obtained from the relevant municipality ...” [Paragraph 26]

“The approach adopted by the Applicant, in seeking the alternative relief, would not only serve the purpose of vindicating this court’s honour consequent upon the disregard of the order ... but will also serve the purpose of encouraging the Respondent to comply with the provisions thereof and provide him with an opportunity of “righting his wrongs” prior to any punishment being imposed upon him. I am therefore of the view that such relief is appropriate in the present circumstances.” [Paragraph 27]

“...I am of the view that a period of 14 days affords the Respondent insufficient time to undertake such demolition and that a period of 30 days would be appropriate in the circumstances. I must also state that the order of demolition granted herein is confined solely to those portions of the structure that are not foreshadowed by the approved plan that were constructed after the issue of the order on the 26th of February 2015...” [Paragraph 28]

Topping AJ made the following order:

“(a) the Respondent is found in contempt of the order granted by this court on the 26th of February 2015; (b) the Respondent is committed to prison for a period of thirty (30) days; (c) such committal is suspended for a period of two (2) years on condition that the Respondent: (i) complies with the terms of the order granted on the 26th of February 2015; (ii) demolishes all building construction work undertaken by him, or on his behalf, which is contrary to the terms of the said order within a period of thirty (30) days of the date hereof; (d) the Applicant is given leave, in the event of the Respondent failing to comply with the provisions of subparagraph (c) hereof, and on the same papers supplemented as necessary, to apply for an order for the Respondent’s committal to prison; and (e) the Respondent is directed to pay the costs of this application on the attorney and client scale.” [Paragraph 29]

## SELECTED JUDGMENTS

### PRIVATE LAW

**VAN DER WESTHUIZEN V MINISTER OF SAFETY AND SECURITY (14013/2010) [2012] ZAGPJHC 207**

**Case heard 14 September 2012, Judgment delivered 10 September 2012**

The plaintiff instituted an action against the Minister, alleging that he was wrongfully and unlawfully arrested and defamed in the presence of his family, despite showing proof that he was not the person being sought in connection with fraud related charges. The judge criticised the conduct of police officers.

On arrest without a warrant, Kgomo J held:

"Our Constitution and other enabling legislation do not countenance an arrest without a warrant for flimsy or negligible or obscure reasons. The law should be interpreted in such a way that the liberty of an individual is always paramount." [Paragraph 90]

On the test for a justifiable arrest without a warrant, Kgomo J held:

"... [T]he question to be determined in relation to the immunity given to the police under the applicable laws is whether any ordinary, prudent and cautious person authorised and bound to execute a warrant of arrest or effect an arrest, would have believed that the person being arrested was the wanted person or the person named in the warrant of arrest, if any." [Paragraph 93]

On the arrest of the plaintiff in the face of evidence proving his identity, Kgomo J held:

"The above conduct, in my view, and finding strengthens the plaintiff's contention that the second defendant acted with a tinge of malice that can even be characterised as racism" [Paragraph 104]

"It is thus my considered view and finding that the plaintiff was arrested in a dehumanising and inhumane manner in front of his small children and that the arrest has humiliated and traumatised him and his family" [Paragraph 114]

"Unlawful arrest and misuse of powers by members of the defendant is frowned upon and its escalation should be curbed as by yesterday, i.e. "pronto"." [Paragraph 131]

On the motive for the arrest, Kgomo J held:

"How he [the second defendant, the arresting officer] would not have known of the plaintiff is not only at variance with recognised concepts of truthfulness but also smacks of blatant lies being told. The plaintiff suggested and charged that this particular "docket" never existed at the time the plaintiff was released from custody but is a recent fabrication by the second defendant in a sorry attempt to cover up for his indiscretion and misdemeanour" [Paragraph 146]

"His creation of "Docket 1336/11/2009 (Vanderbijlpark)" was a failed or transparent attempt and/or ruse to try to cover up his illegal and unlawful act." [Paragraph 147]

On the refusal by the second defendant to testify, Kgomo J held:

"His failure or refusal to come and testify as enunciated in court by their counsel definitely left both the first defendant and its counsel with "*egg on their faces*." [Paragraph 148]

Addressing the recklessness of the arrest, Kgomo J held:

"Attempts were made to press him like a sack of mielie meal inside a Ford Ikon micro sedan until the second defendant and his colleagues realised that he cannot fit therein." [Paragraph 157]

"All of this solely because some police official's ego was sore or needed a boost. The malice inherent therein is palpable." [Paragraph 158]

Judgement was given in favour of the Plaintiff, who was awarded damages of R480 000.00

## CIVIL AND POLITICAL RIGHTS

### MPHAHLELE AND ANOTHER V MOLOTO AND ANOTHER (13/19023) [2013] ZAGPJHC 140

**Case heard 6 June 2013, Judgment delivered 14 June 2013**

This was an application by Mphahlele Letlapa and the Pan African Congress of Azania, seeking an order to declare that a meeting and the resolutions convened by the first respondent (Moloto Narius) were invalid.

In dealing with the time frames for the hearings, Kgomo J held:

"It is consequently my considered view and finding that the respondents' counsel's contention that there are no time frames set when a notice should be issued and whereafter after how long the disciplinary hearing should be held cannot be correct." [Paragraph 70]

"A member to be charged must be given an opportunity to make representations why the charges should not be proceeded with." [Paragraph 71]

"… [T]he total membership of those present who were allowed to take decisions at an NEC meeting of the PAC did not constitute a quorum to pass any valid and constitutionally permissible resolutions at the meeting of 11 May 2013 … Consequently, all deliberations at this meeting as well as all and any resolutions adopted or taken thereat are *null and void*, *ab initio* and thus invalid." [Paragraph 88]

"The time frames given to the first applicant, even if for argument sake the NEC at the meeting of 11 May 2013 had quorated, were woe-fully inadequate and are tantamount to denying the first applicant a right to a fair hearing. The application could still fail under those circumstances." Paragraph 96

On the suspension of the applicant, Kgomo J held:

"It comes down to the simple fact that the suspension by the committee elected at that meeting of 11 May 2013 of the first applicant cannot stand or be lawful, constitutional and valid."

"His suspension and subsequent dismissal thus also stands to be set aside as it is legally and factually a non-event when the Constitution of the second respondent is anything to go by." [Paragraph 90]

"For the sake of completeness as well as for future directives it is my view and finding that I should say something about the lead-up to the so-called disciplinary hearing that led to this application..." [Paragraph 91]

On the missing documents and subsequent response by counsel for the respondents, namely that it had been incumbent on the applicant to establish what further documents accompanied the charge, Kgomo J held:

"I find the last-mentioned attitude not only unreasonable but also an above average display of ignorance and arrogance." [Paragraph 95]

The suspension of the applicant and the subsequent resolutions by the respondents were declared null and void.

**DE LANGE AND ANOTHER V ESKOM HOLDINGS LTD AND OTHERS 2012 (1) SA 280 (GSJ)**

**Case heard 11 April 2011, Judgment delivered 29 July 2011**

This case concerned the disclosure of information under the Promotion of Access to Information Act (PAIA). The applicants were seeking an order directing Eskom to release information regarding its electricity pricing to some of its biggest customers. The respondents invoked sections 36 and 37 of PAIA, which provided for the mandatory protection of commercial or confidential information of a third party, while the applicants relied on section 46, which contained a public-interest override where a disclosure prohibited under s 36 or 37 would reveal an imminent threat to public safety or the environment.

Kgomo J held:

"Section 32 of the Constitution makes a decisive break with the past, entitling everyone to information held by the State. Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the State to a new regimen of openness and fair dealing with the public." [Paragraph 20]

"... [T]he importance of access to information held by the State or public or State entity as a means to secure accountability and transparency justifies the approach adopted in s 32(1)*(a)* of the Bill of Rights and in PAIA, namely that, unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the State or public entity as a matter of right." [Paragraph 34]

In dealing with public interest in the disclosure of information, Kgomo J held:

"The term 'public interest' may in my view mean more than the meagre aspect specifically identified in the section. It may include the public interest in upholding the law as well as the public's awareness of public safety or environmental risks. There may also be the public interest in furthering the general goals of the Act." [Paragraph 139]

"In their heads of argument and arguments in court both sides engaged in academic pontification and splitting of hairs about what is meant by 'substantial contraventions of or failure to comply with the law' and 'an imminent and serious public safety or environmental risk'." [Paragraph 140]

"My view is that if given their ordinary grammatical meanings the above expressions do not need any 'arm twisting' to understand what they imply or how they should be interpreted." [Paragraph 141]

In dealing with the impact of load shedding on the general South African public, Kgomo J held:

"... Billiton smelters consume 5,68% of Eskom's total base load capacity and that Eskom's base load deficiency is almost the same percentage, the conclusions by the applicants and the general public that the extent of the rolling electricity blackouts experienced in South Africa since 2008 would have been substantially reduced or completely eliminated make sense." [Paragraph 148]

"If electricity supply is unavailable to ordinary households, unhealthy power supplies like coal-fired stoves or braziers may be utilised. The environmental and health dangers associated with these alternative power supplies are obvious. People die from smoke or gas/fume inhalations."

"Lung diseases increase, resulting in unbearable pressure on healthcare facilities. Fatal consequences most times follow. These aspects are linked to substances released into the environment" [Paragraph 149]

"This situation brings into reckoning the issue of public interest — whether the harm contemplated in the refusal to disclose is outweighed by the public interest." [Paragraph 151]

"... [O]n the basis of the public interest override in terms of s 46 of PAIA, it is in the public interest that the first respondent disclose to the applicants the information or data as well as the documents sought in this application." [Paragraph 164]

The first respondent's decision to refuse to grant the applicants' request for access to information was thus set aside, and the first respondent was ordered to provide specified records and information to the applicants. The decision was upheld by a majority of the Supreme Court of Appeal in BHP Billiton Plc Inc and Another v De Lange and Others 2013 (3) SA 571 (SCA).

## CIVIL PROCEDURE

### COAL OF AFRICA LIMITED AND ANOTHER V AKKERLAND BOERDERY (PTY) LTD (38528/2012) [2014] ZAGPPHC 195

**Case heard 23 July 2013, Judgment delivered 05 March 2014**

Applicant, a coal mining company, sought to have the respondents (the owner of the Lukin farm property) interdicted to stop respondents denying them access to the farm in order for them to carry on prospecting operations. The respondents argued that that the applicant did not have a clear right, and that the requirements of the Mineral and Petroleum Development Act (MPRDA) were not met when the prospecting rights over the Lukin property were conferred.

On the justification of invasion of ownership rights and accompanying harm to the environment by prospecting and mining, Kgomo J held:

"... [P]rospecting and mining is, in principle, justified by the need to promote development and to contribute towards the redress of poverty and lack of access to the resources and the riches of our

country by as many of the inhabitants of our country in iine with the previous, preconstitutional dispensation" [Paragraph 39]

"The views and interests of the landowner, who may be unwilling to allow his/her property to be "invaded' this way, and those of the broader community, must be taken into account in the decision-making process." [Paragraph 39]

"... [T]he nature of the rights created under mining and environmental legislation (which include prospecting) is such that a number of different and potentially competing rights and interests must be considered and. if possibie, accommodated." [Paragraph 44]

On the allegations of the invalid administrative acts, Kgomo J held:

"It is common cause that generally, an unlawful administrative act remains vaiid and/or enforceable in law and has legal consequences which prevail until the so-said unlawful administrative act or decision is reviewed and set aside, in this sense, such acts are said to be or described as voidable." [Paragraph 58]

On the issue of whether the applicants consulted with the respondents, Kgomo J held:

"The respondents in their submissions attempted to pour cold water on this letter and its import. After analysing the arguments on this aspect i am satisfied that the respondent was approached for purposes of consultations but the respondent refused to consult or frustrated the applicant's attempts to have such consultations going" [Paragraph 83]

"After taking into account the viewpoints of both sides, checking on the applicable laws and factoring facts as dictated by probabilities and the circumstances, it is my view and finding that the applicants have made out a case for the grant of the prayers they sought. The respondent's points of dispute and defence did not withstand scrutiny." [Paragraph 127]

The respondent was interdicted and restrained from refusing the applicant access to property.

## CRIMINAL JUSTICE

### S V AGLIOTTI 2012 (1) SACR 559 (GSJ)

**Case heard 12 August 2010, Judgment delivered 16 August 2010**

This was an application by the State for the admission of the accused's record and contents of bail proceedings at his trial. Central to the case was the fact that the accused was not warned of his rights under Section 60(11B)(c) of Criminal Procedure Act. The case deals with the importance of the section in guaranteeing the right to a fair trial.

On the conduct of the State advocate during trial, in failing to provde a witness statement prior to the witness being called, Kgomo J held:

"I made it clear to the state counsel that that state of affairs was highly undesirable, as it may likely be classified as something akin to 'ambush litigation' ...." [Paragraph 4]

Referring to the principle in *S v Pienaar* that that an affidavit ranked as evidence, but not as high as viva voce evidence, Kgomo J held:

"The court talked therein of higher- caste evidence and lower-caste evidence. In my view that is a recipe for ambiguity and lack of legal certainty. Evidence should be evidence, finish and klaar." [Paragraph 31]

In dealing with the importance of Section 60(11B)(c) of Criminal Procedure Act, Kgomo J held:

"The warning in terms of s 60(11B)(c) is an important constitutional safeguard that impacts directly on whether an accused person receives a fair trial." [Paragraph 35]

"The interests of justice require that the accused's constitutional rights and guarantees be respected" [Paragraph 37]

"It is my considered view that, even where an accused or applicant, in a bail hearing concerning schedule 6 offences, intends to use an affidavit, it is a peremptory duty of the court, right at the beginning of the proceedings, to warn him fully and comprehensively of the provisions of s 60(11B)(c)." [Paragraph 39]

"As I stated before, both oral evidence and affidavit are evidence that may be used in the subsequent trial. As such, the requisite warning should be issued by the court to the accused before he elects to testify orally or to use an affidavit." [Paragraph 39]

"Whether he was represented by a good, able or competent, or experienced, counsel is not a consideration that would affect what ought to be done. It should be done by the court, not by counsel or attorney representing the applicant in the bail proceedings." [Paragraph 41]

The application was dismissed.

**S V AGLIOTTI 2011 (2) SACR 437 (GSJ)**

**Case heard 26 July 2010, Judgment delivered 25 November 2010**

The accused was charged with conspiracy to murder under the Riotous Assemblies Act, and with attempted murder. Alleged co-conspirators admitted to various degrees of involvement in a conspiracy to commit murders, and testified as witness subject to potential immunity under section 204 of the Criminal Procedure Act. The co-conspirator who could implicate the accused did so in a supplementary affidavit and was discredited during cross examination, leaving the State without a prima facie case against the accused at the close of its case. At the conclusion of the state's case, the accused applied for a discharge under section 174 of the Criminal Procedure Act, arguing that he had not received a fair trial and that the state had not made out a prima facie case. The case dealt with the position under South African law with regard to assisted suicide, euthanasia, and the general expected conduct of prosecutors.

On euthanasia and assisted suicide in South Africa, Kgomo J held:

"In South Africa the situation is still fluid and confusing. Different functionaries have differing views on euthanasia (especially) and assisted suicide. Civil society at times holds views opposed by adherents of religion who, in turn, are wont to differ *inter se*." [Paragraph 19]

“Our courts have also in the past sent out inconsistent views in contradictory judgments on assisted suicide and euthanasia. When one traces the development of this phenomenon the confusion increases. The initial view was that a person who knowingly supplied any drugs to a patient for use in a suicide or who hands another a weapon to kill himself/herself was guilty of an offence.” [Paragraph 20]

“The conclusion one arrives at, at the end of it all, is that in South Africa a person assisting any other person to commit suicide — let alone actually killing the suicide requestor — will be guilty of an offence. Consequently, anyone who conspires with, aids and/or abets another to commit suicide, albeit called assisted suicide, will be guilty of an offence.” [Paragraph 21]

“This case is about hidden and/or sinister agendas perpetrated by shady characters, as well as ostensibly crooked and/or greedy businesspersons. It is about corrupt civil servants, as well as prominent politicians or politically connected people, wining and dining with devils incarnate under cover of darkness.” [Paragraph 24]

Regarding the section 204 witnesses, Kgomo J held:

“This points to some kind of 'muvhango' (conflict or dissensus) somewhere in the innards of the DSO and DPP, which is, fortunately, no concern of ours here. Suffice to say that insofar as statements, affidavits, dockets, evidential material and anything that impacted on this trial were held back by the past or present investigation teams, both the State and the defence were hampered and the course of justice was somewhat hindered if not obstructed.” [Paragraph 43]

“… Their rendition was like a scene from a mafia film — tragic, emotionless and comical — only it was real and serious.” [Paragraph 46]

The accused was discharged in terms of section 174.

## SELECTED JUDGMENTS

### PRIVATE LAW

**M v J (2195/2015) [2015] ZAKZDHC 70; 2016 (1) SA 71 (KZD)**

**Case heard 14, 16 April 2015, Judgment delivered 2 September 2015**

The parties were married under Islamic law, and the marriage was not registered in terms of the Marriage Act. In a divorce action the wife sought recognition of the validity of such marriages under the Act. Pending finalisation of divorce proceedings, the wife instituted a rule 43 application for an order pendente lite granting her (a) primary residence of her two minor children, (b) maintenance for herself and her minor children, and (c) contribution towards her legal costs in the divorce action. The husband objected in limine, arguing that no marriage existed and accordingly rule 43, which pertained to matrimonial matters, did not apply. He argued that he had already terminated the marriage by pronouncing a talaq (divorce) and that a marriage according to Islamic law was not valid in terms of the Act.

Mokgohloa J held:

"'The fundamental shift that occurred when South Africa became a constitutional democracy in 1994 heralded changes in all areas of the law. …'" [Paragraph 1]

"According to Muslim law, a divorce comes into effect after the notification by the husband to the wife of the divorce three times. … For the purpose of this application I am not required to determine the issue of whether the parties are divorced or not as this will be determined by the court hearing the divorce action." [Paragraph 8]

"The issue for determination in this matter is whether the present proceedings constitute "matrimonial action" as contemplated in rule 43(1). …" [Paragraph 9]

"Previously, Islamic personal law and other religious legal systems were not officially recognised as part of South African law. Neither was a provision made in statutory law for the recognition of marriages concluded in terms of Muslim law. This was due to the potentially polygamous nature of Muslim marriages. …" [Paragraph 10]

"However, after the advent of democracy in 1994, the courts started changing their approach to Muslim marriages. The change in attitude and approach manifested in cases such as Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening), where the Supreme Court of Appeal recognised a Muslim widow's claim for loss of support following the death of her husband as a result of a motor vehicle accident. …" [Paragraph 11]

"In Khan v Khan the court had to consider whether there was a legal duty on the husband, by virtue of provisions of s 2(1) of the Maintenance Act, to maintain his wife, to whom he had been married by Muslim rites, accepting that the marriage was in fact a polygamous one. The court held that partners in a Muslim marriage, married in accordance with Islamic rites, whether monogamous or not, were entitled to maintenance and thus entitled to maintenance in terms of the Maintenance Act." [Paragraph 12]

"Counsel for the respondent conceded that there are cases … where the applicant was allowed to utilise rule 43 to apply for pendente lite maintenance. He however argued that none of these cases are binding on this court. He referred me to an unreported Natal Provincial Division decision in the case of Jamalodeen v Moola where a woman who had been married in terms of Islamic law, and divorced in accordance with Muslim rites was entitled to maintenance in terms of rule 43, pending the final determination of her constitutional challenge and divorce action. Levinsohn J ordered pendente lite maintenance in terms of rule 43, subject to three conditions …" [Paragraph 13]

Mokgohloa J then refered to *AM v RM* 2010 (2) SA 223 (ECP) … where Revelas J criticised Levinsohn J's approach in *Jamalodeen*:

"I share the sentiments as those expressed by Revelas J. The imposition of restitutionary conditions renders the relief granted in terms of rule 43 useless to a wife who approaches the court precisely because she is unable to maintain herself and her children pending the divorce action. In my view the restitutionary provisions are antithetical to the very purpose of an application in terms of rule 43." [Paragraph 15]

"In Zaphiriou v Zaphiriou it was reiterated that rule 43 was designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under common law in regard to maintenance and costs. The purpose of such relief was to regulate the position between the parties until the court finally determines all the issues between them, one of which might well be whether the parties had contracted a valid marriage or not, or if they had, whether it still subsisted. …" [Paragraph 16]

"Therefore, I find it to be unnecessary for the applicant in a rule 43 application to prove prima facie the validity of the marriage. In my view, the entitlement to maintenance pendente lite arises from a general duty of a husband to support his wife and children. If the enforcement of these rights entails pursuing them in court, then the same considerations applied in Zaphiriou should apply to whether the court can make an order for an interim contribution towards costs." [Paragraph 17]

"Accordingly, the applicant cannot be precluded from obtaining relief in terms of rule 43 (1) by virtue of her Muslim marriage, irrespective of whether the respondent pronounced a talaq or not." [Paragraph 18]

"For the reasons given, I was satisfied that the applicant was entitled to the relief sought …" [Paragraph 19]

It was ordered that the primary residence of the minor children shall be with the applicant and the respondent was granted *pendente lite* contact with the minor children. Further, among other relief, the respondent was directed to pay maintenance to the applicant for herself and the minor children in the sum of R20 000 per month, and to contribute the amount of R15 000.00 towards the applicant's legal costs.

**OKUDO v MINISTER OF SAFETY AND SECURITY [2011] JOL 27880 (KZD)**

**Case heard 11 August 2011, Judgment delivered 03 October 2011**

The plaintiff sued the defendant for damages, alleging that he was arrested, assaulted, and detained by the police.

Mokgohloa J held:

"It is not in dispute that the plaintiff was arrested, detained and that charges against him were subsequently withdrawn. It is further not in dispute that the plaintiff suffered injuries certain whilst in the police custody and that this led him to be taken to Addington Hospital where he was detained for eight days and also kept under police guard. What is in dispute is, who assaulted the plaintiff; whether Ngcobo and Shanmugan [the police officers in question] acted unlawfully in arresting and detaining the plaintiff; and whether Ngcobo and Shanmugan acted wrongfully and malicious in setting the law in motion by laying a charges of possession of drugs against the plaintiff." [Paragraph 12]

Mokgohloa J then set out the requirements for an arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act, and the requirements for an arrestor acting under that provision as established in the Appellate Division case of *Duncan v Minister of Law and* Order, and continued:

"The requirement that the suspicion must rest on reasonable grounds, is objectively justifiable. The test to be applied is not whether a police officer believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. ..." [Paragraph 15]

"... Shanmugan's testimony is that he noticed the plaintiff walking ... The plaintiff changed his direction and walked away from the police. According to Shanmugan, this made him form a suspicion which made him ...stop the plaintiff and search him ... The question therefore is can a reasonable police officer with 12 years' experience arrest a person without a warrant only because that person changed his path of direction upon noticing the police?

I do not think that, this is reasonable suspicion. Furthermore Shanmugan contradicted himself in his testimony regarding who found the alleged cocaine on the plaintiff. ... I find this to be a material contradiction which makes his evidence to be unreliable and untrustworthy. Therefore I find that the defendant failed to discharge the onus of justifying the lawfulness of the arrest." [Paragraph 16]

Mokgohloa J then turned to deal with the issue of assault:

"The plaintiff gave a detailed testimony as to where and how he was assaulted .... Shanmugan on the other hand denied that he and Ngcobo assaulted the plaintiff at all. According to him, the plaintiff was handed in at the Point Police Station free of any injuries." [Paragraph 17]

Mokgohloa J noted that these two versions were mutually destructive of one another, and proceeded to discuss case law on which to accept and which to reject, before continuing:

"The burden of proof is always on the plaintiff to prove his case on a balance of probabilities. In evaluating the plaintiff's evidence, I find him to be credible. His evidence was straightforward. He testified in detailed terms how he was arrested, assaulted, detained and later taken to the Addington Hospital. ... The evidence of Shanmugan on the other hand is riddled with contradictions. He testified that it was Ngcobo who found drugs on the plaintiff and later changed and stated that it was him who found those drugs. His explanation of taking the plaintiff to CR Swart building before taking him to the police station is unconvincing and far-fetched. Instead I am satisfied that the reason for taking the plaintiff to CR Swart building was to assault him as they did." [Paragraph 20]

The defendant was ordered to make payment of damages to the plaintiff in the amount of R131 000.

**CIVIL AND POLITICAL RIGHTS**

**V & V CONSULTING ENGINEERS (PTY) LTD V UMLALAZI LOCAL MUNICIPALITY 2016 JDR 0136 (KZP)**

**Case heard 19 November 2014, Judgment delivered 3 February 2016**

This was an application for access to information of a public body in terms of the Promotion of Access to Information Act (PAIA). The applicant sought access to certain documents in respect of the design and supervision of a road rehabilitation project in the CBD of Eshowe.

Mogkohloa J held:

"The first respondent opposes the application. Its Director: Engineering Services … (Buthelezi) … raised two points in limine. Buthelezi submitted that on 28 May 2009, the first respondent put out a tender by advertisement for the registration of any interested consultant on the Council's Municipal Infrastructure (MIG) database for the rehabilitation of Osborne Road, Eshowe. The applicant failed to submit or apply for this tender. ..." [Paragraph 6]

"… Buthelezi alleges that the applicant, by failing to submit a bid in terms of Notice 56/2009, has forfeited its right to request the information that forms part of the present application. He argued in the second point that the applicant should have disclosed in its application that the tender in respect of PMS (previously awarded to the applicant) constituted a different and separate project from the one awarded to the second respondent." [Paragraph 7]

"… [T]he first respondent's contentions in limine are without substance. Firstly, the first respondent's contention suggests that the right to request information in terms of PAIA is limited to a requester being a registered consultant and participating in the tender. This is misconstrued. Section 1 of PAIA defines a requester in relation to a public body as any person other than a public body making a request for access to a record of that public body. There is nowhere in PAIA that requires a requester to have been registered or having participated in the tender. Secondly, the applicant did not allege in its papers that the two projects were the same. The points in limine are therefore dismissed." [Paragraph 8]

"… [T]he importance of access to information held by a public body as a means to secure accountability and transparency justifies the approach adopted in section 32 (1)(a) of the Bill of Rights namely that, unless one of the specifically enumerated grounds of refusal obtains, citizens are entitled to information held by a public body as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the public body believes those reasons to be." [Paragraph 11]

"Chapter 4 of PAIA specifies grounds for refusal of access to the records of a public body. … The grounds for refusal must be understood within the legislative scheme which seeks to balance access to information, a third party's right to privacy and to protect its commercial interest in a manner which is constitutionally defensible in terms of the limitations." [Paragraphs 12 - 13]

"… [T]he first respondent tends to rely on sections 36 and 37 … There is however not a single reference to these sections or evidence on the grounds they represent. The first respondent cannot place new evidence by means of its heads of argument. … The burden of establishing that the refusal of access to information is justified under PAIA rests on the party refusing access. It is therefore incumbent on the first respondent to lay the basis why it averred that such disclosure would involve unreasonable disclosure of the second respondent's trade secrets thereby causing prejudice in its commercial

competition. ... Since the first respondent did not rely on sections 36 and 37 in its papers, I will accept that disclosure of the requested information would not be likely to harm the second respondents' commercial or financial interests." [Paragraph 14]

"... [T]he first respondent alleges that the applicant's application is materially vexatious and its attitude demonstrates abuse of the law and unjustifiable conduct to frustrate the rehabilitation project and delay services delivery to the communities. It argued that the tender in issue was put out for public invitation in terms of its Supply Chain Management Policy and attached Annexure NFB2 to that effect. However, Annexure NFB2 is not a copy of a tender application. It is a copy of Notice 56/2009, which according to the respondents, is an invitation for consultants to be registered as such for MIG projects. I am therefore of the opinion that the applicant may have an arguable case in challenging the process the first respondent had followed in the advertisement of this tender." [Paragraph 16]

"The first respondent argued that in order to succeed, the applicant has to prove that it has a right or interest in the information requested. ... [T]he first respondent is confusing section 11 with 50 of PAIA, and the requirements of an interdict. ... [N]o such requirement applies to records in possession of public bodies ... I find the first respondent's argument to be without substance." [Paragraph 17]

"The remaining issue is whether the applicant should have exhausted its right to an appeal in terms of section 74 of PAIA before launching this application. Section 78 of PAIA provides that a requester of information may only apply to court for relief in terms of section 82 of PAIA after such requester has exhausted the internal appeal procedure against the decision of the information officer of the public body. ..." [Paragraph 18]

"The question is whether section 78(1) applies in a case where the information officer displays a passive attitude by not responding to the initial request at all. The applicant sent two letters to the municipal manager who is also the information officer of the first respondent. The first respondent does not deny receipt of the letter but justifies its denial of access to information requested." [Paragraph 19]

"Section 25 of PAIA provides that an information officer, to whom the request is made, must as soon as possible but within 30 days of receipt of a request for access to information decide whether to grant the request and notify the requester of the decision. ... [T]he information officer must make a decision and not a mere refusal by default." [Paragraph 20]

"... [T]he first respondent disregarded the applicant's request and when confronted with the present application, raised an unsubstantiated defence which demonstrates lack of understanding of what the request for information and the resultant court application are all about. ... [T]he obstructive behaviour of the first respondent flies in the face of section 32 of the Constitution, the letter and spirit of PAIA and descent [sic] values of government. I find that the first respondent's conduct of failing to respond to the applicant's request was done with the intention to frustrate the applicant's right to explore all avenues to have access of the information requested. This conduct frustrates the long title of PAIA which states that the purpose of the Act is to 'foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information'." [Paragraph 21]

"In my view the first respondent's conduct is egregious to justify the making of a punitive cost order." [Paragraph 22]

The application was granted with costs on a scale as between attorney and client.

**CIVIL PROCEDURE**

**UAP AGROCHEMICAL KZN (PTY) LTD AND ANOTHER V NEFIC ESTATES (PTY) LTD (AR515/11) [2012] ZAKZPHC 79**

**Case heard 3 August 2012, Judgment delivered 20 November 2012**

The respondents had brought an application to compel the appellants to discover documents claimed to be privileged. The court a quo found in favour of the respondent and ordered the appellants to pay the respondent's costs on the scale as between attorney and own client. The appellants appealed against the whole judgment and costs order. The respondent argued that the order was not appealable, the documents were not privileged, and that the parties had concluded an agreement that expert reports would be made available to the respondent for inspection.

Mokgohloa J (K Pillay and Kruger JJ concurring) held:

"The respondents, Nkwaleni farmers, instituted action against the appellants for damages sustained to their citrus trees after they had treated the fruit with … an insecticide supplied by the first appellant and manufactured by the second appellant. The appellants appointed experts to investigate the cause of the damage but the appellants refused to make the expert reports available to the farmers." [Paragraph 2]

"Section 20(1) of the Supreme Court Act … provides that an appeal will lie only against a judgment or order." [Paragraph 6]

"The appellants argued that once the documents in respect of which they claim privilege have been handed over to the respondent, the contents thereof will become known to the respondent and there is nothing that can be done to extract that knowledge from the mind of the respondent. I agree. Consequently, the order to hand over privileged document has a final effect. It cannot be altered by the judge granting it or another judge, and it is therefore appealable." [Paragraph 11]

"For privilege to operate the information must have been obtained for the purpose of obtaining professional legal advice and must be obtained for the purpose of obtaining that advice with reference to actually pending or contemplated litigation. …" [Paragraph 12]

"The appellants submitted … that they appointed their attorney of record on 28 May 2004. According to the appellants, this was the time they had reasonably contemplated the likelihood of litigation. The respondent does not dispute this. Therefore, all documents created after the appointment of the attorney (i.e, 28 May 2004) are privileged as they have been created as part of the exercise to gather information so that the attorney could provide legal advice. The order to compel the appellants to discover such documents is therefore wrong. Furthermore, the respondent's attorney demanded payment of the sum of R3 490 918 from the appellants in a letter dated 22 September 2004. This demonstrates that litigation was contemplated and the respondent did not … request production of the documents created after 22 September 2004. This is evident from the respondent's founding affidavit when it stated that any reports, investigations and results received prior to September 2004 cannot be privileged, This means the respondent had accepted that documents created after September 2004 are privileged." [Paragraph 15]

Mogkohloa J then dealt with the documents created during the period 12 January 2004 to 17 May 2004:

"... According to the respondent, the insurer cannot claim privilege in respect of documents obtained before it had given an indication that the claims might fall under the policies." [Paragraph 17]

"It is clear that by 1 December 2003 the damage causing event had already occurred. It had been suggested that the second appellant's product was the cause of the damage, and some of the farmers had identified a possible external manifestation of the problem with the second appellant's product ... I am satisfied on the facts that objectively, there were clear indications of the likelihood of litigation since December 2003. The insurance company assessed the risk of litigation and concluded that it was likely. Therefore, the reports were commissioned for submission to the appellants' attorneys to advise and assist on the contemplated litigation." [Paragraph 20]

Mokgohloa J then dealt with the alleged agreement to make the documents available. The respondent alleged that during January 2004 an oral agreement was concluded, the terms of which were that the appellants would appoint experts to investigate the nature and extent of the losses suffered by the farmers and that the investigation reports and results would be made available to the farmers. Mokgohloa J examined correspondence subsequently exchanged between the parties:

"It is interesting to note that in all these letters there is no mention of an agreement that the experts report would be provided nor is there a request for production of such report, The first request for production of the report was made on 9 June 2005 by the respondent's attorneys. However, even though there was a request for production of the report, there was no reference to an agreement that the report would be provided." [Paragraph 30]

"Another disturbing feature in the respondent's version is that the terms of the alleged ... agreement differ from farmer to farmer. ... " [Paragraph 31]

"It is clear that there is no consistency amongst the farmers as to what was agreed at the meeting ... Furthermore ... the deponent to the respondent's founding affidavit, did not know when the alleged agreement was reached. He was forced to concede his error after having sight of the version put up by the appellants, it is therefore significant to note that the correspondence exchanged before and after the meeting of 6 April 2004, and the version put up by various farmers ... do not support the respondent's allegation that there was an agreement that expert reports would be made available for inspection to the respondent." [Paragraph 32]

"... According to Mr Marais [for the respondent], the nature, date, place and what was discussed and agreed at the meeting can be resolved after the hearing of oral evidence. I do not agree. A party who alleges that there was a meeting and that certain disclosures were made at that meeting, must state the date and place of that meeting and also what was agreed in that meeting. ... [T]he appellants deny the existence of the agreement. Their version is supported by correspondence exchanged between the parties before and after the date of the meeting of 6 April 2004. On the Plascon Evans rule, I find that the version of the appellants is more probable than that of the respondent. ..." [Paragraph 33]

The appeal was upheld, and the order granted by the court a quo set aside.

**KHAN V INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD & OTHERS [2011] JOL 27434 (KZP)**

**Case heard 8 June 2009, Judgement delivered 14 January 2010**

Respondent, the execution creditor, obtained judgment against the first execution debtor, in the amount of R1 522 209,39 together with interest and costs. In execution of the judgment, the execution creditor attached the first execution debtor's right, title and interest in the action against a third party (an insurance company).The claimant sued out an interpleader summons claiming the right, title and interest of the first execution debtor. He claimed that the said right, title and interest was ceded to him by the first execution debtor on 20 February 2004 under a valid cession agreement.

Mokgohloa J held:

"Industrial Development Corporation of South Africa Limited, the execution creditor, obtained judgment against Mocassin Footwear CC, the first execution debtor ... In execution of such judgment, the execution creditor attached the first execution debtor's right, title and interest in the action against Mutual & Federal Insurance Company Limited instituted under case number 5126/03. The claimant, Faezel Khan, sued out an interpleader summons claiming the right, title and interest of the first execution debtor. ... He stated that the first execution debtor is run by his friend, Yusuf Essa, and his wife, Shireen Sookgreep. During the years 2001 and 2002, the claimant lent money amounting to R300 00 [sic] to Essa and his wife Shireen. Towards the end of 2003, the claimant approached Essa and Shireen and requested them to make arrangements to pay him. They told him they do not have money to pay him because their factory (the first execution debtor) has burnt down and they are awaiting their claim from Mutual & Federal to be paid. During 2004, Essa and Shireen agreed to cede the policy against Mutual & Federal to him." [Paragraphs 1-3]

"According to the claimant, he knew that the first execution debtor's claim against Mutual & Federal was ± R4 000 000. He knew further that the first execution debtor owed the execution creditor an amount of ±R1 200 000. The parties agreed that the claimant will have the R4 000 000 from Mutual & Federal's claim, minus the money owed to the execution creditor. Under cross-examination, the claimant stated that he operates a security company business. The money he loaned to Essa and Shireen was not recorded in the books of his company. He recorded these monies on pieces of paper which he had since lost. Monies were loaned on different dates and places. The money became due during February 2003 and that is when Essa and Shireen suggested ceding their claim against Mutual & Federal to him. The claimant submitted that the money which the first execution debtor owed him became due and payable on February 2003. This was when the first execution debtor then suggested to cede the claim against Mutual & Federal to him. Indeed summons against Mutual & Federal was issued on 29 September 2003." [Paragraph 4-6]

"Mr *Pretorius*, for the execution creditor, argued that the Cession Agreement entered into between the claimant and the first execution debtor is not valid as it was entered into and signed not on 20 February 2004, but after judgment had been obtained by the execution creditor against the first execution debtor and the writ of attachment had been issued. It should be noted that if indeed the first execution debtor ceded its right, title and interest against Mutual & Federal to Khan, then this will mean that Khan took the cession before *litis contestatio*. The effect of this would be that the first execution debtor cannot proceed with the claim against Mutual & Federal, but Khan should. Khan is the one who has *locus standi* to proceed with the claim against Mutual & Federal (*African Cons Agencies v Siemens Nixdorf Info Systems* 1992 (2) SA 739 (C)). Another disturbing factor is that the Cession Agreement refers to the first

execution debtor as Mocassin Footwear CC & Sureties. In the Mutual & Federal case, the plaintiff is described as Mocassin Footwear CC. In the Industrial Development Corporation's case, the first defendant is referred to as Mocassin Footwear CC. It is only in the court order dated 26 February 2007 where the first defendant is referred to as Mocassin Footwear CC & Sureties." [Paragraph 7-9]

"The evidence of Khan is not short of improbabilities. He lent money amounting to R300 000 to the second and third execution debtors, but he has no record of that loan. The money was not recorded in his business books. It is not clear who between the second and third execution debtor is the cedent. Furthermore, the execution debtors have lost all they had in a fire. Their claim against Mutual & Federal is R5 000 000. They decided to cede to Khan all what will be left of them, minus the debt to the execution creditor. I find this to be inconceivable. The above having being stated, I am persuaded … that the Cession Agreement was not entered into on 20 February 2004 but on a later date after judgment was granted against the first execution debtor and a writ of attachment was issued. I am therefore of the view that the claimant has failed to prove his claim on a balance of probabilities and that his claim has to be dismissed." [Paragraph 10-11]

## CRIMINAL JUSTICE

**S V SITHOLE (AR353/11) [2012] ZAKZPHC 3**

**Case heard 1 February 2012, Judgment delivered 8 February 2012**

The appellant was convicted of rape in the Regional Court. The Regional Magistrate referred the matter for sentencing to the High Court, and the High Court confirmed the conviction and sentenced the appellant to 15 years' imprisonment. This was an appeal against sentence.

Mokgohloa J (Ploos van Amstel and Koen JJ concurring) held:

"The issue to be determined is whether Badal AJ, was correct to sentence the appellant to 15 years' imprisonment in circumstances where the prescribed minimum sentence was 10 years' imprisonment without first notifying the appellant of his intention to impose a sentence greater than the prescribed one." [Paragraph 5]

"In S v Mbatha … Wallis J stated at para 14:"I am also alive to the fact that the legislation contains no provision corresponding to s51 (3)(a) when the departure from the prescribed minimum sentence is upwards rather than downwards. Nonetheless it seems to me that this must remain the correct approach when the court is contemplating imposing a greater sentence than the prescribed minimum, in the same way as where it is contemplating imposing a lesser sentence. Otherwise the process of determining an appropriate sentence will be bifurcated in a most undesirable way. If the approach is different from that which I have indicated it will lead to the following situation." Wallis J, continued … and stated: "…, I think that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings."" [Paragraph 7]

"This issue was considered later in S v Mthembu … where the full court declined to follow Wallis J's approach. The full court held that Mbatha had been wrongly decided. The Mthembu's decision was confirmed by the SCA … where the Court held … 13 that: "While it may be notionally axiomatic that the State should forewarn an accused person of its intention to invoke the minimum sentencing provision the

same can hardly hold true for a court. For, surely, a court only arrives at its conclusion as to what a proper sentence is, after having received all of the evidence and hearing argument. Often it is the very act of consideration after the hearing of argument that properly concentrates the judicial mind to the task at hand. Until then such view as may be held by a court may well be no more than tentative." The Court continued … "In particular Wallis J's approach, that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation constitutes, without more, a defect in the proceedings, cannot be endorsed. In our view such failure in and of itself will not result in a failure of justice, which vitiates the sentence. After all, any sentence imposed, like any other conclusion, should be properly motivated."" [Paragraph 8]

"In casu, the appellant was represented. The charge sheet was explicit. It stated: "RAPE R/W S 51 of Act 105/1997". Furthermore at the commencement of the trial the magistrate warned the appellant of the applicability and consequences of Act … I am therefore satisfied that the appellant was well aware of the sentence/s he may have to face. Ms Franke, for the appellant, conceded that in the light of Mthembu's decision, the sentence imposed is appropriate in the circumstances." [Paragraph 9]

The appeal against was dismissed and the sentence confirmed.

## SELECTED JUDGMENTS

### CIVIL AND POLITICAL RIGHTS

**SOUTH AFRICAN PORK PRODUCERS ORGANISATION V NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY OF ANIMALS (26060/2014) [2014] ZAGPPHC 877**

**Case heard 15 September 2014, Judgment delivered 5 November 2014**

The applicant, a non-profit organisation representing the pork industry in South Africa, sought access to certain documentation allegedly held by the respondent, in terms of the Promotion of Access to Information Act.

Before dealing with the substance of the application Phatudi J remarked:

"At the commencement of the hearing, I expressed my disapproval on the part of legal practitioner's tendency of requesting or directing that their matters be heard by certain judges. The applicant's attorney requested "that the matter be allocated to a senior judge adequately experienced to consider relevant issues" is, in my view, regrettably discouraged. I know not of such title, "senior judge". An acting judge is a judge. All judges are deemed to be adequately experienced to adjudicate and consider any legal issue before him/her." [Paragraph 2]

Phatudi J then proceeded:

"… SPCA is a creature of the Societies for the Prevention of Cruelty to Animals Act … (SPCA Act). The respondent is thus a public body as defined in PAIA." [Paragraph 3]

"In refusing to provide access to the complaint, the respondent relies on section 37(1) (b)13 and 44(2) (a)14 of PAIA respectively. The respondent deems such refusal a reasonable protection of privacy in respect of the third party who provided information that was supplied in confidence when lodging the complaint with them. The respondent further contend that the disclosure of the record could reasonably be expected to jeopardise the effectiveness of their method used to the protection of information provided by the members of the public who lodges complaints against animal abuse …" [Paragraph 12]

"I further enquired if redaction of the name(s) of the complaint lodger would cause any prejudice. Counsel submits that reasonable expectations of harm may occur and members of the public may be ward off to expose animal abuse. … The applicant submits that they are only interested in the contents of the complaint and not who reported. They submit they would welcome redaction." [Paragraph 16]

"The applicant submitted that they need the information provided to the respondents to enable them to take disciplinary measures against the Piggery, their member. …" [Paragraph 22]

"Considering the mandatory protection of certain confidential information, the respondent is given the discretionary power to refuse a request for access to a record which consists of information that was supplied in confidence. …" [Paragraph 23]

"The applicant's submissions that they seek the information to enable them to take disciplinary action against its member have not been supported by supporting affidavit from its Limpopo branch. In my view, there is no merit in the applicant's contention in that, the applicant may still put the disciplinary

action in motion against the Piggery on the reports filed by the respondent and the Veterenian. …" [Paragraph 25]

"The respondent submitted that they abandoned their intent to press criminal charges against the Piggery. If the respondent had persisted with its intent of pursuing the criminal charges, then the confidentiality and or protection of privacy would have been removed. …" [Paragraph 26]

"… I am of the view that the protection of privacy of the complainant and protection of confidentiality of the information given by the complainant is reasonable justifying the limitation in the constitutional right of access to information." [Paragraph 29]

## CONSTITUTIONAL INTERPRETATION

### MANSINGH V PRESIDENT OF REPUBLIC OF SOUTH AFRICA AND OTHERS (20879/2011) [2012] ZAGPPHC 3

**Case heard 28-29 November 2011, Judgment delivered 09 February 2012**

The applicant, a practising advocate, sought an order declaring that the President lacked the power to confer the status of senior counsel on practising advocates.

Phatudi J held:

"The institution of awarding silk in South Africa has been "adopted" pre 1961 by way of the Queen's prerogatives. When South Africa became a Republic in 1961, the QC kept their patents. New appointments were made by the State President and named Senior Counsel (SC). This was a prerogative power bestowed on State President …" [Paragraph 9]

"It is common cause that: 14.1 the South African system has changed from pre 1961 monarchy to parliamentary sovereignty in 1961 and finally to constitutional democracy (1993 and 1996) 14.2 in the 1961 and 1983 Acts respectively, the State President, as Head of State, retained "such powers and functions as were possessed by the Queen prior to 1961 Act by way of prerogatives". 14.3 the 1993 and 1996 Constitutions did not retain the said powers and functions the Queen/State President possessed by way of prerogatives. 14.4 the President has only such powers as are bestowed on him by the Constitution or by legislation consistent with the Constitution." [Paragraph 14]

"… [T]he 1961 Constitution and 1983 Constitution empowered the State President in addition to the powers the President had as the Head of State, to have such powers and functions as were possessed by the Queen and State President by way of prerogatives prior to commencement of 1961 and 1983 Constitutions respectively (the prerogative clause)." [Paragraph 17]

"… [T]he final constitution makes a clean break with the past. I am of the view that it was not an oversight on the part of the drafters on behalf of South Africans by not including the said prerogatives in adopting the Constitution. I do not agree … that the prerogatives the Monarchs and the State President's respectively are codified in the Constitution. The drafter's thought of having a break with the past is, in my view, an avoidance of adopting concepts into the Constitution which are not based on the will of the people of South Africa. …" [Paragraph 23]

“The interpretation of phrases in the Constitution must be done in a manner that is compatible with the fundamental values embodied in it. ...” [Paragraph 31]

“The applicant submits that an "honour" for purpose of section 84(2) (k) is a recognition from the head of state for distinguished service to the country. ... The applicant further submits that the conferral of the status of senior counsel is not mentioned on the Presidency's website as part of the system of national orders. She submits that "silk" is not an 'honour' as contemplated in section 84(2)(k) and is not viewed as such by the President ” [Paragraphs 32 - 33]

“...I am of the view that the argument ... that non inclusion of conferment of senior counsel status on the presidency website is not one such "honour" as envisaged in terms of section 84(2)(k), is correct. ... The Order of the Baobab, for instance, is awarded to South African citizens for services distinguished beyond the ordinary call of duty. It is an "honour" awarded for exceptional and distinguished contribution in community service. I am reluctant to accept that the framers of our autochthonous Constitution were comfortable that the President is empowered in terms of section 84(2) (k) to confer the status of senior counsel on practising advocates.” [Paragraph 37]

“Are the services and contributions made by practising advocates exceptional or beyond the ordinary call of duty that warrant an award of the status of senior counsel? Can an award of the status of senior counsel be equated with, for instance, Order of Luthuli or Order of the Baobab, ...?” [Paragraph 38]

“...It is on that basis I am of the view that an honour is earned while serving the country exceptionally beyond the ordinary call of duty. ...” [Paragraph 44]

“There is no legislation ... that empowers the President to institute, constitute and award the status of senior counsel to practising advocates or any legal practitioner who has displayed "good quality work" to the legal profession. The term "Senior Counsel" is not even defined in the Advocates Act. ... In South Africa there is no legislation in place that covers the conferment of honours on practising advocates.” [Paragraph 45]

“... [T]he powers of the President which are contained in section 82(1) of the interim constitution have their origin in the prerogative powers exercised under former constitutions by South African heads of State. ... [T]here are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in section 82(1)/58 Section 82(1) of the interim Constitution is almost a replica of section 84(2) of the final Constitution. Section 82(1) (e) of the interim constitution is a replica of section 84(2) (k) of the Constitution. The words of Goldstone J [in President of the Republic of South Africa & Another v Hugo] that "there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in the constitution" requires no qualification. ...” [Paragraph 46]

“I do not think that section 84(2) (k) proposes a system of awarding any professional who attained an advanced skill in forensic work in his or her profession a status of seniority. If conferring honours envisaged in terms of section 84(2)(k) does include awarding the seniority status to the legal profession, I am afraid, the President will be responsible for conferring honours of seniority to accountants, doctors, auditors, to mention but a few, of 12 years experience with trace records of "good quality work”. [Paragraph 47]

"In my final analysis, the appointment of practising advocates as senior counsel does not amount to the conferring of an honour within the meaning of section 84(2)(k) of the Constitution of the Republic of South Africa." [Paragraph 49]

The President was thus found not to have the powers to confer senior counsel status. The decision was reversed by the Supreme Court of Appeal (2013 (3) SA 294 (SCA)) and the Constitutional Court (2014 (2) SA 26 (CC)).

## CIVIL PROCEDURE

### MALINGA v ROAD ACCIDENT FUND 2012 (5) SA 120 (GNP)

**Case heard 5 October 2011, Judgment delivered 6 October 2011**

The plaintiff, a passenger in a motor vehicle, claiming damages that he sustained as a result of the motor vehicle collision. Plaintiff subsequently amended the particulars of claim, whereupon the defendant filed a special plea, arguing that the plaintiffs claim as set out in the amended particulars of claim had prescribed.

Phatudi J held:

"…[T]he plaintiff's argument is that the amended particulars of claim has not prescribed because the plaintiff seeks to enforce the same "debt" as claimed in the summons prior to the amendment." [Paragraph 10]

"In my evaluation of the evidence, it is not in dispute that summons were issues on the 24th of May 2001 and served on the defendant on 15 June 2001." [Paragraph 15]

"It is apparent that plaintiff pursued the claim in terms of section 17(1) (a) of the Act. The cause of action set out in … the initial particulars of claim support the claim envisaged in terms of section 17(1)(a). The plaintiff's cause of action is based on the identified driver or identified owner of the motor vehicle. The plaintiff's alternatives thereto are also on the premise of provision of section 17(1) (a)." [Paragraph 16]

"In the amended particulars of claim the plaintiff still allege that the defendant is in terms of section 17(1)(a) obliged to compensate him for damages sustained as a result of the collision that occurred on 6 September 1997." [Paragraph 17]

"Paragraph 5 of the amended particulars of claim sets out a different cause of action with an element of unidentified motor vehicle as the cause of the accident. The defendant allege that the new cause of action is tantamount to service of new summons which, as Mr Ferreira submits, has prescribed in that 5 years has expired from the date upon which the cause of action arose." [Paragraph 18]

"It is clear from the unamended summons that the plaintiff did not sue the defendant on the basis of unidentified motor vehicle. It is further clear that the plaintiff set out his cause of action in the particulars of claim relying on the provisions of section 17(1) (a)." [Paragraph 25]

"In my view, the amended particulars of claim introducing the new cause of action on unidentified motor vehicle is indeed tantamount to issuing of "new summons" for purposes of compliance with section 17(1)(b) read with regulation 2(1 )(a) and (c" [Paragraph 26]

"It is further my view that the plaintiff failed to comply with the said provisions in that he failed to cause issue of summons in accordance with the provisions of regulation 2(1 )(c)." [Paragraph 27]

"Based on the above, I find the plaintiff's claim to have prescribed." [Paragraph 29]

**CRIMINAL JUSTICE**

**MOGAGA V S (A622/2013) [2014] ZAGPPHC 199**

**Case heard 24 February 2014, Judgment delivered 26 March 2014**

This was an appeal against sentence. The appellant had been sentenced to an effective term of life imprisonment plus a further 27 years imprisonment. It was further recommended that the Department of Correctional Services should only release the appellant on parole after he would have served at least 30 years of his sentence.

Phatudi J (**Rabie and Msimeki JJ concurring)** held:

"In S v Mhlakaza and Another, the Supreme Court of Appeal set out the principle that '[t]he function of a sentencing court is to determine the term of imprisonment a convicted person may serve.' It is further principled that 'the court has no control over the maximum or actual period served or to be served.' …" [Paragraph 10]

"The court in S v Mahlatsi followed Mhlakaza decision and said that 'the sentencing court shall not consider the possibility of release on parole when determining an appropriate sentence, but that the sentence imposed must be one which the court intends as the ultimate punishment that should be served and that release on parole is a function of the executive arm of government that courts should not likely interfere with.'" [Paragraph 11]

"Considering the sentence of life imprisonment plus a further period of 27 years imprisonment vis-a-vis the provisions of section 32(2) of the then Correctional Services Act … (which was operational at the time of imposition of the sentence), it is clear that there is a misdirection on the part of the trial court in imposing the said sentence." [Paragraph 12]

"It is further clear that the trial court ought to have ordered the sentence of 27 years' imprisonment in respect of counts 2, 3 and 4 to run concurrently with the sentence of life imprisonment in respect of count 1." [Paragraph 13]

"On the reading of the section, it is clear that the court has the discretion to fix a period during which a convict shall not be placed on parole. However, such a "fixed non-parole period" must not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter. …" [Paragraph 17]

"It is further clear .. that if a convict is convicted of two or more offences which are ordered to run concurrently, the court shall fix the non-parole period, subject to the provisions of subsection (1) (b), in respect of the effective period of imprisonment." [Paragraph 18]

"It must, however, be borne in mind that at the time of the trial court imposing the sentences, the amendment to the Criminal Procedure Act was not as yet effected. …" [Paragraph 20]

"… I am unable to fault the trial court in fixing the non-parole period in his sentence but for the number of years so fixed. As demonstrated, the provisions in section 32(2) of Correctional Services Act … did not provide for the maximum number of years that could be fixed as a non-parole period in a sentence. …" [Paragraph 21]

"Fixing a non-parole period in sentencing an offender should, in my view, be made in exceptional circumstances, such as facts before the trial court that would continue, after sentence, which may result in a negative outcome for any future decision about parole. Such circumstances should be relevant to parole and not only be aggravating factors of the crime committed. …" [Paragraph 22]

"The position with regard to the fixing of a non-parole period changed as a result of the insertion of section 276B of Criminal Procedure Act … Had the fixing of a non-parole period of 30 years been done after the promulgation of section 276B of the Criminal Procedure Act, I would not have hesitated to find further misdirection on the part of the trial court." [Paragraph 23]

Phatudi J went on to determine the appropriate sentence:

"The appellant's personal circumstances were, as placed before the trial court, that he was a first offender of 30 years of age at the time of the commission of the offence with 3 children to feed even though unmarried. Added thereto, I find the appellant's self-incrimination at the time of his plea explanation, during cross- examination of the key witness, Mrs Engelbrecht and during his testimony when he endeavoured to reduce his moral blameworthiness. He explained how he and his co-accused went to the house. He painted a picture of an innocent follower of his co-accused, unaware that robbery was committed. He has been helpful in revealing that which the state could not have revealed in evidence." [Paragraph 29]

"I am mindful that the commission of the offence was planned and executed by the appellant and a gang of perpetrators. Murder was committed during the robbery and in the presence of the deceased's wife and their two minor children. The goods robbed were of a substantial value and were never recovered. …" [Paragraph 32]

The appeal against sentence succeeded, and the accused was sentenced to an effective 25 years' imprisonment.

**S v SHAI 2014 (1) SACR 204 (GNP)**

**Case heard 1 October 2012, Judgment delivered 8 October 2012**

The appellant had been convicted in the regional court of the rape of a 13-year-old girl, and sentenced in the high court to life imprisonment. He appealed against the sentence.

Phatudi J (Hassim AJ and Molefe AJ concurring) held:

"In my view, it is clear from the record that the regional magistrate did her best to inform and warn the appellant of the applicability of s 51 of CLAA [Criminal Law Amendment Act]. She even explained to the

appellant that 'if the complainant is below the prescribed age of 16 years, then the sentence will be meted out by the High Court'. She went further, to enquire if the appellant understood the charge put to him, 'that of rape'. I find no leg to stand on to fault the regional magistrate. ...” [Paragraph 15]

“The question to be determined is whether the high court misdirected itself in imposing the sentence it did or whether the sentence imposes a sense of shock or is disproportionate to the offence committed.” [Paragraph 16]

“In my perusal of the record of proceedings in the high court and having heard both counsel, I find no misdirection on the part of the judge in imposing the sentence.” [Paragraph 19]

“The judge first stated that 'the court takes into account that this is not the so-called most serious rape incident'. The judge stated that: 'The court is prepared to accept that the following are substantial and compelling circumstances. • The accused is a first offender. • He did not injure the complainant. • The state proves no psychological effects on the complainant. • [The appellant] has apologised to the family. • The mother of the complainant has testified [that the family] accepts the appellant's apology.'” [Paragraph 20]

“Considering the substantial and compelling circumstances recorded, I am of the view that the sentence imposed is disproportionate to the offence committed.” [Paragraph 23]

“I accept the recorded circumstances that warrant imposition of a lesser sentence than the one prescribed by CLAA. I am of the view that the appellant's youthfulness and the period spent in custody while awaiting trial should have been added (which I now do) to the list of substantial circumstances compelling deviation from the prescribed sentence. Considering the testimony on the appellant's forgiveness by the members of his and the complainant's family, the reports filed and the recommendations, I am further of the view that the sentence imposed is disproportionate to the offence the appellant committed. The appeal against sentence stands to succeed. ...” [Paragraph 24]

The life sentence was replaced by a sentence of 12 (twelve) years' imprisonment, which was antedated, and the prison authorities were ordered to deduct a period of two years from the sentence imposed, when calculating the date upon which the sentences imposed were to expire.

**S V LR 2015 (2) SACR 497 (GP)**

**Case heard 2 December 2014, Judgment delivered 2 December 2014**

A 16 year old child who was driving without a licence collided head on with another vehicle while overtaking illegally, resulting in a death. The presiding magistrate referred the child for diversion. The matter was then referred to the High Court as a special review, on the grounds that the presiding magistrate ought not to have referred the child for diversion as envisaged in terms of Child Justice Act.

Phatudi J (Msimeki J concurring) held:

“[The] Child Justice Act ... was enacted and promulgated....with a view to (among others) establish a criminal justice system for children who are in conflict with the law. The Act further aims to provide for

the holding of a preliminary inquiry and to incorporate the possibility of diverting matters away from the formal criminal justice system." [Paragraph 5]

"The presiding judicial officer may, after consideration of all relevant information presented at a preliminary inquiry, consider diversion if the child acknowledges responsibility for the offence and the prosecutor indicates that the matter may be diverted in accordance with subsection (2)." [Paragraph 7]

"It is clear from the record that the application for diversion was instituted by the defence. It appears that the presiding officer was persuaded by the defence's submission that the child acknowledged responsibility for the offence. Notwithstanding the public prosecutor's opposition thereto, the presiding officer ordered for diversion without considering the provisions of the Act. In my view, the presiding officer misdirected himself by accepting the child's acknowledgement of responsibility for the offence without considering the provisions of section 52(1) (e). … [T]he presiding officer erred and acted irregularly." [Paragraph 8]

"Further thereto, the prosecutor may, in the case of an offence referred to in Schedule 2, after he/she has considered the views of the victim or any person who has a direct interest in the affairs of the victim, may indicate whether or not the matter should be diverted. There is no evidence of either the deceased's family or any person with direct interest in the affairs of the deceased or of the police official responsible for the investigation of the matter demonstrating that they were consulted before diverting the matter. The evidence on record is just that of the prosecutor opposing diversion. The diversion ordered by the presiding officer is, on this leg as well, irregular." [Paragraph 9]

"The presiding officer, as the record demonstrates, … realised the irregularities that the court had committed. He, in his statement stated that he 'truly agrees with the submissions made by the Control Public Prosecutor that the accused minor child should face the full might of the law'. The presiding officer, being functus officio, cannot retract or rescind his own judgment and order. The matter, in my view and in the interest of justice, is reviewable." [Paragraph 14]

"Based on the irregularities committed by the presiding officer which are mentioned herein, the order for diversion made stands to be set aside. Indeed the matter stands to be referred to the Child Justice Court for the minor child to face the full might of the law. …" [Paragraph 15]

The order made by the court a *quo* was set aside and the case referred to Child Justice Court for trial.

**SELECTED JUDGMENTS**

**PRIVATE LAW**

**RD v TD 2014 (4) SA 200 (GP)**

**Case heard 5 March 2014, Judgment delivered 5 March 2014**

The parties were married out of community of property excluding accrual through an antenuptial contract (excluding community of profit and loss). It was alleged by the defendant that the parties entered into a verbal, tacit or implied partnership agreement in respect of a fish farming business venture, with the intention to share in the profits. The defendant counterclaimed for a declarator that a universal partnership came into existence between the parties. This was an exception brought by the plaintiff on the basis that the defendant's counterclaim lacked averments required to disclose a cause of action. The issue before the court was whether the antenuptial contract precluded the parties from concluding a postnuptial partnership agreement relating to particular commercial enterprise. The plaintiff argued that the defendant's allegation of a universal partnership constituted an attempt to amend the antenuptial contract.

De Klerk AJ held:

"It was contended by Mr Wagener on behalf of the plaintiff that the fundamental contention underlying the exception was that the provisions of the antenuptial contract precluded the existence of the alleged partnership." [Paragraph 9]

"... Mr Wagener pointed out that the parties in their antenuptial contract expressly agreed to not share in profit and loss. The defendant's counterclaim, alleging the existence of a partnership that includes the profit generated by the fish-farming business, is thus directly at variance with the express terms of the antenuptial contract." [Paragraph 10]

"... Mr Wagener referred to the case of Pezzutto v Dreyer and Others ... where it was held that the three essentialia of a partnership are — '(1) that each of the partners bring something into the partnership, I whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit . . .'. Consequently, so the argument correctly runs, the very essence of a partnership agreement is the intension to share in the profits generated by the activities thereof. " [Paragraph 11]

"I do not agree ... that the provisions of the antenuptial contract preclude the existence of the alleged partnership." [Paragraph 13]

"I also do not agree that the two cases referred to by Mr Wagener support such a contention." [Paragraph 14]

"In my view a distinction should be drawn between the two kinds of universal partnerships, to wit, societas universorum bonorum and societas universorum quae ex quaestu veniunt." [Paragraph 15]

"It seems to me that Mr Wagener's contention holds true in respect of a societas universorum bonorum, but not necessarily in respect of a societas universorum quae ex quaestu veniunt." [Paragraph 19]

“It was … contended by Mr Van Niekerk [for the defendant] that, whereas the antenuptial contract of the parties excludes community of profit and loss, it does not exclude the liberty of the parties to enter into a joint undertaking for their joint profit.” [Paragraph 23]

“It was further contended by Mr Van Niekerk that the terms of the antenuptial contract in their plain grammatical meaning simply mean that there will not be a merger (confusion) of profit and loss of the parties during the course of their marriage, or, in other words, it excludes a universorum bonorum.” [Paragraph 24]

“It was lastly contended by Mr Van Niekerk that in the very nature of a partnership the joint profit is divided between the partners and each partner then retains his share of the profit for his own account.” [Paragraph 25]

“I agree with these contentions by Mr Van Niekerk. ” [Paragraph 26]

De Klerk AJ found that the partnership envisaged in the counterclaim constituted a 'legal entity' separate from the matrimonial property regime applicable to the parties and the net benefits derived from the partnership would be divided between the parties and accrue to their separate estates. The parties accordingly were business partners like any other two individual partners, each having his or her separate estate. It was held that the counterclaim disclosed a cause of action, and the exception was dismissed with costs.

**MARUMO V MINISTER OF POLICE 2015 JDR 2236 (GP)**

**Judgment delivered October 08, 2015**

Plaintiff instituted an action for damages pursuant to her arrest and detention by members of the South African Police Service. She was arrested at her residence for allegedly contravening an interim protection order that was issued against her. On the same day of the Plaintiff's arrest, an interim protection order was issued against her in favour of her former domestic worker, inter alia for the collection of the latter's personal belongings from the Plaintiff's residence. In accordance with the Domestic Violence Act and the standard form of such interim protection orders, a warrant for arrest of the Plaintiff was simultaneously authorised and the execution thereof was suspended, subject to compliance by the Plaintiff with the provisions of the order.

De Klerk AJ held:

“It is trite law that the onus rests on the Minister to justify the arrest.” [Paragraph 7]

“It is further trite law that if the arrest took place pursuant to a warrant, the onus of proving wrongfulness of the arrest rests on the Plaintiff.” [Paragraph 8]

“The warrant for the Plaintiff's arrest was authorised by an interim protection order.” [Paragraph 36]

“The execution of the warrant of arrest is however dependant upon imminent harm.” [Paragraph 37]

“Constable Mmamogopodi testified that the Plaintiff's conduct did not constitute imminent harm to Ms Lehlona.” [Paragraph 38]

“Consequently in the absence of imminent harm the Police should not have arrested the Plaintiff, but instead should have handed her a Notice to Appear in Court on a charge of contravening the protection order in terms of Section 8 (4) (ii).” [Paragraph 39]

“In the premises I am persuaded that the arrest and detention of the Plaintiff were unlawful.” [Paragraph 40]

“Having regard to the specific facts of the case and after considering, the importance of the Constitutional right to the individual's freedom, awards made by courts in similar cases (the conservative approach of our courts) I am of the view that a just award would be R55 000.00.” [Paragraph 44]

The Plaintiff was awarded costs on the High Court scale as between party and party.

## ADMINISTRATIVE JUSTICE

### KARAN V MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS 2014 JDR 0381 (GNP)

This case concerned a dispute about the tariffs at which the Respondent was charging the Applicant for his water use with regard to a feedlot he operated on a portion of a Farm. Applicant argued that the Respondent was charging him an industrial instead of agricultural water use tariff. Applicant argued that the permit was issued in terms of the provisions of Section 62 (21) (a) 1 of the repealed Water Act 54 of 1956 and wrongfully stated that the water use was for industrial purposes, yet in terms of the prevailing legislation the water use, when the permit was issued, was for agricultural use. The argued that the 1993 amendment of the definition, as referred to by the Applicant, did not amend the conditions of the permit.

De Klerk AJ held:

“The relevant part of Section 62 (21) (a) 1 reads as follows: "The Minister may grant on such conditions as he may determine permission to any person to abstract a quantity of public water and to use it for A PURPOSE SPECIFIED in the permission."” [Paragraph 10]

“The definition of "use for agricultural purposes" as published by Notice 1164 in government gazette dated 7 July 1993 read as follows: "Use for agricultural purposes means use for irrigation of land and includes use for domestic purposes or for the purpose of water borne sanitation or for the watering of stock or gardens or use for or in connection with an intensive animal feeding system or the breeding or keeping or growing, for commercial purposes, of any aquatic animal or plant or any amphibian."” [Paragraph 11]

“Section 34 of the new Water Act provides that a person or his successor in title may continue with an existing lawful water use, subject to any existing condition or obligation attaching to that use.” [Paragraph 12]

“The parties are ad idem that the permit was granted to the Applicant for the specific purpose of a feedlot. Same is also clearly evident from the wording of the permit. It is further evident from the permit itself that same was granted to the Applicant subject to certain conditions including the levying of a tariff for the actual water extracted by the Applicant and which could be adjusted from time to time. It is

common cause that the tariff had from time to time been adjusted, however, there is no evidence on the papers that any of the conditions had been amended." [Paragraph 14]

"It is further common cause that the extraction of water in terms of the permit was in addition to the Applicant's extraction of water for agricultural use." [Paragraph 15]

"It is not the Applicant's case that his water use (in terms of the permit) is for agricultural purposes ... It is the Applicants' case that a feedlot was in terms of the prevailing legislation, at the time when the permit was issued, to him classified as "use for agricultural purposes" and not industrial purposes." [Paragraph 16]

"The insertion of the word industrial purposes next to the word feedlot on the permit is accordingly contrary to the statutory provision which classified a feedlot as use for agricultural purposes." [Paragraph 17]

"In the light of the common cause facts and a proper interpretation of the legislation, I am of the view that the definition of "use for agricultural purposes' at the time when the permit was issued included use in connection with an intensive animal feeding scheme." [Paragraph 18]

"The parties are ad idem that the Trans-Caledon Tunnel Authority levy is specifically charged for water for industrial users. I am, in the light of my finding hereinbefore, of the view that the Applicant is not liable to pay Trans-Caledon Tunnel Authority charges for his existing lawful water use in terms of the permit dated 28 September 1993." [Paragraph 19]

"The Respondent raised a point in limine to wit the Applicant's failure to comply with the provisions of the Promotion of Administrative Justice Act ..." [Paragraph 20]

"The Respondent's contentions are that: 1. The Applicant is challenging a decision made on 28 September 1993 and the Applicant is in effect asking for a review of that decision. Consequently, the Applicant's challenge falls within the provisions of Section 6 (1) of the Promotion of Administrative Justice Act ... and that the Applicant has failed to comply with any of the requirements of the said act. ... The Applicant's contentions are that he is not challenging the decision/permit. His application so the argument runs, centres around the interpretation of a statutory provision." [Paragraph 21]

"In my view the Applicant's contentions are sound" [Paragraph 22]

It was ordered that, in terms of permit number B2/2/16 (3062) dated 28 September 1993, the Applicant was only liable to pay irrigation water use charges, and that the Applicant was not liable to pay the Trans-Caledon Tunnel Authority charges for the applicant's existing lawful water use.

On appeal, the SCA overruled the High Court's finding on irrigation water use charges, but upheld the finding on the Trans-Caledon Tunnel Authority charges: *Minister of Water and Environmental Affairs v Karan Beef Feedlot* (20563)/2014) [2015] ZASCA 157 (9 October 2015).

**SELECTED ARTICLES**

**'GIMME THE MONEY HONEY: THE FAIRNESS OF SPOUSAL MAINTENANCE AFTER DIVORCE', DE REBUS, MARCH 2015, PAGES 18 - 20**

"There is a general misconception that the main, or even the sole criterion, for a claim for spousal maintenance on divorce is the claimant's need or ability to maintain himself or herself. The law to be applied is s 7(2) of the Divorce Act ... "

"The purpose of the court's inquiry in terms of s 7(2) is to determine what award would be 'just'. The court is required to consider the factors referred to in s 7(2) in order to decide, firstly whether maintenance is to be paid at all and, if so, the amount to be paid and the period for which maintenance is to be paid. Section 7(2) gives the court the widest discretion to take into account the factors listed and any other factor that in the opinion of the court should be taken into account. No particular stress was laid on any one or more of these factors, and they are not listed in any particular order of importance or of greater or lesser relevance. The feature of overriding importance is that the court will grant such order as it considers to be just...." (Page 18)

**'FAIR DIVORCE: MISCONDUCT DOES NOT PLAY A ROLE IN FORFEITURE CLAIMS', DE REBUS, APRIL 2014, PAGES 37 – 38.**

"There is a general misconception in divorce litigation that a finding of 'substantial misconduct' on the part of a spouse who, for example, had extra marital affairs, justifies an order for forfeiture of the benefits of a marriage in community of property or, alternatively, the right to share in the accrual. Substantial misconduct ... is, however, only one of the factors that the court may take into consideration ..."

"It was held in JW v SW 2011 (1) SA 545 (GNP) that a finding of substantial misconduct does not on its own justify a forfeiture order. ..." (Page 37)

"Section 9(1) of the Divorce Act ... deals with the aspect of forfeiture ... The section ... refers only to three circumstances the court may take into account when considering forfeiture, namely – the duration of the marriage; the circumstances that gave rise to the break-down thereof, and any substantial misconduct on the part of either of the parties."

"Conspicuously absent from s 9 is a catch-all phrase permitting the court, in addition to the factors listed, to have regard to any other factor. These three factors therefore fall within a relatively narrow ambit. ..."

"Section 9 does not provide for the application of the principle of fairness, neither does it impose a purely penal sanction for a party's misconduct. A party cannot forfeitwhat he or she has contributed towards the marriage. The court must uphold the law and not make a moral judgment. Attorneys, when advising their clients, should do so as well." (Page 38).

## SELECTED JUDGMENTS

### CIVIL AND POLITICAL RIGHTS

**MPHOHONI V NATIONAL POLICE COMMISSIONER AND ANOTHER (608/2011) [2014] ZALMPHC 7**

**Case heard 27 August 2014, Judgment delivered 9 September 2014**

This was an action for damages for unlawful detention. The plaintiff alleged that he was detained for more than 48 hours before making his first appearance in court.

Kganyago AJ held:

"A person's liberty, personality, and dignity is usually compromised by an unlawful detention. It is not in dispute that the plaintiff was arrested and detained as a suspect for an offence …" [Paragraph 10]

"Section 50(1)(c) of the Act provides that an accused person should be brought before the lower court as soon as possible but not later than 48 hours after the arrest. The exception will be if the 48 hours fell outside the ordinary court hours, or if the suspect because of his/her physical condition or illness could not be brought before a lower court or if the suspect was arrested outside the area of jurisdiction of the lower court. In the case of Minister of Law and Order v Kader 1991(1) SA 41 AD … the court said the following: "Section 50(1) serves a twofold purpose. Firstly it seeks to ensure that an arrested person is brought before a court within a short period. In this way it discourages secret and irregular arrests and detentions"." [Paragraph 11]

"The mere fact that the plaintiff was taken to court on the 19th July 2011 but not appeared in court, does not satisfy the requirements of section 50(1) … In my view section 50(1) … requires an actual appearance in court where if there is any further detention, that must be sanctioned by the court." [Paragraph 13]

"The evidence presented, clearly indicate that the plaintiff's first appearance in court was on the 21st July 2011 when his case was struck off the roll. The defendant could not explain why on the 19th July 2011 the plaintiff was taken back to cells without appearing in court. There is no evidence submitted to show that the plaintiff's further detention falls within the exceptions of Section 50(1)(d) of the Act. …" [Paragraph 14]

"Under the circumstances … the plaintiff was brought before the lower court after the expiry of the 48 hours period, which therefore renders his further detention to be unlawful." [Paragraph 15]

### ADMINISTRATIVE JUSTICE

**NAMBITHI TECHNOLOGIES (PTY) LTD V CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND OTHERS (1353/13) [2013] ZAGPPHC 319**

**Judgment delivered 1 November 2013**

This was an application seeking an order reviewing and setting aside the decision to appoint EOH limited in respect of SAP support services; reviewing and setting aside the decision to cancel tender CB204/2012

for the provision of on and off site SAP support services; and reviewing and setting aside the decision to issue tender CB103/2013.

Kganyago AJ held:

"The applicant contends that there was no legitimate change of objective that warranted the respondents to cancel tender no 204/2012. … The applicant submits that tender CB107/2013 has not changed to the extent that it can be said it differs substantially from the cancelled tender." [Paragraph 16]

"The applicant further contends that the process that was followed to appoint the fifth respondent was neither fair, transparent, cost effective or ensured open and effective competition. …" [Paragraph 18]

With regard to whether the services of the fifth respondent was secured by the City of Johannesburg by means of a competitive bidding process, Kganyago AJ held:

"It seems as if the City Council of Johannesburg has afforded the fifth respondent to augment its tender without giving the other competitors an opportunity to do so. The question is whether that was fair or not. …" [Paragraph 27]

"… [I]n my view, the applicant was justified in attacking the decision of the respondents to appoint the fifth respondent in terms of Regulation 32." [Paragraph 30]

"The appointment of the fifth respondent was for a period not exceeding 12 months and we are now in the 10th month. If I set aside the appointment with the full period not yet having run its course, such order will have serious and prejudicial results to the members of the public, more so that they are left with two months before it expires. That will interrupt the services that should be given to the members of the public." [Paragraph 32]

"Therefore in my view, even though I find the decision to appoint the fifth respondent warrant to be set aside, I am not inclined to do so." [Paragraph 33]

With regard to the cancellation of tender CB204/2012, Kganyago AJ held:

"The changes under tender CB107/2013 are minimal. The tenderers who were present when tender CB204/2012 was cancelled, had the opportunity of seeing the tender prices of other tenderers, and it was going to be easy for them to adjust the prices in the new tender CB107/2013.That in itself will give them an unfair advantage over the other tenderers. It would seem the tender was cancelled in order to give other favoured tenderers to adjust their tender prices even though the price is not the only factor to be taken into consideration in awarding a tender. However, price still plays a major role." [Paragraph 41]

"Fairness must be decided in the circumstances of each case. In this case on the 30/11/12, the City Manager signed and approved a resolution that requires the relevant department to fast track and finalizes tender CB204/2012 within two weeks in order to avoid further complications. Seven days later the tender is cancelled citing flimsy reasons for the cancellation. On the 18th December 2012 the fifth respondent is on the site even before it was confirmed that they are appointed. The new tender that was advertised had minimal changes which could have been dealt with the successful tenderer. In my view, all these make the cancellation of tender CB204/2012 to be unfair." [Paragraph 43]

"Taking into consideration the totality of the evidence and argument before me, I have come to the conclusion that there were no justifiable reasons to cancel tender CB204/2012, and that it was unfairly cancelled. The applicant was justified in attacking the decision of the respondent by way of review." [Paragraph 44]

"In the circumstances, I do not find any reasonable justification why the resolution to cancel tender CB204/2012 should not be set aside. It is my findings that the applicant's application hereby succeeds." [Paragraph 47]

The application was granted. The decision to set aside tender CB204/2012 was set aside by the Supreme Court of Appeal in City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd (20580/2014) [2015] ZASCA 167; [2016] 1 All SA 332 (SCA). The court held that there were no grounds to find the cancellation to have been unfair, and that the High Court order amounted to an impermissible infringement of the separation of powers, as it impinged on the municipality's procurement powers and obligations.

## CIVIL PROCEDURE

### THE AIRPORTS COMPANY SOUTH AFRICA SOC LTD V TOURVEST HOLDINGS (PTY) LTD AND ANOTHER (72674/14) [2016] ZAGPPHC 18

**Judgment delivered 25 January 2016**

This was an application for rescission of a default judgment. The judgment had been obtained after the applicant's attorneys had failed to enter a notice to oppose the respondents' review application.

Kganyago AJ held:

"The applicant in instructing their attorneys of record expected them to execute their mandate with the necessary diligence, skill and care required of a reasonable attorney under the circumstances. Once he had given his attorney proper instructions, it will be for the attorney to take the matter forward. In this case the instruction to their attorneys was clear, and that was to oppose the respondents' review application. The instruction was even given on time. I therefore, do not find any ground to find that the applicant was negligent in handling of the intended opposition to the review application. It did all what was within its powers to hand the matter to the people whom it regarded to be skilled to handle the matter further, and in this case their attorneys." [Paragraph 15]

"I now turn to the issue whether the applicant's attorneys were grossly negligent in handling the applicant's matter. It is not in dispute that the applicant's attorneys had a legal duty to execute the applicant's mandate with the necessary diligence, skill and care required of a reasonable attorney under the circumstances." [Paragraph 16]

"Now it must be determined whether, given the circumstances of this case, can it be said that the applicant's attorneys conduct in not entering a notice of appearance to oppose, which resulted in the default judgment been granted, amounted to a failure to measure up to conduct expected of a reasonable attorney acting with due care, skill and diligence. Or put it otherwise, whether by failing to enter the notice of appearance to oppose, the applicant's attorneys have failed to act with the necessary

skill and diligence expected of an ordinary reasonable attorney. The next question will be how does one determine how a reasonable attorney would have acted in similar circumstances." [Paragraph 17]

"In my view on the 13th November 2014, a reasonable attorney would have updated his/her client as to when the notice to oppose was filed and also as to when was the last day to file their answering affidavit. It seems that did not happen. Had Mr Mkhablela updated the applicant about the status of their case, he would have realized that the notice of intention to oppose had not yet been served and filed." [Paragraph 19]

"... I am satisfied that the applicant's attorneys have failed to act with the necessary care and skill expected of an ordinary reasonable attorney under the circumstances. The applicant's attorney was therefore negligent in handling the applicant's matter." [Paragraph 20]

"Now it must be determined whether the applicant is bound by the negligence of their attorney. To put it otherwise, is negligence by an attorney an acceptable explanation to rescind the default judgment." [Paragraph 21]

"From the beginning the applicant's instructions to their attorneys, was clear, and was to oppose the respondents' review application. Even after they have given instruction to their attorneys to oppose the matter, when called for further consultation, they did attend those consultations. In their view, they were relying upon the competence, skill and knowledge of their attorney. They have trusted that their attorney will fulfil his professional responsibility. In my view the negligence of their attorney cannot be imputed to them. The applicant could not have foreseen that their attorney would have acted the way they did." [Paragraph 24]

The application for rescission was granted.

**SIZANI PRIMARY SCHOOL V MEC FOR EDUCATION, MPUMALANGA AND OTHERS (46003/2014) [2015] ZAGPPHC 851**

**Case heard 8 October 2015, Judgment delivered 11 November 2015**

This was an application to declare that the respondents' failure to comply with an order of the High Court constituted an ongoing violation of their duties under the Constitution, and compelling the respondents to comply with the order. The order provided that the administrative action of the Department of Education in unilaterally placing an individual in the vacant post of Deputy Principal at Sizani Primary School be reviewed and set aside, and that the Department of Education readvertise the post.

Kganyago AJ held:

"The relief sought ... is that of a final interdict in the form of a mandamus. A mandamus is usually an appropriate order to compel the performance of a specific statutory duty or to comply with a constitutional obligation." [Paragraph 6]

"... Counsel for the respondents argues that the reading of the order is to the effect that the decision of the Department of Education is still to be reviewed and set aside. I do not agree ..." [Paragraph 10]

"Paragraph 1 of the order read as follows: "the administrative action of the Department of Education, Mpumalanga Province in transferring the third respondent to the applicant be reviewed and set aside". Paragraph 1 cannot be read in isolation to paragraph 2 of the order. Paragraph 2 of the order read as follows: "That the second respondent cause the applicant's Deputy Principal post to be re-advertised..." [Paragraph 11]

"In my view if the reading of the order is to the effect that the decision of the Department of Education is still to be reviewed and set aside, there will be no need for paragraph 2 of the order. Paragraph 2 of the order puts the matter to rest, confirming that indeed the decision of the Department of Education, Mpumalanga Province in transferring the third respondent to the applicant has been reviewed and set aside. In my view the use of the word "be" by the learned Judge, is a question of style of writing and does not in any way render the order to lack clarity or to be vague." [Paragraph 12]

"... [S]ince the court order has not been rescinded, reviewed or appealed against, the court order stand until such time it is set aside, and should therefore be adhered to. The first and second respondents have failed to submit any justifiable reasons why the court order was not adhered to." [Paragraph 15]

"The order ... was clear as to what was expected of the first and second respondents, however they blatantly failed to comply with it. Courts have a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched. Without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. The courts have a particular responsibility and are obliged to shape innovative remedies if needs be to achieve this goal." [Paragraph 17]

"Under the circumstances I find that the respondents have failed to advance justifiable reasons why they failed to comply with the order ... The applicant seeks certain steps to be ordered on a structured basis in respect whereof the respondents should fulfil its obligations which was already canvassed and detailed in the previous application ..." [Paragraph 18]

"That in my view is the spirit as enunciated in the Meadow Home Owners case supra, where it was held that courts should look to orders that secure ongoing oversight of the implementation of the order. I am satisfied that the applicant is entitled to the relief sought." [Paragraph 19]

The application was granted.

## CRIMINAL JUSTICE

**S V SIPHOLI AND ANOTHER (A15/2012) [2012] ZALMPHC 3**

**Case heard 15 May 2012, Judgment delivered 30 May 2012**

This was an appeal against conviction and sentence for the rape of a seventeen year old girl. The appellants both argued that there had been consent.

Kganyago AJ (Makhafola J concurring) held:

"The evidence of the complainant ... is that of a single witness and should be treated with caution. It also has some defects which cannot be ignored. When allegedly confronted by the two appellants, she did

not run to her homestead which was a few paces from where the appellants found her. When she was walking with the second appellant to the direction of dam, they were hugging each other and at a certain stage they were kissing each other. At a certain stage, the second appellant went to request a condom from the first appellant who was at a distance. During that time the complainant was left alone. She had ample time to run away. She did not, but she waited for the second appellant to come back. There is no evidence that there was a struggle between the second appellant and the complainant before they had sexual intercourse. The complainant had also had time to remove her panty on her own." [Paragraph 12]

"The first appellant did not see the second appellant and the complainant when they were having sexual intercourse. The first appellant ordered her to take off her clothes and she complied. She waited for the first appellant to put on the condom without running away. After they had sexual intercourse, the first appellant had time to remove the grass from the back of the complainant. If indeed she was raped, would the first appellant have had time to remove grass from the back of the complainant? That I find to raise some suspicion." [Paragraph 13]

"... When the complainant and the two appellants were walking towards the direction of the dam, they were from a residential area. On the way to the dam they have met several people. At no stage did the complainant scream for help. Nobody was putting a gun or knife on her, but was been hugged by the second appellant." [Paragraph 14]

"The complainant started to cry when she was about to reach her home. All along she was not crying. The only conclusion is that the complainant did not come back early, and decided to falsely accuse the two appellants as she did not know what to tell her aunt. Counsel for both the state and the two appellants, have conceded that the court a quo should have given the two appellants the benefit of doubt as the state had failed to discharge the burden of proof beyond a reasonable doubt that the complainant did not consent to such sexual intercourse. Therefore, I am of the view that the conviction cannot stand and must set aside in relation to count 1." [Paragraph 15]

Turning to the sentence of life imprisonment, Kganyago AJ held:

"In terms of section 51(3)(a), when the court imposes a lesser sentence than imprisonment for life, it must be satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Imprisonment for life cannot be imposed lightly, the court must conduct a balancing exercise of all the relevant factors." [Paragraph 17]

"The alleged rape was not brutal, the appellants were first offenders and the circumstances in which the alleged rape took place are also suspicious. The age of the appellants should also be taken into consideration. The court a quo has therefore, erred in failing to take into consideration the above mentioned mitigating factors by the appellants to constitute substantial and compelling circumstances. The counsel for both the State and the appellants, have conceded that the sentence of life imprisonment was excessive." [Paragraph 18]

The conviction and the sentence were set aside.

**ADMINISTRATION OF JUSTICE**

**BOTHA V SINGH AND OTHERS (30761/14) [2015] ZAGPPHC 447**

**Case heard 29 April 2015, Judgment delivered 21 May 2015**

This was an application seeking an order to compel a Regional Magistrate to allocate a trial date. The Regional Magistrate informed the applicant that the court did not have jurisdiction to hear the matter and refused to allocate a date for trial, despite an order by the Regional Magistrates' Court granting the applicant's request to have the matter transferred to the Regional Magistrates' Court.

Kganyago AJ held:

"The respondent's counsel has conceded that the order of the third respondent has not been set aside. An order of a court of law stand until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it is wrong or you dislike it. In Gauteng Province Driving School Association and Others v Amaryllis Investments (Pty) Ltd and others [2012] All SA 290 (SCA) the court held that respect for authority of the courts is foundational to the rule of law. …" [Paragraph 14]

"It is of paramount importance that orders of the court are respected and compiled with. As an officer of the court the first respondent should be anexemplary. Disobedience of court orders by judicial officers will make amockery of the courts. As a regional court magistrate, in my view he isexpected to know what procedure to follow if he is of the view that theorder made is not capable of been enforced, rather than a blatant refusalto carry out the order." [Paragraph 15]

"In my view the first respondent is acting as if he is a court of competent jurisdiction empowered to review the order of the third respondent. He is exercising powers which he does not have. He is compelled to obey the order of the third respondent since that order has been properly obtained and will remain valid until set aside by a court of competent jurisdiction. It is not his terrain to determine whether the order is wrong or not, and thereafter out of his own and without following the correct procedures, refuse to enforce the order." [Paragraph 16]

"Under the circumstances, I am satisfied that the third respondent hasmade a valid order which was never set aside. As long as that order has not been set aside, the first respondent is compelled to respect and enforce it whether he agrees with it or not." [Paragraph 18]

The application was granted.

## SELECTED JUDGMENTS

### CRIMINAL JUSTICE

**MOKOENA V S (A277/2013) [2014] ZAGPJHC 141**

**Case heard 13 May 2014, Judgment delivered 15 May 2014**

The appellant and another accused were convicted of rape and kidnapping in the Regional Court. On appeal, it was argued that the regional magistrate had descended into the arena, and therefor the appellant did not have a fair trial.

Lamminga AJ (Weiner AJ concurring) held:

"It was also submitted that, the regional magistrate was biased or that there are reasonable grounds to suspect bias on the part of the regional magistrate, due to the way he conducted the questioning. ..."" [Paragraph 8]

"The un-judicial approach in questioning the witnesses is evident as early as page 11 of the record, where the regional magistrate seems impatient and condescending to the complainant. At page 13 the court is clearly exasperated with the complainant …. This impatience and condescending approach persists throughout the record but is probably the least objectionable of the aggrieved conduct." [Paragraph 9]

"During cross-examination of the State witnesses the following conduct is found questionable: There were several instances where the Prosecutor raised objections and the Defence was not given an opportunity to respond, before the regional magistrate made a ruling. When the Defence attorney tried to clarify contradictions ... the regional magistrate interjected and ruled it irrelevant without allowing the defence attorney to respond. The Defence attorney was clearly trying to establish why there was yet another contradiction as to the events of the morning at the room of the Appellant, but was not given the opportunity to canvas the issue at all. It is significant that this evidence was ruled irrelevant at that stage, but the regional magistrate allowed the evidence during examination in chief. When the defence attorney tried to put the appellant's version to the complainant … the court interjected, without justification and argued with the defence attorney about what he wanted to ask. This altercation alone spans 5 pages of the record … This kind of interruption appeared repetitively throughout the record where the defence attorney tried to cross-examine witnesses. Where the defence attorney tried to clarify issues … the court answered the question on behalf of the complainant and stated "Let's move on" without allowing the witness to answer or giving any reason for not allowing the witness to answer. This was repeated when the attorney tried to test her credibility ..." [Paragraph 10]

"The regional magistrate proceeded to subject the witnesses, including the accused, to intensive questioning under the guise of clarification. It is so that there are some questions which were indeed legitimately put … however the record is replete with questions intended to discredit or confuse the witnesses. ... In regard to the second state witness … the regional magistrate goes so far as to question the credibility of the witness … [T]he parties were not afforded an opportunity to put questions to the witness regarding issues raised during the questioning by the regional magistrate. Cross examination of the Co-accused by the prosecutor spans two and a half pages, but questioning by the regional magistrate, nine pages. The tone and nature of the questions are clearly intent on discrediting the witness. … The nine pages of questioning by the regional magistrate is brimming with instances indicating that he was

not merely clarifying, but actively cross-examining the witness. Again the Defence was not invited to pose questions in regard to what the court had asked. In regard to the appellant the Regional magistrate spent 11 pages of the record questioning him, at times being sarcastic …" [Paragraph 11]

"During cross-examination of the appellant and his co-accused, the defence attorney, who took over the case, tried to raise objections, for example, regarding the question of the instructions given to the legal representative. The regional magistrate cut him off and misled him as to which accused alleged that he had a relationship with the complainant and did not allow him to put his point forward." [Paragraph 12]

"The regional magistrate allowed evidence on the relationship between the complainant and the witness A[…], by the complainant and A[…], but when the defence wanted to challenge this evidence, the regional magistrate ruled the relationship irrelevant and denied the defence this opportunity. Later he allowed a witness called by the prosecutor on the issue of the relationship." [Paragraph 13]

"The regional magistrate clearly pre-judged the admissibility of the statement the witness Mr. A[…] made to the police. … His apparent prejudice is compounded by his insistence during the trial-within–a-trial that the witness should have read back the statement, although the witness testified that he explained the contents of the statement to the deponent. The regional magistrate questioned the police officer at length on the fact that he did not read the statement in English to the witness, but explained to the witness what was written down. The regional magistrate became argumentative during the defence address in regard to this issue, which argumentative and repetitive condescending conduct spans 5 and half pages of the record." [Paragraph 14]

"The skewed approach adopted by the regional magistrate when he conducted the trial is also evident in the manner in which he analysed the evidence. … The regional magistrate bent over backwards to ignore the contradictions in the evidence of the complainant and A[…] but was quick to reject the defence version as improbable without any substantial reasons to do so" [Paragraph 15]

"… [T]he conduct of the regional magistrate sustains the inference that … he was not open-minded, impartial and fair during the trial. The nature, content and manner of the questioning justifies a conclusion that it was a far cry from merely clarifying matters and specifically from the perspective of the appellant and his co-accused, must have seemed to be designed to produce a result favourable to the State." [Paragraph 16]

"The language may in many instances be described as unjudicial language that is readily susceptible to an interpretation that the regional magistrate was hostile to the appellant and his co-accused to the extent that he was not able to bring an unclouded mind to bear on the adjudication of the issues before him." [Paragraph 17]

"A further concern … concerns the unwarranted interruptions by the regional magistrate, which, taken in totality, clearly undermined the fairness of the trial. The frequency, length, timing, form, tone and contents of his questioning without doubt conveyed the opposite impression. The effect of this being that the reasonable observer would perceive that the integrity of the judicial process must be called into question." [Paragraph 19]

"It follows that the regional magistrate's transgression of the limitations within which judicial questioning should occur was grossly unfair to the appellant and his co-accused and infringed their right to a fair trial. This type of conduct has the potential to undermine the public's confidence in the courts." [Paragraph 20]

"It is so that the former co-accused of the appellant did not appeal. However, I am of the view, having read the record, that a gross injustice would be perpetrated if we do not deal with his conviction. … In the interests of fairness and justice, this is a case calling out for this court to review the magistrate's decision. Accordingly, this court's inherent power of review is invoked." [Paragraph 21]

"… [T]he complainant's evidence was fraught with contradictions and cannot be accepted. The version of the appellant and his co-accused is more probable and reasonably possibly true" [Paragraph 23]

The appeal was upheld and the conviction of the appellant set aside. The conviction of the co-accused (Accused 1) was also set aside. Lamminga AJ ordered the record of the trial and this judgment to be submitted to the Magistrate's Commission.

**S V GOOSEN 2014 JDR 1490 (GJ)**

**Case heard 12 May 2014, Judgment delivered 12 May 2014**

The Appellant appeared in the Regional Court, where he was acquitted on charges of theft of a motor vehicle and theft, but was convicted on one count of fraud, and sentenced to 8 years imprisonment. After conviction the State proved 6 previous convictions, – four for theft and two for fraud. This was an appeal against sentence.

Lamminga AJ (Weiner J concurring) held:

"In terms of Section 271A(b) of the Criminal Procedure Act … certain convictions fall away as previous convictions after expiration of 10 years. This Section applies where a court has convicted a person of any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed. The conviction shall fall away unless, during that period, the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months, without the option of a fine, may be imposed. The previous convictions of the Appellant in this case do not fall within the application of Section 271A." [Paragraph 7]

"The extent to which previous convictions should be taken into account when imposing sentence was canvassed and listed in S v Muggel … With reference to S v Mqwathi … it was held that: 6. The tendency of taking everything that appears on the form SAP69 into consideration, regardless of the passage of time, must be avoided. It must also be borne in mind that even a criminal is entitled to ask that the lid on the distant part should be kept tightly closed. 7. The degree of emphasis to be placed upon previous convictions is a matter which is within the discretion of the trial court. Where the degree of emphasis is disturbingly inappropriate, in that it cannot be said that the sentencing court exercised its discretion judicially, the Court of appeal will interfere."" [Paragraph 8]

"The principle that it might be appropriate, depending on the circumstances, to have limited regard for or even to disregard previous convictions of the distant past was reiterated in S v Morebudi …" [Paragraph 9]

"In the present case the learned Magistrate did set out various aggravating factors which led him to conclude that a term of direct imprisonment is appropriate and that a longer period of incarceration needs to be imposed. These were that the Appellant, due to his previous convictions has been shown to

be a dishonest person with a propensity to commit crimes of dishonesty and therefor it cannot be believed that he would compensate the Complainant. In addition, the Complainant suffered a large financial loss. The court paid lip service to the Appellant's personal circumstances, business interests, and tender to reimburse the Complainant. He did not have any regard to whether the businesses could continue operating in the absence of the Appellant and made no enquiries in this regard. This indicated an over-emphasis of the Appellant's previous convictions and the element of retribution, constituting grounds for this court to interfere." [Paragraph 10]

"The final legal issue relevant to this appeal is whether the order in terms of Section 276B of the Criminal procedure Act … should stand. In S v Mthikulu … (SCA) it was held … that: 'In the context of fair-trial rights of accused persons, the failure to afford the parties the opportunity to address the sentencing court might, depending on the facts of each case, well constitute an infringement of such fair-trial rights." The court held further … "A court should only exercise its discretion to impose a non-parole period in exceptional cases."" [Paragraph 11]

"In the record placed before this court … [i]t appears that the Appellant was not given an opportunity to address the court on Section 276B; and … [t]here do not appear to be factors upon which the court should have exercised its discretion. There were no exceptional circumstances justifying the exercise of the discretion to invoke Section 276B of the Act" [Paragraph 12]

"The sentencing court, further, fixed such non-parole period in excess of what is provided for in Section 276B, as being not more than two thirds of the period of the sentence. Thus the sentencing court did not exercise its sentencing discretion properly or judicially, and this court may intervene." [Paragraph 13]

The appeal against the sentence was upheld and the sentence was set aside and replaced with one of 6 years imprisonment.

**MBAMBO V S (A532/2013) [2014] ZAGPJHC 140**

**Case heard 12 May 2014, Judgment delivered 15 May 2014**

This was an appeal against sentence. The Appellant had been convicted of robbery with aggravating circumstances by the Regional Court, and sentenced to 18 years imprisonment. The Appellant argued that the presiding officer had misdirected himself in finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, and his finding that a more severe punishment is appropriate.

Lamminga AJ (Weiner J concurring) held:

"After the conviction, the State proved a previous conviction of the Accused. He was found guilty of theft committed on 31 May 2004 … Unfortunately there is no copy of the SAP 69 included in the record and no indication that the SAP69 was entered into evidence as an exhibit. Therefore we do not know when he was convicted and sentenced on that case. Nor do we know what the conditions of his suspension were. However, dispossessing someone of their property is common to both theft and robbery." [Paragraph 6]

"Although the charge sheet referred to Sections 51 and 52 of [the Criminal Law Amendment] Act … there is no indication in the record that the said provisions were explained to the Accused. In cases such as S v

Chowe … and S v Ngomane … it was remarked that it is the task and responsibility of the presiding officer to explain the fact that he is exposed to the minimum sentence legislation, since it is inherent to the right to a fair trial. … [T]his point was not raised in this appeal, but the issue was raised during argument and counsel for the Respondent conceded that, since this was not done, the court was restricted to its ordinary sentencing jurisdiction of 15 years. This concession is incorrect in that in this case the Appellant was informed in the charge that it should be read with the provisions of Sections 51 and 52 …" [Paragraph 8]

"Another point not raised in this appeal is the fact that the Presiding Officer did not inform the parties that he might consider a sentence of more than the prescribed minimum." [Paragraph 11]

"… [T]he mere fact that the defence was not informed of the court's contemplation of imposing a higher sentence than what is the prescribed minimum, is not, on its own, sufficient to vitiate the sentence." [Paragraph 13]

"In the present case the learned magistrate did set out various aggravating factors which led him to conclude that a more severe punishment other that the prescribed minimum sentence would be appropriate. Thus he states that there was premeditation, an ambush of an individual by a group, prevalence of the offence, a previous conviction on a charge of theft and lack of remorse. In light of the decision in S v Mthembu and specifically also that it was decided in S v Mokela … (SCA) … that a court of appeal will only be justified to interfere in the sentencing court's discretion where it is satisfied that the sentencing court misdirected itself, or did not exercise its discretion properly or judicially, the sentence must stand." [Paragraph 14]

The appeal was dismissed.

## CUSTOMARY LAW

**UNIVERSITY OF VENDA V MATHIVHA 2015 JDR 2345 (GP)**

**Case heard 27 August 2015, Judgment delivered 3 September 2015**

Applicant sought a final interdict restraining the First Respondent from occupying and developing a certain portion of land, and ordering the Respondent to remove from that land developments, buildings and/or structures erected by them, and for the Respondent to vacate the land or be ejected.

Lamminga AJ held:

"… It is common cause that the land in question is not registered in the name of the Applicant. It follows that Applicant is not the owner of the land in question, but rather relies on its use and occupation of the land, allegedly donated to it and its right to transfer of the land based on that donation." [Paragraph 12]

"… [I]t is already evident that, as far as the issues between Applicant and the First Respondent are concerned; the Applicant has proved that the land has been donated to it, although not yet transferred and that Applicant is entitled to transfer of the property. Further it has proved that it has been enjoying occupation and use of the land in question, and that the transfer process is being attended to. … [T]he Applicant … has proved a substantive right to the property … and thus satisfied the first requirement of a clear right." [Paragraph 15]

"The Second, Third And Fourth Respondents disputed that the Applicant had any rights to the land in question, the donation of the land and the extent of the land allegedly donated to the Applicant. They alleged that the land was communal land in terms of customary law and allocated to the mother of the First Respondent by them in terms of customary law. …" [Paragraph 16]

"… [I]t is not disputed by the First Respondent that he took occupation of and started construction on a portion of the land donated to the Applicant … First Respondent denies that his occupation of the said land infringes on any rights of the Applicant and he relies on the allegation that Second, Third and Fourth Respondents had given his mother permission to occupy the piece of land. It is common cause that First Respondent was not given any permission by Second, Third and Fourth Respondents to occupy the relevant piece of land. First Respondent does not even allege that he is in occupation on behalf of or as an agent of his mother. He makes vague allegations that "the family" made decisions regarding the land and what to do with it, but nothing is confirmed by confirmatory affidavits. It is clear that the First Respondent's occupation of the land Infringes on the established right of the Applicant and in the very least holds potential prejudice for the Applicant in that it is denied use of that part of the land. First Respondent alleges that he is in occupation of the land pursuant to its allocation to his mother." [Paragraph 17]

"The aforesaid renders it necessary to determine the question whether or not the Second, Third and Fourth Respondents had any authority to allocate the land in question. …" [Paragraph 18]

"Section 212(1) of [the Constitution] provides for the enactment of national legislation to give effect to the recognition and role of traditional leadership at a local level. This constitutional imperative was recognised through the enactment of the Traditional Leadership and Governance Framework Act … (the TLGF) and the Limpopo Traditional leadership and Institutions Act … (the Limpopo Act). These acts regulate the governance of traditional communities and provide processes for the recognition of structures of traditional leadership" [Paragraph 18.1.2]

"The entire issue of whether the land was allocated by the traditional leadership becomes irrelevant when one considers the question whether there was any provision or authority under which the Second, Third and Fourth Respondents could allocate land. …" [Paragraph 18.4]

Lamminga AJ considered the land tenure legislative framework, looking at the various pieces of legislation that regulated the land from the Native Land Act of 1913 up until the promulgation of the Constitution of the Republic of South Africa 1996:

"… [I]n the area which comprised the erstwhile Republic of Venda, the Venda Land Affairs Proclamation (LAP), 1990 is applicable. I found no confirmation during my research that Regulation R17, R16 and R23 were repealed so accept that these regulations still apply. In terms of LAP and R17, there is no provision for allotment of sites or granting of PTO's by traditional leadership in regards to any land, rural or urban, in the territory where it applies. Second, Third and Fourth Respondents conceded that in terms of applicable legislation, they did not have the authority to allocate land or grant permissions to occupy. They rely on the customary law." [Paragraph 18.4.10]

Lamminga AJ then considered the application of customary law:

"It was submitted by the Respondents that the land … is communal land in terms of customary law and was managed and allocated in terms of customary law and that the court should recognise the right of ownership of the Fourth Respondent in accordance with the provisions of section 25 and section 211 of

the Constitution. … The court is not called upon by any of the parties to adjudicate the question of the Fourth Respondent's ownership of the land… but rather whether the land could have been and indeed was allocated to First Respondent. Since the Respondents allege that the allocation was done in terms of customary law, and customary law is recognized by the Constitution, I will deal with this issue and not the rights of Fourth Respondent to ownership to the land." [Paragraph 18.5]

"The customary law pertaining to the allocation of land is not readily ascertainable with sufficient certainty, therefor the court cannot take judicial notice thereof and expert evidence is required. … None of the respondents placed such evidence before the court regarding the following: a. What is considered communal land in terms of the customary law applicable to the Thsivhase community? b. How is the decision to allocate land to or to permit occupation of land made? c. is the allocation of land or permission to occupy land transferrable and if so, how is such transfer achieved under custom? d. Is there any basis in customary law for the First Respondent to have occupation of the land in question? …" [Paragraph 18.5.3]

"… [A]ll the Respondents alleged that the First respondent's mother and not First Respondent, was given permission to occupy in terms of customary law. I am unable to determine whether this was indeed done in terms of the applicable customary law and, if so, whether the First Respondent is, in terms of customary law, entitled to occupy the land. It follows that First Respondent is trespassing on the land in question, as alleged by the Applicant …" [Paragraph 18.5.4]

The application succeeded.

## ADMINISTRATION OF JUSTICE

### LAW SOCIETY OF THE NORTHERN PROVINCES V HOTANE (67016/2013) [2014] ZAGPPHC 516

**Judgment delivered 23 May 2014**

This was an unopposed application for the removal of the Respondent's name from the roll of attorneys. The Applicant had received twenty nine complaints against the Respondent.

Lamminga AJ (De Vos J concurring) held:

"Section 22(1 )(d) of the Attorneys Act … confers a discretion on the court in the determination of whether or not an attorney is a fit and proper person. This discretion must be exercised based on facts placed before it and these facts must be proven on a balance of probabilities and these facts should be considered in their totality, not in isolation. …" [Paragraph 5]

"The court must first determine whether the offending conduct has been established. Once the facts are established, a value judgment is required to decide whether the person is a fit and proper person to practice as an attorney. If the court decides that the person is not a fit and proper person to practice as an attorney, it must decide in the exercise of its discretion whether in all the circumstances of the case the attorney in question is to be removed from the roll or merely suspended from practice. Ultimately it is a question of degree. …" [Paragraph 6]

"The law requires from an attorney to uberrima fides - the highest degree of good faith - in his dealings with his clients which implies that at all times his submissions to his clients should be accurate, honest and frank. This also requires from an attorney never to abuse his position of trust and the fiduciary

relationship that exists between an attorney and client. The Act and the Rules of the Applicant requires an attorney to be scrupulous in his observations and compliance with the Act and the said Rules." [Paragraph 7]

"In this case the facts placed in evidence are undisputed and I find that, on a balance of probabilities the facts have been proved. From the facts so proved it is established that the Respondent on several occasions contravened the Rules of the Applicant in that: (a) He failed to, within a reasonable time, after performance or earlier termination of the mandate received from the client, to furnish the client with a written statement of account setting out with reasonable clarity full details and descriptions of all monies received, all disbursements and other amounts paid, fees and charges and the amount due to or by the client; (b) He failed to pay the amount due to a client within a reasonable time; (c) He, without lawful excuse, delayed the payment of trust money after due demand; (d) He neglected to give proper attention to the affairs of his client; (e) He failed to respond to, or appropriately deal with, within a reasonable time, any communication which reasonably required a response; (f) He failed to comply with an order, requirement or request of the Applicant; (g) He failed, without lawful cause or excuse to perform work of a kind commonly performed by a practitioner, with such degree of skill, care and attention, or of such a quality or standard, as in the opinion of the council may reasonably be expected; (h) He had failed to keep proper accounting records; (i) He failed to keep sufficient funds in his trust account to meet his obligations to trust creditors and failed to keep proper accounting records of his business account." [Paragraph 14]

"The conduct of the Respondent is to say the least, shockingly brazen. He blatantly neglected his duty towards his clients, behaved in an extremely dishonourable way and showed no regard or respect for the provisions of the Act or the Rules of the Applicant. There is no excuse for receiving money on behalf of a client and not accounting to the client as to the proceeds and deductions or not paying out the money due to a client on demand. … The fact that he clearly, on the evidence tried to avoid or delay making payments to clients, that he did not respond when the clients and the Applicant made enquiries, made false reports as to the amounts paid, tailed to provide proof ot payment when requested, [sic] and failed to make payments to clients after giving an undertaking to pay coupled with the fact that he had a trust deficit each month, is indicative of a strong likelihood of misappropriation of funds." [Paragraph 15]

"It is further clear from the Curator's report that the Respondent was not cooperative and actually delayed and frustrated the curator's efforts in not making files and accounting records available. It was only after the Curator had put a hold on the Respondent's trust account that the responded made contact with the Curator. All previous efforts by the Curator to communicate with the Respondent were unsuccessful. …" [Paragraph 16]

"… I find that the Respondent has shown on several occasions that he does not adhere to the uberrima fides expected of an attorney. He has no regard for the Act and Rules and his conduct amounts to a material deviation from the standards of professional conduct. He is not a fit and proper person to practice as an attorney." [Paragraph 17]

The respondent was accordingly removed from the roll of attorneys.

## SELECTED JUDGMENTS

### CIVIL AND POLITICAL RIGHTS

**DUPLAN V LOUBSER NO AND OTHERS, UNREPORTED JUDGMENT, CASE NO.: 24589/2015 (NORTH GAUTENG HIGH COURT, PRETORIA)**

**Case heard 5 October 2015, Judgment delivered 23 November 2015**

This was an application for an order declaring that the applicant was entitled to inherit intestate from the deceased. The applicant and the deceased lived in a permanent same sex life partnership, and had undertaken reciprocal duties of support. The partnership was neither solemnised nor registered in terms of the Civil Union Act of 2006.

Muller AJ held:

"The recognition of same sex marriages has a long history of prejudice, discrimination by family, friends, the public at large, and the law in general, not only in this country, but also elsewhere. The need for legislation to regulate the position of gays and lesbians who wanted to marry was long overdue when the Act came into effect on 30 November 2006." [Paragraph 6]

"… The Act has made it possible, for the first time, for gays and lesbians to be afforded a choice to enter into a formal relationship, recognised by law, which enjoys the same status and privileges together with the responsibilities that heterosexual couples enjoy who enter into a marriage relationship." [Paragraph 7]

"Our common and statutory law, before and after the coming into existence of our constitutional democracy, traditionally distinguished between married people and unmarried people by according certain benefits to married people which the law did not accord unmarried people. The Act, when it came into effect, did not materially alter that distinction. The Act accomplishes to bring same sex partnerships, which are solemnized and registered in terms of the Act in line with the status accorded to heterosexual couples who enter into a marriage relationship as well as eradicating discrimination and restoring the dignity of gays and lesbians." [Paragraph 9]

"The Constitutional Court in Gory v Kolver NO … on which the applicant relies, employed the so-called reading-in method to cure the unconstitutionality of s1(1) of the Intestate Succession Act …" [Paragraph 12]

"The order was, no doubt, aimed at permanent same sex life partnerships in which the partners have undertaken reciprocal duties of support to inherit intestate in the absence of legislation recognising same sex marriages. …" [Paragraph 13]

"At the time the judgment was handed down the Act had not been promulgated. The law in the interim has undergone a significant change due to the Act coming into operation. Same sex civil unions are now recognised as equivalent to heterosexual marriages. That being the case a distinction has to be drawn between same sex partnerships which are solemnised and registered and those which are not. The former is recognized by law and the latter together with heterosexuals who have elected not to marry, are not. " [Paragraph 14]

“The order granted by the Constitutional Court in Gory v Kolver NO … was intended to include in s 1(1) of the Intestate Succession Act … permanent same sex life partners who have undertaken reciprocal duties of support, together with "spouses" until the provisions of s 1(1) are specifically amended to exclude them from the ambit of the Intestate Succession Act …” [Paragraph 18]

“The non-recognition of same sex marriages was at the root of the complaint that s 1(1) is unconstitutional. Parliament removed the impediment that the law imposed on same sex marriages, by the introduction of the Act which declares partners in a civil union to be "spouses". It cured the unconstitutionality of the non- recognition of same sex marriages only. The reading-in order has thus not run its course and still serves to include after the word "spouse" the words: "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".” [Paragraph 19]

“This court, in my respectful view, is not at liberty to deviate from a reading-in of those words. I am obliged to do so. The principle associated with the doctrine of stare decisis is a manifestation of the rule of law which is a founding value of the Constitution. The doctrine requires that lower courts follow the decisions of higher courts in the judicial hierarchy to ensure predictability, reliability, uniformity, equality certainty and convenience.” [Paragraph 20]

“A partner in same sex partnership solemnised and registered in terms of the Act is for all intents and purposes a "spouse" as envisaged by s 1(1)(a) of the Intestate Succession Act … However, be that as it may, I am nevertheless obliged to "read-in" in s 1(1)(a) the following words after the word "spouse":" or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".” [Paragraph 22]

“… [I]t is also not open to me to find that the Act cured the constitutional defect in s 1(1)(a) of the Intestate Succession Act … in the absence of a specific amendment to that effect , save to state, in passing, that the "reading-in", in my respectful view, leads to discrimination against unmarried heterosexual couples.” [Paragraph 23]

The application was granted.

## CRIMINAL JUSTICE

### MOTHUPI V S, UNREPORTED JUDGMENT, CASE NO.: A281/2015 (NORTH GUATENG HIGH COURT, PRETORIA)

**Case heard 12 October 2015.**

This was an appeal against conviction and sentence for unlawful possession of a prohibited firearm. The appellant was in possession of a Russian Grad P 122 mm warhead. The issue before the court was whether this was a prohibited firearm.

Muller AJ (Thlapi J concurring) held:

“It is clear from a reading of s 4 that certain "firearms" and "devices" are prohibited firearms. Neither the expression "prohibited firearm" nor the words "projectile" or "rocket" are defined in the Act. To determine the meaning of s 4(1) the words in their context have to be considered. The Shorter Oxford

Dictionary describes a projectile as "an object projected or propelled through space and it is able to be projected by force". This description of projectile admits of no ambiguity." [Paragraph 8]

"A warhead, by its description, at first blush, appears to resemble ammunition. Ammunition is defined to mean "a primer or complete cartridge". A cartridge is also defined and means "a complete object consisting of a cartridge case, primer, propellant and bullet". A firearm, by definition, is a device that is designed to propel a bullet through a barrel or a cylinder. One can hardly envisage a rocket to be a firearm. The said warhead does not meet the requirement of a cartridge. It is simply a device that contains high explosives." [Paragraph 10]

"In my judgment a warhead of a rocket is not a projectile as envisaged by s 4(1)(d). For a device to qualify as such a projectile it must have been manufactured to be discharged from a canon, recoilless gun or mortar. The particular warhead is not manufactured for that purpose. It is manufactured to be attached to a rocket and is launched from a launcher. Not to be discharged from a cannon, recoilless gun or mortar." [Paragraph 11]

"... A rocket in terms of s 4(1)(d) is a prohibited firearm if it is manufactured be launched from a rocket launcher. The warhead, in itself, is not a rocket if the rocket that propels the warhead through space is not attached to it. It is a component of a rocket, but not a rocket." [Paragraph 12]

"I am satisfied that the warhead without its detonator is indeed an explosive device but it is not a prohibited firearm." [Paragraph 13]

"... As indicated the warhead is neither a firearm nor ammunition. A prohibited firearm which is not a firearm as defined is not covered by the section." [Paragraph 14]

"To sum up. The state, in my opinion, has failed to prove beyond a reasonable doubt that appellant was in the unlawful possession of a prohibited firearm." [Paragraph 15]

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

**SKHOSANA AND OTHERS V S, UNREPORTED JUDGMENT, CASE NO.: A270/2015 (NORTH GAUTENG HIGH COURT, PRETORIA)**

This was an appeal against sentence following conviction for murder, robbery with aggravating circumstances, illegal possession of firearms and ammunition and attempted murder. The majority (Kubushi J, Prinsloo J concurring) dismissed the appeals of appellants 1, 3 and 4 and upheld the appeal of appellant 2 on the count of murder.

Muller AJ dissenting:

"I part ways with regard to the appropriateness of the sentences imposed on all the appellants in respect of the counts of unlawful possession of firearms and the unlawful possession of ammunition." [Paragraph 21]

"I am ever mindful that sentencing rests pre-eminently in the discretion of the trial court. I am equally mindful that in the absence of a material misdirection by the trial court, an appeal court cannot interfere with the wide discretion entrusted to the trial court only because the sentence is not one that the court

itself would have imposed. To do so would amount to usurping the discretion of the trial court and it would erode the discretion of the trial court. An appeal court may be justified in interfering with the sentence imposed by the trial court in the absence of a material misdirection, when the disparity between the sentence of the trial court and that which the appellate court would have imposed is so marked that it can properly be described as shockingly, startlingly or disturbingly inappropriate." [Paragraph 22]

"The use of a firearm to kill the deceased to overcome resistance during the robbery was, no doubt, taken into account in the sentences passed on the appellants in respect of the murder and robbery with aggravating circumstances? Those facts, in my respectful view, may not be taken into account again when sentence is considered in respect of the unlawful possession of firearms and ammunition charges. The aggravating facts , namely, the use of firearms, had already been taken into account in respect of the sentences imposed for murder and robbery with aggravating circumstances. It is in my respectful view a misdirection to have done so." [Paragraph 25]

"It is also clear that the trial Judge was of the view that s 51(2)(a)(i) of the Criminal Law Amendment Act … is applicable in respect of the unlawful possession of firearms and ammunition. … The Firearms Control Act … provides for a maximum sentence of 15 years imprisonment for the unlawful possession of a firearm (which includes a semi-automatic firearm), whereas s 51(2) imposes a minimum sentence of 15 years imprisonment in the absence of substantial and compelling circumstances for the possession of a semi-automatic firearm." [Paragraph 26]

"In S v Baartman the court held correctly in my respectful view, that the Firearms Control Act impliedly repealed the minimum sentence regime in respect of semi-automatic firearms." [Paragraph 27]

"The appellants as stated earlier were charged under the provisions of the Firearms Control Act." [Paragraph 29]

"The sentences of 15 years and 10 years imprisonment respectively imposed by the learned trial judge are exceptional for the possession of semi-automatic firearms. The sentences are disproportionate to the crimes, the criminals and the interests of society. I am firmly of the view that the disparity between the sentences imposed in respect of their unlawful possession of the firearms and ammunition and the sentences which this court would have imposed is so markedly different that the sentences can rightly be described as startlingly inappropriate." [Paragraph 30]

## ADMINISTRATION OF JUSTICE

### OMAR V LAW SOCIETY OF THE NORTHERN PROVINCES AND ANOTHER, UNREPORTED JUDGMENT, CASE NO.: 42471/2013 (NORTH GAUTENG HIGH COURT, PRETORIA)

**Case heard 13 & 14 February 2014, Judgment delivered 9 April 2014**

This was an application for an order reviewing and setting aside the decision of the respondents to summons the applicant to a meeting of an investigation committee pertaining to a complaint, as well as any disciplinary proceedings instituted by the respondents against the applicant.

Muller AJ held:

"To my mind disciplinary proceedings begin when council, after consideration of a complaint lodged with the society, is of the opinion that a prima facie case of unprofessional, dishonourable or unworthy conduct has been made out and has resolved that proceedings be instituted ..." [Paragraph 18]

"It is clear from the wording of rule 95.2.2 that the council may at any time and whether or not it has proceeded under rule 95.2.1 call upon the practitioner to appear before an investigating committee to explain or elucidate or discuss the matter. There is of course an important proviso. Rule 95.2.1 provides that particulars of the complaint lodged with the society be furnished to the practitioner to enable him to reply. In the event that the procedure in terms of rule 95.2.2 is initiated without resorting to the procedure in rule 95.2.1, particulars of the complaint lodged by the complainant must also be provided to the be provided to the practitioner concerned. There is no reason, if particulars of the complaint have to be furnished to a practitioner under rule 95.2.1, to enable the practitioner to make written representations, why the particulars should not be provided to the practitioner when the procedure under rule 95.2.2 is invoked. The provision contained in rule 95.2.1 is manifestly included to comply with the audi alteram partem principle. It follows that the audi alteram partem principle should be extended, for the very same reason, to the procedure under Rule 95.2.2." [Paragraph 20]

"The rule of natural justice dictates that she be informed of the particulars of the complaint. ... Generally bodies that are required to investigate need not observe the rules of natural justice and bodies required to investigate facts and make recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice depending on the circumstances." [Paragraph 22]

"However, the rule of natural justice is applicable whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual has a legitimate expectation entitling him to a hearing. The rule of natural justice is part of the principle of legality, which is a foundational value of our Constitution ... postulates that a public official or body concerned must act fairly." [Paragraph 23]

"... The investigation and report of an investigating committee fall in the above category and is subject to that rule of natural justice. ..." [Paragraph 24]

"The reason underlying the purpose of the investigating committee is to afford the parties the opportunity to canvass the complaint fully. The council is placed in a better position to determine whether a prima facie case has been made out or not after investigation of the investigating of all the facts and circumstances. The report of the committee to the council may have serious repercussions for practitioners and may in appropriate circumstances ruin careers and may, in addition, indeed lead to criminal proceedings. ..." [Paragraph 25]

"I turn now to determine whether the council may delegate its powers to legal officers in the employ of the society, who are not members of council, to initiate, conduct or terminate any disciplinary proceedings provided for in the Act and the rules." [Paragraph 28]

"There can be no doubt from a plain reading of the provisions of the Act ... and the rules that only council have the power to initiate disciplinary proceedings after consideration of a complaint lodged with the society. ... S 69 allows council to delegate disciplinary functions of council to committees. It does not allow those delegated functions to be delegated by any of the committees to individual legal officers in the employ of the society. From the evidence adduced by the society, legal officers have a wide discretion to initiate, conduct, and even withdraw disciplinary proceedings. According to the deponent

legal officers have the delegated power to institute proceedings referred to in rule 95.2.1 and 95.2.2. Council effectively abdicated its control of the disciplinary process to its legal officers which it cannot do. That is not what the legislature intended. It begs the question whether it is the legal officers who decide what matters are serious enough to be referred to council and what matters are not." [Paragraph 32]

"The delegated powers of the legal officers render the recommendation of the investigating committee meaningless because Second Respondent as legal officer, decides, instead of the council (or duly appointed committee), whether a prima facie case has been made out, and if so, whether to proceed with further disciplinary steps. That is what happened in this case. Second Respondent, not council, has decided to initiate proceedings against applicant in terms of rule 95.2 and to discontinue further disciplinary steps despite the recommendation by the investigating committee to council to postpone the meeting. The fact that 8 000 - 9 000 complaints are received per annum affords no reason to disregard the provisions of the Act and the rules of the society. " [Paragraph 33]

"I have come to the conclusion that the decision taken by Second Respondent to initiate proceedings in terms of rule 95.2.2 against applicant is ultra vires the Act and the rules. However the withdrawal of all disciplinary proceedings against applicant (and Mr Omar) will render the relief claimed academic." [Paragraph 34]

The application was dismissed.

## SELECTED ARTICLES

**'THE LIABILITY OF BANKS AS MONEY LENDERS FOR DAMAGE TO THE ENVIRONMENT', (2006) 4 Journal of South African Law 665**

The following is extracted from an English summary of the article. The article seeks to analyse the liability of banks for damage to the environment caused by borrowers through a comparative study of the law of the European Union, the United Stated, the United Kingdom and South Africa.

"Banks play an increasingly important role in the economy because they are in a position to promote development of the environment by utilising their financial resources. In some instances, lenders who took up finance from banks are responsible for damage to the environment. Why should banks that financed projects, in the normal course of events, be held liable for damage to the environment caused by borrowers?" (Page 688)

"The South African act of 1998, has its foundation in section 24 of the constitution of the Republic of South Africa. It incorporates sustainable development as a tool to harmonise the necessity to develop with the need to protect the environment. At the same time the act emphasises the role of the principle of intergenerational equity, which presupposes the duty of the current generation to hand over the earth in a better condition than in which it was received from the previous generation. In the future, when finance is considered for projects that may harm the environment, banks must take environmental as well as economical factors into account. Purely economical reasons cannot be the only relevant factor. Development that is financially sound will have to be weighed up against social factors as well as the impact that it will have on the environment." (Page 689)

"Section 28 of the act places a general duty of care on every person who causes, has caused or may cause significant pollution or degradation of the environment to prevent such pollution or degradation from occurring, continuing or recurring. The persons saddled with the duty of care are the owner, the person in control, or the person who has the right to use land or premises. Banks may, under certain circumstances, be considered to be the owner, person in control, or even the person who has the right to use land or premises. The polluter pays principle is introduced by section 28 as a basis for liability but the principle is expanded to include, not only the polluter, but also entities, such as banks, which in no way whatsoever, contributed to pollution or degradation. The act affords no protection to banks in cases where banks became owner of land by virtue of their security interest in the property. By following established commercial practices, banks may be held liable for environmental damage caused by their clients or erstwhile clients." (Page 689)

"The traditional role of banks as financial institutions has to change because of the duty placed on banks by the constitution and the act, to act as instruments in the protection of the environment. By exerting their influence and by implementing new procedures banks will be able to draw the attention of prospective clients to the need to comply with environmental legislation." (Page 689)

"The emphasis should rather be on the ability of banks, generally, to influence borrowers than to hold banks liable for damage caused to the environment by borrowers." (Page 689)

**SELECTED JUDGMENTS**

**PRIVATE LAW**

**ISMAIL NO AND ANOTHER V ERF 87 DULLSTROOM CC (A357/2015) [2015] ZAGPPHC 835**

**Case heard 3 November 2015, Judgment delivered 11 December 2015**

The appellants had instituted an action against the respondents in which they claimed the reduction of a purchase price in the sum of R85 000, being the difference between the original price and the price that the appellants would have been willing to pay for the property, if they had been aware of a road reserve or servitude attached to the property.

Phatudi AJ (Jansen J concurring) held:

"It is trite that a seller, in casu, the appellants cannot invoke and find refuge in the protection accorded by a "voetstoots" clause where the purchaser (the respondent) can establish that the seller was in fact aware of a latent defect in the property sold either before or when the contract was entered into. The same could be said where the seller intentionally concealed the presence of the defect dolo malo. ... " [Paragraph 1.8]

Phatudi AJ then considered the meaning of a latent defect, and the judgment of Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction*, and continued:

"It is common cause that the respondent purchased Erf 87 in order fully to utilize the 1 322m2 and had plans drawn up by an architect for such full utilization, namely for the purpose for which it has been sold or for which it is commonly used." [Paragraph 3]

"The fact that the respondents were compelled to re-draw the initial plans to obviate the 397 m2 short fall of the 1 322 m2, because of the road reserve, can only be indicative of the fact that no building could be permitted to be erected on the road reserve. In the premises, it follows that the defect occasioned by the road reserve constitutes a latent defect in the property sold of which the appellants were aware and failed to disclose to the respondents." [Paragraph 4]

"The reliance placed on the "voetstoots" clause in the contract by the appellants as a defence in resisting liability, is of no avail … I find myself entirely in agreement with the aforegoing principle which I am bound to follow in the present case." [Paragraph 9]

"In the circumstances, and apart from the visibility or otherwise of the defect, I agree with the appellants' submission, which has considerable force, that it would still have been legally impossible for them to have extended developments to the road reserve, the impediment being caused by the provisions of sections 1 and 34(a) of the Roads Ordinance … This, needless to say, caused the respondent not only undue hardship, but also prejudice of a serious pecuniary nature. The road reserve thus constituted an "abnormal quality" which impaired the utility of the property …" [Paragraph 10]

"In my view, therefore, in some contracts parties are held to a greater duty of disclosure but the determination of the extent of the disclosure does not depend on the label with which the contract is branded. Where one party has knowledge not accessible to the other party, and where from the nature of the contract the latter (as in the present instance) binds himself verbally or otherwise on the basis of

the information communicated (the respondent in this case), the non-disclosure of any such fact is fatal. The contract is voidable at the instance of the aggrieved party because the risk run is in fact greater or different from the risk understood and intended to accept at the time of the agreement." [Paragraph 11.3]

"On a conspectus of the evidence … it admits of no doubt that the materiality of the misrepresentation, be it whether it was fraudulent or negligent, goes to the root of the contract. Put differently, it is generally required that the misrepresentation made, objectively viewed, would have persuaded a reasonable man, acting cautiously, to enter into a contract as a whole, or if he did, on different terms and conditions. In casu, the court is satisfied that the misrepresentation was conveyed intentionally and caused the respondent to act to its detriment." [Paragraph 12]

The appeal was dismissed with costs.

## COMMERCIAL LAW

### LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA V FACTOPROPS 1052 CC AND ANOTHER [2015] 3 ALL SA 319 (GP)

**Case heard 25 March 2014, Judgment delivered 20 May 2014**

This case concerned the question of whether interpretation and meaning of the word "mortgage bond" in section II (a) (i) of the 1969 Prescription Act was wide enough to include reference to a Notarial Mortgage Bond. Applicants sought to amend their plea to incorporate a special plea of prescription.

Phatudi AJ held:

"… [I]t is of cardinal importance to always bear in mind that a debt shall be extinguished by prescription after a lapse of the period which in terms of the "relevant law applies in respect of the prescription of such debt"(my own underlining)." [Paragraph 9]

"I may however remark although, orbiter that in modern commercial parlance, for prescription to begin to run, the debt must have been due and payable." [Paragraph 16]

"On careful consideration of the foregoing prerequisites, it seems clear that the mortgagee, would not be in a perfect position to exercise its right of retention and/or security over the encumbered movables, not until it has "perfected" its claim under the bond. I propose to revert to the notion of "perfection" later in the course of this Judgment. This notion, without a doubt, is peculiar in this context. Having said that, it then becomes necessary to trace and find the origin and the meaning, if any, of the concept "mortgage bond" from our statute books and old authorities. There are in our law, only four legislative enactments in place in so far as my memory can stretch, which makes reference to the concepts of "mortgage bond", "notarial contract", and "notarial bond". None of these measures, in my view, define quiet adequately the pure juridical meaning to be assigned to each for purposes of interpreting prescription of debts." [Paragraph 26]

"From the language employed in both the Deeds Act, 1937 and the Securities Act, 1993, it seems plain that a notarial bond which in its nature, when executed or registered, hypothecates corporeal movable property specified and described in the bond, cannot in my view, constitute a mortgage bond, and

accordingly, prescription of the debts secured by such divergent bonds, ought to differ both in effect and interpretation. ...” [Paragraph 31]

In disagreeing with Prof. M.M Loubser in the work "Extinctive Prescriptions, 1996” when the author observed that the Prescription Act, 1969 does not distinguish between the different kinds of mortgage bonds, Phatudi AJ held:

“In view of the fact that extinctive prescription begins to run as and when the debt becomes due under Section 12 of the Act, where a mortgage bond is registered in respect of a debt, a period of prescription applies to the debt concerned and not the mortgage bond itself. My opinion in this regard is fortified by the imperative language expressed in the Section. The words "shall” ... imports a pre-emptive or restrictive method of interpretation and excludes, therefore, any measure of discretion to justify deviation. In consequence, where a mortage bond is registered after the due date of the debt, the usual prescriptive period applicable to that debt will apply (Section 11(d), until the registration of the mortgage bond, when the 30-year period will find application. Accordingly, any period of prescription which has already begun to run, for instance 2 years before registration of the bond, will be taken into account, and the prescriptive period, after registration of the mortgage bond, will be a further 28-years period.” [Paragraph 33.2]

“I have, with the greatest of respect, an interpretation inimical to that of the learned Judge. The reasons for my dissenting view are that, firstly, the Deeds Registries Act 1937, in Section 102 defines a Notarial Bond as a bond attested by a notary public hypothecating movable property generally or specifically, while in the same breath, Section 50(1) thereof relates to the manner in which execution of a mortgage bond shall be performed by the owner of the immovable property. Such a mortgage cannot be equated to a notarial bond by virtue of the variant assets bonded in them. Furthermore, a "mortgage bond" which is also defined in Section 102 of the Deeds Registries Act, entails a bond attested by the register specially hypothecating immovable property. To my mind, therefore, the intention of the law-giver was always to maintain a distinction in respect of both character and the general purport of the two securities. ...” [Paragraph 45]

Phatudi AJ then considered whether the debt originated from a loan agreement or from a notarial bond:

“Reading from the respondent's particulars of claim as amplified in its declaration, it follows that the nucleus of its claim is founded upon the money lent and advanced to the applicant by the respondent in terms of the loan agreement This view is fortified by what is contained even in the special notarial bond itself.” [Paragraph 63]

“To that extent, the submission advanced on behalf of the respondent that because the debt is sourced by mortgage bond and therefore, the relevant prescription period is thirty years is, with respect, based on wrong premise.” [Paragraph 64]

“From the observation made, it follows logically that the debt on which the respondent relies, has its origin in the loan agreement It is patently clear that the respondent's claim is the applicant's failure to perform positively in terms of the loan agreement which is the vinculum juris giving rise to the obligation.” [Paragraph 73]

“I am firm in my view, therefore, that the differentiation of the legal nature between a "notarial bond” and a "mortgage bond" with reference to prescription of debts, should always be emphasised. This approach, I thought, accords with the provisions of the Deeds Registries Act ... read in conjunction with

the Securities Act ... These are two crucial statutory instruments ever passed by the lawmaker in the last century on the subject." [Paragraph 81]

"In deciding whether to grant or refuse an application for an amendment, the court exercises a discretion, and in doing so, leans in favour of granting it in order to ensure that justice is served by deciding the real issues between the parties." [Paragraph 91]

"In the light of the aforegoing considerations, and bearing in mind the issues raised, I come to the conclusion that there exists no real impediment why an amendment should not be permitted introducing the Special Plea of Prescription. Such an amendment, would in my view not be excepiable as disclosing no valid defence. I accordingly, do not hesitate to grant the application sought, and it is hereby granted." [Paragraph 95]

Applicants were granted leave amend their plea.

## CIVIL PROCEDURE

### TAHO V PUBLIC SERVICES SECTOR EDUCATION AND TRAINING AND OTHERS (58602.2013) [2013] ZAGPPHC 453

**Case heard 12 November 2013, Judgment delivered 21 November 2013**

This was an application for an interdict, in which the applicants sought an order to set aside disciplinary proceedings initiated and conducted by the respondents.

Phatudi AJ held:

"The question whether the labour court enjoys concurrent jurisdiction with the high court is strictly speaking, to be answered with reference to the provisions of sections 157(2) of the LRA, which provides that the labour court has concurrent jurisdiction with the high court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Republic of South Africa Constitution Act, 1996, which arises from "employment and from labour relations, disputes over constitutionality of any executive or administrative act or conduct, or as an employer, and over the application of any law of administration of which the Minister is the employer. Because of the thin line of demarcation between the two, there is constant overlap of jurisdiction. I must remark that, as of today, parliament has not yet provided a mechanism to develop a coherent legal framework within which labour disputes may be speedily resolved, seeing that there exists a great deal of overlap between the LRA and PAJA, both of which provide public sector employees with remedies for labour related issues. This was the view expressed by Skweyiya J in the Chirwa 's case ... Section 157 (2) of the LRA and its validity or otherwise has not yet been pronounced upon by the Constitutional Court." [Paragraph 6]

"The question whether there is concurrency of jurisdiction between the labour court and this court, has been settled in the landmark judgement of the Constitutional Court of CHIRWA V TRANSNET LTD AND OTHERS" [Paragraph 7]

"Consequently, I propose that the question whether the provisions of section 31 of the SDA, which confer exclusive jurisdiction on the labour court in respect of "all matters arising from this Act", should be left to

the court hearing the main application, to test whether the jurisdiction of this court to determine the issues prayed for therein, are excluded by the provisions of Section 31 of the SDA." [Paragraph 10]

"Put, differently, seeing that the Chirwa's case has removed the uncertainty on the issue of concurrent jurisdiction of the labour court, which is a court of equivalent jurisdiction with this court on labour matters, what, however, has not yet been settled is the question whether this jurisdictional power extends to the provisions of Section 31 of the SDA, which is part of the secondary dispute of the subject matter before this court. The moot point raised is, therefore, res nova in our constitutional jurisprudence after 1994, and accordingly requires a robust interrogation by our courts. Such interrogation, however, can in my opinion, not be conducted in an urgent court." [Paragraph 11]

"For the purposes of deciding whether or not to grant the interim relief sought pendente lite, I am of the view, that the court ought to investigate and take into consideration, not only the issues of urgency, which is a cardinal requirement for the purposes of Rule 6 (12) of the Uniform Rules of Court … but also consider all the circumstances, particularly, upon considerations of the probabilities of success of the main application, and the nature of the injury the respondents, on the one hand will suffer, if the application is granted, and should he/she ultimately turn to be right, and that which applicant, on the other hand, might sustain if the application is declined, and he/she finally turns out to be right. In that sense, it might be appropriate in some instances, that though there may be no balance of probabilities, that applicant will succeed, in the ordinary course, it may still be proper to lend interim relief where the balance of convenience is the over-riding consideration, and vice versa." [Paragraph 12]

"The preferred approach would be to grant interim relief where the damage or prejudice to the applicant by the refusal of the relief sought may be irreparable, and irreversible, even though the preponderance of success on the merits might be slim, and should ordinarily be granted where no harm would befall the respondents, and if it does, would be innocuous." [Paragraph 13]

"In the present instance, I hold the view that argument around the issue of jurisdiction during interim relief application, is somewhat premature and ought not arise at all. That argument, which is purely procedural, could best be left to the court hearing the merits in due course." [Paragraph 14]

"I must point out that although the respondents took issue on the aspect of locus standi, it remains obscure as to whether such contention was directed at the principal application or in the present interlocutory matter. If indeed it was focused on the main application, it follows logically, therefore, that such contention was prematurely raised before this court. To do so, would be to put the cart before the horse" [Paragraph 16]

"If, on the other hand, the point was directed at the current proceedings, then consideration ought to be placed whether, ex facie the interim relief application, did the petitioner set out explicitly, the ingredients necessary to found a prima facie right to its claim." [Paragraph 17]

"As to what is meant by a prima facie case, the notion was dealt with and set out in Melteno Brothers. However, in the case law prior to Molteno's, … the courts of the land had come to the conclusion that the concept meant preponderance of probabilities. In other words, the applicant must show probability of success in the main application or action, and that the balance of convenience is only to be considered after the court has been satisfied that a prima facie case has been made out." [Paragraph 18]

"Furthermore, the issue of locus standi is not a prerequisite for purposes of determining whether interim relief should or should not be granted on an urgent basis. Rule 6(12) of the Uniform Rules of Court set

out squarely, the requirements of urgency, and what applicant is required to aver to set out explicitly, the circumstances giving rise to urgency. ... Counsel for respondents was not heard arguing forcefully the question of urgency in his submissions. If he did, then his submissions were planted in sandy soil, it could not germinate or it was simply not argument sufficiently persuasive to guide the court to a contrary view." [Paragraph 21]

"That being said, it is appreciable that applicant seeks to pre-empt the mischief where Second Respondent who was empowered to initiate the disciplinary process by the first respondent on the basis that he, Second Respondent, was "lawfully" appointed as an employee or as so called "independent contractor" under the aegis of the First Respondent, is something applicant thought she cannot leave unchallenged in order to preserve her rights to fair disciplinary processes, and only to challenge later in the labour law structures by which time she would have suffered irreparable harm." [Paragraph 26]

The application was granted.

## SELECTED JUDGMENTS

### PRIVATE LAW

**LOUW V BRUKMAN NO 2009 JDR 0201 (WCC)**

**Case heard 29 November 2007, Judgment delivered 10 March 2008**

This was application for spousal maintenance against the estate of applicant's deceased husband (Charles Yeats Louw). At issue was the interpretation of a certain clause in their settlement agreement, and whether the term was binding on the deceased estate.

Allie J held:

"The issue to be determined is limited to a proper interpretation of the Agreement between the Plaintiff and her former spouse and whether that Agreement was incorporated into the order of Court." [Paragraph 10]

On the meaning of the phrase "Payment to her of maintenance in the sum of R6500.00 per month until her death or remarriage" in the agreement:

"Placing this paragraph within the context of the Agreement, does not alter it's clear meaning because the remaining provisions do not add to or detract from the ordinary meaning of the document as a whole." [Paragraph 16]

"What was not present in the minds of the parties to the contract was that the estate of the deceased should not be bound. At the time when the deceased's Offer to Settle … was framed, no implied or express term accompanied its predecessor to the disputed provision." [Paragraph 17]

"If the deceased had passed away before any of the other provisions of the settlement agreement had been fulfilled, the defendant would not have been able to raise the objection that those provisions do not bind the estate because they are personal in nature. Why then should that argument hold for spousal maintenance. The maintenance provision in this case arose from a bilateral agreement between consenting parties. They were at liberty to limit its application to the lifetime of the spouse paying the maintenance. They elected not to do so. The obligation arises ex contractu and if the contract as a whole is enforceable against the estate, so too should the spousal maintenance obligations be enforceable." [Paragraph 37]

"The notion that spousal maintenance is a sui generis personal obligation arose from an era when women were placed under tutelage as minors subject to the marital power of their husbands." [Paragraph 38]

"In the circumstances I can find no legal basis for importing into the clear and precise meaning of the Settlement Agreement, between the parties, an implied term that the maintenance obligation, would cease upon the death of the late Charles Yeats Louw SC." [Paragraph 39]

"The deceased estate … is bound to perform the obligations of the deceased to pay maintenance to the plaintiff as set out in the Order of Divorce." [Paragraph 39]

## COMMERCIAL LAW

**ADIDAS AG V PEPKOR RETAIL LIMITED 2011 JDR 1815 (WCC)**

**Case heard 28 April 2011 Judgment delivered 5 December 2011**

This was an application for an interdict to stop the respondent from infringing the applicant's trademarks. The respondent argued that the alleged infringements of the registered trademarks were different and related to leisure shoes, not sporting shoes. The question before the court was to determine whether the marks on Pepkor Retail footwear were identical or nearly resembling the trademarks of the applicant as to likely cause deception or confusion.

Allie J held:

"The onus is on the party alleging infringement to show the likelihood of deception or confusion. The applicant has to show that substantial number of people will probably be confused about the origin of the goods or about the connection between the offending goods and those of the registered trade mark owner. " [Paragraph 22]

"Passing-off is a sub-category of the broader category of delict of "unlawful competition"." [Paragraph 59]

"The main distinguishing feature of passing-off is that it consists of misrepresentation. … The representation which is necessary to found a passing-off claim may be express or implied. The test is whether, in all the circumstances, the similarity between the products is to the extent that there is a reasonable likelihood that ordinary members of the public, or a substantial sector thereof, may be confused or deceived into believing that the products of the alleged offender is that of the party claiming passing-off or is connected therewith." [Paragraph 61]

"I am … of the view that as applicants have not proved infringement nor passing-off, the issue of damages obviously does not fall to be considered." [Paragraph 87]

"Even if I accept, as applicants allege, that the respondent's trade marks or device or brand name are objectively meaninglessness or generic, I cannot conclude that they do not serve to distinguish respondent's footwear from applicants' footwear." [Paragraph 88 (a)]

"The identification of what applicants' trade mark is, is a question that the court has to first answer before it can make a comparison between the marks of the applicants and the marks of the respondent." [Paragraph 88 (b)]

"The court has to transport itself into the marketplace and consider the respondent's offending shoes as a notional customer of average intelligence would when purchasing with ordinary caution. The shoe of the respondent should also be considered side by side with those of the applicants and they should also be looked at separately." [Paragraph 93]

"In so considering the circumstances prevailing in the marketplace, the following are relevant. When the Plascon Evans case was determined in 1984 and when the Adidas & Harry Walter Co. case was decided in 1976, South Africans were not as exposed to international branded shoes and clothing as they currently are. At the time many international companies adhered to the request for the imposition of sanctions against South Africa. The country's marketplace accordingly did not have as much international brands as

it now does. Public awareness of the identifying features of the international renown products was not as pervasive then as it now is." [Paragraph 94]

"When the court in the Van der Walt case found: "... that people who are likely to buy the goods in question are not endowed with special powers of perception or recollection which could serve to lessen the probability of deception or confusion," it was effectively assuming, on the probabilities, that the South African public lacked the requisite powers to perceive or recollect that the offending goods are not those of the applicant. " [Paragraph 98]

"When the court in the Plascon Evans case found that: "... the ordinary purchaser may encounter goods, bearing the defendant's mark, with an imperfect recollection of the registered mark ...," it clearly did not have the benefit of the extensive evidence before me of how well-known and widely advertised and promoted the trade mark is. Respondent accepts this evidence of the applicants as being correct." [Paragraph 99]

"Having failed on the infringement and passing-off allegations, applicants have not established harm actually committed nor reasonably apprehended." [Paragraph 121]

"The respondent has not passed-off its footwear as those of the applicants or as having an association with the footwear of the applicants." [Paragraph 126 (2)]

"The application for an interdict is dismissed with costs." [Paragraph 126 (3)]

The judgment was overturned by the SCA on appeal: Adidas AG v Pepkor Retail Limited 2013 JDR 0310 (SCA).

## ADMINISTRATIVE JUSTICE

### NUNES V CRAWFORD AND OTHERS (17899/2008) [2010] ZAWCHC 54; [2010] 4 ALL SA 304 (WCC) (23 MARCH 2010); 2010 JDR 0319 (WCC)

**Case heard 12 February 2010, Judgment delivered 23 March 2010**

This was a review application in terms of section 8(1)(c) of the Promotion of Administrative Justice. The first respondent had a lodged a complaint against the applicant with the South African Council for the Architectural Profession (SACAP), which had initially dismissed the complaint. However, after an appeal to the Council for the Built Environment (CBE), SACAP was ordered to re-open the investigation. Applicant sought to have the CBE's decision set aside, on the grounds inter alia that he had not had notice of the appeal, and that the appeal had been lodged out of time.

Allie J (Madima AJ concurring) held:

"The decision of the appeal committee of the CBE can be properly characterised as administrative action and accordingly falls to be reviewed under PAJA and the remaining common law powers of review that this court has." [Paragraph 14.1]

"The SACAP, misled the first respondent, a lay person ... by informing him that there is no provision for an appeal against a decision by the council not to proceed with disciplinary action against a registered person and by referring him to Sections 28 to 33 of the AP Act and not to Section 35 which deals with a

member of the public's right to appeal to the CBE. The SACAP gave reasons for their refusal to proceed with disciplinary action against the applicant on 25 May 2005. Consequently 89 days had elapsed before the first respondent was advised incorrectly that he had no right of appeal." [Paragraph 14.2]

Allie J then considered the issue of lack of notice:

"I am not convinced that that is a correct interpretation of the implications of Section 28(3) [dealing with questioning by an investigating commission] which is clearly aimed at preventing prejudice to the registered person by protecting him/her from self incrimination. It does not intend to convey that at the stage of an investigation, the registered person may not be consulted at all, for to do so would mean that the SACAP would be acting on the version of a complainant only." [Paragraph 26]

"The decision of the appeal committee of the CBE is not akin to a decision to prosecute, in as much as, it is a decision to compel the SACAP to cause its committee to investigate and if necessary bring disciplinary charges against the applicant. The decision to "prosecute" as it were lies with the SACAP." [Paragraph 30]

"A decision to consider the appeal without notice to the applicant is prejudicial to the applicant because even though he would have the opportunity to defend himself at a disciplinary inquiry in due course, he should be allowed to address the second respondent on the merits before it makes a decision based on its prima facie view of the merits. The decision of the appeal committee undoubtedly has adverse and material effects for the applicant, who as a registered professional person will be subjected to the disciplinary process of the SACAP." [Paragraph 32]

"The role and function of the CBE and the SACAP, like that of most statutory bodies governing a profession, is to mediate the competing interests of the professional person on the one hand and the public that they serve on the other hand in a reasonable, fair and transparent manner." [Paragraph 33]

"... There is no express provision in the CBE Act for either the appellant or the CBE to give notice to the registered person concerned and this is an aspect one hopes the legislature will address in due course." [Paragraph 35]

"... The explanation by the CBE justifying its failure to give notice to the applicant is a mere reference to the absence of an express provision in the CBE or AP Acts requiring notice to the registered person at the appeal stage. These considerations cumulatively considered, tip the scales of fairness and equity in favour of notice to the applicant." [Paragraph 48]

"A party is entitled to use any advantage afforded to it by due process and accordingly the applicant ought to have received notice of the appeal and the document upon which the appeal would be based. This court cannot conclude as counsel for the second respondent has urged it to, namely that applicant suffered no prejudice by virtue of audi alteram partem not being applied by the appeal committee of the CBE." [Paragraph 54]

"The just decision of the appeal committee of second respondent is a prerequisite to the investigation process of the SACAP, a process that this court will not stifle, for to do so would be contrary to the interests of justice as outlined earlier. Accordingly this court exempts the applicant from exhausting all internal remedies that were open to the applicant to challenge the CBE's decision." [Paragraph 57]

"We therefore conclude that second respondent convened its appeal committee without regard to the provisions of Section 21(4) of the CBE Act read with Section 3(2)(b) of PAJA and Section 33 of the Constitution of the Republic of South Africa, 1996. " [Paragraph 58]

The court set aside the decision of the appeal committee of the CBE, and sent the appeal back to second respondent (the CBE) for reconsideration.

## CONSTITUTIONAL INTERPRETATION

### ORIANI-AMBROSINI V SISULU (11635/2010) [2011] ZAWCHC 501 (8 DECEMBER 2011)

The applicant, a member of parliament, sought to review and set aside the decision of the respondent (the speaker of the National Assembly) not to introduce a Private Members Bill of the applicant; an order compelling the respondent to introduce the Bill in the National Assembly; and declaring any rule of the National Assembling preventing any member from introducing A Bill to be invalid and unlawful for violating the Constitution.

Allie J held:

"The applicant concluded that members may not introduce a Bill without prior authorisation of the committee which is dominated by the majority party. … The applicant contended that the above procedure violates Section 73(2) of the constitution which expressly gives every member of the National Assembly the right to introduce Bills in the National Assembly. …" [Paragraphs 23 - 24]

"Although Section 73(2) Constitution gives individual members of the National Assembly the authority to introduce Bills in the National Assembly, the Constitution also makes the process by which such introduction takes place, subject to the Rules of the National Assembly by allowing the National Assembly to make its own Rules or orders under Section 57 of the Constitution. Accordingly individual members of the National Assembly are not given the authority to initiate and prepare legislation as those powers vest in National Assembly, the National Executive and the National Council of Provinces (NCOP) in terms of Sections 55(1)(b), 68(b) and 85(2)(d)." [Paragraph 74]

"The Rules of the National Assembly recognise that individual members may wish to exercise their right to introduce legislation … and accordingly, the precursor to such legislation would be a legislative proposal. A proposal would involve some initiation and preparation. That initiation and preparation is however in relation to a legislative proposal which at that early stage clearly cannot as yet, have the status of a Bill. Initiating and preparing in that context cannot be conflated with the right to initiate and prepare legislation." [Paragraph 76]

"By the time the proposal is considered by the broader house i.e. the National Assembly, it must have gone through a process of motivation, debate and refinement to produce a legally defensible Bill that is not in conflict with the Constitution and prevailing legislation. … Even Bills initiated by the Executive go through a vetting process in as much as they are drafted by a particular State department and State Law Advisors and then considered by Cabinet before they are presented to the National Assembly. …" [Paragraphs 77 - 78]

"... [T]he National Assembly, acting collectively and not its individual members, hold the power to initiate and prepare legislation. In terms of the Rules, the National Assembly put in place a process of initiating and preparing which involves the Committee and relevant Portfolio Committees." [Paragraph 79]

"Section 53 of the Constitution provides that a majority of members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill and that all questions before the Assembly are decided by a majority of the votes cast." [Paragraph 83]

"What is peculiar, in casu, is that it is not a minority political party that argues that the majoritarian principle undermines multi-party democracy, but one individual who does so. ... The Constitution does not only create a multi-party democracy in the narrow terms asserted by applicant. It creates an open, participatory, Constitutional democracy with checks on the power of all three arms of government which are subjected to the ultimate test of whether they offend the provisions of the Constitution ..." [Paragraphs 85 - 86]

"Provision is made in the Constitution for the participation of minority parties in the affairs of government. It is the responsibility of a member to motivate and argue persuasively for the acceptance of his legislative proposal and if he persuades sufficient members of the National Assembly, his proposal ought to see the light of day. ... A National Assembly that is duty bound to facilitate participation in its legislative process is irreconcilable with the impression which applicant attempts to create ... of a committee of the National Assembly, effectively stifling proper consideration and debate concerning a legislative proposal made by an individual member ..." [Paragraphs 87 – 88]

"Constitutional democracy embraces participation and consultation ... In *casu,* the applicant's papers are replete with allegations that the majoritarian principle has operated to prevent consideration of a Private Member's Bill in the National Assembly without reference to a specific instance concerning the Bill in issue in this case as applicant has refused to subject the Bill to the process prescribed by the Rules." [Paragraphs 89 – 90]

"... [T]he right of a member of the National Assembly to introduce a Bill ... must be balanced against the power of the National Assembly to initiate and prepare legislation, to make its own rules of procedure and orders and to scrutinize and oversee executive action." [Paragraph 92]

"It is evident that the applicant interprets Rule 235(4)(b) as giving the Committee *carte blanche* to refuse the proposal. It does not. The Rule provides that the Committee must recommend (my emphasis) that permission either be given to proceed with proposal or that permission be given to refuse the proposal." [Paragraph 96]

"To the extent that applicant suggests that in practice, the Committee's recommendations are followed without the National Assembly, applying its mind, as a collective, to the Committee's recommendations, the applicant is at liberty to challenge that practice on a case by case basis as it occurs. In this matter, however the applicant has refused to subject the legislative proposal or Bill, as he terms it, to the scrutiny of the committee and/or portfolio committee, hence he is not in a position to allege that the committee's recommendation will be slavishly followed by the National Assembly." [Paragraph 98]

The application was dismissed with costs. In Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC), a majority of the Constitutional Court held that several of the impugned rules, and words in other rules, were inconsistent with the Constitution, and ordered that they be severed.

**CRIMINAL JUSTICE**

**S V FLORIS 2009 JDR 0240 (C)**

**Case heard 27 February 2009, Judgment delivered 27 February 2009**

Appellant, a 15 year old, had been sentenced to 15 years imprisonment for murder.

Allie J (Magubela AJ concurring) held:

"The appellant progressed to Standard 5 at school. He is a first offender. In the pre-sentence report the probation officer mentioned that the appellant was suspended from school because of violent behaviour previously." [Page 2]

"... [T]his Court is of the view that "detained" ... means incarceration other than after conviction as is evident in the use of the word detained in section 12 of the constitution, that is, "detained without trial". Clearly a criminal conviction is not a matter concerning the child only as contemplated by section 28(2) of the constitution. This Court just wants to draw counsel's attention to this fact." [Page 2]

"Inasmuch as the offence was a brutal one that deprived the deceased of her life and deprived her family of her continued existence without any provocation by the deceased, it is clear that a sentence has to be imposed which takes account of the consequences of the offence upon the deceased and her family. However, the Court has to tamper its sentence by taking account of the personal circumstances of the accused, and in this matter the appellant was clearly a youthful offender from a very troubled and disturbingly unstable domestic background." [Page 2]

Allie J then dealt with the approach of the trial court on sentencing:

"So in the circumstances of this case, this Court is of the view that the court a quo should have had regard to the approach adopted by the Supreme Court of the Appeal in the case of DPP KwaZulu Natal v P ... where the Supreme Court of Appeal clearly took account of the youthful nature of an accused person who also committed the heinous crime of murder, obviously under somewhat different circumstances, but nevertheless the Supreme Court of Appeal then went on to deal with the possibility of rehabilitating the accused person in that case by imposing, in addition to a sentence of direct imprisonment, all of which was suspended, a further sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act." [Page 3]

"In the circumstances of this case, as this Court does not have the benefit of knowing exactly which rehabilitation programmes are available to the appellant, the Court is of the view that the sentence imposed by the court a quo should be set aside and that the case should be remitted back to the court a quo for it to sentence anew, taking into account the need to impose in addition to direct imprisonment, a sentence which provides specifically for correctional supervision and/or enrolment in some sort of rehabilitation programme." [Pages 3 - 4]

"So in the circumstances the order really is that the sentence imposed by the court a quo is set aside and the case is remitted back to the court a quo to sentence afresh."

**S V STENGE 2008 JDR 0106 (C); 2008 (2) SACR 27 (C)**

This was an appeal against a decision by a Regional Magistrate to declare the appellant a habitual criminal.

Allie J (Hlophe JP concurring) considered section 286(1) of the Criminal Procedure Act, and the power it confers on Superior Courts to declare a person a habitual criminal:

"The section confers a discretion on the court to declare a person a habitual criminal where the person committed the offence out of habit and where the court is of the view that the community should be protected against that person for a period of at least seven years. The discretion has to be exercised with due regard to all the relevant circumstances, including the usual factors that are considered when imposing sentence." [Paragraph 8]

"The intention of the Legislature in enacting section 286 was clearly to vest a judicial officer with the discretion to depart from its provisions in certain circumstances, like in the present case." [Paragraph 9]

"If no evidence is presented to substantiate the allegation that an accused person committed offences out of habit, it is inconceivable that a judicial officer would have relied upon anything other than the criminal record of the accused. It is not possible to prescribe what factors a judicial officer should have regard to in arriving at a decision in each instance. Each case will depend on its own facts and circumstances. " [Paragraph 12]

"I am not convinced that force of habit is the only reasonable inference that can be drawn from a long list of frequent previous convictions. In cases involving petty theft, the court, in considering whether to apply section 286(1), should have regard to the socio economic conditions of the offender as well as all other relevant factors in determining what motivated the person. In a country like South Africa, where as at March 2005, 26,5% [Statistics S.A. 2005 Labour Force Survey] of the population remained unemployed and where a vast proportion of the population live beneath the poverty line, it is reasonable to infer that there are cases where the frequent commission of petty theft could be borne out of desperate poverty. That is not to say that committing an offence for that reason is excusable or even a mitigating factor in all circumstances. It does however provide a reason other than force of habit." [Paragraph 14]

"I cannot agree that the court a quo was properly convinced as no evidence was adduced to support the finding that the Appellant had a force of habit to commit the crime in question and it is patently clear that the court a quo relied solely on the list of previous convictions." [Paragraph 15]

"It is evident that the Magistrate considered that previous sentencing options had not had a deterring effect. That fact alone does not justify the imposition of ever increasing sentences. It would be more appropriate to inquire why the Appellant repeatedly committed offences involving an element of dishonesty than to assume that purely by virtue of their prevalence, the offences were being committed out of habit." [Paragraph 18]

"As the decision was made by the Regional Court, it would not have been subject to review in terms of section 302 of the Criminal Procedure Act. If the Appellant had not filed a notice of appeal, he may have spent a minimum of 7 years and a maximum of 15 years in prison for stealing chicken to the value of R33.81. That with respect can never accord with justice. It would be absurd to say the least." [Paragraph 23]

The sentence was set aside and the Appellant was sentenced to 2 years imprisonment which was wholly suspended for a period of 5 years on condition that he was not convicted of theft or an attempt to commit theft during the period of suspension.

## ADMINISTRATION OF JUSTICE

### THE LAW SOCIETY OF THE CAPE OF GOOD HOPE V ROODT 2010 JDR 0601 (WCC)

**Case heard 28 May 28 2010, Judgment delivered 28 May 2010**

This was an application to have the respondent struck off the roll of attorneys based on allegations of misconduct, theft and other charges.

Allie J (Fortuin J concurring) held:

"Attorneys are officers of the court and a high standard of honesty and integrity is expected of them because they are the people in whom the public ought to have sufficient confidence to trust them with their affairs and with their funds." [Paragraph 11]

"... [F]irstly the offending conduct has clearly been established in as much as it has been acknowledged by the respondent. Secondly the respondent is not a fit and proper person to continue to practise as contemplated by Section 22(10(d) of the Attorneys Act in as much as he has breached a fiduciary duty and position of trust that he held as an attorney and as someone entrusted to operate an Attorney's Trust Account. The circumstances surrounding the theft of the trust monies in this case are very grave. I am of the view that an appropriate sanction that will protect society from such conduct and prevent the respondent from dealing with trust funds until he can satisfy the court that he has rehabilitated, is an order that he be struck off the roll of attorneys." [Paragraph 15]

"...I am of the view that an appropriate sanction that will protect society from such conduct and prevent the respondent from dealing with trust funds until he can satisfy the court that he has rehabilitated, is an order that he be struck off the roll of attorneys..." [Paragraph 15]

### VECTOR LOGISTICS (PTY) LTD V AL NAHAR A1- SANAEI CC AND ANOTHER (7233/2008) [2008] ZAWCHC 240

**Judgment delivered 14 August 2008**

In this case, the court had to determine whether an earlier order of the court was clear and unambiguous.

"In this matter, I want to first state ... that I have, after reading the papers this morning, offered Judge Veldhuizen, the presiding judge in the matter on 14 May 2008, who in fact made the draft order an order of court, an opportunity to hear this matter himself, given the fact that he was the presiding officer at the time."

"... [G]iven the fact that applicant had counsel that was not from this division come into the City to hear this matter, I informed both counsel in chambers that I could hear the matter, and was prepared to hear the matter, even though I was seized with other urgent matters in the fast lane today primarily to accommodate the fact that we had counsel involved that was out of town and that I did not want to escalate the costs unduly for any party."

"However, I have also explained to counsel in chambers that Judge Veldhuizen seemed to have a very good recollection of the matter, I might add that he went so far as to be able to tell me exactly where the respondents were trading, and he certainly knew what had transpired in this matter and he was certainly of the view that he intended this matter to be referred for oral evidence and trial. I informed counsel of this before the hearing of this matter, and counsel was nevertheless prepared to allow me to proceed with the hearing of this matter."

"I mention this at the onset lest there be a situation where I am accused of having been prejudiced in this matter by the discussions I had with Judge Veldhuizen."

"It is firstly necessary for me to determine whether the order granted on 14 May 2008 is clear and unambiguous. I am certainly of the view that, from a procedural perspective, it is unclear, and therefore I am of the view that this Court has the authority to intervene in varying this order so as to make it clear for the purposes of regulating the further conduct of this matter and therefore for the purposes of regulating this Court's own procedure, which it has the authority to do. I am of the view that in an instance where the order is unclear, such as this, I may have regard to the record of the proceedings with a view to establishing what the presiding officer intended to order."

Allie J then dealt with the conduct of the legal representatives for the parties:

"This representation [that a date had been obtained for the hearing of oral evidence] was made to the Court in the presence of the legal representative for the respondent. They both acquiesced in this representation being made to the Court, while it has subsequently transpired today, that the respondent argues that that was not what the draft order conveyed and was not what the draft intends to convey. So one of two things must have happened: either the legal representatives for the respondent and applicant deliberately sought to mislead the Court by stating that the draft order contained something which it did not contain, or there was a genuine and real error on the part of the legal representatives in drafting the order. In either event, whichever cause of conduct motivated the draftspersons of this order to draft that order the way it is, it is unclear. It is not in the interests of either party nor the administration of justice and the running of the matter that it be left in this unclear state."

"So therefore my ruling is that the relief sought by the applicant in this matter would serve to regulate the proceedings of this matter and to facilitate the hearing of this matter on 8 September. In those circumstances I am prepared to GRANT THE RELIEF SOUGHT BY THE APPLICANT as prayed for in paragraphs 2, 3 and 4 of the notice of motion."

"As I have indicated in my brief reasons for this ruling today, I am of the view that the respondents' legal representative was well aware of what the presiding judge at the time, Judge Veldhuizen, had asked them to draft, and they were well aware of that because the advocates came back and told the judge that they had drafted what they were requested to. Then they in fact drafted something with serious omissions. In the circumstances I believe that the respondent was in fact mischievous in opposing this

matter today and therefore I would then also grant the order that the respondents jointly and severally PAY THE COSTS OF THIS APPLICATION today."

## SELECTED JUDGMENTS

### PRIVATE LAW

**STEYN v HASSE AND ANOTHER 2015 (4) SA 405 (WCC)**

**Case heard 9 May 2014, Judgment delivered 15 August 2014**

First respondent was involved in a romantic relationship with the appellant, who lived at the first respondent's house rent-free. When the relationship soured, he issued appellant with an eviction notice. The appellant resisted on the ground that she was living in the house at first respondent's invitation, as his partner. She alleged that he had promised to provide her with a secure home for 10 years. A magistrates' court found there to have been no reciprocal rights and duties of support, and held that the withdrawal of consent meant that appellant's occupation was unlawful and granted an eviction order.

On appeal to the High Court, Goliath J (Schippers J concurring) held:

"The issue regarding the existence of a universal partnership was never explicitly raised by appellant in the pleadings. Appellant therefore does not allege that there was an express or implied universal partnership as a result of their cohabitation. …" [Paragraph 18]

"The initial general power of attorney given to the appellant, which was subsequently revoked, clearly states that the first respondent is married, and lives in Germany. The first respondent was generous towards the appellant, maintained the premises she resided in rent-free, and bought her gifts. The appellant provided assistance with the managing and maintenance of the property. It appears that the parties have not established or maintained a joint household and appellant never contributed towards first respondent's expenses." [Paragraph 20]

"The general power of attorney given to the appellant was revoked as early as 5 November 2007. The relationship was terminated in 2010 and appellant was requested on 19 April 2010 to vacate the premises. The power of attorney giving her access to the bank account was cancelled on 28 April 2010. The revocation of the general power of attorney, the subsequent request to vacate the property, followed by the cancellation of access to the bank account, are all indicative of a relationship having irrevocably broken down" [Paragraph 22]

"The magistrate was cautious not to label the nature of the relationship of the parties, but concluded that it resembled no more than that between a man and mistress or even concubinage between a married man and his mistress. Considering the overall nature of the relationship, as well as the fact that the appellant had no intimate knowledge of first respondent's personal affairs, it is evident that there was clearly no express or tacit universal partnership. I am therefore in agreement … that there is no legal basis to find that there existed reciprocal rights and duties of support between the appellant and the first respondent." [Paragraph 23]

"On appellant's own version there appear to have been no meaningful discussions surrounding their cohabitation. If there were no discussions surrounding the intended duration of the cohabitation, on what basis would the issue of long-term or alternative accommodation have been raised and agreed to by the parties? …" [Paragraph 31]

"… [I]t is highly improbable that first respondent, who had no duty to support the appellant, would have given an undertaking of a secure home for 10 years, or offer to purchase appellant a property at

termination of the relationship. These averments by the appellant are palpably implausible, so far-fetched and clearly untenable, and stand to be rejected." [Paragraph 34]

"The first respondent cannot be prohibited from terminating his relationship with appellant. Nor can the first respondent be placed in a situation where he may not withdraw his consent for appellant to reside with him. The appellant was no longer his partner and the first respondent had duly withdrawn his consent. The first respondent is the owner of the premises and is entitled to retain possession of the premises, having properly withdrawn the consent previously given. In my view the court correctly found that proper notice of termination of occupation was given. The magistrate therefore correctly concluded that the appellant is unlawfully occupying the property." [Paragraph 35]

"The appellant claims that she has been suffering from motor neuron disease since 2006. ... However, there is no medical evidence to substantiate her claim that she suffers from this debilitating disease. ... It is evident that appellant has suffered no diminishment of her capabilities from this progressively debilitating disease and her averments in this regard can therefore not be accepted in the absence of medical confirmation of her condition." [Paragraph 39]

"... I am satisfied that the magistrate duly considered all the circumstances of this case, and correctly found that it would be just and equitable to grant an eviction order." [Paragraph 40]

"The parties have been involved in protracted litigation and appellant ought by now to have made contingency plans, should she not be successful. She was aware of the real prospect of eviction since legal proceedings commenced. I therefore find that a reasonable period for the appellant to vacate the premises would be a period of three months upon the granting of this order." [Paragraph 41]

"The parties were involved in a relationship and an unfortunate sequence of events led to litigation between the parties. The appellant is unemployed, in her senior years and not in good health. Given the regrettable tension that already exists between the parties, I deem it undesirable to make matters worse by granting a costs order against the appellant. Considering the history of this matter, I am satisfied that justice and fairness would be best served in this case if no costs order were made." [Paragraph 43]

The appeal was dismissed.

**DH v WJ 2015 JDR 1545 (WCC)**

This was an application by siblings of the deceased to have his marriage to his caregiver (respondent) declared null and void. The deceased suffered from Parkinson's disease, and married his caregiver of four years without the knowledge of his family. Applicants contended that the deceased was incapable of providing valid consent to the marriage.

Goliath J held:

"... There is clear and unambiguous evidence that the marriage officer was concerned about his capacity to understand the marriage proceedings. ... In any case, a marriage officer's belief that the deceased had the capacity to enter into the marriage is irrelevant to the question before court as to whether the deceased in fact entered into the marriage of his own volition. A marriage officer cannot impute capacity to a party." [Paragraph 33]

"... All of the medical experts assessed the deceased .... Dr O'Cuinne again concluded that his condition was indicative of advanced dementia. Dr Eidelman concluded that the deceased had an irreversible severe dementing illness of the brain together with severe Parkinson's disease. Dr Michelle Jackson stated that as a result of his condition he lacks insight and has a poor grasp of his circumstances and situation. Dr Eidelman expressed the view that the deceased was extremely vulnerable and gullible. Dr Gardiner stated that he had no hesitation in holding the view that the deceased was not capable of understanding his actions ... and lacked the ability to appreciate that he was entering into a marriage in December 2013. He also indicated that his condition predisposed him to be suggestible and open to coercion." [Paragraph 34]

"First respondent did not present any medical evidence to refute the conclusions of the medical experts nor did she seriously address the issue of the mental condition of the deceased at the time of the marriage. In the absence of tangible evidence justifying first respondent's version with regard to the mental condition of the deceased it would serve no purpose for the court to refer the matter to oral evidence when it is apparent that viva voce evidence is unlikely to disturb what appeared from the papers. .." [Paragraph 37]

"It is highly unlikely that any form of cohabitation existed without the knowledge of the family. There is no reason why it should have been regarded as a secret. ... I am satisfied that neither evidence of a cohabitation arrangement prior to the marriage nor any evidence of the existence of a normal marital relationship after the marriage was presented. In fact, it can safely be concluded that the relationship remained that of patient and carer" [Paragraph 39]

"The first respondent must have been aware that the deceased had health challenges and limited capabilities. She personally informed the marriage officer that the deceased had dementia and Parkinson's but alluded to uncertainty surrounding his condition in her replying papers. The deceased could not take care of his own person and first respondent attended to his personal affairs. She attended to his financial affairs and daily withdrawals. The deceased effectively relinquished control of his affairs to first respondent by granting her power of attorney... Bank officials also stated that first respondent took control of his financial affairs whilst the deceased appeared blank, disinterested and lacked participation in his affairs. First respondent failed to explain why the need arose for her to control all the affairs of the deceased." [Paragraph 40]

"... The averments made by the applicant that a normal romantic relationship had developed between them leading to the marriage are palpably implausible, so far-fetched, and clearly untenable and stand to be rejected." [Paragraph 42]

"... All of the experts and the Curator ad litem are satisfied that the deceased was not capable of providing valid consent to the marriage. [The deceased] could clearly not have had the capacity to appreciate the duties and responsibilities which the marriage agreement created. I therefore conclude that [the deceased] did not, as a matter of fact and law, have legal capacity, including contractual capacity, to conclude a marriage ... on 10 December 2013" [Paragraph 43]

"... The applicant, as a successful party, would ordinarily be entitled to costs in her favour. This general rule should only be departed from in exceptional circumstances. The first respondent is in her senior years and her conduct in taking advantage of the deceased who trusted her cannot be condoned. This is a regrettable set of circumstances which undoubtedly has caused much distress to the family of the deceased. Understandably, there is tension between the parties and I deem it undesirable to make

matters worse by granting a costs order against the first respondent. I am therefore satisfied that justice and fairness would be best served if no costs order is made against first respondent." [Paragraph 44]

The marriage was found to be null and void.

**GILES NO AND ANOTHER v HENRIQUES AND OTHERS 2008 (4) SA 558 (C)**

**Case heard 22 February 2007, Judgment delivered 19 September 2007**

A husband and wife (Mr and Mrs Cammisa) had inadvertently signed each other's wills, which had been mistakenly swapped during the signing process. The couple had read their respective wills and were both satisfied with the contents of the wills and their implications. Applicants submitted that rectification was an appropriate remedy. Respondents took the view that the wills were invalid and therefore not capable of rectification.

Goliath J began with a detailed discussion of non-compliance with will signing and execution formalities, looking at international trends:

"Precise and exact compliance with statutory provisions relating to the signing and execution of a will has, in the past been vigorously applied in many jurisdictions. Over the years there has been a shift towards a less rigid approach. ..." [Paragraph 25]

"Internationally various remedial provisions have been enacted to empower the court to grant relief against non-compliance with formal requirements. Primarily three remedial legislative interventions have been enacted to resolve this problem namely by way of substantial compliance provisions, harmless error provisions and a general dispensing power which empowers the court to condone non-compliance." [Paragraph 27]

"... It is generally accepted that a will that fails to comply with statutory formalities may constitute just as reliable an expression of intention as a will executed in strict compliance. ..." [Paragraph 29]

"Acceptance by the Master of a will does not in itself give validity to a will. Any issue relating to the validity or legal effect of any will is to be determined by the court. The Master merely performs an administrative act in accepting the will and such acceptance must not be confused with the recognition of its validity. ... Mr Whitehead's argument ... that Mr Cammisa's will is a valid will because it was accepted by the Master, cannot be sustained. ..." [Paragraph 38]

"Section 2(1) of the Wills Act ... lays down the requirements for the execution of a valid will. Section 2(3) provides the High Court with the power to condone the failure to comply with the formalities required for the execution of a valid will ... " [Paragraph 39]

"Conflicting decisions have been handed down with regard to the correct interpretation of s 2(3). However, in Bekker v Naude and Others ... (SCA) a measure of certainty was reached. ... It has now been settled that the will must have been drafted or executed by the testator personally. The provisions of s 2(3) are to be interpreted in their strict and narrow sense. Section 2(3) therefore allows limited powers to order the Master to accept a will notwithstanding non-compliance with formalities. The court must be satisfied that the person who drafted or executed the document intended it to be his will. Unfortunately

the applicants in this matter could not rely on the remedial provisions of s 2(3) due to the fact that the will was not drafted by the deceased, and thus falls outside the scope of s 2(3). Contrary to certain foreign courts, South African courts do not have a general discretion to condone non-compliance with the prescribed formalities. …" [Paragraph 40]

"The approach adopted by our courts is that rectification of a will is permissible by the deletion, insertion or substitution of words. … " [Paragraph 41]

"Extrinsic evidence of a testator's intention is admissible to rectify a will, including evidence of surrounding facts and circumstances present to the mind of the testator when he made his will. … Extrinsic evidence is accordingly admissible where a particular disposition, due to mistaken circumstances or events, is inconsistent with the structure of the will as a whole and the testator's intentions as shown by extrinsic evidence. …" [Paragraph 42]

"… [T]he main issues to be considered are whether Mr Cammisa intended the document signed by Mrs Cammisa to be his will and vice versa, and whether the applicant has satisfied the requisites for rectification. …" [Paragraph 44]

"The wills were prepared on the instructions of both the deceased. They attended the execution ceremony … The same attesting witnesses signed both wills in the presence of the testators. The wills were duly executed in compliance with the prescribed formalities, save for the fact that the wrong will was inadvertently signed. The circumstances of the erroneous cross-signing have established beyond any doubt that it was a mistake, and that Mr Cammisa clearly meant to sign the will prepared for him, but inadvertently signed by his wife. Mr Cammisa knew and approved of the contents of the document and intended it to operate as his will. Of significance is the fact that the wills contained reciprocal elements of a unified testamentary plan, being the appointment of Mr Cammisa's son as their sole residual heir." [Paragraph 46]

"… I am satisfied that the applicants have discharged the onus of showing on a balance of probabilities that the requisites for rectification of the will are present. … I am satisfied that it has clearly been shown that the discrepancy between the expression and intention was due to a bona fide mistake and that Mr Cammisa intended the document, inadvertently signed by his wife, to constitute his last will. In the result, I come to the conclusion that there has been established on the probabilities the need to rectify the wills of Mr and Mrs Cammisa accordingly." [Paragraph 47]

The application succeeded, with the court ordering specific deletions and substitutions in relevant clauses in both wills. On appeal, the decision was upheld by the Supreme Court of Appeal save for the setting aside of the costs aspect of the court a quo's order: *Henrques v Giles NO* 2010 (6) SA 51 (SCA).

## CONSTITUTIONAL INTERPRETATION

### TLOUAMMA AND OTHERS v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS 2016 (1) SA 534 (WCC)

**Case heard 7 October 2015, Judgment delivered 7 October 2015**

Three opposition parties challenged certain provisions of the National Assembly (NA) rules, and the Speaker's application thereof, dealing with the tabling of a motion of no confidence. The complaints

stemmed from the tabling of a motion of no confidence in the President of the Republic, and the subsequent failure of the Speaker to schedule the debate and vote on such motion before the end of the parliamentary session. An order was sought declaring such failure inconsistent with s 102(2) of the Constitution and NA rule 102A, to the extent that such motion was not accorded "due priority" over other motions. Further, that the new NA rule 102A was inconsistent with s 102(2) of the Constitution to the extent that it did not provide for a political party to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for a debate and voted upon within a reasonable time, or at all. As such it failed to adequately address the defects in chapter 12 of the NA rules identified by the Constitutional Court in Mazibuko v Sisulu. Second, applicants sought an order to ensure that the motion of no confidence be voted upon by secret ballot. Third, the applicants sought a declarator that the Speaker was not a fit and proper person to hold the office.

Goliath J (Henney J and Mantame J concurring) held:

"The office of the Speaker occupies a pivotal position in achieving and sustaining … a vibrant parliamentary democracy. ... In the performance of his or her duties, [the Speaker] is required to show complete impartiality and give a completely objective interpretation of the rules and practice. The Speaker has final authority in enforcing and interpreting the rules of the National Assembly." [Paragraphs 75 - 76]

"... While members of Parliament represent their individual constituencies, the Speaker represents the full authority of the House itself. The Speaker therefore speaks for the House as a whole and must make decisions that are in the best interests of the National Assembly as a whole. … " [Paragraph 78]

"The legal system of South Africa has developed a strong set of traditions concerning the Speaker of Parliament, which were retained from the Westminster system of government. According to these traditions the Speaker of Parliament must maintain the neutrality of the office, must act with fairness, without favouritism and with impartiality. …" [Paragraph 79]

"The Constitution does not prescribe the procedure or any substantive requirements for a motion of no confidence in the President. Section 102(2) must be read in conjunction with s 57(1)(a) of the Constitution which provides that '(t)he National Assembly may determine and control its internal arrangements, proceedings and procedures . . .'. It follows … that it is the National Assembly which must determine and control the 'arrangements, proceedings and procedures' for a motion of no confidence in the President and further that it may do so in its 'rules and orders concerning its business'. " [Paragraph 84]

"National Assembly rule 102A(2) merely means that the Speaker must consult and give serious consideration to the views of the Chief Whip and the Leader of Government Business. The fact that the Speaker is required to consult with the Chief Whip and the Leader of Government Business does not detract from her obligation to schedule the motion with 'due priority', irrespective of whether or not they support its scheduling. … I am of the view that the Speaker's obligation to consult with both of them is considerably reasonable and rational. There is no substance to the allegation that the NA rule 102A(2) is vulnerable to manipulation and procrastination. There is no evidence that the consultation procedure is designed to unreasonably delay, postpone or frustrate the tabling and scheduling of a motion of no confidence. ..." [Paragraph 93]

"On a proper construction … it is the Speaker that is responsible for the scheduling of the motion of no confidence. … The decision-making process for the tabling and scheduling of a vote of no confidence is no longer at the discretion of the majority or minority since the provisions of NA rule 102A(5) are peremptory. The applicants' contention that the scheduling of a motion of no confidence is effectively left in the hands of the ruling party is therefore unfounded. … In the event of the Speaker failing to comply with her scheduling obligations … her conduct may be subjected to judicial review." [Paragraph 95]

"The Constitutional Court specifically refrained from imposing a specific time requirement within which such a motion has to be scheduled, debated and voted on. If this court were to prescribe a specific period within which to schedule a debate on a motion of no confidence it would be unduly prescriptive to the Speaker and the National Assembly as to how and when to schedule its own business. It is not competent for this court to dictate specific time periods to the National Assembly … In doing so the court would be overstepping the boundaries of separation of powers. … In my view NA rule 102A is compliant with the reasoning and order of the Constitutional Court in Mazibuko regarding the time within which a motion of no confidence in the President must be scheduled for debate and voting in the National Assembly." [Paragraph 99]

"The motion … was duly scheduled for debate … Instead of proceeding with the motion, the party decided to withdraw same on the basis that its request for the recusal of the Speaker and voting by secret ballot was denied. All indications are that Agang had agreed to the scheduling of the motion being postponed to the next sitting subject to certain conditions. I am therefore satisfied that the real issue in contention was not the actual scheduling of the motion, but the conditions attached thereto. … It is incomprehensible for Agang to now contend that the Speaker's failure to ensure that its motion was scheduled, debated on and voted for on or before the National Assembly went into recess … was inconsistent with s 102(2) of the Constitution and NA rule 102A …" [Paragraph 105]

"In the event that this court is found to have erred in finding that the relief sought … is moot, it is necessary to consider the merits of the scheduling decision. …" [Paragraph 107]

"… The Speaker as administrative head is best placed to fulfil the obligation to schedule the motion, which clearly involves polycentric decision-making. The court recognises her expertise in fulfilling her function in the House. In exercising its designated judicial control over the actions of other branches of government the court should always be mindful to show due deference to the autonomy of Parliament and presiding officers in respect of the deliberations of Houses of Parliament. In my view the Speaker is entitled to a high degree of deference by the courts. There are sufficient safeguards in the form of review mechanisms in the event that the Speaker exercises her powers in an arbitrary or irrational manner or in violation of the Constitution." [Paragraph 114]

"The Constitution provides for voting by secret ballot in electing the President, Speaker and Deputy Speaker. There is no implied or express constitutional requirement for voting by secret ballot in respect of a motion of no confidence in the President. …" [Paragraph 121]

"… It is within the power and privilege of the National Assembly to amend the rules of the National Assembly to provide for voting by secret ballot. The absence of a specific rule providing for voting by secret ballot appears to be a deliberate choice … The court is not mandated to prescribe to the National Assembly on how to conduct its voting procedures. In my view the effect of granting the relief sought in respect of voting by secret ballot would offend against the provisions of s 57 of the Constitution as well

as the doctrine of separation of powers, in that it would in effect amount to the court formulating rules for the National Assembly. …" [Paragraph 123]

"… The tradition of an impartial Speaker in Parliament dates back to the 14th century in England and is prevalent where parliaments developed from the Westminster System. However, the tradition of impartiality is neither a legal imperative nor a universally applied principle. …" [Paragraph 124]

"… [B]eing a fit and proper person is not a constitutional condition precedent to becoming, or holding office as, Speaker. Absent such prerequisite in law, the question of the Speaker's fitness and propriety does not present a dispute capable of resolution through the application of the law. … [T]he issue of the fitness and propriety of the Speaker is not justiciable." [Paragraph 135]

"… Given the electoral system through which members of the National Assembly are elected, it is inevitable that the Speaker must belong to one of the political parties represented in the National Assembly. … While the position of Speaker … is not inherently partisan … election to the position of Speaker … does not entail the incumbent Speaker severing political-party ties. …" [Paragraph 142]

"The Constitution expressly states that the National Assembly is the competent authority to remove the Speaker. … Nowhere else in the Constitution is the power to remove the Speaker mentioned or conferred upon any other person or institution. For that reason, it is impermissible for any other person or institution to assume that function. … Just as the Speaker is elected by the House, she may be removed from office by a vote of the House." [Paragraph 152]

"… It is therefore inappropriate for the Speaker to be removed by the courts …" [Paragraph 154]

The application was dismissed. Goliath J found that, as the case raised matters of constitutional import and "'indeed adds texture to what it means to be living in a constitutional democracy", each party should pay its own costs.

## CIVIL PROCEDURE

### ARNOLD BOTHA V MAGISTRATE M PANGARKER AND CHRISTINA MAGDALENA SUSANNA BOTHA CASE NO.: 6499/2012 (WCC) (29 JANUARY 2013)

Applicant sought an order reviewing and setting aside divorce proceedings that had taken place before the respondent magistrate, together with the judgment issued by first respondent, save for the decree of divorce itself. The magistrate had refused to grant a postponement, requested due to the unavailability of counsel. It was argued that the magistrate continued with proceedings, finalised the divorce and issued an order in applicant's absence, thereby violating the applicant's right to be heard and his right to legal representation, and that the court denied the applicant the right to a fair trial. The applicant had been represented by various legal representatives at different points in the proceedings.

Goliath J (Cloete AJ concurring) held:

"Section 35(3)(f) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to choose and be represented by a legal practitioner. The decision whether or not to grant a postponement is in the discretion of a trial court. Such discretion must be exercised judicially and upon all the facts and circumstances pertaining to the matter. The importance of legal representation, and where possible, a representative of choice are not to be underestimated. Prejudice to a litigant

flowing from a refusal of a postponement is sometimes virtually presumed where the effect of the refusal of an application is to deprive him of legal representation." [Paragraph 14]

"It is common cause that the applicant's attorney withdrew from the matter ... Within a matter of four days and apparently after experiencing severe difficulty applicant appointed another legal representative who indicated that he was not available on the allocated trial date. ..." [Paragraph 17]

"... [T]he magistrate found that there was no request for a postponement so that an attorney could have argued the application on behalf of the applicant. The magistrate took a decision on 29 February 2012 that she was not going to entertain an application for a postponement prior to 8 March 2012 and neither would her only colleague in the same division. Mr Derris was thus effectively barred from placing the matter on the roll at an earlier date. All the parties concerned were aware that Mr Derris had commitments ... and would not be able to attend court on 8 March 2012 to deal with a postponement. It now appears that Mr Derris was expected to set the matter down for a postponement on an urgent basis in defiance of the magistrate's directions." [Paragraph 18]

"... The magistrates court is a creature of statute and it has no inherent jurisdiction. It is bound by the four corners of the statute which governs its operation as well as the rules promulgated in terms thereof. Rule 55(5) provides that a court, if satisfied that a matter is urgent, may make an order dispensing with the forms and service provided for in the rules and may dispose of the matter at such time and place and in accordance with such procedure as the court deems appropriate. This remedy was not available to the applicant since the first respondent had informed Mr Derris that no such application would be entertained by the court prior to 8 March 2012." [Paragraph 20]

"Rule 31 of the magistrates court rules deals with postponements and provides inter alia that the trial of an action may be postponed by consent of the parties or by the court, either on application or request or of its own motion ... It was ... not open to the applicant or Mr Derris - as was suggested by counsel for both respondents - to approach the President of the division concerned in ... for another magistrate to be assigned to hear the application. They were obliged to have brought the application before the first respondent or her only other colleague in the same division. However rule 31 does make it clear that it was open to the first respondent of her "own motion" ... to grant a further postponement in the interests of justice despite the fact that there may not have been any formal application before her. And it is trite that a final postponement is never final in the sense that any further postponement will depend upon the facts and the exercise of a judicial discretion in light thereof." [Paragraph 25]

"It was grossly irregular for first respondent to simply decide to proceed with the matter without considering the issue of a postponement. The court was fully aware that the applicant's previous legal representative withdrew and that he needed to be given an opportunity to obtain another legal representative at short notice. The court is of the view that it was unreasonable of the learned magistrate to deny the applicant's new legal representative an opportunity to facilitate a postponement of the matter. Moreover, the applicant cannot be blamed for the fact that his legal representative was denied the opportunity to facilitate a postponement prior to the trial date. ..." [Paragraph 27]

"The fact that the applicant arrived unrepresented at court on 8 March 2012 was a direct consequence of the magistrate's refusal to entertain an earlier application for a postponement. Significantly applicant's conduct is described as being engineered to "force" a postponement. It is highly undesirable for a litigant to be placed in such an invidious position because his legal representative was not given the opportunity to request and motivate for a postponement. The issue should have been dealt with openly and

transparently without placing the applicant under the pressure of having to conduct his own case ..." [Paragraph 28]

"The court is satisfied that as a consequence of the magistrate's failure to accommodate Mr Derris, the applicant has not been afforded the right to a fair trial because, in consequence of a refusal to entertain a postponement, he was wrongly deprived of his right to be represented by a legal practitioner or legal practitioner of his choice. The court is therefore satisfied ... that the applicant did not have a fair trial and that this resulted in a failure of justice and consequently the proceedings on 8 March 2012 and 9 March 2012 cannot be allowed to stand and ought to be set aside. ..." [Paragraph 29]

"... It is trite that an award of costs de bonis propriis against an attorney acting in a representative capacity may only be made in circumstances where he or she acted mala fides, negligently, unreasonably or improperly. The court is satisfied that the reasons furnished by Mr Derris are reasonable and acceptable and do not warrant a punitive cost order." [Paragraph 31]

"With regard to costs in general, it is clear that the conduct of first respondent resulted in a miscarriage of justice. However, and notwithstanding his success in this court, it cannot be said that the applicant was blameless ... As to the second respondent, she has been put to significant inconvenience and expense by both the applicant and the first respondent. Having regard to these considerations it is the courts' view that an appropriate order to make is that the applicant and first respondent shall bear the second respondent's costs; and that the applicant and the first respondent shall each bear their own costs." [Paragraph 32]

The matter was referred back to the Regional Court for trial de novo before a different regional magistrate. However, the High Court's decision was reversed on appeal in *Pangarker v Botha* 2015 (1) SA 503 (SCA), the court finding (at paragraph 30) that "[t]he judgment of the high court in finding that the failure to postpone the trial constituted a gross irregularity is disturbing as it is not supported by the facts."

## CRIMINAL JUSTICE

### S V KING 2014 JDR 1705 (WCC)

**Case heard 31 July 2014, Judgment delivered 22 August 2014**

This was an appeal against a murder conviction. Appellant, who was officially on duty as a member of the South African Police Force, shot and fatally wounded an eighteen year old male. The appellant had been convicted of murder in the Regional Court and sentenced to ten years imprisonment.

Goliath J (Mantame and Blignault JJ concurring) held:

"The regional magistrate evaluated the evidence and found that the key witness, Mr Laykers, made a good impression as a single witness, and was credible and reliable ... Furthermore, that on the probabilities, his evidence was supported by the police witnesses. The court rejected the version of the appellant as improbable, and found that the appellant should be convicted of murder on his own version. From the judgment it is apparent that the appellant was found guilty of murder on the basis of dolus eventualis." [Paragraph 15]

"The appellant attacks the conviction on the basis that the evidence does not sustain a conviction of murder. It is contended that the regional magistrate misdirected himself as to the relevant elements to establish dolus eventualis. Furthermore, that the evidence of Mr Laykers, who was a single witness should have been treated with the utmost caution. The regional magistrate erred in accepting it uncritically. ..." [Paragraph 16]

"In my view there are four issues that required careful consideration by the regional magistrate. The first is the position of Laykers at the time of the shooting. He indicated that he came running from someone's front yard when he heard the first shot. He testified that after the first shot was fired he observed Quma and a suspect lying on the floor. This evidence is contradicted by Quma who stated that she was standing at all times, whilst pointing a firearm at the suspect who was lying on the floor." [Paragraph 18]

"... The testimony of Laykers in court regarding the verbal warning does not correspond with parts of his written statement which refers to repeated warnings. His version also contradicts Quma's evidence that the appellant spoke loudly to the suspects inside the building before the first warning shot was fired. In any event, Laykers is not consistent and contradicts himself by first stating that the verbal warning was issued after the first two shots and thereafter changing his version to state that the warning was issued after the first shot was fired. ..." [Paragraph 22]

"The third aspect that required careful consideration was the evidence relating to the position of the deceased at the time of the shooting. The court concluded that the appellant must have seen the deceased on top of the safe, and deliberately directed the shot at the deceased. ..." [Paragraph 23]

"... Considering the configuration of the counter it is questionable whether Laykers or the appellant had an unobscured view of the safe from where they were standing at the window at the time of the incident. ... [I]t cannot be said that Laykers or the appellant had a clear view of the safe." [Paragraph 24]

"Taking into account the configuration of the counter, the fact that the safe was behind the counter and the circumstances prevailing at the time it is indeed plausible that the appellant did not see the deceased on top of the safe. ... The evidence of the police witnesses placing the deceased on top of the safe is purely based on speculation due to the bullet trajectory, assumptions based on the height of the deceased and possible blood that was never analysed. Based on the unreliable evidence of Laykers who is a single witness, it cannot be found beyond reasonable doubt that the deceased was in fact on top of the safe." [Paragraph 25]

"Considering the unsatisfactory features in the evidence of Mr Laykers it is clear that the court a quo erred in accepting his evidence as credible and reliable in all material respects. Furthermore, the refusal of the magistrate to admit the written statement of Laykers on spurious grounds created fertile ground for prejudice to the appellant. ..." [Paragraph 26]

"The final and most important aspect to be considered is whether the appellant acted with dolus eventualus when he caused the death of the deceased. ..." [Paragraph 27]

"The test for intention is subjective ... The fundamental question is not whether the appellant foresaw that the consequences would possibly follow, but whether in actual fact he reconciled himself with the possibility that it would follow. The enquiry is therefore whether, in view of the circumstances of the case, there is any reason to conclude that the appellant did in fact subjectively foresee the possibility that his actions would result in the death of the deceased, and nevertheless reconciled himself with such possibility. ..." [Paragraph 28]

“Counsel for the appellant correctly pointed out that the Magistrate overlooked the critical second element … namely reconciliation with the foreseen possibility. The Magistrate consequently failed to conduct an enquiry into the existence of this element. …” [Paragraph 29]

“Taking into account the circumstances of this case, where the appellant was faced with an unknown number of suspects, one under guard by his colleague; a moving scene where one suspect is seen inside the building, followed by a second suspect; a failure to respond to verbal warnings and a refusal to surrender after the first warning shot, it cannot in my opinion, be found beyond reasonable doubt that the appellant fired the second and third shots with the intention to kill the deceased. He was on high alert, concerned about his colleagues safety, as well as his own due to the uncertainty as to what was transpiring inside, and whether the suspects were armed or not. …” [Paragraph 32]

“In this case the appellant was merely performing his duty as a police officer and attended a crime scene in a notoriously dangerous area. … He acted reasonably in his attempt to apprehend suspects who had unlawfully broken into the Post Office. In my view there is a reasonable possibility that the appellant did not subjectively foresee that a suspect would be killed as a result of the precautionary measures he took when firing the warning shots in an upward direction. It also cannot be found beyond reasonable doubt that the appellant subjectively accepted that by taking those precautionary measures when firing the warning shots, that the deceased would be fatally wounded in the process. The requirements for dolus eventualis were clearly not established. …” [Paragraph 33]

The accused was found not guilty and discharged.

## SELECTED JUDGMENTS

### PRIVATE LAW

**BYRNE V HAWEKWA JEUGTERREIN & ANOTHER [2008] JOL 22694 (C)**

**Case heard 5 – 6, 10 – 12, 18 – 19 March; 11 April 2008, Judgment delivered 16 September 2008**

Plaintiff brought an action for bodily injuries sustained by his minor son (Michael) on a camping trip. It was alleged that the son had fallen out of a bunk bed which lacked a protective railing. There was no direct evidence as to the circumstances of the fall.

Le Grange J held:

"… I am satisfied, having regard to the totality of the medical evidence that it is more probable that the epileptic seizure Michael suffered, was consequent upon the fall rather than the cause of the fall … [A]ll the witnesses who were present when Michael was found on the floor drew the conclusion that he had fallen out of the upper bunk … while asleep. … I am satisfied that … the only reasonable inference to draw from the proven facts, is that Michael was asleep in the upper bunk bed and during his sleep fell from the bed. … " [Paragraph 37]

"The question whether a legal duty exists in a particular case is a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered. … The question is always whether the defendant ought reasonably and practically to have prevented harm to the plaintiff. … " [Paragraph 40]

"There is no doubt in my mind that in this case, public policy demands that parents are entitled to expect that schools will take reasonable measures to prevent risks of harm to pupils on a school excursion, the standard of care is that of a reasonable and prudent parent … and includes the duty to protect pupils from reasonably foreseeable risks of injury. … " [Paragraph 41]

"The evidence of Ms Du Toit cannot be regarded as having no probative value. Her evidence is a stark reality of the dangers unguarded bunk beds pose, if small children … are allowed to sleep on upper bunk beds that are unguarded." [Paragraph 45]

"The parents of the children attending the camp were told that the children will sleep in bunk beds. There is, however, no evidence that they were told about the type of bunk beds and whether or not they have adequate guard rails to prevent a child from rolling out … in his or her sleep. … [A] reasonably prudent parent would have inspected the premises … and would, upon a proper inspection, foresee the reasonable possibility that the absence of proper guard rails would cause injury to his or her child. " [Paragraph 52]

"… I am satisfied that the employees of the first and second defendants failed to take the reasonable steps to prevent the injury to Michael which the reasonable person would have taken. …" [Paragraph 53]

The defendants were thus held to be liable for the damages suffered by the plaintiff in consequence of the injuries suffered by Michael. The decision was confirmed by a majority of the SCA in Hawekwa Youth Camp v Byrne (615/2008) [2009] ZASCA156 (27 November 2009).

**MANUEL V CRAWFORD-BROWNE [2008] 3 ALL SA 468 (C)**

**Judgment delivered 26 March 2008**

As the Minister of Finance, the applicant had provided the financial framework for the government's arms procurement deal. The respondent was a member of a non-governmental organization, opposed to the arms deal. Respondent had written two articles in which he alleged that the applicant was guilty of corruption relating to the arms deal, and should be prosecuted. The applicant asserted that the articles, which provided no proof of the allegations, were defamatory of him. The dispute involved the competing constitutional rights of freedom of expression and dignity.

Le Grange J held:

"In my view, to say a person, in particular a Minister of Finance, who is charged with the responsibility of the National Treasury and fiscal policy of a country, is corrupt and should be prosecuted with corruption and similar offences, without providing a shred of evidence pointing to his/her involvement, is defamatory and aimed to lower such person in the estimation of right-thinking members of society." [Paragraph 20]

"Even if the "little treasure" can be recovered from a "nook in our legal attic" I do not believe that a public apology in this matter will be sincere and adequate in the context of this case. In my view, freedom of expression does not include the right to falsely attack the integrity of a fellow citizen for selfish reasons or for reasons which have nothing to do with public benefit. The respondent in his papers is remarkably silent that he would apologise unreservedly, retract the statements and do so sincerely, in the event that he failed to justify what the applicant alleges is malicious defamation." [Paragraph 28]

"The limited restraint on free speech resulting from the order I make is not directed to stop the respondent from participating in a debate of immense public importance. The restraint is directed at the manner in which the respondent has chosen to participate in the debate and the methods he chose to employ." [Paragraph 31]

The statements were found to be defamatory.

## CONSTITUTIONAL INTERPRETATION

**DEMOCRATIC ALLIANCE V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS 2015 (4) SA 351 (WCC)**

**Case heard 16 March 2015, Judgment delivered 12 May 2015**

At the joint sitting of parliament for the President's state of the nation address in 2015, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces invoked section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act to call upon staff of Parliament and security forces to forcibly remove members of an opposition party from the joint sitting, following disturbances.

Le Grange J (Cloete and Boqwana JJ concurring) held:

“The applicant … is aggrieved that the Speaker and Chairperson used security forces to remove legitimate parliamentary members from a sitting of Parliament, and is now challenging the constitutionality and meaning of s 11 of the Act. The relevant section allows the Speaker and/or the Chairperson to order the staff of Parliament or the security services as envisaged by s 199 of the Constitution to arrest and remove any person who creates or joins a disturbance during a sitting of Parliament or a House or a Committee.” [Paragraph 2]

“… This case is not about whether the Speaker, with the Chairperson, was justified in invoking s 11 … as a measure to protect the orderliness of proceedings … At the heart of the applicant's complaint is the contention that the provisions of s 11, properly interpreted, can only be applicable to non-members of Parliament. The applicant is of the firm view that to construe s 11 differently will render it constitutionally objectionable and invalid … According to the respondents the provisions of s 11 … indeed apply to a member of Parliament who creates or takes part in any disturbance in the precincts of Parliament … and as a result the section is not constitutionally offensive.” [Paragraph 5 - 7]

“It is now well established … that the Constitution requires judicial officers to read legislation, where possible, in ways which give effect to its fundamental values. … On the other hand the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. It is often required by courts to strike a balance to resolve this tension when considering the constitutionality of legislation. Therefore it is imperative, where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, that it should be preserved. Only if this is not possible should resort be had to the remedy of reading-in or notional severance.” [Paragraph 20]

“… [T]he question now is whether the reference to 'a person' is reasonably capable of including 'a member' and, if so, whether such meaning is congruent with ss 58(1) and 71(1) of the Constitution and the doctrine of the separation of powers. … The point of departure is to have regard to the Act in its entirety. …” [Paragraphs 22 - 23]

“Taking into account the ordinary rules of grammar and the syntax in which the particular wording of s 11 is expressed, it is indeed reasonably possible to construe the reference to 'a person' in the provision to include a 'member'. It is not difficult to imagine a situation where a member may create or cause a disturbance of such gravity that it undermines the authority or dignity of Parliament as a whole. In those instances common sense dictates that the presiding officer must be in a position to take decisive action as an orderly measure to protect the dignity of Parliament … On the other hand, objectively viewed, the word 'disturbance', as it appears in the Act, has an extremely wide connotation. … In real terms the definition is so broad that the exercise of the right to free speech in the NA, NCOP or parliamentary meetings, which ordinarily and appropriately includes robust debate and controversial speech, can certainly constitute an act which may be construed to interfere with or disrupt proceedings. This extremely broad definition of the word 'disturbance' in my view certainly creates tension as it detracts from a member's constitutional privilege of freedom of speech and freedom from arrest as envisaged in terms of ss 58(1) and 71(1) of the Constitution.” [Paragraphs 30 - 31]

“It is noteworthy that Parliament in its rules does not rely on force as an appropriate measure to protect its orderly proceedings. Rule 44(1) of the NA does recognise that freedom of speech and debate is 'subject only to the restrictions placed on such freedom in terms of the Constitution, or any other law or these Rules'. However, the freedom from arrest as contemplated in ss 58(1)(b) and 71(1)(b) of the Constitution … has no such limitation. … Inasmuch as Parliament is entitled to conduct its own affairs, the

privilege of freedom of speech is vital to allow Parliament to perform its function of permitting unrestrained debate about matters of public importance. … " [Paragraphs 40 - 41]

"In weighing up the apparent purpose of s 11 and considering the ambit of its application, Mr Rosenberg's argument that s 11 infringes a member's privilege of free speech and his or her privilege not to be arrested … cannot be faulted. … Section 58(2) in my view envisages new privileges or powers which may limit freedom of speech, but such powers or privileges can only be to the benefit of the House as a whole, or of its members in general, and not solely of the Speaker and/ or Chairperson, or other designated presiding officer … The power of the presiding officer to regulate internal proceedings must be dealt with in the rules and orders. In my view … the provision in s 11 is not envisaged by ss 58(2) and 71(1) and does not pass constitutional muster as it permits a member to be arrested for what he or she may say on the floor of a House. This in the true sense of the word violates a member's constitutional privilege of freedom of speech and freedom from arrest as guaranteed under ss 58(1) and 71(1) of the Constitution. The provision in s 11 is overbroad and as a result constitutionally flawed." [Paragraphs 42 - 43]

"As a result of the finding that a member may not be arrested under s 11 if the conduct that led to the arrest is protected under ss 58(1)*(b)* and 71(1)*(b)*, the most appropriate remedy … would be notional severance to bring s 11 within constitutional bounds. It will leave the text unaltered but limits the extent of its application by subjecting it to a condition." [Paragraph 47]

The application succeeded. Section 11 was declared invalid, to the extent that it permitted a member to be arrested for conduct that protected under sections 58(1)(b) and 71(1)(b) of the Constitution. The declaration of invalidity was suspended for 12 months to allow Parliament to remedy the defect. In confirmation proceedings, a majority of the Constitutional Court agreed that s 11 was unconstitutional, but found the order relating to the possibility of arrest for protected conduct not to be apposite. The majority held that invalidity stemmed from s 11's application to members of parliament, and ordered the reading in of the words "other than a member" after the word "person". *Democratic Alliance v Speaker of the National Assembly and Others (CCT86/15) [2016] ZACC 8 (18 March 2016)*.

**LILI V INDEPENDENT ELECTORAL COMMISSION: CHIEF ELECTORAL OFFICER AND OTHERS (3671/2013) [2013] ZAWCHC 196**

**Case heard 12, 13 & 14 August 2013, Judgment delivered 28 November 2013**

The Applicant, a former proportionate representative councillor of the Fourth Respondent (the Council) sought to review and set aside the decision to expel him as member from the Council. The Applicant raised numerous complaints regarding the conduct and procedure of the disciplinary proceedings against him. The Applicant further challenged the constitutional validity of certain provisions of Item 14 of Schedule 1 ("the Code of Conduct") of the Local Government: Municipal Systems Act ("the Systems Act").

Le Grange J held:

"To sum up, whilst it is correct that one sphere of government or one organ of state may not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state, the actual integrity of each sphere of government and organ of state must be understood in light of the

powers and the purpose of that entity. Moreover, while the political framework created by the Final Constitution demands that mutual respect must be paid, all the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. These spheres of government do not have total independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that 'all of them perform governmental functions for the benefit of the people of the country as a whole. Therefore, National and Provincial governments have responsibility to ensure that Municipalities function effectively and to intervene in their affairs if necessary'. ..." [Paragraph 32]

"The contention on behalf of the Applicant that Item 14 confers "unbridled powers of intervention" upon the MEC is in my view flawed. On a proper reading of the provisions ... there is no unrestrained power that the MEC wields in the affairs of the local municipality. The powers granted to the MEC can only be regarded to constitute a safeguard and that form part of a system of checks and balances applied to disciplinary proceedings against councillors. The MEC has in fact no self-standing disciplinary powers over local councillors which can be exercised mero motu. Moreover, a council itself must in all cases investigate and initiate disciplinary proceedings against its own councillors. In less serious matters, where the sanction imposed is no more than a warning, reprimand or fine, the MEC's role is confined to acting as an appeal forum." [Paragraph 38]

"The powers of the MEC under Item 14, when performed as in the present instance, can therefore not be regarded as constitutionally objectionable as they fall squarely within the principal of co-operative governance. The role and functions of the Speaker of the local municipality within the constitutional framework is also not "eviscerated" or undermined as suggested by the Applicant. In fact in the present instance the council was unanimous in its recommendation as to the guilt and sanction of the Applicant. It follows that the challenge by the Applicant on the ground that the MEC's power derived from Item 14 of the Systems Act is overbroad and constitutionally impermissible because it unnecessary interferes with essentially legislative function of an autonomous body, cannot survive." [Paragraph 43]

The application was dismissed with costs.

## ENVIRONMENTAL LAW

**SWARTLAND MUNICIPALITY V LOUW NO & OTHERS [2010] JOL 26136 (WCC)**

**Judgment delivered 21 December 2009**

The applicant municipality sought an interdict preventing the fifth respondent from conducting the mining activities it had commenced on a farm that had not properly been rezoned by it to permit mining. The first to fourth respondents were the trustees of the trust which owned the farm. The fifth respondent was the holder of the mining right, effective for 30 years ending 16 February 2039, granted to it in terms of the Mineral and Petroleum Resources Development Act ("the MPRDA") by the sixth respondent. The dispute related largely to the interpretation of the provisions of the MPRDA, its effect on the Land Use Planning Ordinance 15 of 1985 (Cape) ("LUPO") as subordinate legislation, and the constitutionality of LUPO, or parts thereof.

Le Grange J held:

"The legislative scope of the local authority is therefore important to consider as "municipal planning" is also brought within the scope of Schedule 4 of the Constitution. All municipalities are given their powers in terms of the Constitution which includes municipal planning. According to the Local Government: Municipal Structures Act, a district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by ensuring integrated planning, promoting bulk infrastructural development and services, building capacity and promoting equitable distribution of resources and services." [Paragraph 31]

"The zoning of land is essentially a planning function in terms of Schedules 4 and 5 of the Constitution. The legislator could not have intended to grant the Minister the power to make decisions outside the scope, aims and objectives of the MPRDA. Such an exercise of power has the potential to stand in conflict with the spirit and purport of the Constitution. In my view, such wide ministerial power will negate the municipal planning function conferred upon all municipalities and it may well trespass into the sphere of the exclusive provincial competence of provincial planning. I am satisfied that there is no conflict between LUPO and the MPRDA as contemplated in section 146 of the Constitution, as LUPO and the MPRDA can be read as mutually supportive." [Paragraph 41]

The application was granted. An appeal to the SCA was dismissed: Louw NO and Others v Swartland Municipality (650/2010) [2011] ZASCA 142 (23 September 2011).

## CIVIL PROCEDURE

### HELEN SUZMAN FOUNDATION V JUDICIAL SERVICE COMMISSION AND OTHERS (8647/2013) [2014] ZAWCHC 136; [2014] 4 ALL SA 395 (WCC); 2015 (2) SA 498 (WCC) (5 SEPTEMBER 2014)

**Judgment delivered 5 September 2014**

The Applicant (HSF), in the main application, instituted review proceedings against the JSC for an order, declaring, inter alia, that the decision taken by the JSC under section 174(6) of the Constitution, to advise the President of the Republic of South Africa to appoint certain candidates, and not to advise him to appoint other candidates as judges of the Western Cape High Court, was unlawful and/or irrational. This was an interlocutory application under Rule 6 (11) and 30A for an order directing the JSC to deliver the full recording of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the JSC after the interviews in question. [Disclosure: the DGRU was one of the three amici curiae admitted in these proceedings.]

Le Grange J held:

"The JSC derives its powers from section 178 (4) of the Constitution. It is indeed a sui generis entity mandated with the task of the appointment and removal of judges. It may also advise the national government on any matter relating to the judiciary or the administration of justice. Furthermore, in terms of s 178(6) of the Constitution the JSC is given a certain degree of latitude in respect of its processes. In terms thereof, the JSC may determine its own procedure but its decisions must be supported by a majority of its members. The Judicial Service Commission Act … provides in section 5 that

the Minister must, by notice in the Gazette, make known the particulars of the procedure which the JSC has determined in terms of section 178 (6) of the Constitution. In terms of such provision, the procedure of the JSC was published in the Government Gazette on 27 March 2003 ("the Procedure"). Significantly, Clause 3 (k) of the prescribed procedure, in respect of the appointment of Judges to the High Court, provides that after the completion of the interviews, the Commission "shall deliberate in private and shall, if deemed appropriate, select the candidates for the appointment by consensus or, if necessary, majority vote."" [Paragraph 18]

"Viewed cumulatively, it is evident that transparency and openness of the JSC is ensured by the publication of objective criteria to be used in the selection of judges; the existence of a public interview process; and an obligation falling upon the JSC to give reasons. This process adopted by JSC in respect of judicial appointments in my view does not justify the complaint by the HSF regarding the lack of openness, transparency, equality of arms and access to information." [Paragraph 21]

"... The JSC's deliberations are in my view no different to those of a magistrate or those of a judge as reflected in his or her court-book or deliberations which do not form part of the record of proceedings on appeal or review. Accordingly, the non-disclosure of the JSC's deliberations cannot taint the entire review proceedings." [Paragraph 29]

"When comparing the JSC to these other systems, it leaves two distinct impressions: First, employing a body such as the JSC represents international best practice for the selection of judges. Second, the JSC is already far more transparent than the majority of comparable bodies in other international jurisdictions. Whilst it is accepted that transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that the JSC's claim that it should deliberate in private is well-founded. In fact, certain of these international courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC. They have held that confidentiality breeds candor, that it is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality. With respect to the arguments that disclosure of deliberations could potentially impact on the candidates' dignity, the HSF raises a point that one who is willing to endure public interviews could hardly be affected by the disclosure of Deliberations. It goes without saying that the right to human dignity extends to all South African Citizens, it is important to be mindful that the candidates in the present matter had an expectation that the Deliberations would be confidential. Furthermore, the HSF underscores a key consideration. The knowledge that the full record of the Deliberations might include extremely frank remarks and opinions of senior members of the Judiciary and Executive as to the candidate's competence or otherwise would be made public, could deter potential candidates from accepting nominations for appointment. The very efficiency of the judicial selection process could therefore be compromised." [Paragraph 48]

The application was dismissed.

**CRIMINAL JUSTICE**

**SOLOMON V S (A461/2012) [2012] ZAWCHC 356**

**Judgment delivered 16 November 2012**

The appellant was convicted of three counts of rape in the Regional Court, and sentenced to a term of six years direct imprisonment on each count. The appellant appealed against the conviction in respect of count 2. The main ground of appeal was that the magistrate erred in accepting the evidence of the complainant that sexual intercourse had taken place. Moreover, the appellant contended that even if it did take place, the magistrate erred in accepting that the state proved beyond a reasonable doubt that it was without consent.

Le Grange J (Fortuin J concurring) held:

"The evidence of the complainant clearly indicates before, during and after the rape, that she was scared and frightened of the appellant. She also testified, in no uncertain terms, that her fear was induced by the violent and threatening, conduct of the appellant and that he forced himself on to her. He grabbed at the front of her pants and it was torn. In this circumstances, it is inconceivable to suggest that there was consent to the sexual penetration."

"The criticism levelled at the complainant for the delay in report the incident to the police, is misplaced. The complainant's version that she did not want to go immediately to the police station and only went a day or two later with her aunt and a group of other persons to the police, cannot be regarded as improbable. It, therefore, does not impact negatively on her credibility."

The appeal was dismissed.

**S V SLABB 2007 (1) SACR 77 (C)**

**Case heard 11 September 2006, Judgment delivered 11 September 2006**

This was a special review from the regional court. A district court magistrate had convicted the accused of housebreaking with intent to steal. The matter had been referred to the regional court for sentencing, as the accused had a large number of previous convictions. The regional court magistrate was not satisfied that the proceedings in the district court had been in accordance with justice, being of the view that view that there was insufficient evidence to draw the only reasonable inference that the accused had the intention to commit theft or any crime, when he was found on the premises of the complainant.

Le Grange AJ (Veldhuizen J concurring) held:

"In his memorandum to the High Court the magistrate referred to s 262(1) of the Act, as well as S v Woodrow… where the Court held that the validity of a charge of housebreaking with the intent to commit an offence to the prosecutor unknown had long been the subject of criticism by our courts and the academic writers. As a result the courts usually sought to find some criminal intent on the part of the accused, when the charge against him was housebreaking with the intent to commit an offence to the

prosecutor unknown. The magistrate also made reference to the requirements for a conviction of housebreaking with the intent to trespass." [Paragraph 7]

"I cannot agree with the conclusion reached by the regional magistrate. Firstly, the facts in the Woodrow case differ significantly from the facts in the present matter ... Secondly, to regard the reasoning in the Woodrow case as authority not to convict an accused person of housebreaking with the intent to commit an offence unknown, as provided in s 262 of the Act, is misplaced. ..." [Paragraph 9]

"The Court in Woodrow correctly set aside the conviction of housebreaking with the intent to commit an offence to the prosecutor unknown, as the intention of the accused, when he committed the unlawful entry, was not 'unknown' to the prosecutor. The regional-court magistrate's reliance on the Woodrow decision that a conviction of housebreaking with the intent to commit an offence unknown is undesirable and therefore, so it seems from his memorandum, to be irregular, is misconceived. The reference to the comments of the academic writers ... cannot in my view be regarded as authority to disregard the provisions of s 262 of the Act. ..." [Paragraph 11]

"The definition of housebreaking with the intent to commit an offence unknown may seem questionable ... but the crime of housebreaking, as commonly understood, constitutes a major invasion of the private lives and dwellings of ordinary citizens. The purpose of this crime is to protect and preserve the sanctity of people's homes and property and to punish those perpetrators who unlawfully gain entry into a home or other premises with the intention of committing a crime on the premises. There are numerous instances where perpetrators break into premises and commit heinous crimes. A common-sense approach is therefore called for in determining the intention of perpetrators when they face a charge of housebreaking with the intent to commit an offence unknown to the prosecution, and the ordinary principles of law must apply." [Paragraph 12]

"Where ... perpetrators are caught after unlawfully breaking and entering into premises and the evidence is overwhelming that their intention was to commit (a) crime(s), but it is impossible for the prosecution to prove what crime(s) they intended to commit, the allegation that they intended to commit an offence unknown and to pronounce a verdict accordingly is, in my view, the proper one. To view it any differently will in effect force the State to resort to trespass prosecutions, or to speculate in respect of some known offences, which may lead to questionable decisions. This clearly will place the prosecution in an untenable position and will make s 262 of the Act redundant." [Paragraph 13]

"On perusal of the full record of the hearing in the district court the inescapable conclusion to be drawn is that the accused gained unlawful entry to the premises of the complainant to commit a crime. The facts, however meagre, support the only inference, that the accused intended to commit theft. ..." [Paragraph 14]

The conviction was confirmed, and the matter returned to the regional magistrate for sentencing.

## SELECTED JUDGMENTS

### PRIVATE LAW

**BATCHELOR V GABIE [1999] 2 ALL SA 65 (C)**

**Judgment delivered 24 February 1999**

The plaintiff claimed ejectment of the defendant from premises which were controlled premises for the purposes of the Rent Control Act. The plaintiff gave defendant three months' written notice with effect from 1 May 1997, requiring defendant to vacate the premises by 31 July 1997. Notice was given on the ground that the premises were reasonably required by plaintiff for his personal occupation.

Donen AJ held:

"Prior to the coming into effect of the Constitution … the wealth of authority had held that the lessor's needs and circumstances had to be taken into account and that the lessee's needs and circumstances (including hardship he might suffer as a result of being evicted) were irrelevant to the enquiry … Didcott J, in Naidoo v Thomas 1979 (2) SA 505 (N) at 508C–E stated the position as follows: "Apropos this last point, there is ample authority for the proposition that the needs and circumstances of the lessor are those that matter. The lessee's do not count.""

"It has been submitted that the plaintiff's circumstances had not changed prior to his giving notice to the defendant and therefore the ejectment should not have been ordered. No requirement of changed circumstances is postulated expressly by the legislation. This consideration was relevant in considering the reasonableness of plaintiff's need, his good faith and credibility. In regard to the last the magistrate was in a better position to make a finding than this Court is. It is implicit in the magistrate's judgment, that he accepted the evidence of the plaintiff. The reasonableness of plaintiff's need and his good faith have already been dealt with above. In the circumstances the plaintiff's explanation for giving notice at this particular time, ie discomfort and embarrassment in his family life, must be accepted."

The consequence of plaintiff's decision to use his own premises must be given effect to and the appellant's appeal was dismissed with costs.

### CIVIL AND POLITICAL RIGHTS

**STEWART AND OTHERS V MINISTER OF HOME AFFAIRS AND ANOTHER (12520/2015) [2016] ZAWCHC 20**

**Judgment delivered 29 January 2016**

This application was for a declaration that that section 10(6) of the Immigration Act was unconstitutional, to the extent that it required applicants for a visa and/or permanent residence permits on the basis of their being a spouse of a South African citizen or permanent resident (a "spousal visa"), to make such application from outside the Republic and/or to await determination of such application from outside the Republic.

Donen AJ held:

"On the face of it section 10(6)(b) recognises that there are circumstances where an application for a change of status may be made by the visa holders identified while they are in the Republic and that these should be prescribed by the Minister in the Regulations. (See the definition of "prescribed" in section 1 of the Act). The apparent violation of the second applicant's rights would therefore seem to be caused by a lacuna in the regulations rather than by the application of s.10 (6). … [I]t has become unnecessary to determine the issue of whether the words quoted above should appear in s.10 (6)(b), or whether a further exception to those set out in Regulation 9(9) should be promulgated." [Paragraph 28]

"Firstly, given the narrow ground of rejection of the second applicant's application for a spousal visa, the court is in no worse position than the department to make the decision to issue the "spousal visa" to second applicant, (save for a consideration of reasonable conditions that ought to be attached to such a visa). Secondly, the department is not called upon to exercise unique expertise considering the application. Thirdly, the court has all the pertinent information before it. Fourthly, nothing in second applicant's circumstances or that of the family has changed to make a reappraisal of the matter necessary. The decision is therefore a foregone conclusion. In the circumstances of this case, as they emerge more fully below, I am in agreement with these five submissions." [Paragraph 30]

"In their answering papers respondents do not dispute that second applicant applied for a "spousal visa". As is apparent from the notice of decision adversely affecting second applicant they seem to have treated the application as an application for a "relative's visa" which may be issued, in terms of s. 18 of the Act, to a foreigner who is a member of "the immediate family of the citizen". It is clear from the definition of "visa", (in part (h) of s.1 of the Act) that what is contemplated in section 18 is "staying with a relative". It may be inferred, from the provisions of s. 27(g) of the Act, that the word "relative" is contemplated to mean someone "within the first step of kinship." The provisions of the Act would therefore seem to contemplate a relative of a citizen to be someone who is "a member of the immediate family" other than a spouse. "Spouse" is defined by section 1 (for present purposes) as a person who is a party to a marriage as defined in the Act. The department therefore erred by treating second applicant's application for a "spousal visa" as an application for a relative's visa." [Paragraph 39]

"Mr Mokhari has submitted that the resolution of the issue in this case should be achieved by an application, on the part of the second applicant, for a visa in terms of s.11(6), coupled with an application in terms of s.31(2)(c) of the Act for exemption and a waiver of any prescribed requirement or form according to the definition section of the Act. It is suggested that the requirement of good cause, upon which the Minister may waive the requirement or form, would be constituted by the fact that the applicant had applied for the wrong visa. However, on the papers as they stand the respondents have not disputed that the applicants began the process of applying for a "spousal visa" immediately upon second applicant's return from Zimbabwe in early August 2014, that is, while second applicant was the holder of a visitor's visa. For the reasons above respondents must be regarded as having admitted that the applicant applied for a spousal visa. The only possible visa this could refer to is a visa in terms of s.11(6) of the Act. No reason therefore exists why the second applicant should have to apply for exemption at all." [Paragraph 44]

"The material relief that applicants seek is that the second applicant should be granted a "*spousal visa*". She is entitled to such relief without further ado." [Paragraph 46]

The second respondent was directed to issue the second applicant with a visitor's visa as contemplated in s.11(6) of the Immigration Act, and to afford her the right and liberty to apply for permanent residence contemplated by s.26(b) of the Act within three months of the judgment.

## CRIMINAL JUSTICE

### S V WILLIAMS (29/04/07) [2007] ZAWCHC 48; 2008 (1) SACR 65 (C)

**Judgment delivered 5 September 2007**

The case had been referred to a regional magistrate for sentencing from a district magistrates' court. The regional magistrate felt unable to proceed with sentencing and referred the matter to the High Court.

Donen AJ (Van Zyl J concurring) held:

"The accused had stood trial before the district court on one charge of theft (count 1), nine charges of housebreaking with intent to steal and B theft (counts 2 - 10), and one charge of attempted housebreaking with intent to steal (count 11). He was acquitted on count 1 and on count 4. On two housebreaking charges (counts 2 and 10) he was found not guilty of housebreaking with intent to steal, but guilty of theft. He was convicted on six of the charges of housebreaking with intent to steal and theft as well as on the charge of attempted housebreaking with intent to steal. …" [Paragraph 2]

"The accused was unrepresented. At the outset of the trial he indicated that he wished to plead guilty to ten counts. In general he suggested that his modus operandi involved the commission of housebreaking and theft whenever he and his partner needed money, especially for drugs. When the first ten charges were put to him the accused pleaded guilty to all of them. He was then questioned by the magistrate … The problems which faced the regional magistrate arose from the manner in which the [district] magistrate exercised her powers in terms of this section as well as the failure of the State to put the eleventh charge to the accused until a very late stage of the proceedings." [Paragraph 3]

"It is irregular for a magistrate, regional magistrate or judge to subject an accused to critical questioning where the latter denies an element of the offence, or to ignore the denial and to attempt to convince the accused that such denial is improper or incorrect. The questioning in terms of Section 112(1)(b) of the Act should be aimed at determining what the attitude of the accused towards the allegations in the charge sheet is, and not at a determination of what it ought to be according to the view of the judicial officer." [Paragraph 7]

"I agree with the regional magistrate that the conduct of the district magistrate constituted a striking irregularity. The magistrate abandoned her judicial function, took over the role of the prosecution, and proposed certain allegations from the bench that were not allegations in the charge. She then elicited admissions from an unrepresented accused that he was not personally able to make, and which he might not have made had he been properly represented." [Paragraph 12]

"In my view the reading of the police docket by the magistrate in relation to count six not only vitiates the trial on that particular count, but also the entire proceedings before the magistrate. The proceedings as a whole cannot be regarded as having been conducted in accordance with justice. Once the magistrate

had examined the content of the police docket she could no longer be regarded as one who was exercising her judicial authority impartially, as required by the Constitution." [Paragraph 13]

"This irregularity was compounded by what followed. The magistrate asked the accused whether he knew that it was wrong to break into other persons' homes and steal their goods. He replied in the negative and added that he had not been in his right mind. (No, because I was not on my mind) The magistrate then interrupted him, and eventually asked him whether she should call his mother and have her come and tell the Court under oath that he did not know that he could not break into people's houses and steal." [Paragraph 14]

"In the circumstances the trial of the accused was unfair in that the court was not impartial and failed to protect the rights of the accused in accordance with the provisions of Sections 34, 35(3)(h) and 35(3)(j) of the Bill of Rights." [Paragraph 19]

The convictions of housebreaking with intent to steal and theft on counts three, five, six, seven, eight and nine, the convictions of theft on counts two and ten, and the conviction of attempted housebreaking on count eleven were set aside. The matters were remitted to the district court for trial before another magistrate.

**SELECTED ARTICLES**

**'IMPUNITY AND GROSS HUMAN RIGHTS VIOLATIONS IN SOUTH AFRICA', [2000] MurUEJL 21. Available at http://www5.austlii.edu.au/au/journals/MurUEJL/2000/21.html**

This is the text of a paper delivered by the author at a seminar held in South Africa to commemorate the 50th anniversary of the International Court of Justice.

"As the impunity of the perpetrator deprives the victim of effective remedies, the first question relates to how the granting of impunity for gross human rights violations could ever be built on justice. The short answer is that such impunity, as is provided for in Section 20(7) of the Act, cannot be just. How then do the facts and law in South Africa purportedly sustain the legitimacy of the power, vested in the Amnesty Committee of the TRC, to grant amnesty for gross violations of human rights whenever the violations were "associated with a political objective committed in the course of the conflicts of the past" and "the applicant has made a full disclosure of all relevant facts" (as provided for in Section 20(1) of the Act)?" (Paragraph 6)

"Before proceeding further certain comments may be apposite. Firstly, the Act was not victor's law (which is the criticism often levelled at the Nuremburg and Tokyo Judgements) but the outcome of negotiation to avoid a terminal war of attrition in South Africa. However, the validity of a law to be applied at the conclusion of any conflict in respect of alleged crimes committed during the conflict should be consistent with international standards of justice. Therefore the outcome of the conflict cannot be relied upon either as a criticism or an excuse. Secondly, though the Epilogue to the Interim Constitution (which was the supreme law at the time) specifically authorised a law conferring amnesty in the circumstances referred to above, it contemplated "a future founded on the recognition of human rights". Because the Epilogue was intended "to advance reconciliation and reconstruction" it could hardly have contemplated that South Africa should embark on a course which involved at its outset the removal of every remedy for every victim of every offence, no matter how egregious. Not only would such a step directly fly in the face of the future contemplated in the Epilogue, but it might also bring South Africa into direct conflict with the international community. For example it could hardly have been contemplated that amnesty would be given for acts outlawed in contemporary international law which are the concern of all states and where because of the importance of the rights, obligations erga omnes rest upon South Africa, inter alia, acts of aggression against neighbouring states, genocide and slavery (see Barcelona Traction Light & Power Co Ltd, Judgement of the ICJ 5 February [1970] ICJ Reports 1, at 32). For reasons which I shall set out below, torture should be added to this list." (Paragraph 11)

"The constitutional validity of granting amnesty for torture remains unchallenged and unassailed. As a result applicants can and do apply to the Amnesty Committee for amnesty for torture per se and the Committee is empowered by the Act, and appears to be empowered by the Constitution, to grant impunity for torture. Paradoxically, by way of justification the applicants rely on the past existence of an armed conflict between the national liberation forces and the South African Security Forces, both beyond South African borders and within it. The armed conflict, so they allege, justified the abandonment of the principles of minimum violence, "an acceptable policing culture" and torture. This attitude appears, inter alia, from a submission to the TRC on 21 October 1996 by General J J Van der Merwe, the retired Commissioner of Police, who also served as commanding officer of the Security Branch of the South African Police (SAP) for the period 1 January 1986 to 30 September 1988 and a statement by retired Major-General J L Griebenauw of the SAP which was put before the Amnesty Committee by an applicant

who has applied for an amnesty for the torture of political detainees. (Affidavits to similar effect had previously been deposed on behalf of the South African Defence Force e.g. Lieutenant-General Van Loggerenberg, Chief of Staff, Operations in the SADF in the case of End Conscription Campaign v Minister Of Defence 1980(2) SA 180 (CPD) prior to the emergence of a constitutional democracy in South Africa.)" (Paragraph 21)

**'IN SEARCH OF RIGHTS TO A FAIR TRIAL', (1985) 102 S. African L.J. 310**

This essay sought to crystallize the right to an expeditious trial, focusing on an accused's right to demand efficiency. It was argued that when an objective ceiling of attrition was reached, the accused should be entitled to his acquittal.

"The accused is entitled to demand his acquittal or conviction once he has pleaded to a charge, except in the following circumstances: (i) where he pleads that the court has no jurisdiction to try the offence; (ii) where a plea of not guilty is entered by the court on behalf of the accused, for example, he refuses to plead or the court is not satisfied with his plea of guilty; (iii) where the accused is not appearing for trial, but merely to have his plea and its explanation recorded, for example, section-I19 proceedings; (iv) where it is 'expressly' provided by the CPA or any other law." (Page 313)

"While it is usually quite clear what constitutes a plea, the courts have regarded its life as more ephemeral than the CPA or any other law expressly provides. Section 118 was inserted in the CPA to allow a summary trial to proceed before another judicial officer where the accused had already pleaded not guilty, no evidence had been led, and the original judicial officer had become unavailable for 'any reason'. Such implementation of s 118 is common practice in the magistrates' courts. Eurocentric lawyers would argue that it expedites the process of justice. Magistrates regard the accused's first appearance as an appearance for plea, and the subsequent appearance as one for trial where s 106(4) applies in respect of the still extant right to verdict." (Page 313)

"I suggest, however, that as the section-1 15 dispensation has had the practical effect of threatening the accused's interests, and as it departs from well-established traditions, there are sound practical, ideological and psychological reasons for systematically widening the ambit of the right to verdict, and elevating it in practice to what the legislature anyway intended it to be-the correlative to s 115." (Page 317)

"The accused's key weapon is his right to verdict, which is based on plea. Where the presiding officer injudiciously impedes this right, it should be made possible for review proceedings, based on gross irregularity, to be commenced before conviction. All the evidence after such an irregularity is obviously tainted, and allowing the trial to continue defeats the very purpose of such a right. If the purpose of encroaching on the right of silence is efficient and expeditious justice, the accused should be entitled to his share of it." (Page 319)

**SELECTED JUDGMENTS**

**PRIVATE LAW**

**TRANSNET LIMITED V ERF 154927 CAPE TOWN (PTY) LTD AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 2367/ 2007 (10 MAY 2010)**

Applicant sought an order evicting certain of the respondents from immovable property owned by it, by exercising vindicatory rights, asserting that it was the owner of the property and that the respondents were in possession thereof. The eleventh respondent asserted that it was entitled to occupying the property in terms of an oral lease agreement allegedly concluded with the applicant.

Koen AJ held:

"Notwithstanding that it can adduce no admissible evidence to controvert Lombard's [a director of the eleventh respondent] account of the conclusion of an oral lease agreement Transnet contends that the facts put up in support of the alleged lease ... are insufficient ..." [Paragraph 6]

"Transnet's ownership of the immovable property in question is not disputed. What is in issue is Lorcom's right to occupy the immovable property in terms of the alleged oral lease. In this regard, a dispute of fact exists. ..." [Paragraph 7]

Koen AJ then set out the approach to disputes of fact in application proceedings, quoting from the decision of the SCA in *Fakie N. O. V CCII Systems (Pty) Ltd*, where it was held inter alia that 'fictitious' disputes of fact should not be allowed to delay the hearing of a matter, but that there must be a bona fide dispute of fact on a material matter. Furthermore, uncreditworthy denials include far-fetched or clearly untenable denials that could be rejected merely on the papers [Paragraph 8].

"To this needs only to be added that because these are motion proceedings questions of onus do not arise. The abovementioned principles, so eloquently summarised by the learned Appeal Court Judge, must be applied in order to resolve any disputes of fact notwithstanding that Lorcom bears an onus to establish the existence of the oral lease agreement allegedly entitling it to occupy the premises" [Paragraph 9]

Koen AJ then discussed the factual background of the alleged lease, and continued:

"What makes matters difficult for Transnet is that what Lombard says is not controverted, and the truthfulness of his evidence can be measured only against inherent contradictions therein and against the established facts. The scope for an analysis of probabilities in motion proceedings, if it exists at all, is extremely limited. Motion proceedings are not intended to enable a Court to weigh probabilities to determine where the balance lies in order to decide who is probably telling the truth." [Paragraph 27]

Koen AJ found that there were no inherent contradictions or material conflicts in Lombard's evidence, and nothing in his version which was far-fetched, palpably implausible or clearly untenable. Koen AJ then turned to consider Transnet's argument that any lease agreement was void for vagueness from the second year onwards, on the basis that the rent payable was uncertain:

"Discredited as it undoubtedly now is, it is a principle of our law that a term of an agreement of lease leaving the power to determine the rental entirely to the discretion of one of the parties renders the agreement invalid ... it is evident from a reading of *Benlou* that the principle was reluctantly accepted in

that case because the Court considered itself to be bound by it notwithstanding that it is illogical, and that it does not accord with the position in other legal systems. I respectfully agree with the criticism of the principle, which seems to me to be illogical and contrary to common sense" [Paragraph 32]

"Notwithstanding the reluctance with which the principle confirmed in Benlou appears to have been accepted, and the criticism which has been directed at it, it is our law as expressed by the Supreme Court of Appeal and I am bound by it. ..." [Paragraph 34]

Koen AJ found that the oral agreement was nonetheless valid, and dismissed the application.

## COMMERCIAL LAW

### KULENKAMPFF AND ASSOCIATES V VOSLOO AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 18194/08 (18 FEBRUARY 2010)

This was an application for the provisional sequestration of the first respondent.

Koen AJ held:

"In brief, section 10 of the Insolvency Act ... requires that Mrs Vosloo satisfy the court prima facie that she has a liquidated claim against Mr Vosloo; that Mr Vosloo has committed an act of insolvency or is actually insolvent; and that there is a reason to believe that it will be to the advantage of creditors that Mr Vosloo be sequestrated." [Paragraph 15]

"It is well established that applications for the provisional sequestration orders should not be used in order to recover debts which are bona fide disputed on reasonable grounds. This is so because the procedure for a provisional sequestration is not designed for the resolution of disputes as to the existence or otherwise of a debt... In Investec Bank Ltd v Lewis ... Griesel J held that these principles, enunciated in applications for the provisional winding up of companies, apply equally in applications for provisional sequestration. I respectfully agree. There is no logical reason why the rule, which is designed to deter creditors from collecting debts which are bona fide disputed ... by way of liquidation proceedings, should not apply equally in sequestration proceedings. Insolvency proceedings are plainly not appropriate where the existence of a debt, and thus the legal standing of the creditor, is the subject matter of a genuine dispute." [Paragraph 17]

"Where legal standing as a creditor is placed in dispute by the respondent opposing the grant of a provisional sequestration order the respondent attracts an onus to establish that the existence of the debt is bona fide disputed by him on reasonable grounds. If he discharges this onus then a provisional order will be made..." [Paragraph 18]

"In the result I find that Mrs Vosloo has established standing as a creditor in regard only to the four loan debts evidenced by cheque stubs ... and that it would be to the advantage of creditors if Mr Vosloo's estate were to be sequestrated. ..."[Paragraph 31]

"What remains for consideration is whether, notwithstanding that the requirements of section 10 have been proved, this Court should exercise the discretion vested in it to grant a provisional order of

sequestration. It will be noted that I have observed that that the debts in respect of which Mrs Vosloo has obtained standing as a creditor ... have probably prescribed." [Paragraph 32]

Koen AJ analysed various High Court decisions, and concluded:

"...It seems to me to be undesirable to grant an order for the provisional sequestration of a debtor at the instance of a creditor who will, on the probabilities, be disqualified in participating in any *concursus creditorum*." [Paragraph 35]

The application was dismissed.

## ADMINISTRATIVE JUSTICE

### CLUB MYKONOS LANGEBAAN LTD V LANGEBAAN COUNTRY ESTATE JOINT VENTURE AND OTHERS 2009 (3) SA 546 (C)

**Case heard 17, 18 and 19 June 2008, Judgment delivered 24 July 2008**

The applicant [CML] and first respondent [the developer] owned adjacent land. The respondent applied for its property to be rezoned and subdivided, which was granted upon certain conditions, including the provision of a link road that would traverse the respondent's property and allow for better access to the applicant's property. The parties differed as to the interpretation of these conditions, and specifically as to who held responsibilities regarding the road.

Koen AJ held:

"... It is clear that the operation of s 28 does not inevitably lead to an automatic vesting. ... Whether or not the link road was '... based on the normal need therefore arising from the said subdivision ...' was not an issue pertinently addressed in the evidence placed before the court on affidavit in this matter, and to make a finding in this regard would involve an unacceptable measure of speculation. I should add that CML also contended that the structure plans amounted to a policy determined by the Administrator, but there was no evidence in the papers of there being such a policy and its contentions in this regard are without merit." [Paragraph 35]

"I have some doubt whether a vesting of 'public streets and public places', which is the automatic legal consequence of the confirmation of a subdivision, can be equated to a condition requiring a 'cession of land' imposed under s 42(2) of the Land Use Planning Ordinance ... (Western Cape) (LUPO).... Sections 28 and 42(2) of LUPO are different in language and unrelated in purpose ... Section 28 envisages a situation, as I understand it, where the owner of the parent erf applying for subdivision (that is, before the application is considered by the council) contemplates that it will be necessary that part of the parent erf be used as public streets and public places and thus submits to the automatic legal consequence of vesting upon the confirmation of the subdivision. This is not the same, as I see it, as a condition imposed after the application has been considered by the council, which requires a cession of land to the municipality where all the different factors referred to in s 42(2) of LUPO, such as the needs of the community, public expenditure, the rates and levies paid in the past, or to be paid in the future, have been considered." [Paragraph 37]

"Furthermore, the form in which this matter was brought does not facilitate a challenge to the validity of the conditions. In these proceedings there was no *lis* between the developer and the municipality. They

are both respondents. Issues which may be relevant to the validity of the conditions have thus not been properly addressed in the evidence and, as I have already intimated, to make findings about the validity of the conditions, an exercise which involves examining whether the different requirements of s 28 and/or s 42(2) of LUPO have been complied with, will involve too large a degree of speculation for such findings to be reliable. It is plainly unwise to fish in a sea of evidence put before a court by the parties for the purpose of resolving one issue, in the hope of finding evidential material which answers another issue." [Paragraph 40]

"Once they are imposed the conditions acquire the force of law, because s 39 of LUPO compels both the local authority and all other persons to comply with them … It is, as I see it, what was intended by the council that matters, not what was intended by the developer or by CML. … To this I must add that, because direct evidence of a party's own intention may not be had regard to, to have regard to what officials in the employ of the municipality now say they thought the conditions meant (to the extent that they may speak for the council) is not permissible. " [Paragraph 43]

"In my view, then, Phase 1 condition (c) and Phase 2 condition (c), read with civil condition 11, required the subdivision plans to reflect the entire length of the link road. I think that one can arrive at this conclusion by having regard to the plain words employed by the framers of the condition without it being necessary to rely to any material degree on other tools of interpretation. This interpretation may or may not have the result of vesting the road in the municipality in terms of s 28 or, perhaps, under s 42(2) of LUPO, depending on whether the requirements of those sections were fulfilled. However, these are not questions which the court can decide in this matter, and, as I have said, I make no findings in this regard. What is clear is that the conditions, construed in this manner, have not been complied with." [Paragraph 46]

"… That the legislature intended that compliance with conditions imposed by a council when approving a rezoning or subdivision application is essential and imperative is underscored by the fact that a failure so to comply is a criminal offence in terms of s 41 of LUPO." [Paragraph 47]

"The real issue … is what the conditions mean and it is to take too narrow a view of the court's function and powers in regard to the resolution of disputes, particularly where the exercise of public-law rights and the performance of public-law duties are in issue, to avoid that issue because the declaratory relief initially sought had been unwisely formulated. … It is therefore appropriate, in my view, that a declaratory order, coupled with an enforcement order, be made." [Paragraph 50]

"The decision of the municipality to initiate the process to have the road (possibly) constructed did not flow from its approval of the developer's rezoning and subdivision application. It was a decision independently taken and is unrelated to the conditions it imposed upon the developer. Whether or not the road is necessary, and in the interests of the community, is not a matter upon which a court can pronounce, and I am satisfied that it would not be correct for me to order compliance with these conditions, with a view, at least, that such compliance might eventuate in the link road being built. This should not be understood to mean that these conditions need not be complied with. It means simply that they are not sufficiently connected to the primary declaratory relief sought, for it to be necessary or desirable to order compliance with them in this application." [Paragraph 52]

"It is … within the power of the municipality to prevent the developer from transferring subdivided land until it has complied with all conditions imposed by the council, by not issuing clearance certificates until such conditions have been complied with. Indeed, it is its duty to do this. Plainly, the coercive measure afforded to the municipality is an effective and practical tool by which compliance with conditions

imposed by the council must be enforced. It is a measure which has not been employed, with the result that, notwithstanding non-compliance by the developer with condition (c) of the Phase 1 and Phase 2 approvals, the Langebaan Country Estate, a significant housing development on the outskirts of Langebaan, now exists." [Paragraph 57]

The court found that conditions required the whole of the road to be reflected on the plans.

## CIVIL PROCEDURE

**POTTERS MILL INVESTMENTS 14 (PTY) LTD V ABE SWERSKY & ASSOCIATES 2016 JDR 0215 (WCC)**

**Case heard 25 January 2016, Judgment delivered 1 February 2016**

Plaintiff sued a firm of attorneys and a partner of the firm for damages, alleging the breach of a duty of care owed to it in relation to its purchase of a portion of un-subdivided agricultural land from one of the partner's clients. Plaintiff alleged that the sale agreement was void for non-compliance with the provisions of the Subdivision of Agricultural Land Act. This judgment dealt with an application to amend the defendant's plea, which was opposed by the plaintiff.

Koen AJ held:

"Almost ten years after the action had commenced … in the course of preparing for trial, the defendants' legal team consulted with certain experts. The experts drew their attention to the possibility that the provisions of the Subdivision Act might not be of application to the agreement because the property sold fell within the area of an urban structure plan … and because the property was thus excluded from the operation of the Subdivision Act. … This turn of events caused the defendants to reconsider their admission that non-compliance with the Subdivision Act rendered the agreement void. They promptly gave notice of an intention to amend their plea. No longer did the defendants wish their admission of the application of the Subdivision Act to stand, with the consequent legal conclusion that the agreement was void. They now wished to assert that the Planning Act overrode the provisions of the Subdivision Act, and thus to deny that the agreement in question was void. …" [Paragraphs 6 - 7]

"… [I]t is necessary to make some observations about the nature and scope of the admission in issue. The admission … to the effect that non-compliance with the Subdivision Act rendered the agreement void is an admission of nothing more than a legal conclusion which had been postulated by the plaintiff in its particulars of claim. It related to no facts which had been pleaded by the plaintiff. In essence, the admission is nothing more than an admission that the validity of the agreement should be determined with reference to the Subdivision Act, and that in terms of that Act the agreement would be void. That is, of course, quite correct." [Paragraph 10]

"Where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the Court to determine, and it is well established that mistakes about the law which the parties make are not binding on a Court. …" [Paragraph 11]

"It is evident, in my view, that an admission by a defendant that the applicable law is what the plaintiff alleges it to be falls to be treated somewhat differently to the admission of a fact which is necessary for a

plaintiff to prove. If a fact is admitted by the defendant the plaintiff need not prove it. Questions of proof do not arise when it comes to the law. …" [Paragraph 13]

Koen AJ considered the High Court judgment in *Amod v SA Mutual Fire & General Insurance Co*, and continued:

"… [W]hat really happened in Amod is that the law which applied when the plea was drafted changed, and the Court not only permitted the plea to be amended after the law had been changed to take account of this, but it also permitted the defendant to deny a number of facts which the defendant had previously admitted. In Amod the Court had assumed, and did not hold, that what was in issue was a pure question of law." [Paragraph 23]

"I conclude … that the facts in Amod are quite different from those in this case. Amod is not of direct application to cases where the withdrawal of an admission about the law only is sought. In my opinion, because of the different factual context, the statement in Amod to the effect "that, even in the case of the withdrawal of an admission of law, the court is not relieved of its obligation to consider whether the granting of the application will unfairly prejudice the other side" … should not be understood to mean that prejudice is a consideration where an amendment is sought only so as to place the issues before the Court in the correct legal context." [Paragraph 24]

"… It is true that amendments involving the withdrawal of admissions of fact have the potential to cause prejudice to the other party. However … amendments involving the withdrawal of an incorrectly admitted legal consequence are of a different nature. In any event, in this case I do not think that any prejudice of the kind which might militate against the proposed amendment exists. Only the law is prejudiced if cases must be decided on the basis of what the parties might have in ignorance agreed the law to be." [Paragraph 33]

The amendment was allowed, with costs of the application to stand over for determination at the trial.

**SELECTED JUDGMENTS**

**SOCIO-ECONOMIC RIGHTS**

**CITY OF CAPE TOWN V THOSE PERSONS OCCUPYING AND/OR INTENDING OR ATTEMPTING TO OCCUPY OR ERECT STRUCTURES ON ERF 18370, KHAYELITSHA 2016 JDR 0241 (WCC)**

**Case heard 9 November 2015, Judgment delivered 14 December 2015**

This was an application for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, on the basis that the respondents' occupation of the property was unlawful as applicant had not given respondents consent to occupy the property. A portion of the property in question contained an informal settlement known as Endlovini informal settlement. In respect of this portion of the property the applicant provided shared water and ablution services to the current occupiers. This portion was occupied with the consent of the applicant. There was also a portion of the property which was an open piece of land, which applicant alleged was a bio-diversity sensitive dune area which could not be developed. This was the portion occupied by the respondents.

Nuku AJ held:

"The main issue that arises … is whether it is just and equitable to order an eviction of the respondents. The applicant contends that it is just and equitable to order an eviction of the respondents. The respondents contend that because of the applicant's failure to engage with them, the application should be stayed pending the outcome of the engagement process." [Paragraph 18]

"It is not in dispute that the applicant is the owner of the land that is currently occupied by the respondents. That the respondents do not have the consent of the applicant to occupy the property appears also to be common cause. … That being the case, the respondents are therefore occupying the applicants land unlawfully and as such the PIE Act is applicable to them." [Paragraph 42]

"The factual matrix upon which this application falls to be determined is largely not in dispute. In short the respondents took occupation of the property between May and July 2014. This they did without the consent of the applicant. On the applicant's own papers there was no engagement with the respondents prior to the launching of the application for their eviction. The reasons advanced by the applicant for not engaging with the respondents were that some of the respondents refused to provide their details, were hostile and threatening to the applicant's officials. Given the lack of co-operation from the respondents at that stage the applicant undertook to supplement its papers so as to deal with the issue of alternative accommodation in the event of it obtaining the particulars of the respondent which suggest that some of the respondents would be rendered homeless by an eviction. After this undertaking the applicant neither supplemented its papers to deal with the issue of alternative accommodation nor engaged with the respondents other than to conduct a survey." [Paragraph 44]

"When the respondents raised the issue of meaningful engagement and alternative accommodation, the applicant adopted the attitude that it is not obliged to provide alternative accommodation. The response of the applicant was also not consistent in that whereas on the one hand it said that it was prepared to engage with the respondents on the other hand it indicated that it could not meaningfully respond to the request for an engagement with the respondents as the respondents had not provided the detail as to the proposed parametres of engagement. The applicant also advised that the only representations it was

prepared to take from the respondents were in relation to the date for the vacation of the property." [Paragraph 45]

"The conduct of the applicant as described above is what was described by Jacoob, J, in the Occupiers of 51 Olivier Road case referred to above as the one "is broadly at odds with the spirit and purpose of the constitutional obligations" that the applicant has towards the respondents. That the applicant has a constitutional obligation to engage meaningfully with people who would become homeless as a result of eviction is clear from the following passage in the Occupiers of 51 Olivier Road case referred to above; "The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless because it evicts them. It follows that, where a municipality is the applicant in eviction proceedings that could result in homelessness, a circumstance that a court has to take into account to comply with section 26(3) of the Constitution is whether there has been meaningful engagement."" [Paragraph 46]

"In my view, in a matter where a municipality applies for an eviction it is bound to act reasonably. Part of acting reasonably is the engagement with those who are to be evicted as that ensures that they are treated with dignity in the process. The applicant has not only failed to engage with the respondents but has also failed to provide reasons why it should be held that its failure was reasonable under the circumstances. This is particularly so as the applicant realised this at the start of the proceedings. The respondents have consistently indicated their willingness to engage with the applicant, at least from the time of filing of the answering affidavit dated 29 December 2014. Instead of taking up the issue of engagement with the respondents, the applicant sought to dictate to the respondents on what it would be prepared to engage them with, namely, the date on which they would vacate the property." [Paragraph 48]

"The other factor that has weighed heavily with this court is the applicant's attitude that it is not obliged to provide alternative accommodation to the respondent on the basis that the respondents were in occupation of the property for a period of less than six months when the proceedings were instituted. For this submission the applicant relies on section 4(6) of the PIE act which does not list the availability of alternative accommodation as a consideration…" [Paragraph 49]

"In my view it is not even necessary to decide whether a municipality is entitled to elect whether to proceed under section 4 or under section 6. The interpretation of these two sections which would be consistent with the values of the new Constitutional dispensation would be to interpret these two section in a manner that provides greater protection to the person who is to be homeless upon being evicted. In instances where the person is to be evicted from land owned by an organ of state the protection afforded by section 6(3) of the PIE act, must be available even where the person has occupied the property for less than six months. This must be so because section 6 does not does not differentiate between those who have been occupation for less or more than six months." [Paragraph 51]

"I have taken into account the fact that the property is a bio-diversity and dune area which cannot be developed. I have also taken into account the deplorable conditions under which the respondents live as described by the respondents who have filed affidavit and I am of the view that it would be in the interest of all the parties concerned to find a speedy resolution of this matter" [Paragraph 54]

The eviction was stayed, and the applicant was ordered to engage with the respondent and report to the court within six months.

**ADMINISTRATIE JUSTICE**

**MAXWELE V UNIVERSITY OF CAPE TOWN 2016 JDR 0244 (WCC)**

**Case heard 25 August 2015, Judgment delivered 15 September 2015**

Applicant, a student at the respondent university, had gone to a university building on a public holiday to study. A dispute with a staff member ensued, which was reported. On receiving the report the Third Respondent, acting as a nominee of the Second Respondent, issued a first provisional suspension order against the Applicant. The first suspension order subsequently lapsed and the Applicant thereafter attended a suspension hearing when, despite the first provisional suspension order having lapsed, the Third Respondent issued a first final suspension order. The Applicant appealed against the first final suspension order, and the appeal was upheld by an appeal tribunal, with the first final suspension order being set aside. Applicant then received the second provisional suspension order arising from the same incident. Following a suspension hearing, the Third Respondent issued the second final suspension order.

Nuku AJ held:

"It is the Third Respondent who had issued the first provisional order and the first final suspension order. She issued the first final suspension order after having heard the representations from the Applicant. At this stage she would have heard to consider the matter fully before coming to her decision to issue the first final suspension order. This is the suspension order which was set aside on the basis that by the time the suspension hearing was conducted the provisional suspension order had lapsed and as such it could not be converted into a final suspension order. During the second suspension hearing the Applicant applied for the recusal of the Third Respondent on the basis that the Third Respondent could not be impartial or fair in dealing with the matter as she had issued the first final suspension order that had been set aside on appeal. The Applicant also called into question the fairness and impartiality of the process as the First Respondent had, after the setting aside of the first suspension order, announced in the media that another suspension order would be issued. The Third Respondent refused to recuse herself holding that the Applicant had not made out a case for her recusal." [Paragraph 37]

"In these proceedings it was argued on behalf of the Applicant that there was a basis for the Applicant to have a reasonable suspicion that the Third Respondent would be biased as she had dealt with the first suspension order. It was also argued that what created a reasonable suspicion of bias on the part of the Applicant was the fact that the First Respondent had issued a media statement … stating that it was set to issue another suspension order … It was argued on behalf of the Respondents that "the fact that a decision maker has already considered the matter once, is not a bar to the decision-maker considering the matter afresh and in this regard I was referred to section 8(1) (c) (ii) (aa) of PAJA which permits a court to substitute or vary the administrative action or to correct a defect resulting from the administrative action only in 'exceptional circumstances'. I was also referred to the Hamata case where it was stated that it is not bias to hold certain tentative vies about a matter." [Paragraph 38]

"Considering that the Third Respondent had dealt with the first suspension order, the fact that a day after the first suspension order was set aside she decided to issue another provisional suspension order and the fact that this was communicated to the media the Applicant's apprehension of bias on the part of the Third Respondent is not unreasonable. I am therefore satisfied that there were grounds requiring the Third Respondent to recuse herself from the second suspension hearing and that her failure to do so

must have given rise to the Applicant's reasonable suspicion of her bias. The second suspension hearing was thus tainted with bias." [Paragraph 41]

"Although the Applicant has argued that "The Third Respondent may essentially issue a series of suspension orders on a subjective belief that does not serve the objective purpose of the rules", the reading of the rules do not support this submission. The rules appear to be designed to give the Second Respondent discretion to issue a provisional suspension order which is operative only for 48 hours. Before he can issue such provisional suspension order he has to have reason to believe that the matter justifies the execution of a suspension order, which involves an objective test." [Paragraph 47]

"The power conferred on the Third Respondent can also be exercised after receipt of a report from a member of the University staff or a student who has reason to believe that the continued presence of the student against whom there is an allegation of breach of Student code is likely to pose a threat to the maintenance of good order within the University." [Paragraph 48]

"There are thus jurisdictional requirements that have to be met before a provisional suspension order can be issued." [Paragraph 49]

The decision of the third respondent to issue a final suspension order was reviewed and set aside.

**SAIDI V MINISTER OF HOME AFFAIRS 2016 JDR 0242 (WCC)**

**Case heard 3 November 2015, Judgment delivered 26 November 2015**

The applicants all had their applications for refugee status refused. Whilst their applications for refugee status were pending, they were all issued with asylum seeker permits. These permits were extended from time to time whilst the determination of the applications for refugee status was pending. All the applications for refugee status were then refused, and applicants instituted review proceedings to set aside the refusal of their applications for refugee status. After the institution of the review proceedings, the predecessor of the Third Respondent would extend the permits from time to time pending the finalisation of the review proceedings. This appeared to be done merely on being advised by the office of the State Attorney that review proceedings had been initiated in the High Court. However, a new office holder took the view that it was unlawful to extend the section 22 permits after an applicant had exhausted the internal appeal and review remedies provided for in the Act. Her attitude was that the Act empowered her to extend a section 22 permit after the applicant for refugee status has exhausted his or her review and appeal remedies, but that pending the outcome of the Court review, it was only a Court that coud direct her to extend the section 22 permit. As a result of that change in approach, the permits that had been issued to the applicants were either not extended or were not going to be extended.

Nuku AJ held:

"It is clear that sections 21 (4) and 22 (1) are concerned with a person who has applied for asylum up to the stage where such person has exhausted his or her rights of review or appeal in terms of Chapter 4 of the Act. It also appears that in respect of such a person the refugee reception officer is obliged to issue to the applicant a section 22 permit. In respect of section 21(4) this is clear from the following words used by the legislator, namely: "no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if – (a) such person has applied for

asylum in terms of sub Section (1), until a decision has been made on the application and where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4." ... In respect of section 22(1) it is also clear from the following words used by the legislator, namely: "the refugee reception officer must, pending the outcome of an application in terms of Section 21 (1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily" (my emphasis)." [Paragraph 9]

"Having regard to the fact that under section 22 (1) the Refugee Reception Officer is obliged to issue a permit up to the stage when the applicant has exhausted his or her review or appeal in terms of Chapter 4, It would be absurd to also give the refugee reception officer the discretion to issue the permit which in any event he is obliged to issue." [Paragraph 11]

"Clearly Section 22 (3) is designed to deal with instances where the Refugee Reception Officer is not obliged to issue the permit. Thus, the Refugee Reception Officer has the discretion to extend a section 22 permit. This power certainly is available to the Refugee Reception Officer in circumstances where an applicant for asylum whose application has been refused has instituted judicial review proceedings." [Paragraph 12]

"In am not persuaded that it would be appropriate order the Third Respondent to extend the section 22 permits to substitute the for the following reasons: The Third Respondent laboured under a material error of law and as such did not even exercise the discretion vested in her by Section 22 (3) of the Act; Except for the personal details of the applicants there is no material before the Court to assess whether or not it would be reasonable or otherwise of the Third Respondent to refuse or to extend the section 22 permits. This is a matter that requires consideration by the Third Respondent as she is now aware that she has the discretion to extend the section 22 permits." [Paragraph 20]

It was therefore held that the Third Respondent had a discretion to issue the section 22 permits, therefore that her refusal to do so on the basis that she had no statutory authority to do so was materially influenced by an error of law. Thus the Third Respondent's decision fell to be reviewed and set aside

## SELECTED JUDGMENTS

### PRIVATE LAW

**YB V SB AND OTHERS NNO 2016 (1) SA 47 (WCC)**

**Case heard 13 August 2015, Judgment delivered 13 August 2015**

Plaintiff and first defendant were married out of community of property, with accrual. Plaintiff instituted divorce proceedings, and sought to amend her particulars of claim. Plaintiff sought to join the trustees of a family trust, contending that assets of the trust were in fact beneficially owned by the first defendant, and that the acquisition of the trustees of these assets constituted simulated transactions, and as such fell to be set aside. The trustees objected to the proposed joinder on the ground that they were not necessary parties to the action.

Riley AJ held:

"Section 3 of the MPA [Matrimonial property Act] provides that at the dissolution of a marriage subject to the accrual system … the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses." [Paragraph 27]

"Section 12 of the Trust Property Control Act … provides that trust property shall not form part of the personal estate of the trustee, except insofar as he, as the beneficiary, is entitled to the trust property. … It is accepted law that the assets and liabilities of a trust vest in the hands of the trustees who are required to keep trust assets separate from their personal assets .... It is further accepted law that in their representative capacities trustees are obliged to deal with trust assets to further the interests of the beneficiaries and not to further their personal interest. …" [Paragraph 29 - 30]

"In the present matter the exception (objection) by the trustees of misjoinder is directed at the plaintiff's right to join additional defendants in one action, which is not confined to the joinder of necessary parties. …" [Paragraph 31]

"In my view an accrual claim is a sui generis claim, created by statute, which will result in the trial court having to determine exactly which assets are owed by a spouse and the value of such assets. I do not agree … that the right of a spouse married according to the accrual system is necessarily limited to a monetary claim. Section 10 of the MPA provides that the court may make orders regarding the satisfaction of the claim, including 'the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just'. It therefore follows that the court could award an asset to the plaintiff in satisfaction of her accrual award. …" [Paragraph 34]

"I agree with [counsel for Plainitff] that a crucial issue which the trial court will have to determine in assessing the extent of the first defendant's estate for the purposes of the plaintiff's accrual is whether the assets ostensibly held in the name of the trustees are in fact beneficially owned by the first defendant ... I have no doubt that this will involve controversial factual and legal issues in the divorce trial. In my view the argument that the determination of the plaintiff's accrual claim involves purely an 'arithmetical calculation' is an over-simplification of the issue ..." [Paragraph 35]

"... Considering the issues involved, it seems to me that, based on dictates of convenience, fairness, good sense and reasonableness, there ought not to be a multiplicity of actions where the issues are so closely interlinked. It is now commonly accepted that the expeditious disposal of litigation is often best served by ventilating all the issues at one hearing. ... Since there are no reported decisions in this division on the question as to whether it constitutes a misjoinder to join the trustees of a family trust in the context of an accrual claim in a divorce action, where a spouse contends that the assets of the family trust are in fact beneficially owned by the other spouse, and accordingly are subject to his or her accrual claim, it is necessary to consider the approach adopted by other courts on the issue." [Paragraphs 36 - 37]

Riley J considered several High Court decisions, and continued:

"... [I]n the present matter, plaintiff essentially avers that transactions reflecting that assets were acquired and held in the name of the Ruby Trust are simulated and that such assets are in truth assets which from the outset fall within the personal estate of the first defendant, and must accordingly be taken into account for the purposes of calculating the accrual in his personal estate." [Paragraph 47]

"It is abundantly clear, on the pleadings, that it is plaintiff's case that ownership of the assets of the trust never properly vested in the trustees, that such assets were held merely ostensibly in the name of the trustees, and that their and the first defendant's intention was that the first defendant would control and beneficially own such assets as if they were his personal assets. In my view it is accordingly not necessary for plaintiff to plead and to prove that the trust deed was a sham to substantiate a claim in respect of the trust assets." [Paragraph 52]

"I am satisfied that when deciding the misjoinder exception I am not required to, nor is it competent for me to, exercise my discretion regarding the granting of the declaratory relief sought or to surmise as to how the divorce court will exercise such discretion. In my view all that I am required to do ... is to decide whether in law it is legally competent to grant the declaratory relief sought against the trustees in the present matter." [Paragraph 60]

"... I find that a joinder of the trustees ... to seek binding declaratory orders against them regarding the ownership of assets ostensibly held in the name of the trustees, as well as the ancillary relief to reflect the true ownership, is convenient and fair ..." [Paragraph 64]

The application for amendment was granted.

## CIVIL PROCEDURE

**VAN DEN BERG V TAXING MASTER, WESTERN CAPE HIGH, CAPE TOWN 2014 JDR 2700 (WCC)**

**Case heard 23 April 2014, Judgment delivered 14 June 2014**

This was a review of taxation. The issues to be determined were whether the deponent to the Second Respondent's answering affidavit, the chairperson of the Cape Bar Council, was duly authorised to depose to an affidavit, and whether the applicant's application for leave to amend its notice of motion to include an additional prayer "directing the respondents to pay the Applicant's costs on a scale as

between attorney and client" should be granted, and whether Applicant was in any event entitled to costs in the event of any of the Respondents opposing the application.

Riley AJ (Le Grange J concurring) rejected the challenge to the chairperson's authority, and proceeded to consider the application for amendment:

"It is not necessary to go into too much detail about the background and the events leading up to the taxation of Second Respondent's bill of costs ... What is however clear and undisputed is that there existed severe tension and acrimony between Applicant and Second Respondent's attorneys of record from the time that Applicant received the notice of taxation ... The tension and animosity is further illustrated and highlighted with reference to the serious accusations levelled by Applicant against Koen, Second Respondent's attorney of record. Applicant inter alia accused Koen of the following: - (1) filing a false certificate in terms of Rule 70; (2) having been made aware of the falsity thereof persisting on having the bill taxed on the scale as between attorney and client, and (3) claiming for costs of three counsel well knowing Second Respondent was only entitled to costs for two counsel." [Paragraph 21]

"The fact of the matter is that at the time that Applicant brought his application for the review of the taxation he was fully aware about all the trouble and frustration that Second Respondent's attorneys had caused him up until then. The correspondence reeks of acrimony and tension." [Paragraph 23]

"I pause to mention that even though the taxation took place on 14 December 2009 and Applicant launched his review application on 25 January 2010, he made no attempt whatsoever to address correspondence to Second Respondent's attorneys to advise them of their error in proceeding with the taxation in his absence, nor did Applicant request them to agree to have the taxation set aside. This in my view would certainly have resulted in costs being drastically curtailed. Based on the facts and circumstances of this matter I find that the bulk of the costs incurred in this matter is in fact as a result of Applicant and his legal team's own doing." [Paragraph 26]

"On the papers before me it is evident that it was the First Respondent who proceeded with the taxation even though he was in possession of the letter in which Applicant requested a postponement." [Paragraph 27]

"I find it strange that after service on Applicant of the notice of taxation ... that Applicant did not address any correspondence to them ... or at the least, telephoned them to complain that the date did not suit him or his cost consultant. It seems logical that the Second Respondent's attorneys would be the first to be notified about the problems he had with the date if one considers the prior correspondence between the Applicant and Second Respondent's attorneys. Applicant failed to do this, even though the issue relating to the taxation of the bill had consumed his time and effort for almost a year." [Paragraph 28]

"In my view it is inconceivable and illogical for Applicant to suggest, that as very seasoned practitioners in the law, he and his legal team would have omitted to include a prayer for costs if that is what his original intention was. ... It is further highly unlikely and improbable that bearing in mind the history of the matter and the extreme acrimony between the parties that he would have forgotten to include any reference to costs in his founding affidavit ... I am therefore not persuaded by the argument that it was his original intention to claim costs. If one looks at the correspondence between Applicant and particularly Second Respondents' attorneys his chief complaint relates to the unnecessary costs incurred by him seemingly as a result of the Second Respondent's unreasonable attitude. The issue of costs would therefore have been alive in his mind at the time when the affidavit was prepared. He had the affidavit

with him for at least a week before the application was brought. It is also strange that he would not or did not have sight of the notice of motion prior to the application being launched. ...” [Paragraphs 34 - 35]

“... [T]he Applicant gave two contradictory versions for why costs were not asked for originally. I have already expressed my reservations in this regard. In my view the affidavits filed by the Applicant are severely lacking in detail and particularity in regard to the absence of any reference to costs being sought against either First or Second Respondent. In addition I have mentioned that both Applicant's attorneys of record as well as counsel have failed to go on affidavit to explain how it came about that they failed and neglected to deal with the important issue of costs in the papers.” [Paragraph 47]

“Applicant has not given a satisfactory explanation for having omitted the most important issue relating to costs, from his founding affidavit or the original notice of motion. ... The real position it would seem is that there was never any intention to ask for costs in the first place. ... I am therefore not persuaded that applicant is *bona fide* in the relief sought.” [Paragraphs 48 – 49]

The application was dismissed.

## CRIMINAL JUSTICE

**S V NDZOLA AND ANOTHER 2016 (1) SACR 320 (WCC)**

**Case heard 7 May 2010, Judgment delivered 7 May 2010**

Appellants were convicted in the regional court on one count of murder, and sentenced to an effective 12 years’ imprisonment. Leave to appeal was granted against sentence only.

Riley AJ (Allie J concurring) held:

“When sentencing the appellants, the regional magistrate placed reliance solely on what was presented to him on an ex parte basis by the legal representatives of the appellants. The information in regard to their personal circumstances was sparse, to say the least. At the time of sentence the first appellant was 19 years old and he was unmarried with no children. At the time of the incident he was 17 years old and in grade 10 at school. He had been in custody since his arrest ... for almost a year. At the time of the sentencing proceedings, the second appellant was also 19 years old. He also was 17 at the time of the commission of the offence. He is unmarried and at the time of his arrest was in grade 9 at Ned Doman High School. He is a first offender and he had similarly been in custody since his arrest ... Both legal representatives urged the court a quo to have regard to the fact that the appellants were still very young at the time of the commission of the offence. They further requested the court to deviate from imposing the minimum sentence. ...” [Paragraphs 9 - 10]

“It is clear that the second appellant's legal representative felt that a probation officer would be able to investigate the second appellant's circumstances and provide the court with a much better picture about second appellant's personal and other circumstances for sentence purposes. It is clear ... that the regional magistrate had at that stage already made up his mind that he intended to impose direct imprisonment without considering other sentencing options. He completely ignored the request for a pre-sentence report which in my view shows a clear predisposition on his part. ... Our courts have consistently

emphasised the importance of obtaining a pre-sentence report in the case of juvenile offenders, even if the offender were over the age of 18 at the time of the commission of the offence. ...” [Paragraphs 11 - 12]

“... I am satisfied that the regional magistrate misdirected himself when he ignored the request by the second appellant's legal representative for a probation officer's report. In my view he ought to have requested the probation officer's report of his own accord after convicting the appellants. In his rush to finalise the matter in the way that he did, the regional magistrate also lost sight of the fact that when dealing with juvenile offenders, the court must exercise its wide sentencing discretion sympathetically and imaginatively, to determine a sentence which is suited to the accused, in the light of his personal circumstances and the crime of which he stands convicted. This enables, firstly, the determination of the most appropriate form of punishment and, secondly, the adaptation of that punishment to suit the needs of that particular accused. ... The regional magistrate also completely ignored the element of rehabilitation when dealing with juvenile offenders. ...” [Paragraphs 13 - 14]

“What is further apparent from the regional magistrate's judgment on sentence is that it contains no reference whatsoever to the provisions of s 28 of the Constitution, which, together with international instruments, for example, the United Nations Convention on the Rights of the Child (1989) from which it originated, have brought about significant changes to the sentencing regime concerning the incarceration of juveniles. The regional magistrate's judgment and sentence do not manifest that such changes have been given any recognition by him, nor that they have been implemented by the court a quo.” [Paragraph 15]

“In his judgment the regional magistrate accepts that where an accused is over 16, but younger than 18, at the time of the offence, that the court is not obliged to apply the minimum sentence legislation. ... Apart from emphasising that a reasonably long term of imprisonment must be imposed so as to create an awareness with juveniles that this kind of behaviour will not be tolerated, he provides no further reasons or motivation for imposing the effective 12 years' imprisonment ... In terms of the law as it stands, the appellants who were both offenders under 18, though over 16, do not have to establish the existence of substantial and compelling circumstances, because s 51(3)(a) does not apply to them. The approach adopted by the regional magistrate to sentence in this matter amounts in my view to a misdirection ...” [Paragraphs 17 - 18]

“Due to their tender age at the time of the commission of the offence and their relatively young age at the time of sentence, I must take into account that there is a need to give the appellants an opportunity to rehabilitate. It is, however, also necessary for the court to place the youthfulness of the appellants in proper perspective, lest we forget that they have been convicted of a very serious and heinous crime, which calls for a sentence that is proportionate to their deserts. ...” [Paragraph 20]

“In my view an effective period of 12 years' imprisonment is unjust because the appellants are juveniles, one of them is a first offender, and they should be given a chance to rehabilitate their behaviour in preparation for their reintegration back into their families and society. This court is enjoined to strike a balance between the seriousness of the crime, the interests of the victim and society, as well as the constitutional protection of young persons below 18 years of age, in terms of s 28(1)(g) and s 28(2) of the Constitution. These subsections promote the best interests of the child by instructing that the child should be detained for the shortest appropriate time. ... It is true that where crime is serious and prevalent, particularly where it threatens the wellbeing of society, courts should impose appropriate sentences. The crime of which the appellants have been convicted is heinous. The deceased was himself

still a child of 14 years old. He was pursued by the appellants and others, who set upon him and viciously attacked and stabbed him to death. Our courts should never create the impression that human life is cheap in the eyes of the law. In this matter there is no other legitimate sentencing option than imprisonment. Since imprisonment is unavoidable, I shall, however, temper the duration thereof." [Paragraphs 21 - 22]

The appeal was upheld, and the appellants' sentences substituted with sentences of 10 and 8 years' imprisonment respectively.

**WILLIAMS V S (A118/2015) [2015] ZAWCHC 179 (27 NOVEMBER 2015)**

**Judgment delivered 27 November 2015**

Appellant was convicted in the Regional Court on two counts of rape of a girl under the age of sixteen years old, and was sentenced to life imprisonment. The appeal was against conviction and sentence.

Riley AJ (Saldanha J concurring) held:

"... [T]he complainant is a child and a single witness who testified in respect of a sexual offence. It is trite law that an accused may be convicted of any offence on the single evidence of any competent witness. It is now accepted law that when considering the credibility of a single witness that a trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings, defects or contradictions in the evidence. ... Although our law no longer recognises a cautionary rule in sexual offences matters, it is accepted that the evidence in a particular case may call for a cautionary approach. ... It is also generally accepted that when courts scrutinise and weigh the evidence of young children, complainants in sexual cases and the evidence of a single witness, that the court should not allow the exercise of caution to displace the exercise of common sense." [Paragraph 16]

"... I am satisfied that the trial magistrate was very much alive to the fact that she was dealing with the evidence of a child who was a single witness in a sexual offence and that the court was required to find certain safeguards or guarantees for the reliability of the evidence of the complainant. ... I am further satisfied that the magistrate was mindful that due to the nature of the charges that the evidence of the complainant had to be approached with caution. The trial magistrate found guarantees for the reliability in the complainant's version in the fact that she reported the rape to her niece and in the medical evidence which corroborated a finding of forced sexual intercourse. ... The trial magistrate further found that even though there are discrepancies and or contradictions in the evidence between the complainant and the other witnesses that the discrepancies or contradictions are not of such a nature so as to result in the rejection of the whole of the complainant's or the evidence of the witnesses." [Paragraph 17]

"There is no merit in the criticism levelled against the complainant that she did not cry for help and or that she did not run away at the time that the rape occurred. On the evidence, the complainant did scream for help. She further testified that she could not flee as appellant was next to her. He had produced a knife, threatened her with it and told her to undress. When she refused, he held the knife against her throat and told her he would kill her. During the time that he raped her, he had the knife in his hand and held it next to her head. Considering the situation that she found herself in, she can hardly be criticised for not running away." [Paragraph 18]

“The crime of rape is repulsive and has been described as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity. … [W]here there are no substantial and compelling circumstances in crimes like the present … courts must not hesitate to impose the ultimate sentence prescribed. ” [Paragraphs 27 - 28]

“What is undoubtedly aggravating is that the appellant has several previous convictions. Due to the fact that he committed diverse offences habitually over the years from 1972 onwards, he was declared a habitual criminal in terms of s286 of the Criminal Procedure Act … on 13 December 1984. Of greater concern is the fact that he has three previous convictions for rape and one for attempted rape ... In addition the appellant has been convicted and sentenced for sodomy … and indecent assault ... On a consideration of his previous convictions, it is clear that the appellant has a tendency to commit rape and other serious sexually related offences. … The appellant’s previous convictions indicate that he poses a serious threat to women and children in society. He has further shown that he is not deterred by the lengthy terms of imprisonment that courts have imposed on him in the past. …” [Paragraphs 32 - 33]

“In matters of this nature the victim is the focal point and the goal must be to give proper consideration to the physical, emotional, psychological impact of the crime on the victim. … [I]t is disturbing that notwithstanding the seriousness of the offence and particularly considering that life imprisonment is prescribed by the legislature, that no victim impact report was prepared for the court, nor was proper evidence presented by an expert on the emotional and psychological impact of the rape on the complainant or her family. It does not appear that the complainant was assessed for trauma arising from the rapes nor was she or her family subjected to therapy by suitably qualified experts. It is with great concern that I have noted that in appeals which have come before me in recent times that prosecutors in the regional courts have adopted the practice of substituting victim impact reports, prepared by experts, with what is known as a victim impact statement, at the sentencing stage. ... Of course it is important that the victim is allowed to express his/her personal views of the impact of the rape or sexual assault on him/her and that the sentencing court must give proper consideration to the views of the victim when considering an appropriate sentence. There can however be no doubt that a victim impact statement and a victim impact report prepared by an expert can never be placed on the same footing. ... In this matter the complainant should have been assessed by a suitably qualified expert to determine the impact of the psychological, emotional, physical and other trauma that she suffered on the date the rape was reported or at the least very shortly thereafter. In the event where follow up treatment or therapy was required, it should have been implemented and the complainant and/or victim should have been monitored so that whatever reports were prepared could be supplemented or amended so that they could be presented to the court at the sentencing stage. Depending on the circumstances of the case, it may also be necessary that victim impact reports be prepared in respect of the family members of the victims.” [Paragraph 35]

“Considering the constitutional principle that the best interest of the child is paramount, prosecutors have an obligation to obtain a properly prepared victim impact report in respect of a child victim of rape or sexual assault and they are required to approach matters of this nature with thoughtful preparation, patient and sensitive presentation of all the available evidence with meticulous attention to detail. ... Failure to do this will result in a disservice to the victims of such crimes and result in a situation where a sentencing court will be unable to make a proper assessment of the psychological and emotional trauma suffered by victims in cases of this nature for the purposes of deciding on an appropriate sentence.” [Paragraph 36]

The appeal was dismissed. It was ordered that a copy of the judgment be sent to the Director of Public Prosecutions, who was directed to ensure an assessment by an expert on the trauma suffered by the complainant and her family. The DPP was then requested to provide a report to the court.