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

SEPTEMBER 2015

INDEX TO THE REPORT		PAGE NUMBER
Submission and Methodology		3
Research report		
COURT	**CANDIDATE**	
Eastern Cape High Court (Bhisho) (Deputy Judge President)	Judge Mandela Makaula	7
	Judge Selby Mbenenge	16
	Judge David Van Zyl	22
Eastern Cape High Court (Mthatha) (Deputy Judge President	Judge Zamani Nhlangulela	32
Eastern Cape High Court (Port Elizabeth)	Advocate Richard Brooks SC	39
	Advocate Elizabeth Crouse	46
	Advocate Mkuseli Ndzondo	55
Free State High Court	Advocate Peter Fisher SC	58
	Ms Nobulawo Martha Mbhele	64
	Mr Jamela Mhlambi	68
	Ms Shanaaz Mia	75
	Mr Nkopane Phalatsi	81
	Advocate Louis Pohl SC	88
	Advocate Celeste Reinders	93
Gauteng High Court	Judge Annali Basson	99
	Ms Colleen Collis	109
	Advocate Norman Davis SC	114
	Advocate Raylene Keightley	120
	Ms Nelisa Mali	130
	Mr Lusapo Maseti	136
	Mr Mandla Mbongwe	141

	Ms Lebogang Modiba	147
	Mr Thifhelimbilu Mudau	153
	Advocate Rean Strydom SC	158
	Mr Mpostoli Twala	164
	Advocate Willem Van der Linde SC	169
KwaZulu – Natal High Court (Deputy Judge President)	Judge Shyam Gyanda	172
	Judge Gregory Kruger	179
	Judge Mjabuliseni Madondo	187
	Judge Simon Ndlovu	196
	Judge Kate Pillay	205
KwaZulu – Natal High Court	Advocate Pieter Bezuidenhout SC	212
	Professor Karthy Govender	216
	Ms Sharon Marks	222
	Advocate Glenn Thatcher SC	227
Labour Court	Advocate Connie Prinsloo	233
	Mr Tshidiso Tlhotlhalemaje	241
Northern Cape High Court	Advocate Sharon Erasmus	250
	Advocate Lawrence Lever SC	255
	Ms Mpho Mamosebo	262

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 JSC interviews in September 2009, October 2010, April and October 2011, April, June and October 2012, February, April and October 2013, April and October 2014, and April and July 2015.

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, and do not provide analysis or criticism of the judgments summarised. Our intention in doing so has always been to attempt to move beyond the often partisan and personalised debates surrounding the suitability of candidates for judicial appointment. Instead, we hope to further a deeper analysis of the criteria in terms of which judicial appointments are made, and enable stakeholders to assess how a candidate's judicial track record matches up to those criteria. The report does not seek to advocate, explicitly or implicitly, for the appointment of any candidate.

5. We have searched for judgments on the *Jutastat, 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. Regarding candidates for the KwaZulu-Natal and Eastern Cape 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. For Labour Court candidates, we have obviously focused on labour law judgments.

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. 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.

8. We 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.

9. 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.

10. The themes under which judgements are grouped are the following:
    - 10.1. Private law;
    - 10.2. Commercial law;
    - 10.3. Civil and political rights;
    - 10.4. Socio-economic rights;
    - 10.5. Administrative Justice;
    - 10.6. Constitutional interpretation (structural provisions of the Constitution and governance issues);
    - 10.7. Environmental Law;
    - 10.8. Labour Law;
    - 10.9. Civil Procedure;
    - 10.10. Criminal justice;
    - 10.11. Children's' rights;
    - 10.12. Customary law; and
    - 10.13. 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.

11. 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.

12. 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.

SUBMISSIONS REGARDING THE INTERVIEW PROCESS

13. Members of the commission will no doubt be familiar with most of our core submissions regarding the interview process, and we will not repeat these in this submission. We do wish to take the opportunity briefly to raise two points: regarding the timeframe for submissions, and the time allocated to interviews.

Timeframe for submissions

14. We have raised this issue since the April 2014 interviews, urging that interested organisations be given more time to comment on the shortlisted candidates. In April 2014, we noted that there was effectively 3 weeks or less available for interested organisations to comment.

15. For these interviews, the shortlist was announced by the JSC secretariat on 4 September 2015, and comments were requested by no later than 21 September 2015. This is a period of 18 days, inclusive of weekends. As the JSC's formal announcement notes, 40 candidates were shortlisted to be interviewed at this sitting of the JSC.

16. We respectfully submit that this is far too short a time frame for interested stakeholders to engage fully with the track records of the shortlisted candidates. For the reasons set out in our previous submissions, we submit that this is an undesirable state of affairs, and all parties would benefit from a longer time period within which to analyse and comment on the shortlisted candidates.

17. We therefore again urge the JSC to seriously consider taking the necessary steps to provide a longer period of time between the shortlist being announced, and the deadline for comments.

The time allocated to interviews of candidates

18. In the course of observing the JSC process, we have on several occasions commented on the time allocated to the interviews. We have at times criticised the inconsistency in time keeping between different candidates, and at other times criticised interviews for being too short and giving the appearance of being perfunctory.

19. In this light, we commend the commission for the rigour shown, in particular, in interviewing candidates for leadership positions during the April 2015 sitting. We believe that an in-depth and thorough interview will be the best way for the commission to come to an informed view about candidates' suitability for appointment – provided, of course, that questioning is fair and relevant (a topic which we have canvassed in many of our previous submissions).

20. This approach did, however, result in problems when proceedings ran far beyond the times scheduled. This was most noticeable on the first day of interviews, when the commission adjourned at midnight, without having completed interviewing all the candidates scheduled to be heard that day.

21. The problems of fairness that this presents, both to candidates and to commissioners, is readily apparent. It was identified by commissioners at the time when the question of how the commission should proceed was raised.

22. We would not wish to see the commission being discouraged from conducting full and rigorous interviews by such events. We submit that a simple approach is to ensure that more time is allocated to interviews, which would seem desirable in any event. It may also be that there are grounds to differentiate between different categories of appointment. A one hour allocation may still be seen as appropriate for entry-level superior court appointments, but leadership and appellate court positions may require longer time allocations.

ACKNOWLEDGEMENTS

23. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was conducted by Chris Oxtoby, DGRU researcher, Musa Kika, DGRU intern, and Godknows Mudimu, Kelly Kowalski and Catherine Kruyer, DGRU research assistants.

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

DGRU

21 September 2015

SELECTED JUDGMENTS

LABOUR LAW

NGIDI V MINISTER OF HOME AFFAIRS AND OTHERS (1481/07) [2011] ZAECMHC 16

Case heard 25 May 2008, Judgment delivered 23 September 2011

The applicant was employed by the Department of Home Affairs as a Senior Administrative Clerk. She was dismissed for accepting a gift of a cool drink from a customer. Her internal appeal was unsuccessful, and she sought an order directing the first respondent to reinstate her for several reasons, including being denied legal representation in the disciplinary proceedings, and that she had not been informed by the presiding officer of a provisions of the staff code which did not make it an offence to accept a gift which is less than R350.00 in value.

Makaula J held:

"It is most important that I should mention upfront that the delay and the inconvenience caused to the parties by delivering this judgment so late is regretted." [Paragraph 1]

"What is of foremost importance is for me to determine whether this court has jurisdiction to review the decision of the first respondent. ..." [Paragraph 12]

"... On this aspect, the respondent submitted that neither Section 33 of the Constitution nor PAJA clothe this court with jurisdiction. In the alternative, the first respondent argues that the dismissal of the applicant did not constitute an administrative act. That the first respondent, an organ of state, exercised a public power did not transform its conduct in dismissing the applicant into an administrative act, so contends the first respondent. According to the first respondent its actions are covered by Section 23 of the LRA and subsequently, by ... resolutions ..." [Paragraph 14]

"... [T]he applicant is a member of Nehawu hence she was represented as such both at the hearing and on appeal. ... The collective bargaining agreement was signed and endorsed by Nehawu and the first respondent and was in force at the time of her dismissal. The collective bargaining agreement binds both the employer and trade unions and their members, which is the first respondent and the applicant herein. The agreement regulates their relationship and deal with the dispute resolution mechanisms and the conduct of disciplinary enquiries. ..." [Paragraph 17]

"... Part 2 and 3 of Resolution 4 of 2004 deals with the procedure to be followed when a dispute such as the present one arises between the parties. In terms thereof, the dispute has to be referred for conciliation and arbitration if it remains unresolved. The applicant admits, this, but insists that there is nothing that precludes her from bringing this application based on PAJA before this court. I disagree ..." [Paragraph 18]

"Mr Noxaka, for the applicant, correctly in my view, argued that this court has jurisdiction founded on PAJA. He based his argument in the decision in Fredericks & Others v MEC for Education & Training Eastern Cape & Others. The debate about concurrent jurisdiction between the Labour Court and the High Court has been settled. …" [Paragraph 19]

"It is common cause that the first respondent is an organ of state and that the second respondent was acting under the auspices of the first respondent. … [T]he applicant and the first respondent entered into a contract of employment which is basically regulated by the LRA and mechanism provided therein such as the collective bargaining agreement referred to." [Paragraph 23]

"It is apparent that when the first respondent exercised the power of terminating the employment contract basing its decision on the outcome of the misconduct enquiry, it was not exercising a power in terms of the Constitution or a Provincial Constitution or public power or the performance of a public function in terms of any legislation as required by PAJA." [Paragraph 24]

"Section 33 (1) of the Constitution concerns itself with the review of acts which are by nature administrative. I agree … that the focus of the enquiry as to whether conduct constitutes administrative action, is not dependent on the position which the functionary occupies but rather on the nature of the power being exercised. …" [Paragraph 25]

"Reliance by Mr Noxaka on the Chirwa judgment in this aspect is misplaced. …" [Paragraph 26]

"I further agree … that the subject matter of the power involved in this matter is the termination of the employment contract due to misconduct by the applicant based on the employment contract … The act complained of does not involve the implementation of legislation which constitutes an administrative action." [Paragraph 30]

The application was dismissed with costs on the basis that applicant ought to have referred the matter for conciliation by the General Public Service Sectoral Bargaining Council.

CIVIL PROCEDURE

BAHLE V MINISTER OF SAFETY AND SECURITY AND ANOTHER (362/09) [2012] ZAECMHC 7

Case heard 25 January 2012, Judgment delivered 12 April 2012

The plaintiff sued for, inter alia, unlawful arrest, unlawful detention and contumelia. The defendant raised a special plea to the effect that the plaintiff had failed to comply with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act (the special plea cited the incorrect sections of the Act). The plaintiff introduced two letters as evidence, the

first being a notice of intention to institute legal proceedings addressed by the plaintiff to the defendant, and the second a response by the Office of the Provincial Commissioner to the plaintiff stating that the matter had been referred to Mthatha Police Station. At issue was whether the plaintiff complied with the provisions of the Act by serving the notice on the defendant instead of the National or Provincial Commissioners. The plaintiff argued that there was substantial compliance with the Act to the extent that the defendant received the notice and acted upon it immediately, hence the response by the Provincial Commissioner.

Makaula J held:

"Schedule 1 to the Public Service Act … requires that the notice in terms of the [Institution of Legal Proceedings Against Certain Organs of State] Act should be served with the National Commissioner of the South African Police. …" [Paragraph 10]

Makaula J rejected the relevance and applicability of the cases *Nkisimane & Others v Santam Insurance Co Ltd* and *Unlawful Occupiers, School Site v City of Johannesburg*, which the plaintiff cited as authority for the fact that substantial compliance was sufficient. Makaula J considered these cases to be factually different from the present matter:

"The issues dealt with in both Nkisimane and Unlawful Occupiers are found in Section 3(2)(b) of the Act which requires that the notice should briefly set out (i) the facts giving rise to the debt; and (ii) such particulars of such debt as are within the knowledge of the creditors. Section 4 (1)(a) of the Act deals with the manner of service of the notice and not the contents of the notice." [Paragraph 12]

"The facts bear out that the defendant received the notice albeit it contrary to the provisions of the Act. Having received it, the defendant referred it to the proper functionary hence the Provincial Office's response … The contents of the statement are not in issue, what is in issue is the service of the notice. The plaintiff partially complied with the provision of the Act but for failure to serve on the National or Provincial Commissioners … The defendants strongly argue that such failure to strictly comply with the provisions of the Act must not be condoned. I, with respect, disagree. I find the following dictum by Davis J apposite to the issue at hand; "Insistence that a court cannot under any circumstances condone a deviation from strict compliance may, to some extent, run counter to the inherent jurisdiction of the court." I am therefore of the view that there has been substantial compliance with the provisions of Section 4 (1) (a) of the Act". [Paragraph 13]

Makaula J disagreed with the defendant's argument that the failure by the plaintiff to bring a substantive application for condonation was fatal, and dismissed the special plea with costs.

VAN DER MERWE v FIRSTRAND BANK LTD t/a WESBANK AND BARLOWORLD EQUIPMENT FINANCE 2012 (1) SA 480 (ECG)

Case heard 27 May 2010, Judgment delivered 7 October 2010

The applicant was a farmer who received a loan from the respondent to purchase a tractor. He defaulted in the payments, the respondent repossessed the tractor, sold it, and then issued summons for the balance from the applicant. Following misunderstandings between the applicant and his attorney that a settlement agreement had been reached, and that the attorney of record had withdrawn his services while on the other hand the applicant believed there was no withdrawal of services, the matter was set down and the court granted judgment in favour of the respondent. The present case was an application in terms of Rule 42 (1) (a) of the Rules of this Court, for the rescission of the order granted by the same court against the applicant.

Makaula J held:

"The applicant received advice from his present attorneys and counsel that the judgment obtained was either erroneously sought, or erroneously granted due to non-compliance with Rule 34 (1)." [Paragraph 6]

"The question to be answered in casu is whether the respondent was substantively or procedurally entitled to judgment in terms of Rule 34 (7) application." [Paragraph 12]

"Offers of settlement and tenders to perform, must comply with the requirements of Sub-rules 34 (1)-(4). When an offer of settlement is made by a defendant to a plaintiff to pay a sum of money, the offer must be: (a)a written offer; (b) signed personally by the defendant or by the defendant's attorney if the latter has been authorised thereto in writing." [Paragraph 14]

"The wording of Rule 34 (1) is clear and unambiguous and spells out the peremptoriness thereof. This is evinced by the use of the word "shall" after the word "offer". In my view, this means that it is obligatory for the offer to be signed by the attorney only when he or she has been given written authority to do so by the defendant. My interpretation therefore resonates with the submission … that the provisions of Rule 34 (1) are substantive, rather than procedural in nature." [Paragraph 15]

"Both parties have agreed that the application stands to be decided in terms of Rule 42 (1) (a) which provides as follows: "1. The court may, in addition to any other powers it may have, mero motu or upon the application of any other party affected, rescind or vary: (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby …"" [Paragraph 17]

"It is common cause between the parties that the applicant was neither present nor represented at court when the order was granted. It is furthermore common cause between them that there was nothing procedurally wrong with the manner in which the judgment or order was obtained.

It is further common cause that at the time the order was sought there was non-compliance with Rule 34 (1)." [Paragraph 18]

"... [T]he respondent was not aware that there had been non-compliance with Rule 34 (1) for want of the written authority by the applicant. ... It is apparent that compliance with Rule 34 (1) is not procedural in nature but requires as a matter of law, that an offer be signed by the defendant or by his attorney on condition that he had been given written authority to do so. ... To the extent that the present error is fundamental to the requirements of Rule 34 (1), non-compliance therewith cannot be condoned. ..." [Paragraph 26]

"In the light of the aforegoing, I am of the view that the applicant is entitled to the relief he seeks. Even though the applicant is successful ... the aspect of costs should be reserved for determination by the trial court because there is no indication that the respondent was aware that there was non-compliance with Rule 34 (1) at the time the order was sought and granted." [Paragraph 27]

The order was rescinded, and the applicant granted leave to defend the action.

CRIMINAL JUSTICE

S V XIMIYA (CC91/14) [2015] ZAECBHC 9

Case heard 16, 17 & 18 February 2015, Judgment delivered 19 February 2015

This Was a sentencing judgment following conviction of the accused for robbery and the murder of a 71 year old farmer.

Makaula J held:

"Death of a human being through killing has devastating and dire consequences for the family of the deceased person. It results in financial, emotional, traumatic and psychological problems on those close and around the deceased. Its adverse effects can never be adequately described and the pain it causes cannot be measure in anyway. The pain and helplessness that one feels cannot be verbalized. The same is felt by the deceased family in this matter." [Paragraph 2]

"I may unashamedly say that the deceased had succeeded to look after himself but for the actions of the accused. ... Cutting somebody's life through violence more especial violence which is perpetrated by criminality needs to be condemned and meted out with appropriate punishment. " [Paragraph 4]

"What is now colloquially termed "farm killings" is rife in our country. Farmers who contribute quite substantially to our economy in the recent years have been targeted by criminals. Such conduct has been condemned and still needs to be condemned. Farm killings are sporadic and

need to be knipped in the bud. In my career I have dealt with several cases involving people like the accused who go around robbing and killing farmers especially those who are as old or more as the deceased in this matter. Communities and the government are really affected by these senseless killings of innocent and law abiding members of our community." [Paragraph 5]

"I cringe to think that the deceased in this matter lost his life for absolutely no reason. The only valuable items that were stolen from his farm were left thrown away i.e. the car and fire-arms. Nothing of value apart from the rings was taken away and recovered." [Paragraph 6]

"It is a miracle that the life of Mrs Troskie and the grandchildren was spared. She should thank God, if she is a Christian like I am, that she was not raped. I, however, have to take into account that she was severely injured. I alluded to her injuries in my judgment …" [Paragraph 7]

"The accused played a pivotal role before and after the commission of these offences … The evidence clearly establishes that he switched off the lights when they got to the farm, grabbed and assaulted Mrs Troskie causing her the injuries … He took and removed the items which have been recovered. All these things should be viewed in the backdrop that from the time they left town to come to the deceased's farm, they armed themselves with fire-arms which they used in the killing of the deceased. … This was a planned and well orchestrated robbery." [Paragraph 8]

"In considering sentence, I have to have regard to the personal circumstances of the accused. He was 25 years at the time of the commission of the offences. He is not married though he has 2 children aged 3 and 7 years respectively. He was maintaining them though they stayed with their mothers at the time of his arrest. He was working earning a sum of R3 500.00 per month in a road construction company. Mr Solani, for the accused further submitted that the accused is a candidate or a person who is capable of rehabilitation. Indicators for such are that the accused did not run away, he made a clean breast by confessing and pointing out the crime scenes to the police, so submitted Mr Solani. The parents of the accused are deceased and he lived with his grandparents …" [Paragraph 9]

"The accused did not show any remorse as suggested … The accused changed his defence in order to suite the circumstances of this case. He has not shown, at most, any signs of contrition that was expected of him or any reasonable person in his position especially that he alleges to have been forced in the commission of the offences. Much was expected of him under those circumstances. The age of the accused cannot count in his favour for anything in this matter. He was a grown-up who clearly could discern between right and wrong, what is barbaric and not. He therefore cannot benefit from his age if one has regards to how the deceased was lured outside three times to be killed on the third occasion." [Paragraph 11]

"I, therefore, find no substantial and compelling circumstances in respect of counts 1, 2 and 3. …" [Paragraph 12]

The accused was sentenced to life imprisonment on the count of murder; fifteen years imprisonment on each of the counts of robbery with aggravating circumstances and unlawful

possession of firearms; three years imprisonment on a further count of unlawful possession of firearms; and two years imprisonment on a count of unlawful possession of ammunition.

S V MAKHENDLANA (CC10/2015) [2015] ZAECGHC 40

Case heard 20 & 21 April 2015, Judgment delivered 22 April 2015

This was a decision on sentencing, the accused having been found guilty of raping a 57 year old woman after entering her house and asking for water.

Makaula J held:

"In addition to these injuries the complainant testified that she lost two teeth and those on the lower jaw are loose. She testified that she has not yet fully recovered from the injuries to an extent that her face is somewhat deformed. Her condition after the assault affected her husband to an extent that he told her that he would be better dead than to see her in that condition." [Paragraph 2]

"The trauma the complainant went through and which she was still experiencing was glaring. She broke down during her evidence on numerous occasions. More especially when the version of the accused, which was a blatant lie, was put to her. … It was apparent from the reaction of the complainant that the rape had devastating effects on her which were exacerbated by the false version put to her on behalf of the accused. Rape on its own is humiliating and very serious. Its dire consequences are as displayed by the complainant who intermittently cried during her testimony. This rape has been made worse by the fact that it was perpetrated at the complainant's house. …" [Paragraph 3]

"The accused is 32 years, unmarried and does not have children. He left school in Sub B. He has an elderly mother who lives on old age pension. The accused at the time of the incident was employed as a general worker who earned a sum of R250.00 per week which he used to assist his mother." [Paragraph 4]

Makaula J listed the accused's "great number of previous convictions" [paragraph 5], and continued:

"… [E]ven the current offence was committed whilst out on parole … It is clear from the relevant previous convictions that the accused is undeterred and did not learn from the previous sentences. Instead he is creating a criminal career path for himself which poses a danger to the members of our society. The community needs to be protected from the accused." [Paragraph 6]

"Mr Charles, for the accused, submitted that the fact that the accused changed his mind during cross-examination to admit that he committed these offences and the fact that he apologised proves that he is remorseful of what he has done. With respect I do not agree with that

submission. It became clear from hence the accused was led in his evidence in chief, that he was not sure of his defence. …" [Paragraph 7]

"Mr Charles, apart from this aspect, could not come up with other substantial and compelling circumstances except to submit that the injuries were not severe and the complainant had somewhat recovered from them. It is an undisputed fact that she has not fully recovered from the injuries on her face." [Paragraph 8]

"The previous convictions (which are applicable to this matter) and the subsequent commission of this offence, prove that the accused has not learnt from his past experiences with the law as alluded to. He has been imprisonment for many years only to come and commit a more serious rape. He is not capable of rehabilitation and has proved as such. I do not find any substantial and compelling circumstances." [Paragraph 9]

The accused was sentenced to life imprisonment.

S v DAYILE 2011 (1) SACR 245 (ECG)

Case heard 31 March 2010, Judgment delivered 19 August 2010

This was an appeal against conviction and sentence. for rape by the Regional Court, Port Elizabeth. The accused, 17 years old at the time of the offence, had been convicted of the rape of a 7 year old girl by the regional court, and sentenced to 25 years imprisonment, 10 years of which was conditionally suspended. The appeal was on the basis that the magistrate erred in finding that the contradictions that existed between the state witnesses (N and N) were immaterial. The sentence was challenged on the basis that the 15 years imposed by the court was "shockingly inappropriate and harsh", that the rape the appellant was convicted of was not of a serious nature, and that the court failed to take into account the youthfulness of the appellant at the time of the commission of the offence..

Makaula J (Ebrahim J concurring) held:

"It is worth mentioning … that the magistrate in her reasons for conviction touched on all the various aspects on which the appellant relies for his appeal. Having analysed and considered the contradictions, the magistrate concluded that they were not of a nature that would lead her to reject the evidence of the state. She ascribed the contradictions to the fact that at the time of the incident the complainant was seven years of age and N nine years of age and both testified four and five years later respectively. The magistrate concluded that in spite of the contradictions, there was ample evidence upon which to convict the appellant hence she convicted him." [Paragraph 3]

"The decision arrived at by the magistrate in accepting the evidence of the complainant and N is vindicated by the record. The record clearly shows that despite the contradictions, there was

sufficient evidence and corroboration to sustain a conviction. Contradictions are expected in the circumstances of this matter. That is so because the key witnesses were children at the time the offence was committed. They testified four to five years later. It would be expected to occur even if the witnesses were adults. The two child witnesses were good and intelligent witnesses when I have regard to their ages at the time of the occurrence of this offence. They gave a good account of the events and corroborated each other on all material aspects. There is much credence in their evidence which overshadows the contradictions. " [Paragraph 12]

"The nature of corroboration is neatly woven in the evidence of all the state witnesses. ... " [Paragraph 13]

"It is apparent that the complainant did not report the incident immediately. She advanced as a reason that the appellant had threatened to harm her if she told other people what he did. Her failure to tell someone immediately is by no means surprising considering she was a mere seven years old at the time. What is clear is that eventually, albeit in stages, she did inform N about the incident. ..." [Paragraph 14]

"The defence of the appellant is a bare denial. On an assessment of all the evidence I find that the appellant's version is not reasonably possibly true. The magistrate correctly rejected it and did not err in doing so. I am satisfied that the evidence established the guilt of the appellant beyond a reasonable doubt and there is no merit in the appellant's appeal against his conviction." [Paragraph 16]

"In this matter the trial court correctly found that there were substantial and compelling circumstances justifying the departure from the minimum sentence. What has to be determined is whether a sentence of 25 years imprisonment, of which the appellant must effectively serve 15 years, is appropriate in the circumstances. I may say from the onset that the sentence which was imposed by the magistrate is strikingly inappropriate and stands to be interfered with. The substantial and compelling circumstances which the trial Court rightly found to exist justified a lesser sentence that which it imposed. While the fact that the appellant was only 17 years old when he committed the offence was recognised it does not appear that the trial Court attached sufficient weight to this. Similarly, greater weight should have been given to the absence of evidence regarding the nature and extent of the psychological harm the complainant may have suffered. There is no indication either that proper weight was given to the fact that the rape, while obviously serious, was nevertheless not the worst of its kind. The evidence of Dr J E Howse did not indicate that grave physical harm had been inflicted on the complainant. The only aggravating factor was that the complainant was 7 years old at the time. In view of these factors, this Court, sitting as a Court of first instance, would have imposed a sentence of imprisonment for fifteen (15) years and suspended five (5) years conditionally. ..." [Paragraph 21]

The appeal against conviction was dismissed, and the accused was sentenced to a term of imprisonment for fifteen years of which five years were suspended for a period of five years, on condition that the accused was not convicted of rape or attempted rape during the period of suspension.

SELECTED JUDGMENTS

LABOUR LAW

MARUMO V COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION AND OTHERS (JR241/03) [2003] ZALC 178

Judgment delivered 24 October 2003

This was a review application in terms of s145 of the Labour Relations Act. The applicant was dismissed by his employer, and an arbitrator found that the dismissal had been substantively and procedurally unfair, and awarded compensation to the applicant roughly R500 shy of what the applicant's monthly salary was. Furthermore, the arbitrator only awarded compensation for 8 months, despite the fact that the statutory maximum allowed for 12 months salary and the applicant had been out of work for 15 months. The applicant approached the Labour Court to rectify the compensation amount awarded to him, and to request compensation for 12 months.

Mbenenge AJ held:

"For his assertion, the applicant relies on section 194(3) of the LRA, which deals with compensation awarded to an employee whose dismissal is automatically unfair. I hasten to say the applicant's conclusion regarding the applicability of section 194(3) is wrong in law. Because his dismissal was found to have been both procedurally and substantively unfair, section 194(1) applied."

"Miss de Jongh, who appeared for the third respondent … conceded that compensation was awarded on the basis of a wrong monthly salary. The record is clear in this regard. The applicant's monthly salary was R2 758,88. It would indeed have been the simplest of things for the applicant to approach the commissioner for a correction of the award on the basis that there had been a patent error regarding his basic monthly salary. The matter is now before this court for a determination. I would not put form over substance by remitting the matter to the third respondent solely on the basis of the patent error. More so in the light of the view I take of the entire matter."

"The real issue is whether other than the wrong reference to the applicant's basic salary there are other entertainable grounds of review."

"In my view he has [other grounds of review]: Firstly, it was incumbent on the arbitrator, after finding that the dismissal was both substantively and procedurally unfair, to have resorted to the provisions of section 194(1) of the LRA and make a just and equitable compensation award, not more than the equivalent of 12 months' remuneration … Having recourse to the fact that the applicant was out of pocket for 15 months, the award is surprisingly silent regarding why the maximum of 12 months was not granted. It would be overly technical of me not to find in the circumstances that there was no rational basis for awarding compensation on the basis of 8 months' salary. When a dismissal is both substantively and procedurally unfair the proper approach is that set out in section 194(1) of the LRA."

"Even assuming that the applicant had been employed beyond September, and still is in the employ of another entity, it would have been incumbent on the second respondent to give consideration to whether or not it was just and equitable to award compensation on the basis of 9 months' salary. Therefore, the sole reason given for the compensation award is incomprehensible in my view … The

failure to properly invoke section 194(1) of the LRA prevented the applicant from obtaining a just and equitable compensation award. The applicant's challenge regarding "how the commissioner came to 8 months' remuneration" is, in my view, a proper ground of review."

"I am satisfied that the matter does not fall to be remitted to the second respondent in view of the lapse of time and the need to dispense speedy justice, and that there should be no order of costs. Furthermore, I deal with this matter purely on the understanding that the applicant did not receive the original amount awarded by the second respondent, namely R18 632,72."

The review application was successful.

CIVIL PROCEDURE

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

Case heard 10 December 1998, Judgment delivered 7 March 1999

This case was about the recovery of costs incurred by the applicant in mandating the drafting of an application against the respondent. The applicant had put the respondent to terms and the respondent had refused to comply until it received the prepared application, after which it agreed to comply before the application was institituted. The applicant sought to recover the costs that it incurred in having to prepare the application, and also the costs of the current application. The respondent argued that the costs incurred were extra-judicial and did not fall to be taxed in terms of the Rules of Court.

Mbenenge AJ held:

"I imagine that in proceeding with an application in regard to costs only a litigant would invariably have to supplement his/her papers and place facts in their proper perspective by stating that the respondent has since complied with the demand and by stating the manner in which the concession has been made. In my view, an applicant who institutes a fresh application in regard to costs and annexes to such application papers the intended application papers is in no different position than the one who proceeds with the application for costs only. The fact that the intended application was not issued should present no difficulty at all." [Page 1077, Paragraphs G – I]

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

"Mr Scott's further submission which is linked to the point in limine is that, failing agreement between parties, costs incurred extra-judicially do not fall to be taxed under and in terms of Rule 70(3). I do not agree with this submission. Upon a proper construction of Rule 70(3) nothing precludes a litigant, after laying sufficient facts before the Taxing Master, from claiming that pre-litigation costs be allowed in a party and party bill ... The point in limine is therefore dismissed. It now remains to delve into the merits of the matter and the next question to consider is whether applicant is entitled to costs, given the facts of the matter." [Page 1079, Paragraphs E – F]

"... I find that in the event of an applicant incurring costs in preparation of an application, and against a respondent who is put to terms but steadfastly refuses to concede the applicant's entitlement until after the application has been prepared, but not issued, the intended applicant is entitled, on demonstrating that it would have been successful in the intended application, to an order of costs reasonably incurred. None of the authorities which Mr Scott referred me to seem to assail this view. A party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps ..." [Page 1080, Paragraphs E – F]

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

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

Case heard 8 May 2000, Judgment delivered 16 May 2000

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

Mbenenge AJ held:

"As a general rule, the party who succeeds ... should be awarded his/her costs and this rule should not be departed from except on good grounds. As one of the exceptions to the general rule aforesaid, deprivation of costs may occur if the successful litigant has misled the unsuccessful party to litigate and the latter acted reasonably in instituting proceedings. ... Most importantly, another instance of where the Court may order a successful party to pay the costs of the proceedings is where the defendant/respondent has induced litigation by withholding certain information or where the successful party has caused unnecessary litigation or procedural steps. For reasons which are more fully set out herein below, the general rule on the matter of costs does not find application in the facts of this matter." [Page 354, Paragraphs A – E]

"Both counsel have argued, rightly so, in my view, that, where, as in the present matter, a disputed application is settled on a basis which disposes of the merits except insofar as costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court has, with the material at its disposal, to make a proper allocation as to costs" [Page 355, Paragraph E]

"I am of the view that there is sufficient material upon which a determination of costs can be made." [Page 355, Paragraph F]

"Furthermore, first applicant was entitled, upon having had sight of the will, to seek legal advice regarding its validity and thus make an informed decision regarding whether or not to resort to litigation.

First applicant has not been afforded such opportunity by first Respondent, who was clearly in a position to do so." [Page 357, Paragraph I]

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

"It seems clear from the aforegoing that had applicants or their attorneys had sight of the deceased's will on or before 18 November 1999 this application could have been avoided. Had the application been heard on the merits, applicants would not have succeeded in the light of the deceased's uncontested will and first respondent would have been entitled to costs. Ordinarily, first respondent would have been entitled to costs to the extent that she would have been the successful party. But, as I am of the view that first respondent's failure and/or neglect to let applicants or their attorneys have sight of the deceased's will on or before 18 November 1999 was the fundamental cause of the litigation, first respondent is not entitled to the costs of the application, and applicants are." [Page 358, Paragraphs B – D]

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

CRIMINAL JUSTICE

S V MAPHUKO (A1870/15) [2015] ZAECBHC 21 (30 JULY 2015)

The accused was charged with contravening an order under the Domestic Violence Act. During the course of his trial, the presiding Magistrate formed the view that the accused was incapable of understanding proceedings, and referred the accused for psychiatric observation. Following psychiatric reports, the Magistrate committed the accused to a psychiatric hospital or prison, pending the decision of a judge in chambers. On review, the question of whether the accused had been dealt with under the correct provisions of the Criminal Procedure Act was raised.

Mbenenge J (Van Zyl ADJP concurring) held:

"… In this matter it would appear that the accused was correctly referred for mental observation and that there was substantial compliance with the provisions of sections 77(1) of the CPA insofar as that section makes provision for conducting an enquiry where it appears that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence." [Paragraph 8]

"It remains to consider whether the matter was correctly reported on in accordance with the provisions of section 79. The offence of which the accused was charged is not one involving serious violence. … The ambit of section 79(1)(b) is sufficiently wide to encompass, not only an instance where a charge involves serious violence, but instances where the court considers it in the public interest or where the court in any particular case so directs." [Paragraphs 9 - 10]

"On the authority of S v Booi Pedro, and indeed upon a proper construction of section 79(1)(b), three psychiatrists, including a private psychiatrist, must be appointed when the case falls within the section, unless the court, upon application by the prosecutor, directs that a private psychiatrist need not be appointed, in which case there must be two psychiatrists." [Paragraph 11]

"Nothing, from a reading of the record, points to the prosecutor as having requested the court to dispense with the third psychiatrist. Therefore, the panel was not correctly constituted and the Magistrate could not declare the accused a State patient." [Paragraph 13]

"Even though the subject charge does not involve serious violence, there are, in my view, ample grounds on the strength of which the Magistrate could have considered it necessary in the public interest to invoke section 79(1)(b). The accused has previously undergone psychiatric treatment. The facts of this matter do not point to a once-off incident, but to a continuous problem besetting the accused and his family. Also, the recommendation by the doctors that the accused be declared a State patient is not without significance." [Paragraph 14]

The proceedings conducted by the Magistrate were set aside, and the matter remitted to the Magistrate to deal with appropriately under section 79(1)(b) of the Criminal Procedure Act.

ADMINISTRATION OF JUSTICE

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

Case heard 19 November 1998, Judgment delivered 03 December 1998

This was a contempt of court application. The applicant, a taxi business, had obtained an order preventing the respondents from interfering with the applicants running of its business. The Respondents however continued to interfere with the applicants business activities (by interfering with the collection of stand fees at taxi ranks, and operating under the Applicant's name).

Mbenenge AJ held:

"... I am of the view that it suffices to determine the issues at hand by having recourse to facts stated by respondents in their answering affidavit, together with the admitted facts in applicant's affidavits.

It is trite law that an applicant for an order of committal must show:

(a) that an order was granted against the respondent;

(b) that the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information; and

(c) that the respondent has either disobeyed the order or neglected to comply therewith." [Page 499, Paragraphs E - H]

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

"It would be more appropriate, therefore, to speak of an evidentiary burden as resting on a respondent against whom committal for contempt is being sought to demonstrate his bona fides and the fact that

disobedience of the Court order was neither willful nor mala fide. In S v Fouche 1974 (1) SA 96 (A) … it was held, even when it is said that there is an onus on the accused to rebut a so-called prima facie case, that it is sufficient if he produces evidence that creates a doubt whether culpa was present or not. If he succeeds in producing such evidence then the State has not succeeded in proving its case beyond a reasonable doubt (at 101F--102A).” [Page 501 , Paragraphs F - H]

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

“Accordingly, I am of the view that applicant has proved beyond a reasonable doubt that respondents have wilfully disobeyed para 2 of the order of this Court dated 31 July 1998 insofar as it makes para 1.5 thereof operate as an interim interdict pending the return date of the rule nisi and that the evidence relating to respondents' alleged undertaking is so unsatisfactory that I cannot find it to be reasonably possibly true.”

This Court jealously guards against the flouting of its orders and will always avail itself of the opportunity to deal with those affected in a fitting manner. Consequent upon respondents' disregard of the said order, this Court should impose a penalty in order to vindicate its honour. Direct imprisonment has been prayed for by applicant's counsel. I am, however, of the view that respondents should be afforded a further opportunity to demonstrate that they can be law-abiding citizens.” [Page 503, Paragraphs E – H]

“In the instant matter … I have no information of respondents' earning capacity or any of their personal circumstances. In the circumstances I must do the best I can on the facts before me to impose a proper sentence which will have a salutary effect on respondents and ensure that they desist from and do not repeat their conduct.” [Page 504, Paragraphs B - C]

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

SELECTED JUDGMENTS

PRIVATE LAW

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

The Provincial Tender Board had awarded tenders to two companies, including Balraz, for the payment of social grants. An aggrieved tenderer, Cash Paymaster Service, successfully applied to have the award of the contracts reviewed and set aside on the basis of alleged irregularities in the decision-making process. Two companies were subsequently awarded the tenders, but Balraz did not tender as it was in liquidation. The plaintiff, Balraz's liquidator, lodged a claim for damages against the Department of Health & Welfare based on an alleged breach of contract, alternatively against the Tender Board in delict. The main claim failed, but the alternative claim against the Tender Board was the subject of this case.

Van Zyl J held:

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

"The determination of the legal convictions of the community must now also take account of the norms, values and principles contained in the Constitution and the fact that the constitutional principle of justification embraces the concept of accountability. ..." [Paragraph 32]

"Because the source of the Tender Board's powers and duties is founded in legislation it is necessary to examine the legislation by which it was brought into being. ... [T]he intention of the Legislature is an important and possibly a decisive feature of the circumstances material to the determination of whether or not a legal duty existed. ..." [Paragraph 41]

"In order to achieve its objectives, section 4(2) [of Provincial Tender Board Act (Eastern Cape) 2 of 1994] dictates that the Tender Board shall devise a tendering system that must be fair, public and competitive. This duty must further be read with section 2(2): "The board shall exercise its powers and perform its functions fairly, impartially and independently."" [Paragraph 42]

"... [A] decision of the Tender Board to award a tender to a successful tenderer and to enter into an agreement for the supply of services etcetera is not based on the simple exercise of a discretion. The Tender Board is bound to not only to follow a process that is fair and equitable to all concerned but also to ensure that the successful tender conforms with the tender specifications and conditions, the requirement of competitiveness and the Tender Board's policies, procedures and practices contained in its own directives. ..." [Paragraph 48]

"...This entitles a tenderer to a lawful and procedurally fair process and, where its rights were affected or threatened, to an outcome that is justifiable in relation to the reasons given for it. It is therefore reviewable at the instance of an unsuccessful or dissatisfied tenderer." [Paragraph 49]

"In his judgment in Cash Paymaster Services Pickard JP found that the reasons which motivated the Tender Board to arrive at its decision amounted to gross irregularities of a nature that would justify the court to interfere on review and to set aside its decision. ..." [Paragraph 53]

"This conclusion is, in my view, justified on the papers filed in the review application. These papers formed part of the documentation that was placed before me. ... The members of the Tender Board did not read the tender

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

"…A number of its members raised concerns about the mass of information which they were required to process and expressed the need for further time before finally deciding on the tender. Concerns were also raised that not all relevant and necessary information was before the Tender Board. Notwithstanding this, it allowed itself to be pressured into making a decision because of the alleged urgency of the matter. …" [Paragraph 55]

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

"…In considering the tender submitted in the name of Balraz, the Tender Board effectively allowed the latter to submit a late tender. This was in conflict with the express provisions of paragraph 20.1 of ST36 … In submitting a tender all the tenderers have agreed to comply with the terms and conditions of ST36. The result is that they were all placed on an equal footing in the tendering process. …" [Paragraph 76]

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

"… [T]his is the only factor that militates against the imposition of a duty of care. Although there are no other considerations which may negative or limit the imposition of a duty of care, the absence of foreseeability of harm is such that it cannot, in my judgment, be said to accord with what I perceive to be the legal convictions of the community or that public policy demands that a duty of care should nonetheless be imposed. …" [Paragraph 86]

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

ADMINISTRATIVE JUSTICE

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

Case heard 4 March 2014, Judgment delivered 28 March 2014

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

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

"… A tenderer has the right to a fair and competitive tender process irrespective of whether the tender is awarded to him. …" [Paragraph 17]

"The need for such relief [equitable relief under s 8 of PAJA] usually arises where adverse consequences flow from an order declaring administrative action unlawful. Third parties may have altered their position on the basis that the administrative action was valid and may suffer prejudice if it is declared invalid. In the context of the procurement of goods and services an order declaring the tender process unlawful means that the decision to award the tender and the contract which was entered into pursuant thereto are both void ab initio. …" [Paragraph 20]

"In this case, however, the high court, although correctly finding that the flaws in the tender process and award tainted it and the contract, nonetheless in effect ordered that the joint venture continue to execute the invalid contract under the municipality's supervision. No doubt it was the consideration of pragmatism and practicality that weighed heavily with the high court in ordering the continued execution of an invalid contract. It apparently made that decision in response to the claim by Esorfranki that an appropriate order would be one in terms of which it was to be declared the only successful bidder, and the municipality be ordered to award it a contract to complete the work. The court found that the order proposed by Esorfranki raised a number of 'issues and practical difficulties', and that the granting of the order sought by Esorfranki would not serve to protect the interests of those who were to benefit from the construction of the pipeline. …" [Paragraph 21]

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

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

"In the context of an unlawful tender process for the acquisition of goods and services for the benefit of the public, the finding as to an appropriate remedy must strike a balance between the need for certainty, the public interest, the interests of the successful and unsuccessful tenderers, other prospective tenderers, the interests of innocent parties and the interests of the organ of state at whose behest the tender was invited. … The fact that the joint venture acted upon the award immediately was not due to inaction on the part of the appellants. On two occasions they immediately instituted legal proceedings to set aside the municipality's irregular decision to award the tender to the joint venture. … Esorfranki consistently sought to prevent the contract from being implemented. It was … the persistence of the municipality and the joint venture, in the face of a valid challenge to the award, pursuing a hopeless appeal against the interim order, and by their opposition to the first appellant's Rule 49(11) applications, that any delay resulted. That delay and the execution of the contract were therefore of the municipality and the joint venture's own making. The result was that the joint venture had the benefit of a contract it should never have had in the first place." [Paragraph 24]

"… That the setting aside of the contract might have been disruptive to the finalisation of the construction of the pipeline must be assessed against the fact that the tender process, and consequently the contract itself, was tainted

by dishonesty and fraud. … The joint venture dishonestly obtained the award and the contract. It is therefore hardly open to it to complain that it may suffer prejudice by an order setting the award aside and declaring the contract void. Fraud is conduct which vitiates every transaction known to the law. …" [Paragraph 25]

"The award of public tenders is governed by s 217 of the Constitution. It requires awards to be made in accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective'. The interests of the members of the community who are to benefit from the supply of water via the pipeline must be assessed against their interest, and that of the public at large, that this constitutional imperative be given effect to; that the tender process is free from corruption and fraud; and that public moneys do not land up in the pockets of corrupt officials and business people. …" [Paragraph 26]

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

"The finding of the high court that the parties were to pay their own costs … was essentially made on the basis of what the court described … as the 'unreasonable and unconscionable manner in which Esorfranki and its attorney including Cycad conducted this litigation'. It found that the appellants made themselves guilty of collusion. That finding is not supported by the facts. Esorfranki and Cycad are separate legal entities, they separately submitted tenders, instituted legal proceedings and instructed separate firms of attorneys to act on their behalf. The mere fact that they were the joint beneficiaries of a tender awarded to them in another province, and that there may have been similarities in the papers filed by them in the present proceedings, does not support a finding of collusion, the import of which after all is the presence of dishonesty. There is nothing untoward in one litigant aligning itself with another and co-operating in the quest to achieve a particular result in legal proceedings." [Paragraph 29]

"From a reading of the court's judgment on costs it is evident that it failed to consider that Esorfranki and Cycad were substantially successful in their application to review and set aside the tender process. To that extent they have achieved vindication of an important constitutional right. This failure in my view constitutes a material misdirection. …" [Paragraph 31]

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

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

"…Esorfranki and Cycad were substantially successful in their appeal … and they are entitled to their costs. … [G]iven the serious and reprehensible nature of the conduct of the municipality and the joint venture in the award of the tender and in the subsequent proceedings in the high court, and that the remedy granted by the said court was clearly inappropriate and indefensible, there are on the facts of this matter, circumstances present which justify an order that the costs of the appeal should also be paid on an attorney and client scale." [Paragraph 38]

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

CIVIL PROCEDURE

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

Case heard 30 April 2008, Judgment delivered 30 April 2008

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

Van Zyl J held:

"...The applicant's case is premised on the factual allegation of the existence of a practice in the department to the effect that the MEC, or the head of the department, must authorise the State attorney to make admissions which may require the department to make payment of moneys, and that such authority was absent in the present matter. ... [The issues are]: Firstly, whether a finding that the State attorney acted without the authority of the applicant is in itself sufficient to constitute a ground for the rescission of the judgment of the court and the other relief claimed, and secondly, whether the court is vested with a general discretion to rescind the judgment on the grounds of justice and fairness. ..." [Paragraph 15]

"... I am of the view that the matter can be decided on the applicant's allegations regarding the State attorney's authority without it being necessary to make any factual findings in that regard. ..." [Paragraph 18]

"...The application to ... withdraw the admissions made at the pre-trial conference ... must be seen in the context of the further admissions made on the applicant's behalf at the hearing of the matter. By agreeing to be liable for the respondents' in respect of certain of the heads of damages, and for the trial to proceed only in respect of the remaining heads of damages, the earlier admission of negligence, and the department's liability for such damages as the respondents may prove to have suffered as a result of the fire, was reaffirmed. The earlier admission was accordingly effectively overtaken by subsequent events. ... Accordingly, if the applicant is found to be entitled to withdraw the admissions made at the trial on the grounds relied upon, a similar order must follow in respect of the earlier admission of negligence. The focus of the enquiry is consequently rather on what occurred at the trial and what was agreed between the parties and reflected in the further pre-trial minute ..." [Paragraph 19]

"...The applicant is recorded to have admitted liability for certain of the amounts claimed by the respondents in their particulars of claim as damages. There is in my view no doubt that the agreement at the pre-trial conference to make these admissions constitutes a compromise (hereinunder also referred to as a 'settlement agreement') of issues that were raised by the action and which were in dispute between the parties." [Paragraph 22]

"These issues, namely, negligence and the items of the damages that were admitted, must undoubtedly have featured, first in the settlement negotiations, and later at the pre-trial conference, and were intended to be resolved and for the trial to proceed only on the remaining items of damages. ... I am accordingly satisfied that the legal representatives of the parties intended to enter into a transaction in respect of the merits of the action and the items of damages that were recorded in the judgment." [Paragraph 23]

"The effect of this finding is that it necessitates, in addition to the setting aside of a final judgment, an examination of the legal position with regard to the setting aside of a compromise (as opposed to a request for the withdrawal of an admission made in the course of civil proceedings by a party thereto). ..." [Paragraph 24]

"... As a general rule, once judgment has been pronounced the court cannot thereafter alter, supplement, amend or correct its own order that has been accurately drawn up. The reason is that the court becomes functus officio, its

jurisdiction in the case has been fully and finally exercised and its authority over the subject-matter has ceased. An exception … is where the order granted through some mistake does not express the true intention of the court, or where the order is ambiguous, or the court has inadvertently omitted to include some ancillary relief. …" [Paragraph 25]

"The principle of res judicata also prevents the court from setting aside its own judgment. That is the function of a court of appeal or review. The rationale for this is twofold, namely, the certainty of judgments and the desire, in the public interest, to bring litigation to finality. …" [Paragraph 26]

"… At common law, a judgment 'may be set aside on any of the grounds on which a restitutio in integrum would be granted by any law such as fraud or some other just cause'. …" [Paragraph 29]

"… No doubt because of the importance thereof and the weight given thereto, the effect of a compromise is similar to that of a final judgment. It puts an end to a lawsuit and renders the dispute between the parties res judicata. …." [Paragraph 38]

"It is clear from the main sources of our law on the subject of restitutio, that the remedy developed in the Roman-Dutch law into a flexible and effective remedy to give assistance to an aggrieved party in legal proceedings where no other appropriate remedy exists. Otherwise than was the position in the Roman law, restitutio is not limited in its application to voidable legal agreements, but extends to all legal acts or events that produce legal consequences. …" [Paragraph 48]

Van Zyl J then considered the agent-principal relationship between an attorney and their client:

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

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

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

Van Zyl J found that the application had been brought about entirely as a result of the improper conduct of the applicant's attorney, and dismissed the application with costs. The decision was upheld by the Supreme Court of Appeal in **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA**

122 (SCA), the SCA finding that the High Court had been correct to hold that the appellant was estopped from denying the authority of the State Attorney to enter into the agreements.

CRIMINAL JUSTICE

SITHONGA v MINISTER OF SAFETY AND SECURITY AND OTHERS 2008 (1) SACR 376 (Tk)

Case heard 24 May 2007, Judgment delivered 24 May 2007

A search and seizure was carried out by members of the South African Police Service pursuant to a written authorisation issued in terms of the provisions of s 13(8) of the South African Police Service Act, which authorises the national or provincial commissioner to authorise a member under his command to set up checkpoints at any public place in a particular area. Two vehicles belonging to the appellant were seized at a workshop, and the appellant launched application proceedings for the seizure of the vehicles to be declared unlawful, as well as for a return of the vehicles under the *mandament van spolie.*

Van Zyl J (Jansen and Miller JJ concurring) held:

"The principle underlying the mandament van spolie, namely that every person is entitled to retain whatever he or she has in his or her possession until or unless he or she is lawfully deprived thereof, equally applies to the State and its servants. A valid defence in spoliation proceedings may be, as in the present matter, that the dispossession was not unlawful because it is sanctioned by a statutory enactment." [Paragraph 7]

"... [I]t is clear that it is not in issue that the appellant was in peaceful and undisturbed possession of the vehicles and that she was deprived of such possession. The respondents, however, contend that the appellant's dispossession of the vehicles was not unlawful by reason of the fact that Tsoananyane derived his authority to seize the vehicles from the authorisation issued by the Libode Station Commissioner (the third respondent) pursuant to the provisions of s 13(8) of the Act" [Paragraph 8]

"The appeal essentially raises three issues. The first relates to the validity of the authorisation issued in terms of s 13(8) of the Act. ...: it was submitted that scrap yards and mechanical workshops are not public places as envisaged by s 13(8). It was further submitted that the authorisation was invalid because it was couched in general and ambiguous terms and did not describe the relevant places with the requisite degree of precision. The second issue raised relates to the lawfulness of the execution of the authorisation. ... [I]t was submitted that, because checkpoints were not set up as required by s 13(8), the search and the seizure of the vehicles were rendered unlawful. The third issue raises the question as to the nature of the relief the appellant is entitled to, should it be found that the seizure of the vehicles was unlawful." [Paragraph 10]

Van Zyl J noted that the parties accepted that the section restricted the setting-up of checkpoints to public places, the meaning of which was not defined in the Act [paragraph 14], and went on to deal with the meaning of 'public place':

"The question ... is whether a private business ... from where the public could be excluded by the owner if he so wished, must be treated as a public place, or whether a public place should be given a wider meaning and be construed as a place to which the public can, and do, have access. ... [T]he Chiwani Workshop was a privately owned business to which the public had access, or at least a section of the public, namely customers of the business. No doubt there was a tacit invitation to the public, as customers, to enter the premises. It must equally be accepted that the owner of the business could at any time deny all or any member of the public entrance to the premises. ..." [Paragraph 16]

"There is nothing in the expression 'public place' itself that may indicate that it should be given an extended meaning so as to include a place where the owner or occupier may deny anyone access. ... [O]ur common law places

a more restrictive meaning on the phrase by limiting it to places which serve the interests of the broader public. ...” [Paragraph 17]

“... [S]s (8) should in my view be interpreted in a manner that would prevent an unnecessary and excessive interference with the rights and interests of the individual. I can find no reason why the phrase 'public place' in ss (8) should not be given its ordinary meaning ... To limit the phrase ... to those places where members of the public have the right to go will not in my view frustrate the object of the Act. ...” [Paragraph 21]

As to the ambiguity of the authorisation, Van Zyl held:

“It is clear from a reading of s 13(8) of the Act that the powers of search and seizure envisaged thereby are in addition to and outside the provision of ss 21 - 23 of the Criminal Procedure Act. ... [O]rdinarily the powers of search and seizure are limited by the provisions of ss 21 - 23 of the Criminal Procedure Act. ... In order to primarily achieve the object of prevention of crime, ss (8) empowers and enables police officials to conduct a search and to seize an article without first having to arrest a person, or being satisfied upon reasonable grounds that an article referred to ... is in the possession or under the control of any such person. Subsection (8) accordingly enables a police officer to perform a function he would otherwise not have been able to do without first having complied with the provisions of ss 21 - 23 of the Criminal Procedure Act.” [Paragraph 23]

“It is with this in mind, as well as the fact that the actions authorised by s 13(8) infringe upon the rights of the individual, that it must be decided whether the authorisation in casu describes the places where checkpoints were to be set up with sufficient particularity. ... [T]o simply refer to 'scrap yards and mechanical workshops' is not sufficient. It does not identify the places where the checkpoints were to be set up with sufficient particularity ...” [Paragraph 24]

“I accordingly conclude that, to the extent that the third respondent authorised the setting-up of checkpoints at places that are privately owned businesses ... the terms of the authorisation not only go beyond what the section permits but are also couched in terms which are too general. The authorisation ... must consequently be held to be invalid.” [Paragraph 25]

“According to Tsoananyane they proceeded to Chiwani's Workshop where '(w)e established a checkpoint therein by searching motor vehicles that were there' and, '(o)n the basis of the certificate authorising checkpoints at the workshop, the vehicles suspected to have been stolen...were seized and towed to the Libode Police Station...'. The question then is whether, having acted in this manner, Tsoananyane can be said to have lawfully executed the authorisation issued to him ... In my view he did not. ... On a reading of para (e) of ss (8) it is clear that what is contemplated therein is the display, setting-up or erection of a barrier, sign or object at a particular place. The barrier, sign or object must be such as is reasonable in the circumstances to bring to the attention of a person approaching the checkpoint the order to stop. The said paragraph is couched in peremptory terms ... To simply enter the specified premises and to search vehicles that are found therein ... cannot, by the furthest stretch of the imagination, constitute the setting-up of a barrier, etc, as envisaged by para (e).” [Paragraph 26]

“...[T]he authorisation issued by the commissioner itself does not constitute a search warrant. The power to search and seize arises from, and is subject to, the setting up of a roadblock or checkpoint.” [Paragraph 29]

“...The danger of misuse of authority in the exercise of powers conferred by ss (8) must be recognised. For this reason, and because s 13(8) makes serious inroads upon the rights of the individual, it must be restrictively interpreted. This also conforms with the notion that, where a party opposing an application for a mandament van spolie relies on a statutory provision as a defence which would entitle him or her to deprive a possessor of his or her property, such statutory provision must be restrictively interpreted. The party relying thereon must establish that he or she acted strictly within its terms. ...” [Paragraph 30]

“...There is little doubt that Tsoananyane regarded the authorisation as authority to conduct a search, rather than simply authority to set up a checkpoint. By acting in this manner he failed to comply with the provisions of s 13(8)

and acted outside the limits of the authority. ... The search and subsequent seizure of the vehicles must accordingly be held to be unlawful." [Paragraph 31]

As to the remedy, Van Zyl J held:

"I agree ... that the lawfulness of the applicant's possession of the two vehicles is irrelevant in these proceedings. The appellant is relying on the mandament van spolie. It is a summary remedy aimed at restoring her possession of the vehicles. ... [I]t is not open to a respondent to raise as a defence that the applicant's possession is illegal. ... The underlying principle is that the required unlawfulness of the spoliation does not concern the lawfulness of the applicant's possession, but refers to the manner in which the spoliation took place". [Paragraph 34]

The appeal was allowed with costs, and the vehicles were ordered to be returned to the appellants.

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

Case heard 9 December 1999, Judgment delivered 9 December 1999

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

Van Zyl J held:

"... [A] court is obliged to order the detention of an accused who stands charged of a Schedule 6 offence and a court will only be empowered to grant bail in those instances provided that the accused can advance exceptional circumstances why he or she should be released. The effect of this provision is to shift the onus to the accused to convince the court on a balance of probabilities that such exceptional circumstances exist. ... [T]he appellant will discharge the onus upon a balance of probabilities.' ..." [Page 241F-G]

"... As a starting point the court must look at the five broad considerations mentioned in paras (a) to (e) of ss (4). In doing so a court may take into account any of the factors set out in ss (5), (6), (7), (8) and (8A). This must then be weighed against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody as provided for in ss (9). Further, in terms of ss (10) the court has a duty to weigh up the personal interests of the accused against the interests of justice. ..." [Page 242H-I]

"The effect of ss (11)(a) is to add an additional element to the enquiry, namely that an accused who is charged with the commission of a crime referred to in the Sixth Schedule is to establish that exceptional circumstances exist which in the interests of justice permit his or her release. ..." [Page 243C]

"The approach adopted by Kriegler J in the Dlamini case suggests that the exceptional circumstances as envisaged by ss (11)(a) are not to be construed as requiring an accused to place before a court factors or circumstances in addition to those provided for in ss (9) and (10) of the Act. The enquiry remains the same, namely a weighing up of the considerations referred to in ss (4), (9) and (10) of s 60 and then to exercise a value judgment according to all the relevant criteria on the facts placed before a court. At the end of the day the court has to decide if those factors which have been found to exist and which favour the release of an accused from detention are such, weighed against the interests of justice, so as to constitute exceptional circumstances for the purposes of ss (11)(a). ..." [Page 243H-I]

"... I am satisfied that the magistrate has not misdirected himself in his approach to the enquiry as envisaged by ss (11)(a). ..." [Page 244G-H]

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

"The motive for the commission of the crime is further relevant in considering the likelihood whether the appellant, if released on bail, will endanger the safety of the public or attempt to influence or intimidate witnesses, or jeopardise the proper functioning of the criminal justice system (such as compliance with bail conditions). ... [T]he allegation is that the deceased was investigating a matter concerning the theft of cheques in which the appellant is implicated. ..." [Page 247F]

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

"According to the appellant she is a business woman owning a number of businesses that require her attention. Her evidence is to the effect that she would suffer financial prejudice should she remain in custody as she would physically be unable to attend to her business interests. It would however appear that subsequent to the incarceration of the appellant an order was obtained by the State in terms of the provisions of the Prevention of Organised Crime Act ... as a result whereof her assets have been attached and her businesses have been placed under the control of a curator bonis. I cannot accordingly fault the magistrate's finding that the contention 'namely that the accused person needs to go and run her businesses has been overtaken by events so to speak'. Further ... one should not lose sight of the fact that upon a proper construction of s 60(11) of the Act, the personal interests of the accused are secondary and the interests of society in the proper and effective administration of criminal justice are supreme." [Page 249B-D]

"At the hearing of this matter Mr Beukes indicated to the Court that since the hearing of the bail application new evidence became available relating to the business interests of the appellant. ... It is not competent for an appellant in appeal proceedings to place new evidence before the Appeal Court by way of statements from the Bar. An appeal in terms of s 65 is analogous to an ordinary appeal. Like any other appeal an appeal against the refusal of bail must be determined on the material on record. ..." [Page 249E-G]

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

In closing, Van Zyl J condemned as irregular the approach taken by the magistrate in allowing both attorneys representing the appellant to cross-examine each state witness, but found that this it had not prejudiced the appellant or affected the validity of the proceedings [page 251B]. The appeal was dismissed.

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S V MAPUKATA 2009 (2) SACR 225 (TK)

Case heard 6 February 2009, Judgment delivered 6 February 2009

The accused pleaded guilty in the magistrates' court to a charge of dealing in dagga, and was sentenced to a fine of R 3000, and in default thereof, 8 months' imprisonment. She was sentenced to a further two years' imprisonment, suspended for five years.

Nhlangulela J (Miller J concurring) held:

"When the matter was brought to this court on automatic review, Petse ADJP queried the sentence on the basis that the alternative sentence of eight months was not proportionate to the gravity of the crime and the sentence of payment of a R3000 fine. What Petse ADJP was concerned with is that an excessive alternative sentence invariably indicates that the sentencing court has abdicated its duty to punish the accused for the crime which he/she has committed. … When that does happen, the sentencing court would have strayed from applying the guiding principle that a court should always take into account the personal circumstances of the accused, the nature of the crime and interest of society, without overemphasising each of such factors above the other. I fully concur with the concerns of the Acting Deputy Judge President." [Paragraph 2]

"The mitigating and aggravating circumstances upon which the magistrate imposed the sentence were that: she was a woman 69 years of age and a pensioner; she was never married but has two children who live independently of her; she is responsible for the support and maintenance of one minor grandchild using a child-support grant; and she is a first offender. … The magistrate considered the involvement of the accused in dagga-dealing as a sign of greed and ungratefulness to the government because she was a recipient of an old-age pension. Nevertheless, the magistrate found it appropriate that the accused be spared from custodial punishment as a last chance." [Paragraph 4]

"I must make a comment about the quantity of dagga involved in this case. The charge-sheet indicates that the accused had been found dealing in 28 zolls of dagga weighing 200 kg. During the trial and sentencing the State did not prove the 28 zolls weighed 200 kg. That the accused was the supplier of 28 zolls (not bags) was proved. In my view, I would expect 28 bags to weigh as much as 200 kg. If the dagga in question weighed that much the magistrate would surely have imposed a more severe sentence than he did. Therefore, it may be concluded, with the benefit of hindsight, that the weight of dagga was 200 grams." [Paragraph 5]

"… [T]he sentence does not seem to be completely out of proportion to the nature of the crime. I find further that the accused's personal circumstances, and especially that she was a first offender and a woman of advanced age, constitute a compelling case for the imposition of non-custodial punishment, for now at least. Consequently, the imposed sentence falls to be set aside and substituted with a fresh sentence. I will take into account the suggestion made by the magistrate that a term of three months' imprisonment would be a suitable alternative sentence." [Paragraph 6]

The alternative sentence was substituted to one of three months' imprisonment.

ADMINISTRATION OF JUSTICE

CHRISTIAN CATHOLIC APOSTOLIC CHURCH IN ZION V HLAMANDLANA AND OTHERS (1499/14) [2015] ZAECMHC 51 (23 APRIL 2015)

Case heard 27 March 2015, Judgment delivered 23 April 2015

Applicant argued that respondents were in contempt of a previous court order which had ordered them, inter alia, to return a church building and property removed from it to the applicant, and interdicting them from holding themselves out to be church leaders, and interfering with the activities of the church leadership.

Nhlangulela ADJP held:

"As a matter of law, the court order dated 15 November 2013 is a valid court order that is binding upon the parties to whom it is directed. The respondents cannot be heard to be contending otherwise despite the rumblings of protest raised by them on affidavit. It also bears mentioning that the order shall remain so valid and enforceable upon those to whom it is directed until such time as it has been set aside by a court of competent authority. Breach of a court order constitutes a punishable criminal offence to the extent that it violates the dignity, repute or authority of the court in enforcing its orders …" [Paragraph 6]

"… [C]ounsel for the respondents, raised a point of lis pendens, contending that the enforceability of the court orders … were suspended on 24 April 2014 when the respondents filed an application for leave to appeal … as well as against the order of Majiki J … setting aside the answering affidavit of the respondents on the basis that it was an irregular step. The problem with this contention is that in our law of civil procedure, Rule 49 (1)(b), an application for leave to appeal a judgment or order has to be brought within 15 days after the date of issue thereof … The respondents filed the application for leave after approximately two months. But when that happened the application for condonation … was not brought. For these reasons I am bound to accept the submission … that the application for leave does not comply with Rule 49 (1)(b). It can safely be regarded as pro-non scripto. Therefore, both the orders dated 15 November 2013 and 20 February 2014 as well as that of Majiki J were not suspended by the filing of the application for leave … " [Paragraph 7]

"Mr Hlamandlana, and the co-respodents by extension, did not deal pertinently with the allegations made on behalf of the applicant … Instead he raised the issues of leadership dispute and the meeting of the members of his group … He raised issues concerning the efforts being made by his group to effect regime change that are pursued in court proceedings … With respect, these issues do not address the serious breaches which have been levelled against the respondents … I have observed that the allegations made by Mr Hlamandlana do not directly implicate any one or more persons of Mr Mboyi's group. … These allegations do not constitute bona fide disputes of fact on a material matter, but they are sweeping statements which carry highly diminished evidential value in my view. They fall to be rejected out of hand without recourse to oral evidence." [Paragraph 13]

"I find that the order of court made on 15 November 2013 was served upon the first, third and fourth respondents on 22 November 2013; and served upon the second respondent on 06 December 2013. And they have been shown beyond a reasonable doubt to have wilfully and with mala fides elected not to comply with the orders. … The respondent's defence that the resolution of the Church conference … ex-communicating Mr Mboyi and substituting him and his group with the respondents faction requires to be

given priority over the court orders must be given a short shrift. Such a resolution cannot prevail over the court order that was lawfully issued. The applicable rule is that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. …" [Paragraphs 16 - 17]

"In this case there is a need to advance the objects of contempt of court proceedings, punishment and enforcement because the respondents very clearly wilfully and mala fide neglected the orders of court and later on, as an excuse for not complying therewith, they held a meeting … to pass resolutions the effect of which it was to emasculate the provisions of the orders. Such conduct cannot be tolerated. An award of a punitive order of costs is warranted as a mark of the Court's displeasure with the conduct of the respondents." [Paragraph 19]

"I take into account the relevant factors as stated on affidavits … Those factors include the circumstances of the respondents that they are Church members, but who have shown unwarranted disdain towards the orders issued against them and aggravated by the fact that they have not taken a single step towards complying with the orders for a period spanning two years." [Paragraph 26]

Respondents were held to be in contempt of court, and were each sentenced to three months' imprisonment, suspended for five years on condition they were not convicted of contempt during the period of suspension. Respondents were also ordered to pay the costs of the application on the attorney and client scale, jointly and severally.

QAKATHAYO V SOUTH AFRICAN SOCIAL SECURITY AGENCY (2058/11) [2013] ZAECMHC 19 (17 JANUARY 2013)

Case heard 22 November 2012, Judgment delivered 17 January 2013

At issue was whether the applicant's attorneys of record were liable to pay costs *de bonis propriis* incurred due to a postponement of an interlocutory application. Applicant had sought to stay the main application pending the finalisation of an internal appeal. Respondents opposed this on the basis that the relevant internal administrative review remedy had yet to be created.

Nhlangulela J held:

"… [I]nstead of pursuing the main application by setting it down for hearing on the point of law as raised … the applicant brought the interlocutory application. Pursuant thereto, the applicant secured a date for arguments, set down the matter for hearing … and appeared before me with the opponent to present arguments." [Paragraph 6]

"… [A] decision on the relief sought in the interlocutory application will automatically dispose of the relief sought in the main application. Yet the main application did not serve before me. In the event I did not have authority to deal with it. And *Mr Mtshabe* declined an invitation made by me that the parties may just as well permit the adjudication of both applications. In the light of the stalemate I was driven to the decision that the interlocutory application serving before should be postponed to a future date for hearing together with the main application. What then remains is a question of wasted costs of hearing … " [Paragraph 7]

"I have already found that the issues raised in both applications are the same, hence the order I made that both applications must be heard together. I have also found that the reason for a postponement of

the interlocutory application was the failure on the part of the applicant to set down the main application for hearing. Arising from these findings is the question why it was that the applicant did not see a need to cause both applications to be heard on 22 November 2012 when, as the *dominis litis*, she ought to have ensured that both applications are heard together. This question could not be answered by those who represent the applicant It being obvious that the applicant would never be able to make such a complex decision, those instructed by her had to profer a reasonable explanation for the Court to decide whether to mulct or exonerate them from paying the costs. ... It matters not that the respondent did not controvert those allegations. All that I have to do is to evaluate the allegations against the following factors: the cause of action and the nature of defence proffered, indigency of the applicant, the reason for the set down of the interlocutory application, the purpose of the postponement and whether or not the applicant acted negligently, recklessly, irresponsible or maliciously." [Paragraph 11]

"In my judgment there was no good reason for the setting down of the interlocutory applications as the adjudication of it alone would be impossible. In both applications the cause of action is the reviewing of the decision of the respondent, the parties are the same and the relief sought is virtually the same. The defence ... does not only have merit, but it has also been conceded by the applicant. There was no reason for setting down the interlocutory application in the circumstances. I would not dismiss the interlocutory application because the issues therein, including the special defence of law, are pending in the main application. Instead of setting down the main application so that it is heard and finalized the applicant brought an application which is similar to the main application. I am acutely aware of a growing number of similar applications in this division that are being brought against the department merely to provoke a protracted litigation which is punctuated with numerous postponements deliberately, to cause a delay in the finalization of disputes and to squeeze the public purse of as much "legal fees" as long as it is possible. This case is quintessentially the same. I am not persuaded ... that the attorney has a right to implement client's instructions even where doing so is to repeat one and the same application. Surely, a line must be drawn between the execution of reasonable instructions and the doing of something else to frustrate and abuse the legal process as the attorneys for the applicant have done in this case. ..." [Paragraph 12]

"It is not the case of Manitshana Tshozi Attorneys that the applicant instructed them to litigate in a manner that will over-burden the Court with a prolix of papers unnecessarily. In the circumstances they cannot fault their client for the decision they took which has resulted in unnecessary costs at the expense of the respondent. ... It is my view that the attorneys for the applicant were grossly negligent in the circumstances of this case at the expense of the respondent and the court. They are liable to pay the costs incurred by reason of the postponement of the matter." [Paragraphs 14 – 15]

NKUME v FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK 2012 (4) SA 121 (ECM)

Case heard 6 March 2012, Judgment delivered 15 March 2012

Applicant sought an order of specific performance under the National Credit Act, seeking reasons for the refusal of a credit facility. After proceedings had been instituted, respondent supplied the requested information, notwithstanding its opposition to the application.

"It would then appear that the real issue for determination is one of costs. To that end I must have regard to all the affidavits filed on the merits of the application. Of course there will be no need for the court to

decide who the winner is, since the merits of the application have become academic. ... The proper approach is to utilise the materials available and decide the issue of costs on broad, general lines, and not the lines that would necessitate a full hearing of the merits that have already been settled. ... In the circumstances the universal rule, that a party who succeeds should be awarded costs, cannot apply. In the exercise of the court's discretion I have to consider the manner in which the parties conducted themselves in this application, both before and after the application was brought. ... I must also consider which of the parties took unnecessary steps or adopted a wrong procedure, any misconduct by a party, and any other relevant factors." [Paragraph 9]

"The respondent averred in the answering affidavit that due to some 'far more pressing issues' it could not comply with the applicant's request before 7 November 2011. It then raised legal defences to the relief sought, that, in any event, since the conduct of the respondent was an administrative act which is governed by the provisions of the Promotion of Administrative Justice Act ... under which the applicant had to bring the application within 180 days, the application was brought prematurely and, for those reasons, the applicant must be deprived of the costs." [Paragraph 10]

"... [T]he respondent did not explain its delay in responding to a demand for information, until the application was brought and litigation costs incurred thereby. In my view it did not avail the respondent to remain supine in the face of a legal demand, and only to respond when the application had been brought. The conduct of Ms Msomi, acting for the respondent, was unbecoming and it ought to be viewed as a complete disregard of the rights of the applicant in terms of s 62 of the Act. The reason, that 'far more pressing issues', without more, made it impossible for a response to be given before 4 November 2011, is inadequate." [Paragraph 12]

"... I hold that the applicant's claim, which is based on s 62 of the Act, cannot be disregarded merely because the conduct of the respondent is capable of being reviewed under PAJA. An order of a mandamus or specific performance of a statutory obligation in terms of s 62 of the Act is enforceable in law." [Paragraph 13]

"In this case ... for the mere fact that no explanation was given by the respondent as to why it refused to give reasons and release the particulars of the credit bureau in good time for the costs to be avoided, the furnishing of the information on 7 November 2011 constituted unreasonable delay." [Paragraph 15]

"In my judgment there was no reason why the information which was readily available on the computer of the respondent on 27 October 2011 should have been withheld by the respondent, and released only on 7 November 2011. That the respondent had far more pressing matters to attend to is not a good explanation for the failure to make the information available to the applicant on 27 October 2011. Further, in the circumstances, the bringing of the application on 4 November 2011 was not premature." [Paragraph 17]

Respondent was ordered to pay the costs of he application.

HLABA v MEC FOR HEALTH, EASTERN CAPE, AND OTHERS 2012 (4) SA 401 (ECM)

Case heard 15 March 2012, Judgment delivered 16 March 2012.

Applicant sought an order exempting him from exhausting internal appeal remedies under the Promotion of Access to Information Act (PAIA), and compelling the signature of an MMF 1 claim form. After the institution of proceedings, the form was duly signed, leaving the issue of costs to be determined.

Nhlangulela J held:

"To decide the question of costs the court should have regard to the acknowledgement of the respondents that they had a duty to complete the MMF 1 claim form, the reasons for which the applicant brought the application, the conduct of the parties prior to and after the application was brought, the legal objection which the respondents raised in the answering affidavit against the granting of the relief sought and any other factors which are relevant to the decision to be made. It is so because all that the court is being asked to do is to allocate the costs without so much being concerned as to whom between the parties would have been successful had the MMF 1 claim form ... not been completed and furnished to the applicant. ..." [Paragraph 4]

"The nub of the respondents' opposition to the relief sought is that the application ought to be dismissed with costs because it was brought prematurely in that, firstly, the applicant never applied correctly for the claim form to be completed and, secondly, he did not exhaust the internal appeal remedy but he merely engaged the respondents through 'futile correspondence' and 'by-passed internal appeal remedies'." [Paragraph 9]

"In this case the applicant seeks, among other relief, an exemption from following the internal appeal procedure in term of s 75 of PAIA, not because he did not take steps to subject the passive refusal of the respondents to an internal appeal process, but because he was refused engagement in that process. On the proved facts, the applicant was totally refused a hearing by the respondents with the result that he resorted to this application. The respondents testified that they were unable to respond to the applicant's requests because the hospital was short-staffed and operated under a lot of pressure. The eight available doctors could not cope with the deluge of requests for medical information, and consequently the medical superintendent had no option but to ignore the applicant's requests. This attests to a systemic failure in the health department and an admission by the respondents of failing to execute their statutory duties as envisaged in s 6(2)*(g)* of the PAJA, which reads 'the action concerned consists of a failure to take a decision'." [Paragraph 15]

"... [T]he respondents have failed to give reality to the applicant's rights of access to medical information and in terms of s 14 of PAIA and of appeal in terms of ss 74 and 75 of PAIA. It is not that the applicant did not lodge an appeal at all because he did so ... which complied substantially with the requirements of s 75 of PAIA. It cannot be doubted that had the applicant been given the appropriate forms to complete and lodge towards the appeal, he would have been able to comply fully with s 75. With all avenues for constitutional expression being denied by the respondents, the applicant was correct in bringing an application seeking a mandamus to force the respondents to comply with their duties. In my opinion the relief sought in the notice of motion was well considered by the applicant in the light of the bar which is created by the provisions of s 78 of the PAIA." [Paragraph 17]

"It is not correct that the applicant bypassed the internal appeal process. The truth of the matter is that the applicant was denied his right to engage in the appeal process. There was a need for the applicant to

ask for a mandamus in this court, as it did in terms of s 82*(b)* of PAIA, to force the respondents to execute their obligations in terms of s 77(3) and (7) of the same Act. Such conduct is reasonable. In the circumstances this court would be correct in ordering the respondents to carry out their statutory duties even though there has been no direct refusal on their part to do so …" [Paragraph 18]

"… [T]he respondents conducted themselves very badly against the applicant's requests. For this they cannot escape the costs. But when dealing with public office, especially that of the government, one should not lose sight of the fact that inas- much as the residual blame for an administrative bungle lies at the door of the minister concerned, administrative officers are responsible for most of the bungling that we see. In this case the reason for a lack of compliance on the part of the minister could not be properly described as being mala fide in my view. The same can be said about the second respondent. This factor must be reflected in the order that will be made." [Paragraph 19]

Respondents were ordered to pay the costs of the application on party and party scale, jointly and severally, the one paying and the others being absolved from liability.

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

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

BURCHELL v ANGLIN 2010 (3) SA 48 (ECG)

Judgment delivered 30 April 2009

The plaintiff ran a game reserve and a hunting safari business, directed at overseas visitors, in the Eastern Cape. He and the defendant had been friends and business associates, but their relationship soured. The plaintiff alleged that the defendant made defamatory statements about him to his key booking agent in the USA, known as Calebas. Most of his safari clients originated from this agent. The plaintiff alleged that bookings suddenly and dramatically decreased, due to defamatory statements made by the defendant. He instituted an action for damages and loss of profit. The key issue for determination was which substantive law (American or South African) should be applied.

Crouse AJ held:

"LAWSA states that the conflict rule to determine the *lex causae* of a dispute involving a delict remains an unsettled question in South African law. … As far as I am aware the only South African case where the *lex causae* had to be determined in a delictual matter and where mention was made in broad terms of the double actionability rule was *Minister of Transport, Transkei v Abdul*… Forsyth criticised the handling of the subject-matter in this case, referring to it as a 'garbled version of the unreformed English rule'." [Paragraphs 95- 96]

Crouse AJ traced the development of the double-actionability rule under the English common law [paragraphs 97-106]. She concluded that the rule tended to favour the wrong-doer, as they can escape liability if there is a defence available to him in either the *lex fori o*r the country in which the delict occurred (*lex loci delicti*). However the rule is not inflexible and has been subject to reform. It was shown in *Red Sea Insurance Co Ltd v Bouygues* that it is possible to depart therefrom on clear and satisfying grounds in order to avoid injustice, by holding that a particular issue should be governed by the law of the country which had the most significant relationship with the occurrence and with the parties.

Crouse AJ then moved to detail development of the issue in American law. The choice of law in USA was the *lex loci delicti.* However, it was found that this doctrine can lead to injustice in certain circumstances. Thus the law was restated to provide that the rights and liabilities in respect of a delictual issue are determined by the local law of the forum which has the most significant relationship with the parties. [Paragraphs 106-109].

Crouse AJ also considered jurisprudence of other countries insofar as was necessary, as South African private international law "cannot be allowed to languish in a straitjacket" [paragraph 112]. She stated, however, that she was cautious to take into account, *inter alia,* the fact that different delicts should be approached differently by virtue of their nature and that some foreign judgments are based on policy considerations particular to their specific jurisdiction.

"The unreformed form of the [English] rule always works in favour of the defendant and to the prejudice of the plaintiff. The reformed rule, in my opinion, is but a shadow of the original rule and now merely a term used to describe the discretion that the presiding officer exercises. … The question is then: how am I to decide the issue? The learned author of *LAWSA* states that the orthodox method of choosing the applicable law in a multijurisdictional situation may be summed up in three words: *(a)* characterisation, *(b)* selection and *(c)* application. The process being as follows: first, the forum looks at the issue before it and characterises the question in terms of its conflict rules; then it selects the appropriate connecting factor in accordance with the characterisation which it has made to determine whether its domestic law or the substantive law of a foreign country will apply; and finally it applies the rule of the selected legal system." [Paragraph 113-114]

"The dispute between the parties is whether justification in law exists for the publication. If so characterised, the issue is substantive. Thus, I characterise the issue as the substantive law of delict: defamation. According to *LAWSA*, the connecting factor in a delictual claim is the place where the delict was committed. I will now try to determine the place where the delict was committed. Having said this, I keep in mind that all delicts should not necessarily be treated alike." [Paragraph 116]

Crouse AJ applied the seven possibilities for where a delict can be committed, as identified by the American academic authority, to the facts and found that in each of them that the place where the delict was committed was in the USA. Significantly, when assessing "principal harm" in this case, Crouse AJ stated that the principal harm in a defamation case is where the damage to the claimant's reputation took place, not where the claimant suffered financial loss. Crouse AJ also focused on the fact that the most essential element of the delict of defamation is that the defamatory statement be published or known, as it is concerned with the protection of reputation rather than individual self-worth.

"After considering all the above, I come to the decision that the *lex loci delicti* was Nebraska, USA." [Paragraph 118]

"Internationally, a balancing test is used to determine the jurisdiction with the most significant relationship to the parties and the delict, and then the law of that jurisdiction is applied. I will follow this route. Having decided that the *lex loci* of the delict is Nebraska, I must now decide whether this is indeed the jurisdiction with the most significant relationship to the parties and the delict. In order to come to this decision, I will endeavour to establish whether our law or Nebraskan law will weigh more heavily on the balancing scale." [Paragraph 122]

"I will deal firstly with the relationship that each of the parties and the delict have with South Africa. The plaintiff is domiciled in South Africa and operates his business … as sole proprietor in South Africa. The plaintiff employs staff in South Africa. No South African hunters do business with the plaintiff. In either party's version, the trigger to the defamation originated or partly originated in South Africa. Any financial loss the plaintiff suffered in his estate would ultimately have been felt in South Africa. This fact weighs heavily on the balancing scale. The video recording of the plaintiff's alleged abuse of his employees was recorded in South Africa. … The subject of the alleged fraudulent land deal is situated in South Africa. The ultimate breakdown in relationship between the parties

occurred in South Africa. The defendant had acquired an interest in land in South Africa and often visits South Africa. ...” [Paragraph 123]

“... I have found that the *lex loci delicti* is Nebraska, USA. This fact weighs heavily in the balancing scale. The plaintiff so successfully conducted business in the USA that 75 percent of his clients originate there. ... The plaintiff has had a relationship with the booking agent ... since 2000. According to the plaintiff, roughly 95 percent of all clients coming from the USA are booked by Cabelas. The head office of Cabelas is at ... Sydney, Nebraska. The plaintiff does Frontier Safaris' advertising through Cabelas. Cabelas makes payments to Frontier Safaris into the plaintiff's Bank of America account...The plaintiff often visits America. The plaintiff often pays for his staff to attend to business in the USA. The defendant is an American citizen who works and resides in the USA. He and his wife hold interests in two quite substantial businesses in the USA. The alleged relationship breakdown between the plaintiff and Cabelas, resulting in financial loss, took place in America.” [Paragraph 124]

“After the above consideration, I must find that Nebraska's relationship to the parties and the delict is more significant than the relationship of South Africa thereto....” [Paragraph 125]

“Thus, in my judgment, the factors connecting the delict and the parties with Nebraska are sufficiently strong to make it substantially more appropriate to displace the law of South Africa as the applicable law on this substantive matter. I therefore find that ... the *lex causae* is the law of Nebraska, subject thereto that it passes our constitutional threshold test. This decision does not mean that the law of Nebraska is applicable in the quantification of damages. This decision is also left open for decision after argument at the subsequent trial.” [Paragraph 130]

SOCIO-ECONOMIC RIGHTS

KHAN V PASSENGER RAIL AGENCY OF SOUTH AFRICA AND ANOTHER (A3056/2014) [2015] ZAGPJHC 16 (13 FEBRUARY 2015)

Case heard 2 February 2015, Judgment delivered 13 February 2015

The was an appeal against the decision of a magistrate that it was just and equitable to evict the appellant and his family from property owned by the first respondent, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). The appellant contended that his family would be made homeless should they be evicted, and that the second respondent (the City of Johannesburg) therefore was under a constitutional obligation to provide temporary emergency accommodation.

Crouse AJ (Tshabalala J concurring) held:

“Evictions of people from their homes may only take place under judicial control. The judicial officer must ensure that evictions are justifiable and that all relevant circumstances have been taken into account. PIE creates a tension between the interests of landowners and those in occupation of

property and under threat of eviction. … Our Constitution in section 25 and 26 provides protection for the rights of both landowners and persons under the threat of eviction. As stated in Ndlovu v Ngcobo; Bekker and another v Jika … it must be remembered that PIE does not sanction expropriation of the landowner directly or indirectly; PIE could merely delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions to evict." [Paragraph 12]

Crouse AJ considered Constitutional Court judgments relevant to evictions, and continued:

"The first issue to be decided is whether the Appellant will be rendered homeless, if evicted, bearing in mind the Plascon-Evans test principle … The Appellant's assertion that he would be homeless is based on the fact that he is currently in a more precarious financial position than the position he was in when he entered into the lease agreement. …" [Paragraphs 18 - 19]

"… Taking into consideration the Appellant's last affidavit and the evidence of his wife, their joint income is now at least R5 600 per month. In addition the Appellant is doing extra work. The Appellant had not taken the Court into his confidence as to the value of this additional work. In terms of the Municipality's report there are rental options available from R1 200 per month. The only logical conclusion is therefore that on the family's monthly income, they will not be homeless. The learned magistrate's finding that the family would not be able to maintain their current life style in a 3 bedroomed home is no doubt correct, but that will not render them homeless. The Appellant can by no means be considered rich though." [Paragraph 20]

"The Appellant's contention is further that there is a constitutional duty on the Second Respondent to provide emergency housing. … [Section 153 of the Constitution] requires the municipality to interpret the national and provincial policy and programmes, and to make choices on how to practically implement it and how to best achieve its objects. This is a matter of policy. The Second Respondent has determined a specific socio-economic approach to emergency housing, namely that emergency housing is only available to households with an income of R3 500 and less. The Appellant does not qualify for emergency housing when this means test is applied. In argument the Appellant's counsel was specifically asked whether the Appellant can contend that the Second Respondent's policy was unreasonable. The Appellant does not contend this and there is no review of this policy before this Court, nor is there an obvious reason for it at this stage. As section 26 of our Constitution deals with the progressive realisation of the right to housing within the state's available resources, the Second Respondent's response thereto must of necessity entail matters of policy and therein lies scope for reasonable differences of approach and prioritisation. For this reason a court must handle such policy with circumspection, because of the separation of powers principle." [Paragraph 22]

"There can be no unqualified constitutional duty on local authorities to provide alternative accommodation in all evictions. … [A] progressive realisation of the right to adequate housing cannot be translated into an individualised specific claim to a particular instance of housing of a particular kind at a particular place. Therefore the Appellant is not entitled to a specific home, i.e. a three bedroomed home in a specific neighbourhood at a specific rental and if this is not available, claim his entitlement to state aided housing." [Paragraphs 23 - 24]

The appeal was dismissed.

ADMINISTRATIVE JUSTICE

PORT ALFRED RIVERHOUSE PROPERTY (PTY) LTD V NDLAMBE MUNICIPALITY & ANOTHER [2009] JOL 23948 (E)
Judgment delivered 10 July 2008

The applicant owned land situated directly across a river from the leased property, brought an application for the review of the lease agreement entered into between the first respondent and the second respondent (Van der Walt). The grounds of review were, firstly, that the lease was in contravention of a restrictive condition in the title dead of one of the erven of which a portion was leased by Van der Walt. The restrictive condition stated, *inter alia*, that the erf must be used as a "public open space". The second ground of review was that the lease was not advertised as required by section 124(2) of the Municipal Ordinance 20 of 1974.

Crouse AJ held:

"...It is accepted by the parties that the acts complained of are administrative acts as envisaged by the Promotion of Administrative Justice Act ... ("PAJA") and that the application must be dealt with under PAJA." [Paragraph 6]

With regard to the first ground of review, the restrictive condition, Crouse AJ held:

"... [O]ne must look at the predominant feature of the contract between the municipality and Van der Walt. The effect of the lease contract was that Van Der Walt erected a temporary structure as office on the boundary ... In terms of the lease, Van der Walt must keep the beach surrounding the lagoon clean and must refurbish and maintain the ablution facilities. Van der Walt's use of the premises includes environmental education and general recreation, a safe and maintained swimming area, safe parking, prevention of littering, dumping or squatting. She also upgraded braai facilities and conducts outdoor activities and adventure tourism. She presents training in first aid, navigation and diving. In return for these obligations, Van der Walt is entitled to conduct her business which has to do with recreation and recreational tourism, all of which is compatible with the general purpose to which the property let is to be put." [Paragraph 16]

"Within the meaning and intent of the town planning scheme, "public open space" is land to which the general public has access. Objectively viewed, the business conducted by Van der Walt holds no prejudice for the general public's access ... if anything the agreement between the municipality and Van der Walt enhances this use by the general public. ... In the circumstances, this ground of review is dismissed." [Paragraphs 21-22]

With regard to the second ground of review, the failure to advertise the lease, Crouse AJ held:

"... [T]he question to be decided is whether the failure to mention that the intended contract is one of lease in the advertisement renders this contract susceptible to review." [Paragraphs 25-26]

"I have no difficulty in finding that the agreement between the municipality and Van der Walt was in fact intended as a PPP [public-private partnership], although it is termed a lease. I have also no difficulty in finding that the agreement between Van der Walt and the municipality was entered in good faith and for public benefit. I also find that the municipality was entitled to choose either a PPP or a lease as a vehicle to contract with Van der Walt. The municipality could have termed the contract a lease or a PPP." [Paragraph 33]

"The question however remains whether the publication of the PPP is sufficient compliance with the provisions of section 124(2) of the Municipal Ordinance … to enter into a lease agreement with Van der Walt." [Paragraph 34]

"Section 124(2) of the Municipal Ordinance … only requires publication. This section does not determine what information must be published." [Paragraph 36]

"Fairness dictates that the information published must be such that it places the ratepayer who might want to object in a position to do so. In its founding papers the applicant referred to the said advertisement and also the proposals to which the advertisement refers. The applicant acknowledges correctly that the proposal refers to a lease agreement. As there are no allegations to the contrary, I can thus safely assume the applicant had knowledge of the intended PPP through the advertisement and of the intended lease agreement through perusal of the proposal. The applicant does not allege any prejudice she had suffered in relation to the advertisement not stating that the vehicle of the PPP was a lease … In the circumstances of this case, I cannot find any prejudice to the applicant. I therefore dismiss the second ground of review." [Paragraphs 41- 42]

The application was dismissed with costs.

CRIMINAL JUSTICE

S V JAMA [2008] JOL 21714 (E)

Judgment delivered: 6 September 2007

The accused was convicted of assault with intent to do grievous bodily harm and sentenced to 12 months imprisonment, of which 6 months were conditionally suspended for five years. The correctness of the conviction and sentence was queried on automatic review.

Crouse AJ (Pickering J concurring) held:

"… I have received the magistrate's reasons. … In short, the magistrate submits that the accused was convicted on the basis that she had intention in the form of *dolus eventualis."* [Paragraphs 2-3]

"The evidence is that the accused and the complainant had a love relationship. The accused had given money to the complainant to keep for school shoes for her children. The money was lost. The accused confronted the complainant about the money, at a time when the accused was peeling potatoes with a knife. A struggle ensued over the knife. The complainant testified that the accused did not stab him, but that she pulled the knife back while he was holding it, and that as a result he

was cut. … The complainant thereafter broke the toilet window with his head and tried to leave the house through the toilet window. The accused pulled him back into the house, but he managed to exit through the window. As a result, he was cut by the broken glass." [Paragraph 4-5]

"…[T]he magistrate found that the accused *should have* foreseen the possibility that her actions could cause serious injury and reconciled herself with this possibility. The magistrate convicted the accused as charged, namely of assault with the intent to do grievous bodily harm in that she stabbed the complainant with a knife on his left finger and that she pulled him against a broken window pane causing him to be stabbed/injured by the glass with the intent of causing him grievous bodily harm." [Paragraph 7]

"… [T]he intention to do grievous bodily harm was not proven. The accused did not stab the complainant with a knife. No deduction can be made that the accused *had subjectively* foreseen the possibility that the complainant could be seriously injured when she pulled him back from the window and/or that she had reconciled herself with this possibility. The magistrate's finding that the accused "should have foreseen" denotes to *culpa* and not *dolus.* A form of *dolus* is necessary before the accused can be convicted of assault with the intention to do grievous bodily harm. Culpa is insufficient." [Paragraph 8]

"A sentence of direct imprisonment after a conviction of assault common is an improper sentence in the circumstances of this case. The accused had already spent 14 days in jail, before I ordered her release…" [Paragraph 10]

The conviction was set aside and substituted by a conviction of assault common and the sentence was set aside and substituted by a sentence of 14 days imprisonment or a fine of R400. It was recorded that the accused had already served the alternative sentence of 14 days imprisonment.

SELECTED ARTICLES

'A BAR FOR WOMEN?' *CONSULTUS* DECEMBER 2002 VOL 15 NO. 3 PAGES 30-31

This article 2002, reflects on the history prior to the admission of women as attorneys and the challenges that women continue in the legal profession.

"Starting as a junior at the Bar is never easy, and it is particularly challenging if you are a woman. For some years I was the only woman at the Port Elizabeth Bar..."

"Advocacy was even more difficult for woman in the past, when it was considered a revolt against nature to allow a woman to enter the legal profession. In *Incorporated Law Society v Wookey*, Innes ACJ, Solomon J and J de Villiers JP upheld an appeal by the law society that the respondent should not be admitted as an attorney because she was a female. Innes ACJ addressed the question to counsel appearing for the respondent: "How can a married woman appear for another and not for herself?" ... In an article discussing this judgement, RPB Davies J concluded ..: "The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the world... all life- long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature and when voluntary, treason against it."

"Modern man cannot be entirely blamed for women's struggle during the past century to be admitted to an exclusively male profession. For a long time men adhered to the views of great Roman and Roman-Dutch masters of law who advised against allowing women into courts... One can only wonder if this unacceptable and unreasonable measure precluded some brilliant legal minds from making a considerable contribution to our legal history."

"The first woman to be admitted to the Bar was Irene Antoinette Geffen.... In 1969 Miss Justice Van den Heever was the first woman to be elevated to the Bench, after having joined the Bar in 1952. She was also the only woman to be appointed to the Supreme Court of Appeal. In an article in 1999 March *Consultus,* Judge Van den Heever spoke out against having to take on low-paying and oh-so-deserving cases that male advocates refused. Based on my own experience and feed-back from other women at the Bar, I have concluded that not much has changed since Judge Van den Heever joined the Bar."

"Male domination in our courts has caused tension regarding the dress code for woman advocates. Some ten years ago a Cape Town judge complained about the fact that a female Cape Town advocate wore trousers in court. At the time gender equality was very much an issue and the advocate under fire contacted several female colleagues, including myself, to protest...." (Page 30)

"Thirty years ago two percent of advocates in South Africa were women. In 1997 12,7 % of advocates were women...And by 1998 14 % of junior members and 2 % of silks affiliated with the GCB were women. In January 1999 there were two female silks at the Johannesburg Bar, three at the Pretoria Bar and one at the Cape Town Bar. There were 196 female juniors in total (according to GCB statistics). Three years later there are eight female silks (2% of all silks) and 230 female junior members (16 % of all juniors) practising at the various Bars (according to GCB statistics). The increase in the percentage of female juniors at the Bar is encouraging. However, these figures still do not reflect the growing ratio of female legal graduates...Representation at the annual GCB meeting is

now racially equal, but there is no gender equality, and this should be addressed by the Bar." (Page 31)

"As yet, woman advocates in South Africa are equal to male colleagues neither in numbers nor in status. We have come a long way in proving Van Leeuwen wrong in his opinion that, due to inborn weakness, nearly all women are less suited than men for matters requiring knowledge and judgement. Yet female advocates in general are still breaking free from the mould created by our past. I am of the opinion that the more female advocates join the Bar and the ranks of senior advocates, the more it will be accepted that a woman can do the job as well as the next man (as I think has happened in the Office of the Director of Public Prosecutions). On the other hand, as the bumper sticker says: "Women who want to be equal to men have no ambition ..." (Page 31)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

QUEENSTOWN GIRLS HIGH SCHOOL v MEC FOR EDUCATION, EASTERN CAPE, AND OTHERS 2009 (3) SA 268 (CkH)

Case heard: 15 February 2007, Judgment delivered 21 February 2007.

Applicant urgently sought to review and set aside conduct by officials of the Department of Education, Eastern Cape, compelling them to admit a learner into grade 8. The school had declined to admit the learner due to a blank conduct certificate, suggesting poor conduct at the learner's previous school. Although a certificate subsequently described the learner's conduct as satisfactory, the applicant's principal (Edkins) declined to admit her, on the basis of independent knowledge of the learner's poor disciplinary record and information privately conveyed by the principal of the learner's previous school.

Ndzondo AJ held:

"Edkins … has averred in his affidavit that he had an independent knowledge that Buhle was a learner with a bad record as to discipline. … This is incorrect and, on the contrary, his knowledge on his perceived behavioural problems … is based on reports that he received from other persons. … There are no supporting affidavits from these persons, save that of … the principal of Balmoral. However, I have no intention of attaching any weight to what she says in her affidavit because she does not seem to be a trustworthy person. At first she did not complete the aforesaid certificate of conduct and, when the fourth respondent took it to her to complete, she wrote that her conduct was satisfactory and there is no explanation in her affidavit why she changed to say that Buhle has a poor record and that the word 'satisfactory' is incorrect and should be withdrawn. It has been explained in the papers that a blank conduct certificate in this regard denotes unsatisfactory conduct on the part of the learner concerned. When she forwarded a blank form to the applicant she conveyed a message that Buhle was not of acceptable behaviour. In fact, Buhle's non-admission is based on this." [Paragraphs 26 – 28]

"The conduct of the principal of Balmoral is highly suspicious, more in particular when regard is had to the statement of Edkins to the effect that she told him secretly that Buhle was not of good character. To me she has been less than candid in this matter and I am convinced that her reasons for retracting her earlier statement about Buhle's conduct are devoid of the truth and accordingly cannot be accepted. Her sinister motives are demonstrated by the events set out in the next paragraph …" [Paragraph 30]

"It is the applicant's case that there were 11 applicants who had dubious records regarding their conduct. When the 86 (including the 11) conduct certificates were returned to her after the interviews had been cancelled there were only three that were sent back to the applicant, and there is no explanation … as to what happened to the other eight forms. However, it would be reasonable to assume that she must have subsequently completed the blank certificates to denote good conduct on the part of the remaining eight learners, and submitted them to the applicant, and these learners must have been ultimately admitted, and, if I am correct in this, her actions were indeed quite inappropriate and unbecoming. She unfairly discriminated against these three minors. Edkins also conveniently says nothing about this in his affidavit. It also does not emerge from his affidavit that he ever confronted her about her change of stance in the matter. This also makes Edkins' conduct in this regard suspect. Unfair discrimination is expressly prohibited by the Constitution. …" [Paragraph 31]

"Even if I am held to be wrong in what is stated above, I am still convinced that Edkins acted precipitately and improperly in refusing to admit Buhle. … In the meeting … he made it clear that Buhle's application had been refused on the grounds that the certificate of conduct had not been completed and hence the application was incomplete, and *at that stage it had not been about the child's conduct* … Accordingly, the inference is irresistible that the conduct of Buhle played no part whatsoever in his decision not to admit her." [Paragraphs 33 – 34]

"I must say that I have prepared this judgment with a great measure of haste due to time constraints. The order dismissing the application was made on Thursday 20 February 2007, and on the following day I was informed that the applicant wished to apply for leave to appeal. In view of the urgency of the matter, it was set down for hearing on the next Thursday, and I had only a few days at my disposal within which to write this judgment. In the premises, I wish to say that, if I have not dealt with an issue which is of significance in this matter, it should be understood that it has not been done deliberately, but has been due to the limited time at my disposal." [Paragraph 40]

The application was dismissed. The decision was overturned by the full bench in **Queenstown Girls High School v MEC, Department of Education, Eastern Cape, and Others 2009 (5) SA 183 (CK)**. The full bench found that "the learned acting judge in the court a quo was confused as to what administrative action was in issue and reached the incorrect conclusion. He should have concluded that the appellant was entitled to an order setting aside [the] directive."

CRIMINAL JUSTICE

MAFONGOSI V REGIONAL MAGISTRATE, MDANTSANE AND ANOTHER 2008 (1) SACR 366 (CK)

Case heard 22 June 2007, Judgment delivered 30 August 2007

This was an application to review a decision taken by the first respondent to continue with the applicant's trial, after the latest of several withdrawals by the applicant's legal representatives for ethical reasons. First respondent stated that applicant's right to legal representation had "expired". The applicant was duly convicted of fraud and sentenced to an effective 25 years' imprisonment.

Ndzondo AJ (Petse J concurring) held:

"… I am convinced, with regards to what happened in the office and in court, that [first respondent's] conduct was so grossly irregular as to warrant interference by this court. … It is quite clear that the first respondent took a decision in his office that he was not going to afford the applicant any further opportunity of obtaining the services of another attorney after Mr Ngwenya had informed him that he intended to seek leave to withdraw as the attorney of record when the matter was called." [Paragraphs 15 - 16]

"Mr Ngwenya must have informed the applicant what the first respondent had said … namely that her 'right to legal representation had expired' and it accordingly follows that it was undoubtedly for this reason that she decided to conduct her own defence and not apply for a further postponement of the case. … It was grossly irregular for the first respondent to decide simply, after Mr Ngwenya had informed him that he intended to withdraw as the attorney of record, to proceed with the case without having

heard the applicant on the issue. ... I doubt if this was an oversight because … he took a decision in his office that he was not going to afford the applicant another opportunity to engage the services of another legal representative and, by so doing, he ought reasonably to have known that this was in effect a denial to her of her constitutional right to be legally represented, and consequently a denial to a fair trial." [Paragraphs 18 - 19]

Ndzondo AJ considered case law on the right to legal representation, and continued:

"… [T]he applicant did not ask for a postponement. However, the possibility that she would have done so, had she been advised that she had a right to make such an application after the withdrawal of her attorney from the case, cannot be excluded. In fact, as alluded to above, she was given no choice but to proceed with her defence. Furthermore, the fact that she had initially sought legal assistance from the Legal Aid Board is a clear indication that she was not desirous of defending herself at the trial, and her decision to do so was not an informed one, and to me she felt compelled to do so." [Paragraph 25]

"State counsel placed heavy reliance on the fact that Mr Ngwenya had informed the court that the applicant had elected to conduct her own defence, which statement was confirmed by the applicant. … This can be of no assistance to the State. First, it must be considered in the light of what the first respondent said in court regarding what he had told the legal representatives in his office. Secondly, it is clear from the cases cited above that where an accused elects to be legally represented and then decides, for whatever reason, to conduct his or her own defence, the presiding officer has a duty of ensuring that such decision to abandon that choice has been freely and voluntarily taken by him or her and consequently that it is an informed one." [Paragraphs 28 - 29]

"The State, for proof of its case, relied, inter alia, on the evidence of a fingerprint expert and, as stated above, had to secure the services of a specially trained prosecutor from Pretoria. Furthermore, her attorney had informed the court that the applicant also wanted a fingerprint expert to prepare her defence, but did not have the necessary funds to employ one. I am accordingly not persuaded that the applicant had an easy day in court and on the contrary she must have been disadvantaged and therefore prejudiced, more particularly that she had no legal assistance. The State's evidence was of a technical nature and her cross-examination can hardly be described as effective." [Paragraph 34]

"I am therefore satisfied … that the applicant did not have a fair trial and this resulted in a failure of justice, and consequently the conviction and sentence cannot be allowed to stand and ought to be set aside." [Paragraph 36]

"Before concluding this judgment and given the widespread theft of government moneys intended for the poorest of the poor and sometimes most vulnerable of our less fortunate members of society, not only within the area of jurisdiction of this court, but countrywide, I feel constrained to say, without wishing to be seen to be prescriptive, that it would be perfectly within his rights if the Director of Public Prosecutions … were to prosecute the applicant afresh before another magistrate." [Paragraph 41]

The conviction and sentence were set aside.

SELECTED JUDGMENTS

PRIVATE LAW

UNITRANS AUTOMOTIVE (PTY) LIMITED V THE TRUSTEES OF THE RALLY MOTORS TRUST 2011 (4) SA 35 (FB)

Case heard 3 March 2011, Judgment delivered 10 March 2011

Applicant had been granted an ex parte interim interdict preventing the Respondents from dealing with a 4 x 4 Hilux motor vehicle pending the obtaining of a declaratory order to the effect that the applicant was the owner of the vehicle. Respondent argued that applicant was estopped from demanding the return of the vehicle.

Fischer AJ held:

"The legal position has been dealt with over a number of years in cases [citation to Appellate Division and High Court judgments] … All the above cases … deal, amongst other things, with the causal connection between the representation and the extent to or manner in which the representee acted on such representation to his or her own prejudice which has commonly become known as the so-called proximate cause test. In casu it was incumbent upon the respondent to show that culpa on the part of the applicant caused the respondent to be misled into the erroneous belief that Kok had the right to dispose of the vehicle. Put differently, the respondent must discharge the onus of proving that the negligence on the part of applicant (and not any other person's negligence) was the cause of respondent's erroneous belief. … The Appeal Court appears to have gone even further in Johaadien … by qualifying the view expressed in … Grosvenor Motors … by saying that it was conceivable that the owner of a motor vehicle could "by reason of compelling considerations of fairness" be estopped from asserting his or her rights even if there was no culpa on his or her part. …" [Paragraphs 4-5]

"The legal position has however been succinctly stated by the Supreme Court of Appeal in, amongst others, the case of Stellenbosch Farmers' Winery Ltd v Vlachos t/a The Liquor Den …: "As in the present instance, cases of estoppel by negligence often involve the fraudulent conduct of a third party and the complaint against the person sought to be estopped is that his negligence permitted or facilitated the fraud. In this situation our Courts have rejected, as being too broadly stated, the so-called 'facilitation theory', viz. that whereever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it … It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other's mistaken belief and resultant loss; and whether this result was reasonably foreseeable."" [Paragraph 7]

"Nienaber JA went on to state that our courts have, in attempting to determine whether it was the fraud of the intervening party (in casu Kok), or the negligence of the owner (in casu the applicant) which caused the representee (in casu respondent) to act to his prejudice "chiefly but not exclusively" employed the so-called proximate cause test. The learned Judge went on to state that whatever the approach was, it should not be viewed in isolation but rather in the context of a broad overall picture which would as such as of necessity include matters of policy and fairness. … " [Paragraphs 8-9]

"I am of the opinion that if regard be had to not only the manner in which applicant dealt with Kok, but in addition thereto the extent to which Kok was entrusted with the indicia of dominium or jus disponendi, being the vehicle, its ignition keys, the certificate of registration and the motor vehicle licence and licence disk evidencing that the vehicle had been transferred into the name of Kok, it must be accepted that applicant had as such provided Kok with all the "scenic apparatus" with which Kok was able to represent to the respondent that he was entitled to dispose of the vehicle and that respondent was as such entitled to purchase same from him. In Oakland Nominees (Pty) Ltd … Holmes JA encapsulates what in my opinion is the correct approach: "It would be wrong to say that the requirement is that the representation which is relied upon must be the cause of the defendant's loss. Such a formulation would emasculate the defence of estoppel, for the cause of the defendant's loss is nearly always the villainy of the intermediary. (my emphasis) In estoppel by negligent representation we are concerned with the effect of the representation on the state of mind of the defendant, i.e., that his reliance on it was the cause of his having entered into the transaction... This state of mind precedes his loss. Hence the requirement is that the representation and his reliance on it must be the cause of his having acted as he did - to his detriment." (emphasis of Holmes JA) ." [Paragraph 11]

"I find on the facts before me that without the indicia of dominium or the "scenic apparatus" provided by applicant to Kok, Kok would have been unable to persuade respondent to act to its own detriment and purchase the motor vehicle in question. The respondent purchased the motor vehicle and was able to register same in its own name by virtue of the indicia or "scenic apparatus" provided to it by Kok. Kok had in turn been provided with such indicia by applicant in circumstances where it acted negligently and on its own ipse dixit contrary to normal practise and procedure in parting with the indicia and/or "scenic apparatus" before receiving payment. The applicant was furthermore negligent in not foreseeing that Kok could and in fact did deal with the vehicle as his own property given the facts. In the circumstances and having regard to the facts and considerations of fairness I am of the opinion that the applicant is not entitled to the relief it seeks and that the application should be dismissed with costs." [Paragraph 12]

MBANA V MNQUMA MUNICIPALITY 2004 (1) BCLR 83 (TK)

Judgment delivered 26 June 2003

This case dealt with the validity of an employment contract entered into between the plaintiff and the Mayor, in light of the fact that the Mayor did not have the authority of defendant to conclude such an agreement; and if the contract was valid, whether its termination by the defendant was valid.

Fischer AJ held:

"It is quite clear that procedurally sub-rule (6) needs to be distinguished from sub-rules (1) and (4) of Rule 33. Rule (1) is invoked when the whole dispute between the parties, as defined by the pleadings, may be adjudicated upon after the institution of proceedings by reference to an agreed upon written statement of facts. What is clear is that under sub-rule (1), as opposed to sub-rule (4), the parties are entitled as of right to have the matter heard in this manner. … Where the parties wish to dispose of something less than the whole dispute between them they cannot seek to do so by agreement and as of right as they are obliged to formally apply for a separate determination under sub-rule (4). …" [Paragraphs 5 - 6]

"The court furthermore accepts that the parties have complied with the requirements of Rule 33(2) in that the facts have been stated accurately and the question for adjudication concisely formulated. It is of the utmost importance that great care be applied in the formulation of such statement of agreed facts especially if regard be had to the provisions of section 21A of the Supreme Court Act … It is common cause between the parties as regards the stated case that the legal position is governed by the Local Government: Municipal Structures Act … and the Local Government: Municipal Systems Act … as read with the Constitution…" [Paragraph 9]

"The intention of the legislature regarding the power to conclude a contract of employment on behalf of the defendant municipality must be inferred from the language of the legislation referred to above and read within the context thereof. … The cardinal rule of interpretation furthermore requires that this Court adhere to the plain meaning of the words of the statute unless such would lead to an absurdity or anomaly [citation to Appellate Division and SCA authority] … Section 57 of the Municipal Systems Act distinguishes in clear and unequivocal grammatical language between the written employment contract on the one hand and the performance agreement on the other hand. Section 60 of the same Act simply serves to confirm this distinction as in this section the Executive Mayor may be delegated the power to negotiate matters incidental to the employment contract but not to conclude the contract as such. Section 59(2) quite clearly stipulates that a delegation or instruction must not conflict with the Constitution, the Municipal Systems Act or the Municipal Structures Act. There is nothing in the relevant legislation to support the suggestion that the municipal mayor has the power to negotiate and conclude an employment contract with a municipal manager independently of the Municipal Council or that such power may be delegated by such Council. The maxim delegatus delegare non potest is apposite. … I find in the circumstances that the Executive Mayor, in negotiating and concluding the contract with the plaintiff independently of the municipal council acted unlawfully." [Paragraph 15]

"The further argument advanced … on behalf of the plaintiff is premised upon the submission that even though the statutory provisions are clear and unequivocal and notwithstanding the fact that the Executive Mayor had no authority … the defendant would nevertheless be bound by the action of the Executive Mayor, regard being had to the status of such office and the alleged overriding principles of the Turquand rule. The State, like any other company or corporation can only act through its employees. An outsider contracting with a company in respect of a contract that may be lawfully entered into, is entitled to assume that certain classes of company officials have the necessary implied authority to do what is usually associated with the powers relating to the office held by such officials. … Similarly when dealing with a statutory body such as the defendant in concluding a contract that may be lawfully entered into by such body, an outsider is entitled to assume that certain classes of officials have the power to conclude such contracts on behalf of the statutory body. … In the present case the provisions of the Constitution as read together with the Municipal Structures and Municipal Systems Acts make it quite clear that the process relating to the employment of a municipal manager does not depend on acts relating to the internal management of the defendant as opposed to the position … in the National & Overseas case …" [Paragraphs 16-19]

"In my opinion section 82 of the Municipal Structures Act gives the municipal council and no other person or committee the power to appoint a Municipal Manager. … The relevant Acts do not give the Executive Mayor such powers. To my mind Mr Dukada's submissions are thus without substance. The authorities he referred the Court to are inimical to the proposition he attempted to develop in argument. The Turquand rule can never be used as a mechanism whereby a court could or would bind an authority such as the defendant municipality to an act which is ultra vires. It is legally untenable for a court to

accord legal validity to such an act. In casu this would lead to an absurdity with the defendant municipality being bound by every unlawful act of the Executive Mayor related to municipal affairs simply because that person held the particular office. The checks and balances contained in the relevant statutes would amount to nought and this would lead to an anomaly the legislature could never have intended. ... The Executive Mayor in concluding the contract with the plaintiff ... acted ultra vires and the contract is thus invalid. It is accordingly unnecessary to decide whether the termination of the contract was valid or not." [Paragraphs 25-27]

CIVIL PROCEDURE

MATISO AND OTHERS V MINISTER OF DEFENCE 2005 (6) SA 267 (TK)

Case heard 10 March 2005, Judgment delivered 25 March 2005

This case dealt with the taxation of two bills of costs, and the issue of whether or not the State as judgment debtor could be brought before a court on contempt proceedings in order to enforce payment.

Fischer AJ considered the common law on the enforcement of judgment debts and High Court case law and held:

"In the Kate case the constitutional obstacle as well as the prohibition contained in the State Liability Act were "overcome" by reading and interpreting the Jayiya judgment so as to allow for: "... an adapted common law rule of civil contempt, shorn of its criminal elements of punishment, in the form of a declaratory order that a State functionary is in contempt of a court order" (my emphasis). The idea was that the State functionary could then be called to court to explain how and when the order sounding in money would be complied with ... I, with respect, cannot agree with the interpretation of the Jayiya judgment by Froneman J in so far as it relates to the development of the common law in respect of orders sounding in money and allows for the suggested adaptation of the common law. As I understand the development and rationale of our common law ... the whole object of contempt proceedings is not only to vindicate the court's honour in cases where a judgment debtor deliberately and mala fide ignores the court order ... but as importantly to compel compliance therewith by the judgment debtor ... Furthermore, civil contempt has always been and still is a criminal offence which is committed only when a party to a court order deliberately and mala fide ignores the order of the court ad factum praestandum and not when such party ignores the order of the court ad pecuniam solvendam (the state of mind of the judgment debtor as regards the latter order is irrelevant for purposes of a successful execution) ... Civil contempt remains a common-law crime irrespective of whether or not it has been "shorn of its criminal element of punishment". A declaratory order in such circumstances as proposed by Froneman J would perpetuate the very common-law distinction complained of in that it would not only serve to discriminate between State functionaries and private individuals in respect of orders ad pecuniam solvendam but would once again give the judgment creditor no more than a "hollow and unenforceable" judgment." [Paragraphs 11 - 13]

"This Court, like all other courts throughout the country, is enjoined by the Constitution to interpret the law (both common law and statute) within the new constitutional context in order that all such law, where reasonably possible, complies with the Constitution ... Where such law does not comply with the Constitution it must be remedied, where possible, to enable it to so comply and where this is not possible

it must be declared unconstitutional (see section 172 of the Constitution and National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others …). Section 165(5) of the Constitution stipulates that "an order or decision issued by a court binds all persons to whom and organs of State to which it applies" and to the extent that the State Liability Act, as amended in 1993, as read together with the prevailing common law frustrates a judgment creditor in attempting to compel compliance by the State with an order ad pecuniam solvendam by effectively placing the State above the law it would appear that such Act (Act 20 of 1957), and more specifically section 3 thereof, is in conflict with section 165(5) …" [Paragraphs 14 - 15]

"In the circumstances and while section 3 of the State Liability Act remains on the statute book in its present form I find that the prevailing common law does not allow the State, as a judgment debtor, to be brought before court on contempt proceedings to enforce the payment of money orders (ad pecuniam solvendam) and that the relief prayed for cannot be granted." [Paragraph 19]

The application was dismissed with costs.

CRIMINAL JUSTICE

SALIWE V S (A49/2015) [2015] ZAFSHC 151 (13 AUGUST 2015)

Case heard 27 July 2015, Judgment delivered 13 August 2015

This was an automatic appeal against sentence. The appellant, together with two other accused, was charged with the rape of a 43 year old woman. He was convicted and sentenced to life imprisonment by the regional court. On appeal, the appellant argued that the court a quo had erred in finding that there were no substantial and compelling circumstances justifying departure from the prescribed minimum sentence.

Fischer AJ (Mocumie J concurring) held:

"In sentencing the appellant to life imprisonment, the court *a quo* considered, in mitigation of sentence, the fact that the appellant had been in prison for approximately 22 months awaiting trial, that he had been under the influence of alcohol as well as his friends and that he was a first offender. In aggravation of sentence the court *a quo* found that the complainant was a defenceless woman who had been raped by three men and that it must have been a traumatic experience which would remain with her for the rest of her life." [Paragraph 5]

"The evidence led in mitigation of sentence relating to the personal circumstances of the appellant were the following: (1) he was 24 years old, (2) he was unmarried and had no children, (3) he had completed grade 10 at school, (4) he was gainfully employed at the time of the incident and his subsequent arrest, (5) whilst his mother was still alive he had no idea as to the whereabouts of his father, (6) he had asked the complainant for forgiveness for what he had done, (7) he asked the court to have mercy." [Paragraph 8]

"The court *a quo* correctly found … that an apparent lack of physical injury to the complainant cannot and will not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. … I will accept that this court in assessing whether or not the prescribed minimum sentence was appropriate, is not entitled to resort to vague and unsubstantiated speculation and conjecture in an

attempt to impose a lesser sentence which would comply with this court's subjective notion of fairness .." [Paragraphs 12 – 13]

"... [U]pon a careful reading of the record, it does however appear that the court *a quo* failed to have appropriate regard to the appellant's personal circumstances and more specifically the fact that he was a relative youth, had asked the complainant for forgiveness and had spent the last 22 months in prison awaiting trial. The court chose rather to rely on the view that the complainant had been severely traumatised and would carry the scars of the unfortunate incident with her for the rest of her life, notwithstanding the fact that there was no evidence on record to support this inference." [Paragraph 14]

"A sentence of life imprisonment is currently the gravest of sentences that can be imposed on an individual by a court of law in South Africa and this for even more severe crimes such as murder. I am of the view that there are a number of factors that weigh heavily in the appellant's favour such as the fact that he is only 24 years of age, was gainfully employed, a first offender, had been materially influenced by his co-accused as well as the consumption of alcohol and that he had in conclusion seen the error of his ways in seeking forgiveness from the complainant. In my opinion these factors strongly suggest a very real prospect of rehabilitation. The trial court clearly ignored this reality and chose instead to focus on the nature of the crime as well as the complainant's personal circumstances. The Supreme Court of Appeal has found that such circumstances are deemed to be substantial and compelling and if discarded by the trial court would be deemed to be unjust entitling a court of appeal to interfere and impose a different sentence. ..." [Paragraph 15]

"... I am of the opinion that the very real prospect of rehabilitation of the appellant together with the fact that he is a first offender who realised the error of his ways must, in the particular circumstances of the case, be regarded as substantial and compelling circumstances justifying a lesser sentence ... In order to give substance to the prospect of rehabilitation, I am of the view that imprisonment for a period of 20 years would be more appropriate." [Paragraphs 16 – 17]

The appeal was upheld, and the sentence set aside and replaced with a sentence of 20 years' imprisonment.

SELECTED JUDGMENTS

CIVIL PROCEDURE

APOSTOLIC FAITH MISSION OF SOUTH AFRICA AND ANOTHER V MOLOI AND OTHERS (4702/2013) [2014] ZAFSHC 151

Case heard 19 June 2014, Judgment delivered 11 September 2014

This was an application in terms of Rule 28 (4) for an amendment of a Notice of Motion, a rule nisi having been granted at the instance of the first applicant to prevent the respondents from disrupting church services of the applicant. The case dealt with the requirements and the procedures to be followed when amending a pleading.

Mbhele AJ held:

"The observation in all cases supra is that amendment will only be refused if allowing it would cause prejudice to the other party. The attitude of the Courts is not to close the door in the face of a litigant whose additional information may assist the court to come to a just decision." [Paragraph 11]

"An interim order is a court issued proclamation that is meant to be effective only until a court has had a chance to hear a complete case and has entered a final order." [Paragraph 13]

"The proposed amendment does not seek to strike out the existing interim order nor does it alter the same in the absence of a specific order directed at the interim order. The Notice of Motion as amended will be adjudicated upon by the court for the purpose of a final order. Allowing the amendment will in my view not affect the existing interim order." [Paragraph 14]

"The amendment sought by the second applicant seeks to narrow down the prayers as set out in the notice of motion to a specific future event." [Paragraph 19]

"Disruption of church services is an undesirable phenomenon at any given time. I do not see how the respondents will be prejudiced by the proposed amendment." [Paragraph 20]

Leave to amend the notice of motion was granted, with each party to pay their own costs.

CRIMINAL JUSTICE

SOLO V S (A225/2015) [2015] ZAFSHC 112

Case heard 13 April 2015, Judgment delivered 11 June 2015

The appellant was convicted in the Regional Magistrate's Court on three counts of rape, and sentenced to life imprisonment on counts 1 and 4, and to 10 years imprisonment on count 5. The appellant argued that the court a quo erred in its finding that the State had proved its case beyond reasonable doubt, and in not accepting his version.

On the evidence of identification-

Mbhele AJ (Musi J concurring) first considered the question of identification in respect of count 1, and held:

"Our courts have repeatedly stated that the evidence of identification must be approached with caution. Such witness must not only be honest but must be reliable. It is generally accepted that even the most honest witnesses may make honest mistakes with identification, owing to circumstances surrounding the specific incident" [Paragraph 9]

"It is, in my view, clear from the testimony of both the complainant and her boyfriend that at the time of reporting this incident they both failed to give full account of who their assailants were. It is not conceivable why the complainant's boyfriend who had known the appellant for over eight years would describe him as an unknown male person when giving his statement to the police." [Paragraph 10]

"The complainant's account of how many people accosted them on the night of the incident, differs from that of her boyfriend. Their description of how the appellant was dressed differed as well. Complainant mentioned that there were both street lights and a mass light while her boyfriend mentioned that there were no street lights in the vicinity." [Paragraph 12]

"Contradictions in the complainant's evidence are so material that the evidence has to be approached with caution. I am of the view that the trial court misdirected itself when if found that the numerous contradictions are of no material effect." [Paragraph 14]

"I am not persuaded that the appellant's failure to testify can be used as a factor against him in this matter. The state was throughout the trial saddled with the burden to prove its case beyond reasonable doubt. I am not persuaded that the state succeeded in discharging its burden." [Paragraph 15]

Mbhele AJ then considered the convictions in respect of counts 4 and 5, and held:

"Appellant did not adduce evidence to refute the overwhelming evidence brought by the state. The state's evidence was undisputed. I am of the view that there was no misdirection on the part of the trial court when convicting the appellant on both counts 4 and 5." [Paragraph 19]

"Sentencing is pre-eminently in the discretion of the trial court. The sentences can only be interfered with if the sentencing court exercised its discretion unreasonably or in circumstances where sentences are adversely disproportionate." [Paragraph 20]

"When weighing up the mitigating factors against the aggravating circumstances, this matter as well as the interests of the community, I am not persuaded that the sentences imposed in this matter are unjust. I am of the view that the trial court exercised her discretion judiciously." [Paragraph 23]

The appeal thus succeeded in respect of count 1, and the conviction and sentence were set aside. The convictions and sentences in respect of counts 4 and 5 were confirmed.

NTSASA V S (A10/2014) [2014] ZAFSHC 88

Case heard 19 May 2014, Judgment delivered 12 June 2014

The appellant and two other accused were charged with housebreaking with the intent to rob, robbery and four counts of rape. The appellant was convicted, and sentenced to seven years' imprisonment for housebreaking with intent to rob and robbery, and 25 years' imprisonment for rape, on the basis that he

raped the complainant more than once. The question before the court was whether the court a quo correctly identified and convicted the appellant, as well as the appropriateness of the sentence.

Mbhele AJ (Van Der Merwe J concurring) held:

"The correct approach when analysing evidence is that evidence must be considered in its totality." [Paragraph 8]

"The complainant was attacked by two male persons, one of them is called Tshediso. Her description of this person was that he had a dark complexion, short hair and a moustache and that he wore a striped t-shirt, a leather jacket, jeans and tekkies on the date of the incident. It was not disputed that the appellant fits this description. Two weeks after the incident, the appellant was found in possession of items belonging to the complainant which he sold …" [Paragraph 10]

"Although the circumstances were certainly not ideal for observation the complainant gave a remarkably detailed description of her assailant and she immediately recognised him when she saw him again. This indicates that her identification of the appellant is reliable. In addition, the appellant was in possession of items stolen from the complainant, which he did not explain but falsely denied." [Paragraph 11]

"When one puts all pieces of evidence together, a reasonable possibility of excluding the appellant as one of the assailants who broke into the complainant's house does not exist." [Paragraph 12]

"The complainant, as a single witness, was both credible and reliable. In the result I am not convinced that the trial court erred in convicting the appellant." [Paragraph 13]

"It is trite that a court of appeal may not interfere with sentence unless it finds that the trial court did not exercise its discretion judicially." [Paragraph 14]

"The appellant's legal representative argued that the trial court overemphasised the interests of the community and the seriousness of the offence at the expense of personal circumstances of the appellant. I disagree. When sentencing the appellant the trial court considered all relevant factors and found that there are compelling and substantial circumstances that warrant deviation from the prescribed minimum sentence." [Paragraph 15]

"I am of the view that the trial court did not misdirect itself. Given all the circumstances I am of the view that the sentence imposed is appropriate. It cannot be said to be a sentence that could not reasonably have been imposed in the circumstances." [Paragraph 16]

The appeal was dismissed.

PAKELA V S (A 195/2013) [2014] ZAFSHC 95

Case heard 5 May 2014, Judgment delivered 29 May 2014

This was an appeal against the conviction and sentence of a police officer who was convicted for the theft of motor vehicle parts. The main issue before the court on appeal was whether the prosecution had proved beyond reasonable doubt that the accused had in fact committed the crime.

Mbhele AJ (Musi J concurring) held:

"It is trite that the state has to prove its case beyond reasonable doubt. The appellant's version must be reasonably possibly true. If the court finds that it is reasonably possible that the accused's version is true, then he is entitled to acquittal." [Paragraph 11]

"The court a quo found that the state witnesses were truthful and reliable, more particularly Warrant Officer Lesibe who has testified before and it for the past 14 years and could not find fault with him or his testimony. The court condemned the appellant for not recording the incidents of that night in his pocket book but found no fault with the state witnesses for committing the same omission. More weight was put on the appellant's failure to produce the docket for which his statement was needed." [Paragraph 11]

"Upon cross-examination it emerged that the two female police officers who were working at the charge office on the night of the incident would, if called, have contradicted the state's version. ...The conduct of the state witnesses, on the night of the incident leaves many questions unanswered." [Paragraph 12]

"The police pocketbook is a "bible" of any police officer and I find it strange that they all chose not to record this incident in their pocketbooks. The incident was not even recorded in the occurrence book at the charge office as is normally the practice." [Paragraph 13]

"What is even more strange is that they failed to confiscate and record the tools that were used and found on the scene of the crime in the SAP13 register." [Paragraph 14]

"It is unfathomable how a person acting alone, could get into a boot of a car and manage to put a wooden block on its lid to keep it closed." [Paragraph 15]

"I have asked myself the question whether the state's case was so strong and convincing that it justified total rejection of the appellant's version. The answer is no. The court a quo in its analysis of the evidence expected the appellant to prove his innocence and disregarded the material defects that were so glaring in the state's case." [Paragraph 16]

"In the magistrate's view the appellant was expected to give reasons why the state's witnesses implicated him falsely. This approach is wrong as it puts a burden on the appellant to speculate and find reasons why the state witnesses implicated him falsely." [Paragraph 17]

"I am of the view that the state has not succeeded in proving the guilt of the appellant beyond reasonable doubt." [Paragraph 18]

The appeal succeeded, and the conviction and sentence was set aside.

SELECTED JUDGMENTS

PRIVATE LAW

ERASMUS V JACOBS AND ANOTHER (5410/2011) [2012] ZAFSHC 111 (7 JUNE 2012)

Case heard 24 May 2012, Judgment delivered 7 June 2012

The case concerned an application to remove an executor from office in terms of section 54 of the Administration of Estates Act. Section 54(a)(v) states that an executor may be removed from his office by the court "if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned." The Applicant sought to remove her brother, the First Respondent, from the office of executor by reason of the fact that he is not a fit and proper person to be responsible for the administration of the estate; and that an independent executor should be appointed to investigate the circumstances regarding the conclusion of the sale of the farms forming the subject matter of their deceased mother's will.

Mhlambi AJ held:

"The thrust of the Applicant's claim, according to her, was the dishonest manner in which the sale agreement between her late mother and First Respondent's company was concluded, which she viewed as an orchestrated effort to prejudice her as a beneficiary. … She based her conclusion on the following: 1) She never knew of the will of 1 December 2005. 2) Both the will and sale agreement were concealed from her and she had no knowledge of their existence until after her mother's death. 3) The purchase price… was suspect as it was significantly lower than the valuation of the property as at the time of the sale. 4) Her late mother was diagnosed with Alzheimer's disease, a considerable period before her death. It was, according to the applicant, unlikely that her deceased mother could have been of sound mind as at the time of the sale." [Paragraphs 5-6]

"The First Respondent admits having purchased the farms from his late mother on 13 April 2006. Applicant and her spouse have been staying on the farms for free since 2003. He contends that the sale of the farms to himself occurred three years before their mother's death and had nothing to do with the deceased estate…. First respondent further maintains the amount owing to the Applicant by virtue of the Liquidation and Distribution Account was paid to her on 16 or 18 November 2011." [Paragraphs 8-9]

"He, furthermore, holds that the application to remove him as an executor of the deceased estate is as a result of the Applicant's dissatisfaction with the Sale Agreement concluded by him with their late mother, a transaction she was fully aware of." [Paragraph 10]

"Counsel for Applicant referred me to various authorities (for which I am grateful)…'The office of the executor should not be used in order to pursue a private agenda'. *Van Niekerk v Van Niekerk*….In *Harris v Fisher*…, it was said 'Executors or Administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate.' 'The Court has a discretion on removing an executor in terms of section 54(a) (v) of the Act and the main guide must be the welfare of the beneficiaries.' *Die Meester v Meyer En Andere*…" [Paragraphs 12-15]

"However, Solomon ACJ, in *Sackville-West v Nourse And Another* … quoted as follows…'But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity'….'If satisfied that the continuance of the trustee would prevent the trusts being properly executed,' might remove the trustee." [Paragraph 16]

"The cardinal question is: Can the First Respondent be said to have acted, in his capacity as Executor, dishonestly or in an untrustworthy manner? In my view, this question should be answered in the negative. The conduct complained of falls outside or took place before First Respondent took office." [Paragraph 17]

"Applicant has not furnished an iota of evidence or factual basis in support of the allegations she makes against the First Respondent. She has received her portion of the inheritance in terms of the Liquidation and Distribution Account and accordingly there is no indication that she was concerned with the manner the estate was being administered. I am inclined to agree with First Respondent's Counsel that the Applicant's main purpose is to achieve the setting aside of the Sale Agreement." [Paragraph 18]

"Respondent's Counsel advanced the following further arguments which, in my view, are sound: (a) The contract was concluded three years prior to the parties' mother's death. (b) There was no medical report or evidence to confirm that Applicant's late mother was of unsound mind as at the conclusion of the contract of sale. Equally strange is applicant's statement in her replication that, she handed the deceased the contract document for signature. (c) There are no prospects of success with Applicant's envisaged action against First Respondent even in the event another executor is appointed. (d) In replication, Applicant admits her signature on the contract, despite her having stated in the Founding Affidavit that it was concealed from her." [Paragraph 19]

The application was dismissed.

CIVIL PROCEDURE

FARMWISE GAINS (PTY) LTD V REINHARDT HAGEMAN [2012] JOL 29361 (FB)

Case heard 3 May 2012, Judgment delivered 24 May 2012

The case was an opposed application for a summary judgment based on breach of an agreement in terms of which the defendant was to supply maize to the plaintiff.

Mhlambi AJ held:

"There are, in my mind, three aspects in dispute in this matter, *viz*: a)Whether the claim is a liquidated amount of money. b) Whether the defendant raised a proper defence in terms of subrule 3(b). c) The concern whether the verification of the cause of action is proper." [Paragraph 1]

"Counsel for the plaintiff confirmed that the damages claimed are contractual, flowing from the two contracts for delivery of maize by the defendant to the plaintiff. He argued strongly that the claim should be regarded as a liquidated amount in money as the ascertainment of the amount was prompt and a mere matter of calculation." [Paragraph 4]

"Defendant filed a notice of intention to oppose the summary judgment application by means of legal argument to be presented by counsel, and duly filed heads of argument ... This step, of not filing an answering affidavit, did not go well with the plaintiff, and more so in that no particulars were disclosed as to the legal argument to be made ... Briefly, the defendant's heads of argument highlight the following: (i) Plaintiff's claim is based on damages and, therefore, not on a liquidated amount. ii) The manner of calculation is based on clause 15(1)(b).iii) Consequently, in the absence of agreement as to the quantum the claim remains illiquid. iv) Plaintiff has not complied with rule 32." [Paragraphs 12-13]

"A defendant upon hearing of an application for summary judgment may in terms of rule 32: '(a)... (b) Satisfy the court by affidavit that he has a bona fide defence to the action; ... disclosing fully the nature and the grounds of the defence relied upon." [Paragraph 14]

"It is obvious that the defendant has not acted in accordance with the rule, and raise [*sic*] a proper defence as required. The question is, notwithstanding the finding, can the Court grant leave to defend ... In order to exercise the discretion under rule 32, the Court must examine whether the plaintiff's claim complies with rule 32(1) or (2)." [Paragraph 15]

"In our organized society with businesses, trades and professions organized as they are it is normally a matter of no difficulty to determine the usual and current market price of articles sold and the reasonable remuneration for services rendered. These are matters, which as a rule can be ascertained speedily and promptly. Generally speaking therefore a Court can, in exercising its discretion regard such a claim as a debt or liquidated demand unless of course there are features, appearing from the claim as framed or other relevant circumstances, which preclude the Court from regarding such a claim as a debt or liquidated demand in the sense discussed in this judgment': *Fatti's Engineering Co. Ltd v Vendick Spares"* [Paragraph 17]

"I am therefore satisfied that the defendant's heads of argument fill the lacuna created by the failure to comply with rule 32(3) (*Jacobsen van den Berg SA (Pty) Ltd v Triton Yachting Supplies*)...I therefore find it unnecessary to decide on the point *in limine* raised by defendant's counsel in regard to the noncompliance with rule 32 ..." [Paragraphs 18-19]

The application was therefore dismissed.

CRIMINAL JUSTICE

RAMAISA V S [2012] JOL 29081 (FSB)
Case heard 16 April 2012, Judgment delivered 3 May 2012

The appellant, a school teacher, was charged with the murder of his wife. The magistrate refused to grant bail, *inter alia* on the grounds that the appellant had made a threat against the child, the offence was very violent and led to a feeling of shock and anger in the community, the two children would be in a vulnerable position with regard to the appellant and could be manipulated by him to alter their testimony as well as that the release of the appellant would impact on public trust in the justice system. The present case was an appeal was against the refusal of the magistrate to release the appellant on bail.

Mhlambi AJ (Jordaan J concurring) held:

"The issues in this appeal are as follows: i) Has the appellant convinced the court on a balance of probabilities that the interest of justice do not require his detention; ii) Has the magistrate exercised her discretion to grant bail wrongly; iii) If so, is this Court sufficiently persuaded that this is so, without imposing its view on the court *a quo*." [Paragraph 6]

"In an appeal against the refusal of the bail, it should be stressed that no matter what the appeal court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail, exercised that discretion wrongly (*S v Barber*)"[Paragraph 9]

"On page 101 [of the decision of the court *a quo*]… the prosecutor addresses the court as follows:
'The State case as well as the defense (*sic*) case, has already been closed but in terms of section 63 of the Criminal Procedure Act, the court felt that it does not have enough evidence to come to a conclusion and instructed the state to call upon the domestic violence clerk, your worship, like I indicated…' In the light of the above, the only inference to be made is that, the evidence of the two witnesses clarified the doubt that the magistrate had in granting the bail or not… … " [Paragraph 14-15]

"The evidence surrounding the threat to the child was led before the court acted in terms of section 60(3) of the Act. This section is to the effect that if the court is of the opinion that it does not have reliable or sufficient evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court … It was therefore unnecessary for the court to invoke the provisions of section 60(3), as it could have refused the application merely on the suggested threat of the child if the court believed in the credibility and/or reliability of the Police witnesses. Therefore, to rely on the latter factor to refuse to grant bail is very opportunistic." [Paragraph 17-18]

"It is quite evident that the court misdirected itself and failed to grasp the import of section 60 of the Act. The 'five pages of things that the court can take into consideration' must be read and

interpreted correctly in order to make a proper analysis and evaluation of the evidence." [Paragraph 19]

"The court in terms of section 60(9), in considering the question in subsection (4) shall decide the matter by weighing the interests of justice against the right of the accused to his personal freedom... ... taking into account the factors set out thereunder. These factors are clearly in favour of the appellant. The court failed to apply its mind as to the contents of this subsection and accordingly misdirected itself... the court quotes section 60(4)(e) in an attempt to justify the evidence of the woman from the ANC Women's League. This attempt is futile as this subsection has no application in the present case and as she had also found. It refers to exceptional circumstances, which are not applicable here. Consequently calling this witness was unnecessary" [Paragraph 21]

"It is clear to me that the magistrate is "clutching at straws" in order to arrive at the conclusion she did. It is further evident that on her dealing with section 60 of the Act, that she had embarked on a system of elimination of the grounds and factors which might or might not be applicable. This selective reasoning led her to quoting and interpreting the sections out of context and incorrectly." [Paragraph 22]

"The word "probable" in section 60(4) above is defined as "capable of being proved, demonstrable, moveable, having the appearance that may reasonably be expected to happen". "Likely" is defined as "seeming as if it would happen or prove to be as stated" (see the *Shorter Oxford English Dictionary on Historical Principles*) ... I opine that the cross-examination of the appellant, despite its aggressive nature, did not reflect badly or portray him in a bad light. ... What stands out clearly in his evidence is his denial that he will manipulate the children, his concern for the welfare of the children, their accommodation, transport to school, education and safety." [Paragraphs 23-25]

"It is interesting to note that the prosecutor never pursued this matter any further. I am therefore convinced that the magistrate never considered the provisions of section 60(9) in coming to her conclusion. It is also evident that it was opportunistic to rely on the untested evidence of the Police in respect of the threat to the minor child, as she was in doubt as to her decision even after the State and the accused closed their cases. ...What remains to mention is that from the onset, the appellant never denied to the Police that he could be responsible for her death. His legal representative advised the court (despite their refusing to answer questions about the "merits") at the inception of the bail application, that their defence was selfdefence. It is clear to me that the evidence on record militates against the appellant planning or wishing harm to his children." [Paragraph 27-28]

"I am therefore of the considered view that the magistrate overlooked some important aspects in this matter, justifying a court on appeal to interfere with that decision ..." [Paragraph 29]

The appeal was upheld and the accused was granted bail.

MOLOLO v S (A284/2012) [2013] ZAFSHC 23 (7 JUNE 2012)

Case heard 24 May 2012, Judgment delivered 7 June 2012

The appellant was convicted of murder in the regional court and sentenced to 15 years imprisonment. The appeal was against sentence only.

Mhlambi AJ (Molemela concurring) held:

"The appellant, as at the time of sentence, was 45 years old, married, a holder of a University Degree in Education and had worked for the Department of Education's office in Bloemfontein for 21 years. He earned a salary of R10 000.00 per month. He has a 17 year old daughter for whom he paid maintenance in the amount of R300.00 and paid R1 000.00 towards her grocery. He also cared for his sister's two children for whom he paid University fees." [Paragraph 3]

"He had one previous conviction of reckless and negligent driving which the court did not take into consideration and, for all intents and purposes, regarded him as a first offender. The court found that he had caused the two fatal stab wounds to the deceased when he stabbed him from the front. Thereafter, he had stabbed the deceased in the back when the latter turned around to flee." [Paragraph 4]

"The facts that led to the appellant's prosecution are briefly as follows: The deceased was quite displeased with the behaviour and attitude of the lady who had alighted from the appellant's car. He had approached the appellant, who was at the time seated in the driver's seat to register his displeasure. An altercation then ensued between the appellant and the deceased as blows were exchanged. The appellant got out of his motor vehicle, pursued the deceased and stabbed the deceased twice. The deceased sustained fatal injuries in the process." [Paragraph 9]

"The cardinal issue in this appeal then is whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances were non-existent and therefore precluded from departing from the sentences laid down by the legislature." [Paragraph 10]

"Counsel for the appellant referred to *S v Maleka*, arguing for a partially suspended sentence. The appellant in that case, a 30 year old teacher was convicted in a Regional Court of murder and was sentenced to ten years imprisonment. The following factors constituted mitigating factors in that case: The appellant was a first offender; The appellant is a useful member of society and occupies a responsible position as a science teacher holding a senior teaching diploma; The appellant supports his mother as the sole breadwinner; The appellant acted under extreme provocation; The crime was not premeditated and was committed almost on the spur of the moment; The conviction and imprisonment of the appellant is likely to render it extremely difficult for him to be re-employed as a teacher. On appeal the sentence was reduced to ten years imprisonment of which five years was suspended for three years." [Paragraph 11]

"In the seminal judgment of *S v Malga*s…it was emphasised that: 'The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders… and like considerations were equally obviously not intended to qualify as substantial and

compelling circumstances... But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'" [Paragraph 14]

"*Malgas, supra*, was followed in *S v Matyityi....* See also *S v Serabo*...The main purposes of punishment are deterrent, preventive, reformative and retributive – *R v Swanepoel*... One should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all the factors." [Paragraph 15]

"In *S v De Kock*... it was stressed that the three factors of the Zinn triad have to be considered in conjunction with one another and that each should be afforded a certain weight depending on the facts of the case, taking into account the purposes of punishment." [Paragraph 16]

"In the present appeal there are a number of mitigating factors, *viz*: 17.1 The appellant is a first offender; 17.2. The crime was not premeditated and committed almost on the spur of the moment; 17.3. The deceased initiated the quarrel; 17.4. The appellant is a useful member of society who occupied a responsible position in the Department of Education; 17.5. The appellant was the breadwinner of his family and the next-of-kin; 17.6. The appellant acted under provocation; 17.7. The probability of his re-employment in the Educational field is probably zero as a result of his conviction and imprisonment." [Paragraph 17]

"On reading the record on sentence, it would appear that the learned magistrate did not put sufficient weight to these factors. Mr Van Rensburg's contention that appellant's personal factors were under-emphasised, does not appear to be misplaced." [Paragraph 18]

"Besides, it is apparent that the trial court did not consider the particular circumstances of this case in the light of the well-known triad of factors relevant to sentence and impose what is considered as a just and appropriate sentence... ... The court therefore felt itself bound to comply with the prescription of the minimum sentence legislation. This constitutes a misdirection. In my view, the appellant's mitigating circumstances, cumulatively viewed, constitute substantial and compelling circumstances that warrant deviation from the prescribed sentence." [Paragraph 19]

"I am therefore of the considered view that this court is justified in interfering with the sentence imposed by the trial court and that an appropriate order is the following: The appeal succeeds ... The sentence of 15 ... years imprisonment is set aside and there is substituted for it a sentence of imprisonment for 10 ... years. ..." [Paragraphs 20-21]

SELECTED JUDGMENTS

PRIVATE LAW

PIENAAR V VUKILE PROPERTY FUND (A140/2014) [2015] ZAFSHC 127

Case heard 11 May 2015, Judgment delivered 25 May 2015

This was a delictual claim for the injuries sustained by the plaintiff when she slipped and fell at a shopping centre. The claim was not successful in the court a quo. The main issue before the court on appeal was whether or not the respondent's negligence in not cleaning tiles was the cause of the appellant's falling and injuring herself.

Mia AJ (Van Zyl J concurring) held:

"Negligence on the part of the respondent would be proved if it was clear that the respondent ought reasonably to have foreseen that the tiles constituted a danger to the public when they became dirty and took no steps to avert the danger by cleaning the tiles or warning the public of the danger." [Paragraph 4]

"… [T]he Court a quo found that the probabilities suggested that the appellant was running as she was late. The appellant wore smooth soled shoes as described by De Beer who saw them when she took off the appellant's shoe at the appellant's request. The Court a quo accepted De Beer's evidence as she would not have known ordinarily that the appellant had taken an early lunch break unless the appellant had informed her of this fact. … There was no evidence indicating how much of dirt the travertine tiles collected or exactly how smooth or slippery they became in comparison with the glazed porcelain tiles. …" [Paragraph 9]

"The appellant elected to claim damages from the respondent who would ordinarily not be liable for the negligent acts of the subcontractor it engaged to clean the Centre." [Paragraph 10]

"In the present matter the respondent's liability would arise from the breach of its duty to take reasonable steps to prevent injury which ought to have been foreseen. This is in accordance with the classic test for negligence expressed in Kruger v Coetzee … In applying this test to the present matter it is evident that the respondent took steps to guard against harm. The respondent appointed a subcontractor to clean the premises and took steps to ensure that the performance of the duty was undertaken and that the necessary care was taken." [Paragraph 12]

"Since Nel was not a cleaning expert and had no knowledge of the cleaning routine at the Centre, his evidence was not sufficient to show that the respondent had failed in its duty to take the necessary care. Only the evidence of a cleaning expert could rebut the respondent's evidence that the cleaning system employed by the respondent was adequate. The "tongue tip test" conducted by Nel … was not sufficient to indicate that the respondent did not take reasonable care. The test entailed Nel wetting his finger and running it along the floor… This test has no scientific basis or any skill set required in relation to cleaning the tiles. It is also not a reliable indication that the floors were not cleaned the night before the appellant slipped on the tiles or that the floors were not kept clean during the day by the cleaners when the appellant slipped." [Paragraph 13]

"… [O]ne must be mindful of the fact that what is reasonable or which reasonable steps ought to be taken in a given set of circumstances would depend on the facts of the particular case. On the facts of this matter it is clear that the respondent took all reasonable steps to ensure that the tiles were clean

and not slippery. The Court a quo's finding that the respondent did what was required of it and that it was not necessary to do more than what it had done, is unassailable. The Court a quo's finding that the appellant did not succeed in showing that the respondent was negligent is in my view correct." [Paragraph 14]

The appeal was dismissed with costs.

SOCIO – ECONOMIC RIGHTS

BAPHIRING COMMUNITY V UYS AND OTHERS 2010 (3) SA 130 (LCC)

Case heard 24 – 28 August 2009; 1 December 2009, Judgment delivered 19 January 2010

This case dealt with a claim for restitution in terms of the Restitution of Land Rights Act. The claimant proposed to hold the land through a communal property association to which all the community members would be allowed to join. The main issue was whether the restoration would be feasible and equitable in terms of s 33 of the Act.

Mia AJ (Gildenhuys J and M Wiechers (assessor) concurring) held:

"The land at old Mabaalstat is used for agricultural cultivation. The present value, as estimated by a valuer … comes to an amount of R70 million. The difference in the value of the land as it was at the time of dispossession and the present value (even considering an adjustment for inflation purposes) is considerable. Expropriation of the land in order to restore it to the Baphiring community will, in addition, require the current landowners to be compensated for financial loss they may suffer as result of the expropriation, which will increase the costs to the fiscus of acquiring the land in order to restore it to the claimant community." [Paragraph 18]

"The lack of support and resources for relocation to the old Mabaalstat, as well as the circumstances of the claimant community at the new Mabaalstat, weighs against relocating the Baphiring community to the old Mabaalstat. It appears that, if relocated, community members would be forced to downgrade their living space." [Paragraph 26]

"The evidence of the lack of institutional, expert and financial support, as indicated above, accounts for the general absence of successful relocations to restored land. The cost of the acquisition of Rosmincol (estimated at R70 million, to which must be added the solatium and the financial losses which will be suffered by the landowners as result of the expropriation) is substantial. … In addition, there will be the costs of equipment and running capital necessary for continued farming on the land. Mrs Van der Merwe's evidence indicated that, over and above the acquisition costs, another approximately R65 million would be required to ensure the community can relocate successfully to old Mabaalstat." [Paragraph 27]

"The evidence is that not all of the community members will want to move. It is not clear at this stage how many families will move and how many new homes will be required to be built. … Resources, in terms of expertise and financial assistance, are necessary, but lacking in the present case. This impacts negatively on the community's intended use of the land and the feasibility of restoration." [Paragraph 28]

"There are graves of the Baphiring tribe on several of the portions of the farm Rosmincol. The graves were pointed out on the property belonging to Mr Prinsloo during the site inspection in loco. … The claimants request restoration of the land housing the gravesites in the event that it is found that restoration is not feasible. The respondents indicated that they had no objection to such restoration." [Paragraph 30]

"Having considered the evidence, it is clear that the separated question referred for prior decision, viz whether restoration is feasible, must be answered in the negative. Consequently it is declared: 1. Restoration of the farm Rosmincol to the Baphiring community is not feasible, subject to para 2 below. 2. Restoration of all gravesites of the claimant community is feasible, the manner of such restoration to be determined in a subsequent hearing. 3. The restitution to which the Baphiring community is entitled shall take the form of equitable redress. 4. The form and extent of equitable redress are to be decided at a subsequent hearing of this matter. 5. There is no order as to costs." [Paragraph 31]

The decision was overturned on appeal in Baphiring Community and Others v Tshwaranani Projects CC and Others 2014 (1) SA 330 (SCA). The SCA held that whilst the Land Claims Court had been correct to take the cost implications of restoration into account, it was hamstrung by inadequate evidence on the issue. This meant it could not determine the question of feasibility conclusively, and ought to have ordered the state to lead further evidence. The case was remitted to the Land Claims Court.

CRIMINAL JUSTICE

S V MABABSO (50/2015) [2015] ZAFSHC 83

Judgment delivered 23 April 2015

This was a review in terms of section 302 of the Criminal Procedure Act. The accused was charged with possession of 10.1kg of dagga and convicted. Central to the review were inconsistencies surrounding the trial and conviction, including the lack of legal representation when the accused had indicated she needed legal representation, and the confusion created by the record of the proceedings.

Mia AJ (Lekale J concurring) held:

"The accused pleaded guilty to the charge of possession of dagga. In response to the question whether the accused was aware that it was an offence to possess dagga in South Africa, she initially responded that she was not aware that it was an offence. The question is repeated at the request of the accused and she responds in the affirmative and is convicted." [Paragraph 8]

"Whilst the offence is a serious offence and one that may be prevalent in the jurisdiction the Court serves, it is trite that the punishment must fit the crime and this must take account of all the factors relevant to sentencing such as the accused's personal circumstances, the offence as well as the interests of the community. The accused was clearly not in a position to pay a fine immediately and this was evident as she informed the Court that she was unemployed. There was no attempt to ascertain whether she could access money to pay the fine or to make an arrangement to pay the fine in view of her statement that her minor child was left with her sickly father." [Paragraph 12]

"It is also evident that whilst the accused was informed of her right to appeal, she was not informed that the record of the proceedings would be sent on review and that she was entitled to cause written comments to accompany the record." [Paragraph 13]

"It is appreciated that the magistrates' courts receive many matters to attend to and that forms may well assist in expediting matters. However expediency can never yield to the right to apply for bail, to be informed of this right, to be informed of the reason for one's continued detention, the right to legal representation, especially where this has been requested by the accused and the right to be informed of review proceedings and the opportunity to submit comments. Expediency can never yield to the right to have one's proceedings conducted in accordance with justice. In view of the numerous issues highlighted above I am unable to conclude that the proceedings were conducted in accordance with justice." [Paragraph 14]

The conviction and sentence were set aside.

DAVIDS V S (A 181/2010) [2010] ZAWCHC 232

Judgment delivered 22 October 2010

The appellant was convicted of murder and attempted murder, and argued on appeal against sentence that the court a quo erred in overemphasising the seriousness of the crime and underemphasising the personal circumstances of the appellant. Secondly he argued that the trial court underemphasised that the appellant was young when the offence was committed. The main issue before the court on appeal was whether the sentence imposed on the appellant was shocking or disproportionate to the offence.

Mia AJ (Hlophe JP and Ndita J concurring) held:

"In the present matter the appellant is a repeat offender, having committed at least four housebreaking and theft offences in his early teens. The appellant was convicted of housebreaking with intent to steal and theft in 2003 but the passing of sentence was postponed and he was placed under supervision of a Probation Officer." [Paragraph 9]

"Notwithstanding his punishment having been postponed in 2003 and having been referred to a social worker to participate in rehabilitation programmes, the appellant went on to commit at least six more offences." [Paragraph 10]

"…The appellant has also not utilized the numerous opportunities he had when his sentence was suspended to change his behaviour. Having regard to the previous offences, the offences in casu, have increased in gravity and the consequences for the community have become dire with the passage of time." [Paragraph 11]

"The Probation Officer mentions in the report that the parents of the appellant have a history of alcohol abuse and family violence. … The appellant was exposed to life skills programmes when his first sentence was postponed. It appears that the opportunity to learn life skills was presented at an early age and before he progressed to further crimes." [Paragraph 13]

"Having regard to the circumstances surrounding his dismissal, it may well have been that he was disenchanted by the reduced wage/salary that he received, however, the response in relation to the

problem it posed was inappropriate and disproportionate to the dispute that existed between the appellant and the deceased." [Paragraph 15]

"... [T]he Court a quo had regard to the provisions of section 51(3)(b) and found that the appellant's youthfulness constituted a substantial and compelling reason to justify imposing a lesser sentence. There is no disparity between the sentence and the gravity of the offences. In the result the sentence is not shocking or inappropriate and I can find no reason to interfere with the sentence ..." [Paragraph 16]

The appeal against sentence was dismissed.

CHILDRENS' RIGHTS

MULDER V MULDER (A275/2010) [2011] ZAWCHC 122

Judgment delivered 01 February 2011

This was an appeal against the decision of a Magistrate to increase the maintenance of the respondent and the minor child from R2 000.00 per month each to R7 000.00 per month each. Central to the appeal was the question of whether the Magistrate had misdirected herself in assessing the new maintenance payable.

Mia AJ (Le Grange J concurring) held:

"... [T]he appellant responded to questions with great reluctance and on occasion indicated that he did not wish to respond to questions. He informed the Court a quo that he did not wish to support his ex-wife and would support his daughter if she lived with him. ... Mr Hendricks was invited to elaborate on what information the Court a quo failed to consider during the enquiry and was unable to add anything further. This is not a credible or genuine complaint in this regard having regard to the facts of this matter." [Paragraph 10]

"An enquiry in terms of s 6 of [the Maintenance] Act ... is one sui generis. The test is that of a balance of probabilities. The procedure followed throughout is one akin to civil proceedings. Section 10(5) provides that the law of evidence, including the law relating to the competency, compellability, examination and cross-examination of witnesses, as applicable in respect of civil proceedings in a magistrate's court, shall apply in respect of the enquiry." [Paragraph 11]

"The appellant did not challenge the cost of maintenance of the minor child nor did he indicate that the requirements of the applicant were unreasonable or that they were not supported by the evidence tendered. ... Having regard to the vouchers submitted and the monthly expenses indicated there appears to be no misdirection which prejudices the appellant." [Paragraph 13]

"There is no glaring misdirection in the magistrate's calculation of the appellant's approximate income. The appellant's complaint that the bank statements were outdated ignores that he was the author of such circumstance. It appears that a court order was required before the appellant furnished any information regarding his income. Nothing prevented the appellant from furnishing his updated bank statements during the enquiry or indicating what he financial position was." [Paragraph 14]

“The submission on behalf of the appellant that the magistrate accepted that "he had lots of debt" and therefore the appeal should succeed has no basis in law ... It is trite that the interests of the minor child, in this instance the maintenance of the minor enjoys greater priority than the appellant's creditors.” [Paragraph 15]

“The record does not indicate that the applicant and minor child's expenses are beyond the applicant's ability ...” [Paragraph 16]

“On a conspectus of the evidence I am satisfied that the appellant has sufficient funds available to satisfy his maintenance obligation. The Court a quo did not misdirect itself on this issue. There is therefore no substance in the complaint that the Court a quo did not take into account his current financial position.” [Paragraph 20]

The appeal was dismissed with costs.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

RADEBE AND OTHERS V PRINCIPAL OF LESEDING TECHNICAL SCHOOL AND OTHERS (1821/2013) [2013] ZAFSHC 111 (30 MAY 2013)

Case heard 17 May 2013, Judgment delivered 30 May 2013

The first applicant was forced to sit alone in the staffroom during school hours each day from the months of January to May 2013 due to the fact that the dreadlocks she wore as an integral part of her Rastafarian religion were in contravention of the school code of conduct. The applicants applied for, *inter alia*, an order on an urgent basis declaring that the conduct of the first respondent (the school principal) in banishing from the learner from her classroom during school hours to be unlawful and discriminatory on the basis that it violated her Constitutional rights of freedom of religion, to a basic education, belief, opinion, expression, association, and culture. They further sought orders, *inter alia*, that the applicant be allowed to participate fully as a Grade 8 learner with immediate effect and that the school implement an extra tuition programme to enable to catch up on the learning she had missed.

Phalatsi AJ held:

"Section 28(2) of the Constitution … provides that in every matter affecting the child, the child's best interests are paramount. The serious invasion of the first applicant's (a child's) right to basic education occurs on an on-going basis and every day that passes by without her being in class, receiving education. It is … incumbent upon this Court to grant the child urgent protection. To force her to await relief in the ordinary course will be tantamount to dereliction of duty. On the basis hereof, I find that this matter is urgent." [Paragraph 7]

Phalatsi AJ then detailed the contentions of the applicants:

"… … The instruction that she [the applicant] should cut her hair is an instruction to violate her faith. The applicants contend that: by preventing the first applicant from attending class, the respondents were treating her differently from other learners in that class; such differentiation is based on her religion; it is unfair discrimination; and that it is in breach of her constitutional right to equality." [Paragraph 13.1]

"The applicants further contended that whilst the governing body has the power to suspend a learner … this may only be done after following due processes. … They further argue that there is no provision in law that empowers a person to send a child home, away from school, unless the child has been lawfully suspended ….thereby depriving him/her of education." [Paragraph 13.2-13.3]

"I must at this stage emphasise that no attempt was made by the respondents to contradict these allegations and submissions." [Paragraph 13.4]

Phalatsi AJ then listed the three requirements for the grant of a final interdict as set out in the case of *Setlogelo v Setlogelo* and stated how the requirements were satisfied in this case with respect to each one:

" ….a) There must be a clear right on the part of the applicant…*In casu*, it is clear that the first applicant has a clear right to basic education … b) An injury committed or reasonably apprehended … the first applicant has been unlawfully excluded from receiving education and for every day that she is so excluded, the injury continues. I, therefore, find that the injury, *in casu*, is not only apprehended, but is actually committed and continuing. … 3. The absence of any other satisfactory remedy available to the applicant. …I have already found that this matter must be dealt with as one of urgency, as delaying it only causes more harm to the first applicant." [Paragraph 21]

"It cannot be overemphasised that religion is a very sensitive issue and that religious intolerance can ruin the whole country. One needs not look at the whole world, as good examples of what religious intolerance can do, can be found in our own African continent, as in Northern Mali and Northern Nigeria. The courts of this country must be alert and proactive and root out the evil of religious intolerance in any form. They should nip it in the bud wherever and whenever it raises its ugly head." [Paragraph 21]

"I am, therefore, satisfied that all the requirements for the granting of a final order have been established by the applicants…." [Paragraphs 23-24]

CIVIL PROCEDURE

FIRSTRAND BANK LTD T/A WESBANK V HATTINGH (1325/2013) [2013] ZAFSCH 124 (4 JULY 2013)

Case heard 13 June 2013, Judgment delivered 4 July 2013

This was an application for summary judgment. The plaintiff sued the defendant in terms of an instalment agreement entered into by the parties in terms of which the plaintiff sold the defendant a car. The plaintiff averred that the defendant had breached the agreement by failing to pay the instalments in terms of the agreement. The plaintiff cancelled the agreement as a result of the breach, however the defendant stated in his affidavit resisting summary judgment that the vehicle had latent defects which existed at the time of the sale and impaired the vehicle's utility for the purpose for which it was sold. The defendant therefore tendered return of the vehicle against repayment of the instalments he had already paid.

Phalatsi AJ held:

"During the hearing of the matter, counsel for the plaintiff conceded that the defendant has raised a triable issue. … He, however, contended that since the defendant does not dispute that the plaintiff remains the owner of the vehicle and that all that the plaintiff requires at this stage is return of the vehicle, the court should grant summary judgment only on the basis of return of the vehicle to the plaintiff and the other issues to be determined during the trial." [Paragraph 6]

"The plaintiff's right to claim return of the vehicle is based on the fact that the defendant has breached the contract. Defendant denies that he has breached the contract. … I therefore find it difficult to comprehend how the court can order return of the vehicle to the plaintiff before deciding whether the defendant has breached the contract, as there would be no basis on which such an order is made. The plaintiff is not entitled to use a non-performance for which it is responsible as a

foundation for a claim of cancellation and damages. I have also not been referred to any authority that the court can order restitution in piecemeal fashion in that part of restitution is ordered at summary judgment stage and the other part after the trial." [Paragraph 7]

"On the basis of the above, I find that summary judgment cannot be granted and therefore the application for summary judgment is dismissed." [Paragraph 8]

"The next question to consider is the one of costs. Counsel for the defendant argued that pursuant to the filing of the opposing papers, the plaintiff became aware of the defendant's defence and should not have proceeded with its application after becoming aware of same. The defendant therefore argues … that the plaintiff should pay his costs occasioned by the hearing of this matter on an opposed basis. I, however, find that it was not unreasonable for the plaintiff to proceed with this matter to hearing on an opposed basis and that the defendant can still argue the costs of this application at the end of the trial." [Paragraph 9]

The application for summary judgment was therefore dismissed.

CRIMINAL JUSTICE

MARAIS V S [2012] JOL 29004 (FSB)

Case heard 7 May 2012, Judgment delivered 27 May 2012

The appellant was convicted of murder and sentenced to 15 years' imprisonment in the regional court. The present case was an appeal against the sentence, and the exercise of the court's review powers in terms of section 304(4) of the Criminal Procedure Act to consider whether the conviction itself was proper. The issues for determination were (i) whether the defence of private defence raised by the appellant could succeed and (ii) whether the conviction for murder should be replaced by a conviction of culpable homicide.

Phalatsi AJ (Molemela J concurring) held:

On issue (i):
"The learned writer Jonathan Burchell … defines private defence … The elements of private defence arising therefrom are that the attack must be imminent, unlawful and must not have been completed. The defence must be necessary to avert the attack, a reasonable response to the attack and directed against the attacker." [Paragraph 13]

"Now, the first question to be decided is whether, in the light of the appellant's own evidence, it can be said that he acted in private defence. The evidence of the appellant negates the basis of private defence … the evidence that he stabbed the deceased because he was angry clearly negates the fact that he was responding to the attack; his evidence that he had pushed the deceased's hand at the time that he stabbed him negates the fact that the attack was imminent. He had already succeeded in warding off the attack… I consequently cannot find that the appellant succeeded in his defence, namely, private defence." [Paragraph 14]

On issue (ii):
"On the evidence before the court, there is nothing that suggests that the appellant had the intention (whether in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*) to cause the death of the deceased. Indeed, his own evidence is that he never intended to stab him on the chest, but was aiming for his face. What led him to stab in the chest is that the deceased took an evasive step when he stabbed him. He also conceded that he ought to have foreseen that when he stabbed him in the direction of his upper body, that could cause his death. This clearly illustrates that he acted negligently and not intentionally. In the premises, I find that the appellant should have been found guilty of culpable homicide." [Paragraph 15]

"Both legal representatives conceded that, should the appellant be convicted of culpable homicide, the appropriate sentence to impose is that of 3 years' imprisonment. The mitigating factors in this matter are the following: The extreme provocation of the appellant by both Eddie and the deceased, who stabbed and chased him up to his home… The intake and effect of alcohol on…the appellant… The youthfulness of the appellant….the date of the incident… was his 21st birthday… is a first offender… appellant showed some measure of remorse and he testified that he felt very bad about what had happened… appellant spent some time in custody awaiting trial… I, however, find that, weighing the above factors against the seriousness of the crime, the prevalence thereof and the interests of the community, the appropriate sentence should be 4 years' imprisonment." [Paragraphs 16-17]

The appeal was upheld. The conviction of murder was replaced with that of culpable homicide and the sentence was reduced from 15 years to 4 years' imprisonment.

MPHUTHI V S [2012] JOL 29076 (FSB)
Case heard 2 May 2012, Judgment delivered 20 May 2012

The appellant was convicted on a charge of rape and sentenced to 13 years' imprisonment in the Regional Court. The court a quo relied on the evidence of a single witness. The present case was an appeal against both conviction and sentence.

Phalatsi AJ (Van Der Merwe J concurring) held:

"In its judgment, the court *a quo* found that although the complainant is a single witness, the court found her evidence to be credible as she did not contradict herself. I find this finding very strange indeed… I have quoted at length in respect of the complainant's evidence to illustrate a litany of material contradictions between her testimony in court and her statement." [Paragraph 7-8]

"The court *a quo* did not even take into account that crucial witnesses were not called by the State. The only conclusion which can be made is that the State did not call these witnesses as they were not supporting the complainant's version. In the circumstances the denial of rape by the appellant is reasonably possibly true." [Paragraph 9]

"Mr *Pretorius*, who appeared on behalf of the State, also correctly conceded that the conviction could not be supported, because of the complainant's contradictions and improbabilities in her

evidence…. In the light of the above, it is clear that the conviction should be set aside." [Paragraphs 10-11]

The conviction and sentence were thus both set aside.

S V MOKOKOLO (10/2013) [2013] ZAFSHC 109 (30 MAY 2013)

This case was an automatic review in terms of section 302 of the Criminal Procedure Act. The accused was charged with contravention of section 59(4) read with section 89 of the National Road Traffic Act, in that the accused unlawfully exceeded the speed limit of 120 km/h by driving his vehicle at 171 km/h. The accused, who was unrepresented, pleaded guilty. The court proceeded to ask questions to determine whether the accused admitted all the elements of the crime. The court entered a plea of not guilty after questioning the accused, in that the accused did not admit that he had intention to commit the crime. Immediately thereafter, the State closed its case without calling any witnesses.

Phalatsi AJ (Lekale J concurring) held:

"It is trite that the State must prove the guilt of the accused beyond reasonable doubt. This means that the State must prove each and every element of the crime that the accused is charged with, beyond reasonable doubt, failing which, the conviction cannot stand." [Paragraph 9]

"The finding by the magistrate that where the accused places his intention in dispute, he/she has a duty to lead evidence as to what happened and what he/she believed, is not only against, but is also a danger to our whole criminal justice system and *juris prudence*." [Paragraph 10]

"In *S v Lubaxa* the court, dealing with applications in terms of section 174 of the Criminal Procedure Act, held that if there is no possibility of a conviction other than if the accused enters the witness box and incriminates himself, a failure to discharge an accused in these circumstances would be a breach of his/her rights guaranteed by the Constitution. … In *S v Nyanga*, the court held that if the court is satisfied that the admissions adequately cover all the elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty." [Paragraph 11-12]

"On the question as to whether the accused had a case to meet after the State had closed its case, it is clear from the record that the State had failed to prove the element that had been put in dispute by the accused, being intention." [Paragraph 13]

"This simply means that the State had failed to prove all the elements of the offence against the accused beyond reasonable doubt. I have already found that there was no duty on the accused to lead evidence to prove or negate intention and the accused, therefore, had no case to meet after the State closed its case." [Paragraph 14]

"I, therefore, find that the learned magistrate erred in convicting the accused as charged. Her reliance on the evidence of the accused to prove intention was an irregularity of such a gross nature that it vitiates the proceedings insofar as the accused's constitutional right against self-incrimination was violated thereby." [Paragraph 18]

"In the light of the above, the order of the magistrate is set aside and replaced with the following: 'The accused is found not guilty and discharged.' ..." [Paragraph 19]

MOSIA V S [2012] ZAFSHC 85

Case heard 19 March 2012, Judgment delivered 3 May 2012

The appellant, together with his brother, was convicted on one count of rape and one of attempted murder. They were sentenced to life imprisonment in respect of the charge of rape and eight years imprisonment on attempted murder. This case was an appeal against the sentence.

Rampai AJP (Dafue J concurring) rejected the appeal. Phalatsi AJ dissented:

"...It is...clear that the court *a quo's* finding of absence of compelling and substantial circumstances is solely based on the physical injuries of the complainant..." [Paragraph 11]

"I firstly want to deal with the evidence in respect of the injuries suffered by a victim of rape, which I will deal with in two categories: 12.1 **psychological trauma** Rape is a crime which is inherently traumatic. The court should readily accept the evidence of the rape victim in respect of psychological trauma, even in the absence of expert evidence, because, as I have already said, such psychological trauma is a natural consequence of rape; It is unthinkable to come across any rape victim who has not been traumatised by the incident, even in the absence of any physical and /or bodily injuries. 12.2 **Physical and/or bodily injuries**: In respect of physical injuries, the expert evidence of a medical practitioner is indispensable, as human nature dictates that a victim of violence will tend to exaggerate the seriousness of his/her injuries." [Paragraphs 12.1-12.2]

"Now, in this very case, the complainant testified in court that her face was so swollen that the people from whom she requested help could not even recognise her, that she had suffered genital injuries and that she was bleeding on her private part because of the assault and the rape. But the medical report does not reflect any of these alleged injuries. When she was confronted with this contradiction in cross-examination during the trial, all she could say was that she made the doctor aware of the said injuries and she did not know why they were not reflected in the medical report...It is fair for the court to accept that the victim is feeling pain on her body, but to accept that the pain is as a result of the assault during the rape, without any expert evidence, is treading on dangerous grounds... Even Cillie J, when granting the appellant leave to appeal, correctly held that the evidence and observations of the court *a quo* are not based on any medical evidence." [Paragraph 12.2.1-12.2.2]

"I therefore find that the reliance of the court *a quo* on its own observations and on the evidence of the complainant on the nature of her physical injuries and the effects thereof, is a material misdirection which entitles the court of appeal to interfere with its sentence." [Paragraph 13]

"...In the light of my finding that the reliance of the court *a quo* on the evidence of the complainant and its own observations was a material misdirection, can it still be said, based on the physical injuries of the complainant as depicted on the medical report, that this is the worst case scenario imaginable... it is trite that the courts will always deal with the fact that a person is a first offender

differently from repetitive offenders. Indeed, this fact is even acknowledged by the legislature in that, in minimum sentencing legislation, the legislature makes a distinction in respect of sentence on certain offences based on the fact whether that person is a first or further offender." [Para 15-15.1]

"*In casu*, other than the appellant being a first offender, at the age of 36, he had minor children that he was supporting, he was drunk during the commission of the crime and he was in prison for a period of 30 (thirty) months before being sentenced." [Para 15.2]

"In deciding the appropriate sentence in a crime involving violence, like rape in the present case, the degree of violence will always be considered … in aggravation or mitigation of sentence. The violence in respect of the rape should be distinguished from the one in respect of attempted murder, for the purpose of sentence on the charge of rape. Failure to do that will amount to the accused being sentenced twice for the same conduct, which would be unfairly prejudicial to the accused. It would simply vitiate against the principle that the sentence should fit the crime." [Paragraph 15.3]

"I therefore find that in the present case, the cumulative effect of the factors mentioned above, constitute substantial and compelling circumstances, which justify deviation from the imposition of life imprisonment." [Paragraph 16]

"This, however, does not detract from the fact that rape is a very serious offence and that more so if, as in the present matter, it is rape of the victim by more than one person…Taking into account the seriousness of the crime, the traumatic effect on the victim and the physical violence as set out in the medical report, I am of the view that the appropriate sentence should have been one of 20 (TWENTY) years imprisonment." [Paragraphs 17-18]

Phalatsi AJ would thus have upheld the appeal and substituted the sentence of life imprisonment for one of 20 years imprisonment, to run concurrently with the 8 year sentence for attempted murder.

SELECTED JUDGMENTS

COMMERCIAL LAW

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

Case heard 7 November 2013, Judgment delivered 14 November 2013

This was an application by the surety and co-principal debtor of a close corporation to have a warrant of execution against his immovable property set aside, on the basis that it was his personal residence. The property was put up as security for an indebtedness incurred in his name jointly and severally with that of the second respondent, in favour of the first respondent. The main issue before the court was whether a business rescue amounted to a 'statutory compromise' and would amount to a defence by the applicant.

Pohl AJ held:

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

"The pertinent question … is whether or not this business rescue amounts to a 'statutory compromise' … within this context and would thus amount to a defence in rem within the context alluded to above. … If the business rescue is, however, a defence in personam which attaches to the second respondent alone, it would not be a defence available to the applicant, with the result that the application must fail." [Paragraph 15]

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

"In interpreting s 154 of the Companies Act, I am mindful of the trite legal principle that I should endeavour to establish the true intention of the legislature and that, in doing so, the interpretation should be restrictive." [Paragraph 19]

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

The application was dismissed with costs.

PRIVATE LAW

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

Case heard 21 November 2013, Judgment delivered 05 December 2013

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

Pohl AJ held:

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

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

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

"I do not agree … Such a construction would, to my mind, defeat the object of the supply chain procedure and the relevant statutory provisions, which are inter alia designed to facilitate a fair, equitable, transparent, competitive system which combats the possibility of fraud, corruption and favouritism." [Paragraph 15]

"It needs mentioning that in the present application before me, respondent did not bring a counter-application to have the relevant rental agreement declared null and void and/or unlawful. The question is thus whether or not the respondent should have done so for this court to take that into account in adjudicating the merits of this application. To my mind the answer to that question lies in an assessment of whether or not the issue was substantially and comprehensively raised in the opposing affidavit. If so, then it was not necessary to bring a counter-application. It is thus a question of substance rather than form." [Paragraph 16]

"It is trite law that in motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues, because they are not designed to determine probabilities." [Paragraph 18]

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

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

at its foundation in clause 2.5 of the rental agreement and the applicant's allegation in paragraph 5 of the founding affidavit, that in terms of the rental agreement, (which I have found to be invalid), it retained the ownership of the goods." [Paragraph 20]

Pohl AJ considered whether the applicant had given timeous notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, and held:

"It is common cause that the applicant did give the respondent such notice but not timeous. Whether or not it was legally necessary to give such notice in the circumstances of this case, is once again dependant on an interpretation of the contract and the definition of debt in [the] Act ... My previous finding that the contract is invalid and unenforceable makes it however unnecessary to deal with this defence raised by the respondent as it once again entails the interpretation of the contract. (which I have already found to be invalid)." [Paragraph 21]

On costs-

Pohl AJ then considered the question of costs, and held:

"The matter first came before the court on 1 August 2013. Counsel informed me that by that time, no opposing and replying papers had been filed. The matter was then removed from the roll and it was ordered that the costs must stand over. No substantial, compelling and convincing reasons were placed before me as to why the final order as to costs in this matter should not follow suit, including the costs of 1 August 2013." [Paragraph 22]

The application was dismissed with costs

CIVIL PROCEDURE

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

Case heard 1 September 2014, Judgment delivered 11 September 2014

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

Pohl AJ (Kruger J concurring) first dealt with the postponement application, and held:

"A proper reading of the application for the postponement reveals that the only real and substantive reason why the appellant sought the postponement was the unavailability of both the senior counsel and junior counsel the appellant briefed to assist him in this matter. It further reveals that both the advocates and the attorney, acting for the appellant laboured under the mistaken belief that the High Court application would have the effect that the Magistrate's Court application for the eviction would not be able to proceed." [Paragraph 9]

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

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

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

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

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

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

Finally, on the question of costs, Pohl AJ held:

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

"Costs are in the discretion of the presiding officer. The magistrate considered the abovementioned factors and it cannot be found that he failed to exercise his discretion judicially. There is no reason for this court to interfere with the magistrate's order as to costs." [Paragraph 25]

The appeal was dismissed with costs.

CRIMINAL JUSTICE

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

Judgment delivered 04 September 2014

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

Pohl AJ (Jordaan J concurring) held:

"The accused in this matter had been charged on 23 June 2014 with housebreaking with the intent to steal and theft. He was legally represented and pleaded guilty to the charge and was duly convicted after the application of Section 112 (2) of the Criminal Procedure Act ..." [Paragraph 2]

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

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

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

SELECTED JUDGMENTS

COMMERCIAL LAW

ABSA BANK LIMITED V BANTJES AND ANOTHER (3748/2013) [2015] ZAFSHC 157

Case heard 13 August 2015, Judgment delivered 20 August 2015

This was an application to have a certain immovable property belonging to the defendants, an elderly couple, declared executable pursuant to a judgment granted against the defendants. The couple were sued as sureties for LF Bantjes Civil CC, who entered into a loan with Absa Bank. A covering mortage bond in favour of Absa was registered over the immovable property as security. The defendants argued that the immovable property was their primary residence.

Reinders AJ began by considering whether the defendants were indigent, and held:

"It can be assumed that the defendants are not indigent. As is evident from the papers Mr Bantjes is a civil engineer, and according to Mrs Bantjes she and her husband run their business from the residence. The said business also provides their only source of income." [Paragraph 8]

"The lack of information regarding the defendants' income also places a question mark on the averment by Mrs Bantjes that they cannot afford to rent a property as accommodation, and furthermore to rent offices to continue conduct of their business. … In all probabilities, only a study or one bedroom would suffice for purposes of conducting their business. Even a two bedroomed town house would suffice to afford the defendants housing as well as an office to conduct their business from." [Paragraph 9]

"In the absence of the information as indicated above, I have no other inference to draw but that the defendants deliberately failed to disclose the said information to create the impression that they are destitute." [Paragraph 10]

"It is common cause that no payments were made to Absa Bank since May 2013, and even before that many debit orders were unpaid. … [A]lthough an offer is made by defendants in their opposing papers to effect monthly payments to Absa Bank, no detail is given, and in view of the absence of proof of their income, this offer cannot be taken seriously. … If they were indeed serious, I would have expected them to have started regular payments of what they aver they can afford in order to show their bona fides." [Paragraph 11]

"It was alleged by defendants that properties in Bloemfontein has devaluated. No proof of such a tendency was furnished. … A valuation of the immovable property in the amount of R 1 800 000.00 was annexed to the application. Mr Sander for defendants pressed hard upon me to accept that this valuation was indicative of the truth in respondents' contention that they would still be left with a big outstanding amount indebted to Absa Bank after a forced sale." [Paragraph 13]

"The plaintiff as a financial institution has a legal right and obligation towards clients whose money is being utilised to fund mortgage bonds, to minimise its losses." [Paragraph 14]

"… I have sympathy with Mr and Mrs Bantjes. That relocating would be traumatic to them is understandable, especially given their mature age and the lengthy stay that they have enjoyed at the

residence, including their involvement in their church. The elderly in our society should be respected and accommodated, and their dignity should also be preserved as far as possible." [Paragraph 15]

After citing the Constitutional Court decision in Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others, Reinders AJ continued:

"… [A] sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. It was not argued, nor can it be concluded that there was an abuse of court procedure in casu. To the contrary, given the lengthy history of this matter, it is quite clear that Absa Bank has bent over backwards and endured all the opposition and even postponements on request of the defendants." [Paragraph 16]

"Taking all the above relevant factors into account, it leaves me to conclude that the plaintiff is entitled to an order declaring the immovable property executable. It is trite that cost should follow suit and I find no reason to deviate therefrom, save that I am not prepared to award cost on a scale of attorney and client." [Paragraph 17]

The immovable property was declared executable.

E-PAPA (PTY) LTD AND ANOTHER V DIE SAKMAN CC AND ANOTHER (2419/2015) [2015] ZAFSHC 142

Case heard 4 June 2015, Judgment delivered 11 June 2015

This was an application for an interdict to prevent the respondents from infringing the second applicant's trade mark, and passing off its goods as those of the first applicant. Applicant manufactured and distributed maize meal, and the first respondent manufactured bags and printed signage. Applicants alleged that first respondent distributed the maize under the name of Amigos Maize Meal, that one Van Wyk was the "controlling mind" of the first respondent, and that the first respondent employed one Murray, the second respondent. A preliminary issue was whether the court had jurisdiction to entertain the claim for passing off in so far as the alleged passing off occurred outside South Africa, in Lesotho.

Reinders AJ held:

"In more recent times it has been held by the Supreme Court of Appeal in Metlika Trading Ltd v Commissioner, SA Revenue Service … that the court may assume jurisdiction to grant an interdict in personam no matter if the act in question is to be performed or restrained outside the court's area of jurisdiction, or even outside the Republic. I am satisfied that the court has jurisdiction to entertain a prohibitory interdict based on passing-off herein. … " [Paragraph 4]

"Van Wyk possessed intimate knowledge of the allegations by the Applicant, but elected to make bare and ambiguous denials. He is indeed the "controlling mind" of Amigos. His version is untenable." [Paragraph 13]

"E-PAPA's product has no doubt been marked with a distinctive get-up, with characteristics fully described in the prayers to follow below. This get-up has acquired a reputation in the market. Applicants annexed an extract of E-PAPA's monthly turnover pertaining to its Lesotho business, clearly indicative of the goodwill it enjoyed in Lesotho. The get-up and trade name was clearly known in the market and

acquired a public reputation. Murruy [sic], as former sales manager of E-PAPA in Lesotho, was well aware of this." [Paragraph 17]

"Misrepresentation by the Respondents were clear in that there was not only a likelihood of deception that members of the public would be confused, but actual deceit. So for instance was the said Mr Tsung under the impression that he had in fact purchased the product of E-PAPA. The representation by Respondents was false and unauthorised ... That the deceit was calculated is clear from the fact that the stereo of E-PAPA was not returned but in stead used to print the distinctive get-up of E-PAPA on Respondents' bags." [Paragraph 18]

"... Applicants have shown a clear right to Respondents not unlawfully infringing the trade mark of Oolsnirp and passing of their product as that of E-PAPA. It is reasonably apprehended that Applicants will suffer damage until Respondents' unlawfull actions are interdicted and the Applicants do not have any form of similar protection by any other ordinary remedy." [Paragraph 19]

"I am thus satisfied that the Applicants have met the requirements for the granting of a final interdict. ..." [Paragraph 20]

BLUE CHIP 2 (PTY) LTD T/A BLUE CHIP 49 V RYNEVELDT AND OTHERS (A233/2014) [2015] ZAFSHC 70

Case heard 2 March 2015, Judgment delivered 19 March 2015

Appellant, a registered credit provider in terms of Section 40 of the National Credit Act (NCA), entered into unsecured credit agreements with the respondents. A magistrate refused to grant default judgment applications due to uncertainty over whether the causes of action had arisen wholly within the court's jurisdiction, as notices under section 129 of the NCA had been delivered by registered post to addresses outside the court's jurisdiction. The appellant contended that the Magistrate erred in that a Section 129 notice was merely a peremptory procedural requirement prior to the enforcement of litigation, and that it cannot be said that such notice forms part of a cause of action based on the breach of an agreement between the parties.

Reinders AJ (Van Zyl J concurring) held:

"Section 129(1)(a) requires a credit provider to draw the default to the notice of the consumer in writing before commencing any legal proceedings to enforce a credit agreement. This includes legal proceedings to cancel the agreement. ... Whilst Section 129(1)(b) seems to prohibit the commencement of legal proceedings, Section 130 has the effect that such an action is not void." [Paragraph 11]

"In my view, a plaintiff (where the NCA is applicable) have [sic] to aver in his summons, compliance with Section 129 thereof. The purpose thereof is to take the barriers away which prohibits such a plaintiff to proceed with the enforcement procedure. It enlightens the Court that the procedural requirement of notice has been met (or not met). It does not however, form part of the cause of action that has to be alleged in the summons. It is merely a peremptory procedural requirement and a plaintiff has to allege compliance therewith or why same is not applicable. In casu, the cause of action remains the conclusion of the contract and the breach thereof. The Section 129 notice therefore does not become an element of the contract or to the breach thereof. It however completes the cause of action." [Paragraph 14]

"A Magistrate's Court is a creature of statute and it is well-established that a Magistrate's Court has no jurisdiction or powers beyond those that were granted by the act." [Paragraph 15]

"For purposes of jurisdiction the words used in Section 28(1)(d) is not to be understood to mean only the cause of action (to wit the contract in casu) as set out in the summons." [Paragraph 16]

"The provisions of Section 28(1)(d) is a departure from the common law rule actor sequitur forum rei, which requires a defendant to be sued in the district where he resides or carries on business. The right of a plaintiff to make use of this special jurisdiction is therefore restricted, and he may sue the defendant under this provision only if the cause of action arose wholly within the district. … It is common cause that Kimberley does not fall within the magisterial district of the Magistrate's Court of Bloemfontein. It was accordingly incumbent upon the appellant for jurisdictional purposes to allege and prove that the said notice was delivered to the Respondents. The appellant's cause of action would be completed therefore on "receipt" of the Section 129 notice, which in this instance is outside the territorial and jurisdictional area of the Magistrate." [Paragraph 18]

"… [A] Section 129 notice has been described as a gateway provision or a new pre-litigation layer to the enforcement process. One of the means by which the legislation expressly provides for its purposes to be pursued is consensual resolution." [Paragraph 19]

"In order to obtain judgment, the plaintiff will therefore have to prove delivery of the Section 129 notice in terms of Section 130. Where default judgment is sought, the consumer's lack of opposition will entitle the Court from which enforcement is sought, to conclude that the credit provider's averment that the notice reached the consumer is not contested. If it is contested and the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to, the Court will have to make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true and if so, act in accordance with Section 130(4)(b)." [Paragraph 19]

"So seen, the giving and receiving of the notice is a fact "giving rise to jurisdiction" which needs to be set out and proved to vest jurisdiction in terms of Section 28(1)(d)." [Paragraph 21]

"One of the factors so giving rise to jurisdiction, was not within the jurisdiction of the Magistrate's Court of Bloemfontein, but in fact Kimberley and other Magisterial areas where the cause of action on "receipt" of the Section 129 notice was completed." [Paragraph 22]

"In casu, the appellant realized at the time of the conclusion of the agreement that the respondents did not reside within the Magistrate's Court jurisdiction in Bloemfontein. He can hardly be heard to complain at this stage that it is inconvenient or expensive to follow the Respondents to the jurisdictional area where they reside. It is likewise inconvenient and expensive for the consumer to litigate in an area where he/she does not reside." [Paragraph 24]

The appeal was dismissed.

PRIVATE LAW

STEWART N.O. AND ANOTHER V LOUW (5039/2013) [2015] ZAFSHC 47

Case heard 10, 11, 13 February 2015, Judgment delivered 26 February 2015

Plaintiffs, in their capacity as trustees in the consolidated insolvent estate of Graeme Minne and Carolina Frederika Minne, claimed an amount of R425 984.00, mora interest and costs from the defendant, pursuant to an agreement entered between the parties. The defendant argued that he had signed the agreement under duress.

Reinders AJ held:

"The onus in casu is on the defendant to prove that he signed the document under duress." [Paragraph 9]

"To establish the defence of "duress" (metus) the defendant accordingly have to prove on a balance of probabilities the following: 10.1 There must be a threat of imminent evil, for example, to the life, person, honour or property of a person or a member of his/her family. 10.2 The threat must be unlawful. 10.3 The threat must have induced the threatened party to enter into the contract or to agree to terms to which he/she would not otherwise have agreed." [Paragraph 10]

"Unfortunately I cannot find on the evidence adduced, (even on the defendant's own version) that he entered into the agreement under duress. … [T]here was no threat of imminent evil or alike made to him. He was never threatened with losing his property at all. At best, he and his wife came to the conclusion due to the fact that the plaintiffs already knew about their property, that they had to enter into an agreement to save the property. At no stage did plaintiff make any threat in this regard, but even so, if the plaintiff did tell the defendant that he could or would lose his house if he was not in a position to pay, it does not seem to me to be an unlawful threat." [Paragraph 11]

"… The evidence furthermore does not reveal that the defendant was unduly influenced to sign a particular agreement. On his evidence when he arrived, he was informed that they should reach an agreement … – which they did after negotiating. " [Paragraph 12]

"I accordingly cannot find that the agreement was entered into due to metus." [Paragraph 13]

On the amount the defendants owed the plaintiffs and the method of calculation used, Reinders AJ held:

"It is not necessary for me to make a decision in this regard as same did not form part of the dispute on the pleadings. I am not called upon to adjudicate what the original amount was that the defendant might have owed the plaintiffs due to the Ponzi-scheme. This was settled by the parties. Whether it be a good or bad settlement is none of my concern – I am only called upon to decide whether the agreement was entered into due to undue duress." [Paragraph 14]

"I feel sorry for the defendant in this matter. However, legally, to my mind, he is indebted to the plaintiff in the claimed amount." [Paragraph 15]

"The plaintiff urged upon me to make a special cost order de bonis propriis on the scale as between attorney and own client regarding the costs relating to the witness Thelma Veldtman. The reason being that the defendant's attorney was not prepared to accept her transcription of the evidence before the Master and therefore plaintiff had to call her as a witness. … I am not prepared to make any special cost order in this regard nor do I consider the lady to be a necessary witness. In fact, in as far as Caroline Young, could also not remember the particular incident, her testimony did not and could not contribute herein and she was an unnecessary witness as well." [Paragraph 16]

Judgment was given in favour of the plaintiffs.

SELECTED JUDGMENTS

LABOUR LAW

SOUTHGATE V BLUE IQ INVESTMENT HOLDINGS [2012] 8 BLLR 824 (LC)

Judgment delivered 4 May 2012

The applicant was employed on two successive fixed-term contracts, the second for a period of one year. He claimed that prior to the expiry of the second contract, he concluded a third fixed-term contract with the respondent's then CEO (Canca), for a period of three years as Group Programme Coordinator, and that after commencing work, the respondent had purported to terminate his services on the ground that the second contract had expired. The respondent denied that negotiations concerning the third contract had been concluded, and claimed that in any event the CEO lacked authority.

"The crux of the applicant's claim is a purely contractual claim. He alleged that there was a premature breach or repudiation of a three-year fixed-term contract. …" [Paragraph 28]

"Only Canca and the applicant were involved in the negotiations regarding the agreement. There is, accordingly, no evidence before this Court to refute their evidence regarding what was agreed upon in respect of the third contract. …" [Paragraph 31]

"… [I]t is not a prerequisite for the validity of a contract of employment that there has to be agreement on every detail of the contract. In fact, parties may even agree at a later stage what the exact nature of the employee's job would be. In the present case, I am on the evidence satisfied that the applicant and Canca were *ad idem* that they had reached agreement on the material terms of the employment contract. The evidence as well as the emails confirm that Canca and the applicant were *ad idem* about their intention to create an employment relationship and that it was their intention that the applicant would render his employment in the capacity as a Group Programme Coordinator. Pursuant to their agreement, the applicant did in fact commence working in the new position that was contemplated by the negotiations between Canca. They had further reached agreement that the contract would be for a three-year period and that it would be on the same salary level as that what was agreed upon in terms of the second agreement. The fact that Canca and the applicant may have still been in the process of finalising the KPIs of the applicant's position did not, in my view, prevent the contract of employment from coming into existence. …" [Paragraph 35]

"… Whilst I do accept that if parties have not reached agreement on a material term of the contract that a contract will not come into existence, the evidence in the present matter shows that the parties have indeed reached agreement on the material terms of the employment contract. The evidence … clearly shows that Canca and the applicant have contemplated that the agreement would come into being once they have agreed on the nature of the job, the remuneration and the period of the contract. They did not contemplate that an agreement on the KPIs/job profile was a material term of the contract. … [T]he parties have … reached agreement on the material terms required for the conclusion of a contract of employment." [Paragraph 39]

"… [I]t now needs to be determined whether it was a requirement that the third contract had to be in writing in order to be binding between the applicant and the respondent. … It is accepted that, except where the parties agree that the contract concluded between them shall be in writing, an employment contract need not be reduced to writing. … [B]oth Canca and the applicant led unchallenged evidence to

the fact that a recordal in writing was not a precondition for the third contract to be valid although it was contemplated that the contract be reduced to writing from a good corporate governance perspective…" [Paragraphs 41-43]

"The respondent pleaded that Canca did not have the necessary authority to create the position of Group Programme Coordinator without first obtaining the approval of the respondent's Board of Directors. … The respondent was … of the view that the applicant was a managerial employee hence the Board was required to give its approval whenever a manager was appointed. Canca's unchallenged evidence was that the applicant was not a manager. Waja was called to confirm whether the applicant was a "manager" yet had no idea what the applicant did. … I am on the evidence not persuaded that the applicant was in fact a senior manager as defined in the delegations. … In the event, I am of the view that Canca had the necessary authority to appoint him to the designated position." [Paragraphs 55-58]

"… I am nonetheless of the view that by operation of the *Turquand* rule that the applicant was entitled to assume in good faith that Canca had the necessary authority to appoint him and conclude the employment contract on behalf of the respondent. …" [Paragraph 59]

The application succeeded. The respondent was ordered to pay the applicant contractual damages in the amount of R5 576 500, and to pay the applicant's costs on a scale as between party and party. The decision was overturned by the Labour Appeal Court in **Blue IQ Investment Holdings (Pty) Ltd v Southgate (JA28/13) [2014] ZALAC 21; (2014) 35 ILJ 3326 (LAC) (30 May 2014)**, the court finding that the intended position was at a management level, and the CEO had lacked the authority to conclude the new contract of employment.

NYATHI V SPECIAL INVESTIGATING UNIT 2011 12 BLLR 1211 (LC)

Case heard: 19 July 2011, Judgment delivered 22 July 2011

The applicant created a document, which was circulated by email, which contained a wide range of allegations of racism within the respondent. Applicant refused to undergo a polygraph examination, and was informed that any refusal to comply strictly with the instructions would constitute insubordination and/or material breach of her employment contract entitling the SIU to terminate her contract of employment. Applicant sought to interdict the respondent from terminating her employment contract, to declare a decision to extend her suspension to be invalid, and to permit her to resume her duties.

Basson J held:

"The requirement to consent to a lie detector test for purposes referred to … is one of the many provisions that require an employee of the respondent to consent to measures that are intrusive. … A failure to make a full financial disclosure as well as providing any false statement or false information may result in disciplinary action be taken. The respondent submitted that these provisions, although extraordinary, are not unreasonable in the context of an organisation such as the respondent in light of the fact that the respondent is responsible for investigating corruption and maladministration in government departments and state institutions. It is therefore vital for the effective functioning of the respondent that its members conduct themselves with the utmost integrity." [Paragraph 14]

Basson J identified two legal issues to be determined: 1), whether the respondent was entitled to extend the suspension beyond the 90 day period provided for in the Disciplinary Policy; and 2), whether respondent was entitled to terminate the employment contract on the basis that the refusal to undergo a polygraph test constituted a repudiation of the contract by the applicant.

"… [I]t cannot be argued that the SIU's Disciplinary Policy is merely a guideline that can be ignored. … [I]t was common cause that the Disciplinary Policy forms part of the contractual terms and conditions … as a result of the fact that the Policy was specifically integrated into the contract. The clause is furthermore framed in peremptory terms and unequivocally states that the suspension lapses after 90 days. … The purpose of a clause providing for the expiry of a suspension is to protect the employee from a protracted suspension. … In the present case it was also common cause that no disciplinary proceedings have, up until the institution of these proceedings, been instituted against the applicant. To allow the respondent in these circumstances to simply ignore the peremptory wording used in clause 9.2 and continue to extend the suspension indefinitely, is not only unlawful in my view but goes against the purpose of the inclusion of such a clause … I am therefore persuaded … that the suspension of the applicant expired after 90 days and that the extension thereafter is unlawful." [Paragraphs 18-27]

Basson J then dealt with an argument that respondent could invoke a clause in the contract which provided for an unlimited suspension:

" … [I]t could not have been the intention of the drafters of the contract to provide for two conflicting suspensions clauses. … [E]ven if it was, it is clear … that the respondent had *elected* to invoke clause 9 of the Disciplinary Policy in suspending the applicant. … [O]nce the election was made, the respondent is bound by it. Consequently, the respondent cannot … halfway through the suspension process decide to abandon the process provided for in the Disciplinary Policy and proceed with another suspension process provided for in the contract. Even if this was possible, I do not accept that it could have been the intention to have two suspension clauses: the one with a limited duration and the other providing for an unlimited period of a suspension. … I am therefore persuaded that the extension of the suspension period was unlawful. The applicant therefore succeeds on this point .." [Paragraphs 29 – 30]

The decision to extend the suspension was set aside, and the respondent was ordered to allo the applicant to resume her duties. Basson J then turned to consider whether the respondent could lawfully terminate the contract:

"… [T]he Court accepts that the respondent has sound reasons for including such an obligation, to submit to, *inter alia*, a polygraph, in light of the core business and functions of the SIU … The Court also accepts that, although some of the measures such as having to submit to a polygraph examination … may seem to be intrusive, these measures are reasonable in the context of an organisation such as the respondent (provided, of course, that these measures are applied fairly and only when reasonably necessary to do so)." [Paragraphs 31-33]

"… [I]t is accepted that the employment relationship has a contractual character although labour legislation has supplemented the deficiencies of the common law principles particularly in respect of the *termination* of a contract of employment with the import of the requirement of *fairness.* The contract of employment and the principles of the law of contract therefore remains intact in respect of the question whether a contract is lawful and whether the contract of employment was lawfully, as opposed to fairly, terminated. … A distinction must therefore be made between the lawfulness and the fairness of the termination of the contract of employment. The requirement of a "*fair*" termination does not, therefore,

suggest that employers need not adhere to the requirements in respect of the *lawful* termination of the contract of employment. It cannot therefore … be said that the LRA has completely overtaken the common law principles relating to the cancellation and repudiation of the contact." [Paragraph 34]

"… In principle therefore, an employer has the right contractually to terminate the contract. Whether the termination will also be fair is an entirely different question and not relevant in these proceedings. …The only remaining question is whether there are facts before this Court to indicate that the respondent is intending the interdict the contract *unlawfully.* … I am firstly persuaded on the papers that it is a material term of the contract to submit to a polygraph test and that the applicant, by refusing to do so has repudiated a material term of the contract entitling the respondent to terminate the contract. … [I]t is not at issue here whether or not the termination would be *fair*. I am therefore not persuaded … that this refusal does not go to the root of the agreement and therefore not material. … The refusal to undergo a polygraph test may also constitute misconduct and may even be a ground for dismissal. However … [a]t issue here is whether or not the respondent can lawfully terminate the contract because the applicant had repudiated a material term of her contract and whether or not certain procedures as contained in the Disciplinary Policy must be followed." [Paragraphs 35-39]

"… At issue here is whether the Court should interdict the respondent from lawfully terminating the contract. I am not persuaded that the applicant has made out a case for the relief sought … What remain, however, intact are the applicant's remedies under the LRA and should the contract of the applicant be terminated lawfully, she may still refer the dispute pertaining to an alleged unfair dismissal to the appropriate forum … In order to succeed, the applicant had to show that she has a right to a disciplinary hearing as set out in the Disciplinary Policy before her employment contract is terminated for breach of a material term in terms of the contract. I am not persuaded that the applicant has made out such a case.' [Paragraphs 41-43]

SEKGOBELA V STATE INFORMATION TECHNOLOGY AGENCY (PTY) LTD [2009] JOL 23676 (LC)

Case heard 4 – 5 February 2008, Judgment delivered 26 February 2008.

Applicant alleged that he had been automatically unfairly dismissed for having made a protected disclosure in terms of the Protected Disclosures Act. The court considered whether the disclosure made by the applicant was the reason for his dismissal.

Basson J held:

"… [I]t was central to the respondent's argument that there was no legal obligation on the respondent to follow a specific procurement policy or procedure and that the policies and procedures referred to by the applicant in his evidence were purely internal processes which may be departed from at the discretion of the respondent. In others words, there was nothing to complain about simply because the respondent was under no legal duty to comply with procurement policies and procedures. … In his evidence the applicant testified that the respondent is a public entity and as such it is bound by the provisions of the Public Finance Management Act … (hereinafter referred to as the "PFMA") and the Treasure Regulations and procurement processes. The applicant explained in great detail the different processes to be followed in respect of goods or services to be acquired by the respondent. …" [Paragraphs 7 - 8]

“A proper reading … clearly indicates a duty on the respondent to have a procurement and provisioning system that complies with the provisions of the PFMA. Furthermore, it is clear that the respondent is required to prevent expenditure not complying with its operational policies. The PFMA thus imposes a legal duty or obligation upon the respondent to have and maintain a procurement and provisioning system and also to prevent expenditure not complying with an operational policy which in the case of the respondent would, *inter alia*, be the SITA Procurement Policy and procedures. ... It was also the applicant's evidence that the respondent is subject to the Treasury Regulations…’ [Paragraph 11]

“ … [T]he respondent, being a public entity, is bound by the provisions of the PFMA and … had a legal duty to comply with the PFMA, the Treasury Regulations and procurement processes and policies. … As such the respondent was bound to comply with the legal duties and obligations. It cannot thus … be concluded that this policy was merely an internal policy that could be deviated from since it was clearly drafted as part of the respondent's responsibilities as outlined in the PFMA. The SPPP document is … something other than an optional guideline… I am … satisfied that the applicant has succeeded in persuading this Court that the respondent had to execute procurement procedures in terms of this policy.” [Paragraph 14]

“… The applicant made a disclosure which … was a protected one because of the failure of the respondent's employees to comply with a legal obligation to which they were subject. … The disclosure was furthermore made in good faith ... It is therefore concluded that the applicant had made a disclosure of an impropriety (as defined in the PDA). He testified he made the disclosure about improprieties which he believed were substantially true. He also did not make the disclosure for purposes of personal gain. Whether or not he was dismissed as a result of this disclosure is a separate question ...” [Paragraph 15]

“In terms of section 187 of the LRA a dismissal will be automatically unfair if the *reason* is, for example, … the fact that the employee made a protected disclosure ... [A] dismissal will only be automatically unfair if the reason is one of those listed in section 187(1)(a)–(h) of the LRA. Where an employee thus alleges that his dismissal is automatically unfair, the sole enquiry would be to establish the true reason for the dismissal and once that has been established whether or not the reason is one of those identified in section 187(1)(a)–(h) of the LRA. … [T[he applicant testified that his dismissal for misconduct was not the true reason for his dismissal, but that it was only a pretext for his dismissal and that the real or true reason for this dismissal was the fact that he had made a protected disclosure. … Is there an "onus" on the employee to establish the reason for his dismissal? … In terms of section 192(2) of the LRA the onus to prove the existence of a dismissal rests on the employee ... Once the employee has discharged this onus, the employer bears the onus to prove that the dismissal was fair ... This means that it is for the employer to prove that the employee was dismissed for a permissible reason and that the dismissal was effected in accordance with a fair procedure. Because this is an onus placed on the employer … it is an onus in the true sense and will remain on the employer throughout the course of the trial. … The mere fact that an employee alleges that he or she was dismissed for an impermissible reason does not detract from the fact that the onus to prove the fairness of the dismissal remains on the employer. It is, however, not sufficient for the employee to simply allege that he or she was dismissed for an impermissible reason …” [Paragraph 31]

“Did the applicant in this matter present sufficient evidence to this Court to cast doubt on the reason for the dismissal put forward by the employer? And, was the disclosure made by the applicant the principal or dominant reason for the disciplinary action which resulted in the applicant's dismissal? This question is pertinent in light of the fact that it was argued on behalf of the respondent that other reasons relating to

misconduct may have played a decisive role in the dismissal of the applicant … in light of the complete absence of any evidence that might cast doubt on the applicant's clear evidence that the true reason for his dismissal was the fact that he had made a protected disclosure, I am therefore satisfied that the applicant was dismissed for an impermissible reason and that that likely formed the principal or primary reason for his dismissal. Accordingly I find that the dismissal of the applicant was automatically unfair. This conclusion is certainly reinforced by the fact that the applicant was expressly charged and expressly found guilty of having made a disclosure to the Public Protector." [Paragraph 32]

The dismissal was held to be automatically unfair, and the respondent was ordered to pay the applicant compensation equal to 24 months' salary, as well as the costs of the application. An appeal was dismissed by the Labour Appeal Court in **State Information Technology Agency Ltd v Sekgobela (JA53/08) [2012] ZALAC 16; [2012] 10 BLLR 1001 (LAC); (2012) 33 ILJ 2374 (LAC) (6 June 2012)**.

AVIATION UNION OF SOUTH AFRICA AND OTHERS V SOUTH AFRICAN AIRWAYS (PTY) LTD AND OTHERS (J2206/07) [2007] ZALC 66; [2008] 1 BLLR 20 (LC); (2008) 29 ILJ 331 (LC) (1 OCTOBER 2007)

Case heard: 27 September 2007, Judgment delivered 1 October 2007

This was an urgent application to compel respondents to comply with provisions of section 197 of the Labour Relations Act (LRA). SAA had been employing the second and further applicants to perform certain work, but decided to outsource that work or to contract it to LGM SA. Before outsourcing, SAA concluded an agreement with the trade unions whose members would be affected, to the effect that the outsourcing would constitute a transfer of business as a going concern in terms of section 197 of the LRA, and that the contracts of employment of the employees involved would be transferred to LGM SA in accordance with section 197, and this would not affect their continuity of employment. The dispute was about the fate of the workers in light of the termination of the Outsourcing Agreement. Applicant demanded that, since SAA had called for tenders from bidders interested in having the affected services outsourced to them, it should specify that the successful bidder would have the contracts of employment transferred to it in terms of section 197. SAA refused.

Basson J held:

"… What is clear from this section [s 197] is that it has as its purpose the preservation of the contract of service in the event of a transfer as a going concern which in turn would result in the preservation of the employee's work security. In this regard the Constitutional Court in NEHAWU v University of Cape Town held that one of the purposes of section 197 of the LRA was to protect workers against unfair job losses and that this section therefore gives rise to an automatic transfer of employment contracts from the transferor to the transferee of a going concern. … It has, however, been acknowledged by the Constitutional Court in NEHAWU … that there exists a tension between the business interests of the employer and the worker's interest in job security. … This dual purpose of section 197 thus requires a balance between the (business) interests of the employer on the one hand and the interest of workers in job security. … [N]ot every act of a business transfer or an act of outsourcing would as a matter of course constitute a transfer of a business as contemplated by section 197 of the LRA and that much will depend on whether or not the transfer in fact meets the requirements as set out in section 197 … [T]hree criteria must be satisfied before it may be concluded that a transfer as contemplated by section 197 has indeed taken place: Firstly, the transaction must constitute a "transfer" as contemplated by section 197. …

Secondly, a "business" must be transferred which also includes a part of the business, trade, undertaking or service; The "business" must be transferred" as a "going concern"." [Paragraphs 22-23]

"... The question which arises is whether there can be a section 197 transfer between the unsuccessful outgoing contractor and the successful incoming contractor? ... I am of the view that, if regard is had to the purpose of the section 197 ... which is to protect the work security of employees when a business is transferred as a going concern ... that preference should be given to a more liberate interpretation rather than a conservative or narrow interpretation of section 197 and that the interpretation ... should lean in favour of protecting the rights of employees affected by the often harsh effects of a transfer as a going concern." [Paragraphs 26 - 28]

"... Although I am in agreement with the sentiment expressed that section 197 should be read so as to protect the work security of employees affected by a business transfer ... it is clear from section 197 ... that the legislature had only contemplated a transfer from the old employer to the new employer and nothing else (the so-called first generation transfer). The intention of the legislature appears ... to be readily apparent from the clear wording of section 197(1)(b). ..." [Paragraphs 30-31]

'Consequently ... section 197 only contemplates first generation outsourcing: In other words, where the business is transferred by the old employer to the new employer and not the so-called second generation transfers. ... I am not persuaded that, in light of the express and unambiguous wording of section 197(1)(b), that it would be appropriate to interpret section 197(1)(b) to also apply to a transfer "from" one employer to another as opposed to a transfer by the "old" employer to the "new" employer. ... [I]t should be left to the legislature to extend the ambit of section 197(1)(b) to also apply to the so-called second generation transfers. ..." [Paragraphs 32-33]

"...Where there is a contractual nexus between the old employer and the new employer, that contractual agreement must be evaluated in order to determine whether or not that resulted in a transfer of a service as a going concern as contemplated by section 197. ... What would be the position if there is no such a contractual nexus? Nokeng appears to be authority for the viewpoint that a contractual nexus is not a pre-requisite for a transfer of a business or service as a going concern. In such a case the facts of the particular case will nonetheless be evaluated in order to determine whether or not there was, despite the absence of an agreement (or transaction), a transfer as a going concern as contemplated by section 197 of the LRA. ..." [Paragraph 36]

"... [T]he Applicants have failed to show a prima facie right ... The Applicants have also failed to show any irreparable harm particularly in light of the fact that the application is premature in light of the fact that the bidding process has not yet even been completed. The balance of convenience also favours SAA in view of the fact that it will not be able to employ another contractor should it be restrained from doing so. The individual applicants have a suitable remedy at their disposal either in terms of section 189 of the LRA or in terms of appropriate proceedings after the tenders have been awarded." [Paragraph 39]

The application was dismissed. An appeal to the Labour Appeal Court was partially upheld, the Court holding that section 197 was capable of application when, at the end of the contract between SAA and LGM SA, the services were transferred to SAA or contracted out by SAA to another party (*Aviation Union of South Africa obo Barnes and Others v South African Airways (Pty) Ltd and Others (JA 51/07) [2009] ZALAC 12*). The SCA overturned the Labour Appeal Court and confirmed the LC decision (*SAA v Aviation Union of SA* (123/10) [2011] ZASCA 1 (11 January 2011)). Finally, the Constitutional Court overturned the

decisions of the Labour Court and the SCA: *Aviation Union of SA and others v SA Airways and others* (2011) 32 ILJ 2861 (CC).

SELECTED ARTICLES

'SEXUAL HARASSMENT IN THE WORKPLACE: AN OVERVIEW OF DEVELOPMENTS', (2007) Stellenbosch Law Review 3, 425.

The article dealt with three main topics: the continuing search for a workable legal definition of harassment, the location of protection against harassment within protection against unfair discrimination, and the availability of remedies to the victim.

"From the perspective of legal certainty, however, this approach [of defining sexual harassment with reference to the type of conduct involved or its effect on the victim] is problematic for two reasons. First, such a definition may exclude behaviour that at face value seems to be non-sexual, but which is intended or implemented in a sexually oppressive manner. Secondly, even if the conduct is sexual in nature, the reality remains that the law recognises, in principle, the acceptability of interaction between the sexes, even at work (ie sexual conduct is not necessarily sexual harassment)." (Page 426)

"… [H]ow serious must the conduct complained of be before it will be regarded as sexual harassment? Despite a fairly clear indication as to what types of conduct may constitute sexual harassment, the answer to this question is not entirely clear and also requires consideration." (Pages 429 - 430)

"… [W]here the offensive conduct is, for example, verbal or where the conduct creates a hostile or offensive working environment which does not involve a loss of a tangible job-related benefit, it may not always be easy to determine whether sexual harassment has taken place. … It therefore becomes important to determine from whose perspective the conduct or the alleged hostile working environment must be judged." (Pages 431 - 432)

The article then considers the merits of subjective and objective tests, before discussing a "reasonable victim" test:

"'In terms of this test, the feelings and perceptions of the victim are taken into consideration as well as the surrounding circumstances. … One of the main points of criticism is that it unduly places the conduct of the victim under the spotlight. Care should always be taken that the focus of an enquiry into harassment is not placed on the victim's personal history rather than on the conduct of the harasser. It is nonetheless suggested that this test is the more acceptable because it tries to find a balance between the perceptions and feelings of the victim (typically as a woman) whilst, at the same time, it takes into account the surrounding circumstances" (Page 433 - 434)

The article surveys the history of South Africa's approach to defining sexual harassment, before considering the link between harassment and discrimination, including discussion of the position in the United States.

"Practices of a sexual nature which undermine or inhibit a woman's job performance or which force her to resign therefore constitute sex discrimination not only because they encroach upon her right to equality in the workplace, but also because they violate her right to dignity." (Page 439)

"Despite widespread acceptance of the link between harassment and discrimination, problems do remain because of certain fundamental differences that exist between discrimination and harassment as legal phenomena. … [A] claim for sex discrimination … requires the claimant to show that there was differential treatment on the basis of sex. Once a claimant is able to show the causal link between

differential treatment and her sex, discrimination on the basis of sex will have been established. This formula does not necessarily work in case of sexual harassment." (Pages 440 - 441)

"In short, discrimination law does not work with degrees of conduct, while harassment law does. … [T]here are a variety of remedies available to the victim of sexual harassment, one of which is a claim of unfair discrimination. At the same time, experience has shown that instances of harassment are either dealt with as a disciplinary matter or culminate in constructive dismissal claims in the wake of a resignation by the victim. … [T]his may lead to a definition or understanding of harassment removed from reality and the important role discipline and protection against unfair (constructive) dismissal play in combating harassment in the workplace." (Pages 442 – 443)

The article then discusses remedies and the relationship between sexual harassment and constructive dismissal, before concluding:

"Perhaps the most important feature of these developments is that the underlying approach that harassment is discrimination is now firmly established, also in South Africa. Acceptance of this paradigm has influenced our understanding and, for practical purposes, the legal definition of sexual harassment. … [I]t is significant that at last some reliance has been placed on the Employment Equity Act by victims of workplace sexual harassment. But … this has been done against the background of the fact that the victim's job security still was compromised by the harassment." (Pages 450 – 451)

SELECTED JUDGMENTS

PRIVATE LAW

ADAMS V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO. 31049/2011, SOUTH GAUTENG HIGH COURT

Case heard 3 September 2014, Judgment delivered 21 November 2014

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

Collis AJ held:

"… [T]he plaintiff elected not to testify during these proceedings. The rationale thereof was not explained to the court. The failure on the part of the plaintiff to take the stand deprived the court of an opportunity to observe the plaintiff and his disposition as at date of commencement of the proceedings. … However, based on the factual disposition as well as the views expressed by the experts … the pertinent question arose what award would be fair and adequate compensation … in respect of his loss of earnings and earning capacity. … It is by now accepted that in the assessment of these kinds of damages, which cannot be assessed with any amount of mathematical accuracy the court has a wide discretion. … Furthermore, with regard to expert evidence, it is trite … that in applying a scientific criteria or reasoning the expert witness must satisfy the Court that the conclusions drawn by the expert … are founded on logical reasoning and … based on facts proved by admissible evidence. … " [Paragraphs 22 - 25]

"… [T]he plaintiff as at date of the accident was earning R 7000 per month. This fact, quite simply, not only was undisputed, but it is how this particular plaintiff is to be categorised as. Even if this court is to accept that his earnings at the time of R7000 per month, was considered to be a high income bracket for someone of his ilk, it was a salary that he was earning before even taking up employment at … the position he found himself in as at date of collision. That having been the position; in all likelihood or probability would have translated in this being his likely earnings or probable earnings. … In the result I do not accept … that indeed pre-morbid, the plaintiff had reached his career ceiling and to suggest otherwise would be wholly unrealistic. A progression to have reached a career ceiling of median of Patterson B4/B5, as basic salary, I am of the opinion is a conservative approach and in all likelihood more probable." [Paragraphs 30 - 32]

"The evidence presented in respect of the plaintiff's post-morbid career path was that the plaintiff post collision has been left completely unemployable. In substantiation of this contention the plaintiff proceeded to not only present factual evidence by his spouse and previous employer, but also presented evidence of an expert nature. … [H]is spouse testified that post collision the plaintiff is a different person. He has become very irritable; he is very forgetful and has to be reminded all the time about things left for him to do. The same sentiments was also expressed by his previous employer i.e. that … when the plaintiff returned to work, all of a sudden he was very irritable; he could not remember where he had placed new stock … and as a result she constantly had to check on his work. Prior to the collision however the plaintiff was an excellent worker." [Paragraph 34]

"Where the defendant was of the opinion that the plaintiff still possessed a residual earning capacity, the defendant carried the onus to prove such … on a balance of probability. … [T]he defendant ought to have identified the work, which on its own expert opinion was routine, simple, structured and supervised. In addition thereto, the defendant ought to have proven what income the plaintiff will earn whilst doing such work, when most likely the plaintiff would have secured such work and lastly for how long the plaintiff would have maintained such work. … In this regard the most crucial evidence presented in this regard, was the evidence of the defendant's industrial psychologist. … Dr Harmse conceded during cross-examination, that the plaintiff if he is able to obtain future employment, he would have to perform work for a very sympathetic employer. The doctor further conceded that in his endeavours to obtain employment that the plaintiff with his limitations would have to compete with other job seekers and in all likelihood would find this challenging. The witness also conceded that when he prepared his report he did not have the benefit of all the expert reports of the plaintiff at his disposal and as such his opinion might not have been very objective. … On the evidence presented by the defendant; I cannot find that the defendant succeeded in proving that the plaintiff post-morbid maintained a residual earning capacity and as a result I must find that such earnings are zero." [Paragraphs 36 - 38]

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

CRIMINAL JUSTICE

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

Case heard 12 June 2015, Judgment delivered 19 June 2015

This was an appeal against the decision of the District Court, refusing to grant the appellants bail pending trial. The appellants were accused of murder read with the provisions of section 51(1) of the Criminal law Amendment Act, thus the charge fell within the category of Schedule 6 offences in terms of the Criminal Procedure Act. The issue was whether the court a quo erred in not granting bail to the accused.

Collis AJ (:

"… The success of this appeal is dependent on whether the appellants have discharged the *onus* in the Court *a quo* in terms of section 60(11) of the Act. In the context of section 60(11)(a), it is necessary for an applicant to persuade the Court that "exceptional circumstances" are present that in the interest of justice permit his release. In the past a number of decisions have attempted to define what would constitute exceptional circumstances. … Having regard to the provisions set-out in section 60(4) of the Criminal Procedure Act; a Court is expected to exercise a value judgment in accordance with all the evidence, and to apply the relevant legal

criteria … In the present matter the crux of this appeal lies within the contents of the appellants' affidavits presented as evidence before the Court *a quo.*" [Paragraphs 9-12]

"The record reflects that the learned magistrate went to great lengths albeit that the applicants were legally represented to satisfy herself that they understood the charge which they were facing and the *onus* which they carried in applying for bail … The record further reflects that the applicants contended in their affidavits that the State's case was weak. Furthermore, given the economic loss to their businesses; families and that which their employees will suffer; that these factors constituted exceptional circumstances justifying their release on bail. … The magistrate had found that the appellant's defence of self-defence was neither corroborated by witnesses nor objective probabilities and had rejected their contentions that the murder was not committed at the very least by a group of persons acting in the furtherance of a common purpose. It was common cause that all three the appellants were members of the Mahwelereng Taxi Association; further that all three were found in possession of 9mm firearms and were arrested together at the crime scene. … Similarly, in relation to any loss they might suffer to their businesses, employees and families, the magistrate found no additional evidence except that their own affidavit evidence were presented before the Court *a quo* to corroborate such evidence. As a consequence the Court *a* quo did not consider these factors to constitute exceptional circumstances … This, in my view, is where the exercise in analysing the evidence presented before the Court *a quo* in determining whether the appellants had discharged their *onus* should have ended." [Paragraphs 18 - 20]

"Having regard to the evidence presented before the Court *a quo* they had not succeeded in demonstrating that the decision of the Court *a quo* was wrong and therefore needed to be set aside … In respect of whether the bail application should have been brought in terms of Schedule 6; the record reflects that the appellants duly understood when the learned magistrate explained to them and questions were individually put to them by the learned magistrate that they carried the *onus* as set out in Schedule 6 when they applied for their release on bail. … In the decision *S v Dhlamini* our Constitutional Court unanimously decided that the right to be presumed innocent is not a pre-trial right, but a trial right. As such no misdirection by the Court *a quo* had taken place." [Paragraphs 22-25]

The appeal was dismissed.

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

Case heard 6 August 2014, Judgment delivered 19 August 2014

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

Collis AJ (Nicholls and Claassen JJ concurring) held:

"The case for the Respondent was founded on circumstantial evidence and pointings out made by the Appellant and that of his co-accused. There were no eyewitnesses to the murder and no

witnesses who allegedly saw the Appellant, his co-accused or the deceased in each other's company on the night in question. ..." [Paragraphs 7-8]

"Upon the conclusion of the trial-within-a-trial, the trial Court found that the Appellant's statements and the pointing out were made freely and voluntarily and admitted the evidence against him. ... A decision by the trial Court to rule as admissible the statements made and evidence obtained during the pointing out is not cast in stone. ..." [Paragraphs 12-13]

"I am of the opinion that the trial Court correctly admitted the evidence tendered by the Respondent as against the Appellant and that of his co-accused during the pointing out. No objective facts were shown by the Appellant suggesting that the police officials, on the day that the pointing out was conducted, had any reason to falsely implicate the Appellant or his co-accused in the commission of the offence. ... As a general rule, hearsay evidence is inadmissible in both civil and criminal proceedings. However, Section 3 of The Law of Evidence Amendment Act ... provides for circumstances under which hearsay evidence may be admitted. ... In *casu* the probative value of the hearsay evidence tendered by the police witnesses thus depended primarily on the testimony of the Appellant and his co-accused, confirming the extra-curial statements and pointings out made vis a vis one another or disavowing the aforesaid. During the hearing of the trial within-a-trial, both the Appellant and his co-accused disavowed their extra curial statements and the voluntariness of the pointings out..." [Paragraphs 21 - 27]

"It thus follows that, albeit during the trial the Appellant and his co-accused disavowed themselves from the extra curial statements and paintings out made by them, the objective factors do not support their disavowals given the nature of what was pointed out, and given the nature of the information around how the offence had been committed. The Appellant and his co-accused could only bear knowledge of the above, if they had both been involved in the commission of the offence. ... I conclude that the trial Court correctly admitted and placed reliance on the pointing out evidence and accompanied statements as made not only the Appellant but also by his co accused ... In addition thereto the trial Court, in considering whether the inference sought to be made is the only reasonable inference that can be drawn from the facts, the Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. The Court must carefully weigh the cumulative effect of all of them together, and it is only after it has done so, that the Appellant is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. ... I am of the view that the trial Court correctly concluded that the circumstantial evidence established the guilt of the Appellant." [Paragraphs 30-33]

"During the hearing of the appeal, counsel for the Appellant conceded as much that Mr Davids could not have been an *alibi* for the Appellant, as he at best could testify as to the movement of the Appellant prior to them parting ways, and on his own testimony referring to the part of the evening they went on their own frolic to rob the unknown white gentleman. ... [T]he trial Court correctly concluded that no reliance can be placed on the evidence of Mr Davids as an alibi for the Appellant on the night of the murder. ... I cannot find any merits in the appeal against conviction. Consequently I propose that the appeal on the merits should be dismissed." [Paragraphs 36 - 38]

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

The appeal was dismissed.

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

BADER V SA COUNCIL FOR SOCIAL SERVICE PROFESSIONS AND ANOTHER, UNREPORTED JUDGMENT, CASE NUMBER 56790/2013, NORTH GAUTENG HIGH COURT (20 FEBRUARY 2015)

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

Davis AJ held:

"Section 5(1) of PAJA gives effect to the rights entrenched in s32(2) of the Constitution … by providing that any person whose rights have been materially and adversely affected by an administrative action and who was not being given reasons for the action, may request the furnishing of such reasons. In terms of s5(3) of PAJA, the failure to furnish "adequate reasons for an administrative action" creates the presumption in any proceedings for judicial review that, in the absence of proof to the contrary, the action was taken without any good reason." [Paragraph 6]

"Mr Molele strenuously argued that the RCPC "did what it was obliged to do" in terms of the SSPA, namely to consider a complaint referred to it and to make a ruling thereon." [Paragraph 8]

"Despite Mr Molele's argument, it does not appear from the RCPC's letter or minutes that the aforesaid had indeed taken place." [Paragraph 10]

"I am therefore of the view that no "reasons" for its decision appears from the RCPC's letter, its minutes or the affidavit of its Chairperson. Insofar as it was argued or contended that the minutes should be taken to constitute adequate reasons, I again differ. It has been stated that the usage of the word "adequate" in section 5(2) of PAJA constitutes an "important qualifier"." [Paragraph 11]

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

"The consequence of the above and the effect of the rebuttable presumption created in section 5(3) of PAJA is to place the onus on the administrator to show that the action was taken lawfully notwithstanding the failure to give reasons." [Paragraph 17]

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

"... Neither the Registrar, nor the RCPC, not the CPI have been empowered by the regulations to cancel the registration of a person such as the Second Respondent. It is only after the proceedings in a disciplinary inquiry has taken place in terms of Regulations 16 to 24 that the decision of such a committee ... reports its findings to the First Respondent who may then act in terms of Section 22 of the SSPA." [Paragraph 28]

'To an extent the referral to a disciplinary inquiry constitutes a "correction" of the CPI decision. At common law it is well established that the court will generally refer the matter to the original decisionmaker rather than to attempt to correct the decision ie substitute its own decision for that of the administrator..." [Paragraph 30]

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

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

CONSTITUTIONAL INTERPRETATION

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

Judgment delivered 3 March 2007

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

Davis AJ held:

"In the present instance, the first respondent's failure has, due to the nature of the interim payment order, effectively prevented the applicant's proper preparation for the quantum portion of his trial. It has therefore also effectively encroached on or prejudiced his rights of access to this Court as enshrined in section 34 of the Constitution. Although such a consequential encroachment would not apply in each

instance, there are other constitutional inroads made by section 3 of the State Liability Act which are of general application ...” [Paragraph 11]

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

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

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

“I have furthermore considered whether the section can be saved from unconstitutionality by excising from it a portion thereof, such as finding only the portion "or against the property of the state" to be offensive. It was, however, correctly, in my view, pointed out by counsel for the applicant that even though attachment might then be allowed, the issuing of a writ therefor will still be precluded by the remaining portion of the section. The only portion of the section which is not inconsistent with the Constitution, is the portion after the word "but", being that referring to satisfaction from a consolidated revenue fund.” [Paragraph 25]

“I also enquired as to the practical consequences of a finding of unconstitutionality. In terms of the provisions of section 172(2)(a) such a finding would only be effective after confirmation thereof by the Constitutional Court. Such confirmation would only be considered after proper enrolment and pursuant to a reference to the Constitutional Court by way of rule 15 of its Rules.” [Paragraph 27]

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

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

CRIMINAL JUSTICE

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

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

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

Davis AJ (Louw J concurring) held:

"In the learned author Snyman's work … the definition of dolus eventualis is stated as follows: "A person acts with dolus eventualis if the commission of the unlawful act…is not his main aim but: (a) the subject foresees the possibility that…the unlawful actmay be committed or the unlawful result will ensue and (b) he reconciles himself with the possibility". In casu the appellant expressly testified that these acts amounted to assault but was only directed at the main aim of punishing the deceased. … The appellant stated that he never intended to kill the deceased, nor did he foresee his death … There is no indication that a murderous intent was at some stage formed or became present during the assault. In my view the finding of guilt based on dolus eventualis is incorrect and the appeal against the conviction of murder on this ground must succeed. However, having regard to the extent of the assault and the time period thereof, resulting in the ultimate death of the deceased, one must consider whether the appellant is not guilty of culpable homicide." [Pages 5-6]

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

"… [N]ow that a new conviction is on the table, the issue of sentence can be and should be considered afresh. … Counsel for the appellant suggested that a sentence of five years' imprisonment would be sufficient, but in my view that would trivialise the extent of the assault and trivialise the worth of a life, in this case, which has been lost by the deceased. In my view a serious sentence is justified and it should be a period of effective imprisonment for some years." [Pages 7-8]

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

ADMINISTRATION OF JUSTICE

THE LAW SOCIETY OF THE NORTHERN PROVINCES V KHOZA, UNREPORTED JUDGMENT, CASE NUMBER 53448/2014, NORTH GAUTENG HIGH COURT

This matter concerned the Law Society's powers in terms of the Attorneys Act and concomitant rules to strike an attorney from the roll. The Law Society alleged that the respondent had committed several transgressions, including misappropriation of trust funds, delaying payment of trust funds to clients, failing to account to clients, running a deficit on trust accounts and contravention of Attorneys Act provisions relating to bookkeeping by attorneys. The respondent's appeal against the interim order was dismissed.

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

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

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

"… [T]he process of evaluation involves a three-stage enquiry. … The first enquiry is to establish whether the offending conduct has been established on a balance of probabilities … The second enquiry is whether the practitioner is a fit and proper person to continue practise … The third enquiry is whether, in all the circumstances, the practitioner is to be removed from the roll of attorneys or whether another sanction would be appropriate …" [Paragraph 17]

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

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

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

"In the present instance, and taking all factors into consideration as well as the discretion with which the court is vested, I am of the view that the present Respondent deserves censure in the form of a sanction but not removal of his name from the roll of attorneys." [Paragraph 22]

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

SELECTED JUDGMENTS

PRIVATE LAW

OOSTHUIZEN V VAN HEERDEN T / A BUSH AFRICA SAFARIS 2014 (6) SA 423 (GP)

Case heard 3 June 2014, Judgment delivered 10 June 2014

Appellant sued respondent, his neighbour, after some of his cattle died from a disease allegedly contracted from blue wildebeest on respondent's game farm. The magistrate in the court a quo dismissed the claim.

Keightley AJ (Louw J concurring) held:

"... [T]he appellant averred that the respondent's alleged wrongful conduct was demonstrated by his negligence in keeping blue wildebeest, which are known to be carriers of snotsiekte, and which can result in harm to cattle, on his properties; by his keeping blue wildebeest close to the property of the appellant without taking the necessary precautions to prevent harm to the appellant's cattle; by the respondent managing his blue wildebeest in such a manner as to create an enhanced risk for the appellant; and by the respondent's failure to comply with the necessary statutory obligations pertaining to keeping dangerous animals. ... The court a quo dismissed the appellant's claim on two grounds, the first being in respect of the element of causation and the second being in respect of the element of proof of damages." [Paragraphs 14-16]

"The crux of the appeal is clearly the question of factual causation, more specifically, did the appellant satisfy the onus resting on him to establish that the respondent's blue wildebeest, and *only* the respondent's blue wildebeest, were the probable cause of the infection of the appellant's cattle with snotsiekte?" [Paragraph 21]

'The evidence led at the trial by the appellant and his witnesses on the one hand, and the respondent and his witnesses on the other, gave rise to mutually destructive versions of events. On the one hand the appellant vehemently asserted that his cattle never went onto Goa West during the winter months when the risk of infection was highest. ... On the other hand, according to the testimony of the respondent and his witnesses, the appellant continued to move his cattle between Goa East and Goa West throughout this period ... [Paragraphs 23-24]

"It is relevant to point out at this stage that the uncontested evidence of the respondent was that he comes from cattle-farming stock in the area, and in fact had grown up on the farm Goa (the farm now leased by the appellant) where his father had farmed cattle. For this reason, in my view, his evidence in this regard carries considerable weight." [Paragraph 27]

"Where a court is faced with mutually destructive or irreconcilable versions ... it must proceed as follows. It must first determine whether the matter may be resolved on the probabilities. This involves considering the credibility of the witnesses, their reliability and, finally, determining on the probabilities whether the party with the onus has succeeded in discharging it. ... If there are no probabilities upon which to assess the irreconcilable versions, then the court must apply the [following] approach..."Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. ... It must be clear to the

court of first instance that the version of the litigant upon whom the onus rests is the true version…".” [Paragraphs 31 - 32]

“In the present case it seems to me that the dispute … can be resolved on the probabilities. Moreover, it seems to me that, having regard to all of the evidence presented, the probabilities do not favour the appellant…” [Paragraph 33].

“… I am of the view that the magistrate was correct in accepting the respondent's version as the more probable. It follows that the court a quo was correct in concluding that the appellant had not satisfied the onus resting on him to establish that it was the respondent's blue wildebeest, and no others, that infected his cattle … Moreover, even if it were to be assumed in favour of the appellant and contrary to my finding above that the court a quo erred in the conclusion it reached in respect of the element of causation, I am not persuaded that the appellant would have succeeded in establishing delictual liability on the part of respondent in any event.” [Paragraphs 34-35]

“… While it cannot be gainsaid that it is well known that blue wildebeest carry the snotsiekte virus, this in itself is insufficient to establish negligence on the part of the respondent. He testified that he had farmed for many years with both cattle and blue wildebeest in proximity to each other with no problems. In fact the *appellant* himself testified that he viewed the risk of his cattle contracting snotsiekte from the respondent's blue wildebeest as very low.” [Paragraph 38]

‘There may well be cases where a game farmer can be held to have acted wrongfully and unlawfully by farming with blue wildebeest in the proximity of cattle-farming. The law reports contain examples of cases in which the courts have considered claims by cattle farmers against game farmers over the risk of snotsiekte. … What these cases illustrate is that, as is so often the case in matters of this nature, whether a particular defendant or respondent acted wrongfully or negligently … will depend very much on the particular facts to hand. … To succeed in a delictual action, both negligence and wrongfulness must be established … As far as the element of wrongfulness is concerned, it is trite that not every infringement of a right will be regarded as being legally reprehensible. The boni mores — or legal convictions of the community — are used as a test to determine whether a particular infringement is wrongful or unlawful. This is essentially an objective test, based on the criterion of reasonableness. The question is essentially whether, in all of the particular circumstances of the case, a defendant has infringed a plaintiff's interests in an unreasonable manner. This requires a balancing of interests between the plaintiff and the defendant in light of all the relevant circumstances of the case.” [Paragraphs 41-43]

“In my view … it was not reasonable for the appellant to expect the respondent to take sole responsibility, at substantial cost to the respondent, for reducing the risk of possible snotsiekte infection, while at the same time taking no responsibility himself for reducing the risk. … To place this responsibility on the respondent would be contrary to the underlying principles governing the reasonable use of property between neighbours.” [Paragraph 45]

“The boni mores or legal convictions of the community do not require that courts should come to the assistance of a litigant who adopts an attitude of this nature. The facts of this case demonstrate that the appellant assumed the risk that his cattle might be infected and that he deliberately did nothing to prevent this. He proceeded on the assumption that if his cattle contracted snotsiekte, the law would hold the respondent liable for his loss. This was a mistaken assumption. …” [Paragraph 46]

The appeal was dismissed with costs, including costs of two senior counsel.

CRIMINAL JUSTICE

S V MNGUNI 2014 (2) SACR 595 (GNP)

Case heard 30 July 2014, Judgment delivered 30 July 2014

The appellant was convicted in the regional court of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, in that he had raped a 20-year-old mentally retarded woman. He was sentenced to life imprisonment, being the minimum sentence as prescribed by s 51 of the Act. The appellant appealed against his conviction and sentence. The National Director of Public Prosecutions had published directives on the prosecution of sexual offences which required public prosecutors to adopt a victim-centred approach to give priority to the emotional and psychological wellbeing of the complainant; to make every effort to reduce secondary traumatisation; and to make additional efforts in this regard in respect of mentally disabled complainants. Therefore aside from the issue of conviction and sentence, the case also addressed the issue of secondary victimization.

Louw J (Keightley AJ concurring) found that the state had failed to prove the mental disability of the victim as required by the Act, but found that the appellant was guilty of rape and imposed the minimum sentence of ten years' imprisonment.

Keightley AJ wrote a separate concurring judgment:

"I would like to add something to the judgment. It has to do with the issue of the correct approach that should be followed at trial in circumstances where an accused person is charged with the crime of rape of a mentally disabled person. ... What this case … raises is the particular question of what the prosecutor and presiding officer need to do to ensure that the issue of the mental disability of the complainant is dealt with properly. … [I]t is important to bear in mind that the Criminal Law (Sexual Offences and Related Matters) Amendment Act… was enacted to, inter alia, ''(a)ddress the particular vulnerability of persons who are mentally disabled in respect of sexual abuse''…" [Paragraphs 12-14]

"These objectives must be seen in the context of a constitutional guarantee of the rights to, among others, privacy, dignity and the right to freedom and security of the person. These rights carry with them a constitutional obligation on all organs of state to respect, protect, promote and fulfil them. Public prosecutors fall under the rubric of organs of state and accordingly they are required to satisfy these obligations in respect of the complainant in a case such as the present. Courts, in turn, are bound by the Bill of Rights, and must conduct themselves in a manner consistent with it. … The national director has … published directives on the prosecution of sexual offences. These directives require public prosecutors, amongst other things, to do the following: to adopt a victim-centred approach, to give priority to the emotional and psychological wellbeing of the complainant, to make every effort to reduce secondary traumatisation, and to make additional efforts in this regard in respect of mentally disabled complainants." [Paragraphs 16-17]

"The present case demonstrates a clear shortfall in achieving these objectives. In the first place, the public prosecutor ought to have checked the expert report of the psychologist before trial to ensure that it correctly addressed what needed to be addressed, namely whether the complainant was mentally disabled as defined in the Act and, hence, whether she was able or not to consent to sexual intercourse in terms of s57.

The expert report failed to do this. Instead, it concluded quite unhelpfully and inappropriately that the complainant's 'ability to distinguish between right and wrong was compromised'. This conclusion does not address the question of mental disability under s 1 of the Act. It refers instead to the competence of an accused person to stand trial." [Paragraphs 19-20]

"Not only is it quite irregular for the court to try to formulate an opinion in this manner, but it is also fundamentally contrary to the complainant's rights to privacy and dignity. She was effectively put on display and discussed as an object by the magistrate and others involved in the trial." [Paragraph 22]

"This situation could have been avoided had they instead proceeded as follows: In the first instance, the public prosecutor should have ensured the accuracy of the psychological report and ensured that it was fit for purpose well in advance of the trial. … Secondly, having failed in this regard, the public prosecutor should at least have sought to lead the evidence of the psychologist on the real issue at hand, namely whether the complainant's mental disability was such that it could be found to fall within one of the four categories of the definition of a person who is mentally disabled as defined in s 1 of the Act, as outlined above. … And thirdly, even failing this, it fell to the presiding magistrate to question the psychologist in order to elicit his expert opinion on these issues, rather than what the magistrate did in this case, which was to castigate the psychologist and his report and to dismiss the report as useless. … Had any of this been done, the complainant's rights would have been properly protected and it would have been unnecessary to subject both her and her family to secondary victimisation and traumatisation by parading her in front of the court." [Paragraphs 24 - 27]

CHILDRENS' RIGHTS

EX PARTE MS AND OTHERS 2014 (3) SA 415 (GNP)

Case heard 1 November 2013, Judgment delivered 2 December 2013

The first and second applicants were the commissioning parents in a surrogacy arrangement. The third applicant was the surrogate mother. They sought confirmation of their surrogate motherhood agreement in terms of section 292 and 295 of the Children's Act. The issue was whether it was competent for the High Court to confirm a surrogate motherhood agreement where the written agreement was only entered into, and confirmation sought, after the artificial fertilisation and pregnancy of the surrogate mother.

Keightley AJ held:

"Surrogacy arrangements are multifaceted. They require a consideration of many interconnected concerns, ranging from those that are deeply personal to the parties involved, to those that deal with the necessary practical aspects of the arrangement. … The surrogacy scheme established under the Act is carefully structured so as to regulate this complexity of interests, rights and obligations … one of the central requirements … is that surrogate motherhood agreements must be formally encapsulated, and vetted and confirmed by the High Court before any steps are taken that may result in the conception of a child. To this end, artificial fertilisation of a surrogate mother is expressly prohibited unless and until a surrogate motherhood agreement has been confirmed by the court. … In terms of our Constitution, the best interests of a child are of paramount importance in every matter concerning the child. In essence,

surrogacy arrangements are all about the child to be born. Accordingly, although the hoped-for child is not a party to the surrogate motherhood agreement, his or her future rights and interests are the most important of all the rights and interests involved. ...” [Paragraphs 7 - 9]

“... [T]he parties are in breach of this fundamental requirement. This gives rise to two questions: First, is it competent under the Act for a court to confirm the surrogacy agreement notwithstanding this breach? The Act does not deal with this question in any express terms ... Second, if ... I find that a court is so competent, what is the correct approach to be adopted in cases like the present? ...” [Paragraph 10]

“... Only parties who fall within the categories prescribed by the requirements of section 295 may enter into a legally sanctioned surrogate motherhood agreement. The agreement itself must obtain judicial sanction, and the sanctioning court must be satisfied that the requirements of sections 292 and 295 are met before it can confirm an agreement. Both commissioning parents, and the surrogate mother must be found to be suitable to fulfil the responsibilities that will rest on them. ... [U]ltimately, it is the care, welfare and best interests of the child to be born that will determine whether a court should confirm an agreement. ... The Act requires the court to confirm the surrogacy agreement and, in addition, to authorise the artificial fertilisation of the surrogate mother, before such fertilisation takes place. The Legislature clearly viewed the latter prohibition in a serious light in that it attached a criminal sanction ... to a breach of the prohibition. ... It is also significant that the statutory scheme attaches very different consequences to valid and invalid surrogate motherhood agreements. ... What then, of agreements that parties seek to validate after conception of the child to be born, in circumstances where neither the agreement, nor the artificial fertilisation of the surrogate mother enjoyed pre-existing judicial sanction? Do these agreements fall into that category of agreements that do not comply with the provisions of the Act? Do courts have the power to validate them, by way of confirmation under section 292, despite their failure to comply with these pre- requisites of the statutory scheme?” [Paragraphs 25 - 27]

“... [T]he first question ... is whether it is competent for a court to confirm a surrogate motherhood agreement where artificial fertilisation of the surrogate mother has resulted in the conception of a child in the absence of pre-existing judicial sanction? ... [T]he Act does not say what the consequences of non-compliance with these provisions will be on the validity of a written agreement subsequently entered into ... It is also silent on the concomitant question of whether the court has the power to validate such an agreement ... It is a well-established principle of our common law that an agreement to commit an unlawful act is not enforceable. This includes acts that are unlawful in terms of a statute. An agreement to commit an unlawful act is unenforceable, and an agreement to facilitate or encourage the commission of an unlawful act, even if indirectly, may be unenforceable ... In the absence of clear provisions to the contrary, a court would normally be slow to interpret a statute so as to give the court a power to condone, and even to encourage, unlawful and criminal conduct by giving retrospective effect to an agreement linked to a prohibited act.” [Paragraphs 28 - 33]

“However ... a surrogacy agreement advances additional constitutional rights. These include the right to dignity, the right to make decisions concerning reproduction, and the surrogate mother’s right to security in and control over her body. ... Courts are enjoined in terms of section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights in interpreting any legislation. Statutory interpretation must positively promote the rights contained in the Bill of Rights ... [T]he prohibition on artificial fertilisation of the surrogate mother prior to confirmation of the surrogacy agreement, and in the absence of authorisation by a court is aimed largely at ensuring that there is certainty in the legal relationship between the parties involved before the prospect of a child becomes a reality. In this sense,

the prohibition serves the interests of all of the parties involved. It also advances the principle of the best interests of the child in that there can be no doubt that it is in the prospective child's best interests for his or her legal and parental status to be settled at the earliest possible opportunity. … [T]his does not mean that the best interests of the child may not also be served by a subsequent confirmation of the surrogacy agreement, ie after the child has been conceived. The question is whether the relevant provisions of the Act, properly interpreted, may be read as giving a court the discretion to grant such confirmation." [Paragraphs 34 - 39]

"… [I]t appears to me that the provisions conferring the power on a court to confirm a surrogacy agreement in and of themselves do not preclude the court from doing so where the surrogate mother has already undergone the process of artificial fertilisation in terms of a verbal surrogacy agreement between the parties and is already pregnant." [Paragraph 43]

"It may be that … a prohibited act of artificial fertilisation has already occurred. However … this fact does not impinge on the validity of the surrogacy agreement, or prevent the court from confirming that agreement. The Act prescribes an express criminal penalty for the commission of a prohibited act of artificial fertilisation; it does not provide for invalidity of the surrogacy agreement as a penalty. … This interpretation is consistent with the constitutional injunction on courts positively to promote constitutional rights in their interpretation of statutes. … [T]he broad objective of the regulatory scheme … is to ensure sufficient protection for the rights and interests of all parties involved in surrogacy arrangements. … [T]he court must retain a discretion … to confirm a surrogacy agreement if it is satisfied that all the requirements of section 292 and section 295 are met." [Paragraphs 48 - 49]

"Above all else, it is the rights and interests of … the unborn child, that demand the most protection. … The invalidity of a surrogacy agreement potentially has a profoundly detrimental effect on the legal and parental status of the child born to the surrogate mother. … Accordingly, I find that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement." [Paragraphs 53 – 56]

The surrogate motherhood agreement was confirmed.

ADMINISTRATION OF JUSTICE

SOUTH AFRICAN APARTHEID MUSEUM AT FREEDOM PARK INCORPORATED UNDER SECTION 21 V STAINBANK AND OTHERS [2015] JOL 33209 (GJ)

Case heard 28 November 2014, Judgment delivered 11 December 2014

This application concerned whether the first respondent and his associated entities should be held in contempt of a court order prohibiting the respondents from publishing various statements about the applicant or its directors. The applicants contended that the first respondent had defiantly continued to conduct himself in breach of the order.

Keightley AJ held:

"The order is in the form of an interim interdict, [and] prohibits the respondents from "publishing, disseminating to the public, or causing the publications of, statements about the applicant, or its current

or erstwhile directors, or its legal representatives, to the effect that they, or any one of them: "have perpetrated a fraud, or perjury or deceit in connection with the applicant, the museum it operates, and the formation incorporation or foundation of either"; "are criminals, racist or liars"; "'stole' or 'misappropriated' (or expressions to that effect) any intellectual property, idea or anything from or belonging to the First Respondent".” [Paragraph 7]

‘Mr Stainbank's point *in limine* is premised on the averment that the applicant is not "duly incorporated" as a juristic person. This is because, so the argument proceeds, it was incorporated contrary to Mr Stainbank's protected trade mark, THE APARTHEID MUSEUM. … Mr Stainbank relies on the case of *Hollywood Curl* (*Pty*) *Ltd and another v Twins Products* (*Pty*) *Ltd* as precedent in this regard. His point about this case is that it involved the same Krok brothers who were instrumental in establishing the applicant. Their company, Twins Products (Pty) Ltd, was successful in obtaining relief under section 45(2) of the previous Companies Act. Twins Products succeeded in opposing an appeal against an order enforcing a name change on the part of a competitor on the basis that its registered name, Hollywood Curl (Pty) Ltd, was calculated to cause damage to the Krok's business in terms of which they marketed products under the "Hollywood" label. Mr Stainbank is of the view that this case constitutes binding precedent on this Court, and on the applicant, and prevents it from approaching the court for relief when it falls foul of the protection accorded to Mr Stainbank's trade mark. On Mr Stainbank's understanding, the *Hollywood Curl* judgment had the effect that any registration of a company by the Registrar of Companies under a name overlapping with a registered trade mark would automatically be rendered *ultra vires* and invalid. … In addition, he submits that the alleged fraud involved in the incorporation of the applicant, as well as its embedded association with racism, should be sufficient to persuade me, on inherent constitutional grounds, to non-suit the applicant from seeking the protection of the court in the present application.” [Paragraphs 24 - 25]

“Mr Stainbank sought to persuade me that on broad constitutional grounds, and in a quest to prevent the perpetuation of racism, this Court should decline to exercise its jurisdiction so as to come to the aid of the applicant. I am unable to accept Mr Stainbank's submissions in this regard. The present case concerns an application to hold Mr Stainbank and his associated respondents in contempt of an order of this Court, which order was sought and granted at the suit of the applicant, and is directed against the respondents. Section 165(5) of the Constitution … provides that: "An order or decision issued by a court binds all persons to whom and organs of state to which it applies." Mr Stainbank's appeal to constitutionalism and the Constitution ignores this fundamental constitutional principle that lies at the very heart of the present matter. His ideological stance, deeply held as it may be, cannot justify a departure from this principle. This would be antithetical to the very rule of law he purports to seek to uphold. … In the circumstances, the respondents' point *in limine* is without substance and must fail. ...” [Paragraphs 29 - 30]

“... The requirements for contempt of court are: the existence of the order concerned, service of the order on, or notice thereof to the respondent, non-compliance by the respondent with the order, which non-compliance must be willful and *mala fides.* … The *onus* is on the applicant to establish these requirements beyond reasonable doubt. However, once the applicant has established the existence of the order, service or notice and non-compliance, the respondent assumes an evidentiary burden in respect of the willfulness and *mala fides* elements. …The willful but *bona fide* disobedience of a court order does not constitute contempt. … [A] respondent's belief that the order was wrongly granted will not constitute a defence.’ [Paragraphs 31-37]

"... [I]t seems to me that the respondents' defence rests on the premise that they know the truth behind the incorporation of the applicant and the establishment of its museum; this truth is very different to that put into the public domain by the applicant and supported by the courts thus far ... the respondents are entitled to publicise the real truth, and should not be muzzled by a court order to prevent them from doing so. On this basis, Mr Stainbank submitted ... that in the interests of justice, and on the basis of the need to advance the constitutional imperatives of human dignity, the achievement of equality and non-racialism, I should reject the attempt to find the respondents guilty of contempt..." [Paragraph 44]

"... [O]ur courts have time and again laid down that even though a respondent may believe that a court order was wrongly granted, unless and until the order is set aside, the respondent is not at liberty to ignore it. Non-compliance in those circumstances will amount to contempt. The reason for this is not hard to fathom: if every person could disobey a court order because of his or her personal belief that it was wrongly granted, the administration of justice would fall into chaos. ... In the present matter, the respondents have adduced no evidence to suggest that they did not understand the order, or that their non-compliance was innocent. On the contrary, Mr Stainbank's conduct, and the attitude he has displayed throughout, demonstrates clearly that he is very aware of the prohibition contained in the order, and has made a conscious decision to act in defiance of it in order to advance what he believes to be the true state of affairs. ... I am satisfied that the applicant has established, beyond reasonable doubt, that the respondents are guilty of contempt of the order. ... [T]he contempt was patently *mala fide*. Mr Stainbank expressed no contrition for his conduct. On the contrary, his statements indicate that he sees the threat of imprisonment as justifying further defiance of the order. The underlying objective of holding someone in contempt of court is to secure compliance with the order concerned, and to restore the dignity of the court. The applicant has submitted that the threat of a three-month period of imprisonment is appropriate in this case to meet this objective. I agree with this submission: perhaps when reality sinks in, Mr Stainbank will reflect on his conduct and the harm it has done to dignity of this Court, and elect to purge his contempt rather than to submit himself to a not insignificant term of imprisonment. In an effort to provide Mr Stainbank with sufficient time to reflect on the consequences of his decision, I will provide him with an additional five days within which to purge his contempt." [Paragraphs 46-49]

The first to third respondents were declared to be in contempt, with costs awarded to the applicant on an attorney-client scale.

SELECTED ARTICLES

'THE CHALLENGES OF LITIGATING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA', [2011] New Zealand Law Review 295.

The article dealt with the enforcement of socio-economic rights through litigation, in particular the challenges faced by those seeking to enforce the state's compliance with its constitutional socio-economic obligations.

"Despite the supportive framework … the enforcement of socio-economic rights through litigation has proved to be a challenging exercise … The primary underlying factor is he disjuncture between the constitutional promise to effect social justice through the enforcement of socio-economic rights, and the actual extent of the socio-economic need on the ground. … [T]he poverty gap is so large, and the backlog in the provision of basic services … is so extensive, that it far outstrips the capacity of the state's available resources to effect delivery. In these circumstances, the burden of expectation on the courts to fill the gaps through socio-economic rights adjudication is disproportionately high." (Page 305)

"The Constitutional Court has consciously decided on a restricted role for the courts in socio-economic rights adjudication. It has emphasised that the primary responsibility for assessing social and economic needs, and for putting measures in place to fulfil these needs, rests with the legislative and the executive branches of government. Legislation and other measures … are therefore the primary instruments for the achievement of socio-economic rights. …" (Pages 307 - 308)

"In essence, the Constitutional Court sees the function of the courts in the adjudication of socio-economic rights as being premised on ensuring democratic accountability on the part of the legislative and executive branches of government in respect of the manner in which they seek to fulfil their obligations. … One of the key underlying factors in this approach by the Constitutional Court is its concern to ensure that the principle of the separation of powers is maintained. … One of the consequences … is the measure of deference shown by courts to other branches of government in socio-economic rights adjudication." (Page 308)

"This extends also to the relief granted in socio-economic rights cases. … [T]he Court has been extremely cautious in granting such relief in the socio-economic rights cases it has adjudicated. … [T]his is in line with the general approach adopted … which envisages courts acting as watchdogs in calling government to account, but at the same time allowing government the flexibility it requires to decide for itself on the appropriate corrective action on socio-economic matters. Inevitably, this approach points to what some have … referred to as a model of distributive rather than corrective justice … While corrective justice focuses on correcting the harm done to the individual litigant in ordering an appropriate, individually focused remedy, distributive justice recognises the community-wide implications of legal breaches. Thus, an order requiring the state to make good a defective socio-economic rights policy or practice, rather than order the state to provide a particular service to an individual litigant, is in keeping with the underlying thesis of distributive justice." (Page 309)

The article then surveyed recent socio-economic rights decisions of the Constitutional Court, including *Mazibuko v City of Johannesburg*, *Nokotyana v Ekurhuleni Metropolitan Municipality*, and *Joseph v City of Johannsburg*, before concluding:

"... For jurisdictions that do not yet have a system of enforceable socio-economic rights, the focus of the debate is on the need to institute these rights formally ... The perception might be that once this is achieved, the major battle is won. The South African experience gives a somewhat different indication. Largely because of the pervasive and high levels of social injustice experienced by the majority of South Africans ... the battle to include socio-economic rights in the Constitution was not, relatively speaking, hard fought. ... [T]he very reason for the inclusion of these rights in the Constitution is also the reason that the enforcement ... has proved to be so challenging: to turn around such entrenched social injustice requires a concerted effort on the part of all branches of the state and society." (Page 321)

"The difficulty for lawyers involved in socio-economic rights work in South Africa is that because of weaknesses in other parts of this system, disproportionate reliance is sometimes placed on finding a solution through law in order to rectify the appalling hardships still being suffered by too many South Africans. In turn, we lawyers place disproportionate reliance on the courts to find real solutions through their judgments. ..." (Pages 321 - 322)

SELECTED JUDGMENTS

PRIVATE LAW

AUGUSTINE AND OTHERS V MINISTER OF POLICE (19296/10) [2014] ZAGPPHC 969 (8 DECEMBER 2014)

Case heard 29 August 2014, Judgment delivered 8 December 2014

Plaintiffs sought damages arising from unlawful entry, search, humiliation, intimidation and assault by the members of the South Africa Police Service (SAPS).

Mali AJ held:

"On 16 June 2009 approximately thirty (30) members of the South African Police Service ("SAPS") broke into and entered the premises of the plaintiffs at about 2 am, without the plaintiffs' permission. The first plaintiff initially thought they were being robbed as the SAPS members did not identify themselves. They only identified themselves subsequent to having pointed rifles at the plaintiffs and shining flashlights and laser beams at them. They also assaulted the second plaintiff. … [S]ome SAPS members refused to permit the second plaintiff to attend to her two and half year old baby who was sleeping alone in a separate bedroom. At the time all the plaintiffs were awake and scattered around the house. One policeman held the third plaintiff down and trampled him with his foot on his back and pointed a firearm at him. … The ordeal continued up until the first plaintiff, who was on his knees and having been shoved and pointed at with a rifle, heard someone saying they were members of SAPS. …" [Paragraphs 4 – 5]

"The plaintiffs called Dr Swanepoel, an expert witness …. He testified that the results from the battery of tests he conducted indicated that all of the plaintiffs suffered from post-traumatic stress. The stress has resulted in the first plaintiff suffering from dystonia, a condition where a person still functions but continues to live a life of depression. The second plaintiff, as a result of the post-traumatic stress, had to be prescribed specialised medication to deal with her insomnia and in order to address direct anxiety experiences. However, she needs on-going treatment as the tablets just address her insomnia, without addressing the anxiety, mistrust of the environment, cognitive impairments etc. The third plaintiffs concentration, amongst other things, is affected, something which probably led to the deterioration of his academic performance. He also suffers from anger and aggression, one of the symptoms of post-traumatic stress." [Paragraph 12]

"The defendant's case, *inter alia*, centres on the fact that the plaintiffs' house was pointed out to them by a suspect as the house where a certain Eugene Morgan, who was involved in spate of robberies, resided. Although the police officers alleged that they were given permission by the first plaintiff to enter and search his house, they conceded that, if the padlock on the driveway gate was cut and if the burglar sliding gate at the dining room was broken open, they entered onto the premises without permission." [Paragraph 17]

"The defendant's case turns on the alleged consent by the first plaintiff. However it is this jurisdictional fact that the plaintiff has placed under attack. Having considered all the factors and balancing the defendant's evidence against that of the plaintiffs, on a preponderance of probabilities, the plaintiffs version is accepted as reasonably true. In a nutshell, it is found that the policemen did not have permission to search the premises of the plaintiffs." [Paragraph 22]

"… [T]he facts and the background to the psychological *sequelae* suffered by the plaintiffs differ significantly to the comparable cases. It is fair to consider all relevant factors in the circumstances of this case. The plaintiffs were sleeping in the safety and privacy of their home when they were violated by the unlawful entry of SAPS members. The first and the second plaintiffs were humiliated, caused to suffer indignity that made them feel useless and ashamed in the presence of their children who needed them most at the time. That negatively impacted on their role as parents. The third plaintiff was still an adolescent who had to endure humiliation, assault and witness his parents being violated and weakened. These are the people he would naturally see as his hope and refuge. … I am satisfied … that the plaintiffs had suffered psychological *sequelae.* This was a direct consequence of the actions of the members of SAPS as indicated above. However, Í am not persuaded that the severity of suffering by the plaintiffs weighs far more than the suffering experienced by the plaintiffs in ***Draghoender*** **and** ***Kritzinger*** above. When regard is had to all the circumstances of the case, the amount of R25 000.00 appears to me to be a sufficient amount for damages suffered by the plaintiffs. It is my considered view that the matter should have been brought to the Magistrate's Court." [Paragraphs 28 – 29]

Defendant was ordered to pay the first plaintiff R25 000.00 in general damages and R6 800.00 in past medical expenses; to pay the second, third and fourth plaintiffs R25 000.00 in general damages; and to pay the plaintiff's costs at the Magistrate's Court scale.

COMMERCIAL LAW

AB CC V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE (VAT 1005) [2014] ZATC 4 (9 DECEMBER 2014)

Case heard 29 September 2014, Judgment delivered 9 December 2014

This was an appeal against respondent's decision disallowing appellant's objection to revised assessments raised by the respondent for various Value Added Tax ("VAT") periods. Appellant contended that it was entitled to levy VAT at a zero in respect of the supplies it had made to an entity, ("C"). Respondent argued that the appellant should have levied VAT at the standard rate, because the services rendered by it were not in respect of building new houses and/or houses for first time owners, and therefore did not qualify as a subsidy or grant in terms of the Housing Subsidy Scheme. At issue, therefore, was whether various housing projects carried out by the appellant on behalf of C were made in terms of the Housing Subsidy Scheme referred to in the Housing Act, and therefore, whether the appellant was correct to levy VAT at a zero rate.

Mali AJ held:

"In deciding whether the rectification/revitalisation, rehabilitation and building of completely new houses fall under the Housing Subsidy, the enquiry must, of necessity, be directed at the meaning of the words "*housing subsidy scheme"* in order to understand what a housing subsidy scheme is and what it covers." [Paragraph 13]

"I find that there is no consistency, even amongst the government departments, concerning the interpretation and application of the provisions dealing with housing subsidy schemes/assistance. It is obvious that the Provincial Department, which drafted the contract, made it clear that the VAT treatment

in respect of *services rendered in accordance with the provisions of the Housing Subsidy Scheme are* ***zero rated for Value Added Tax purposes."*** [Paragraph 22]

"… [T]here is no cut and dry definition of what a housing subsidy scheme entails. It varies from one person's interpretation to the other, depending on the circumstances. Various documents have to be cross-checked and referenced to get to the answer which suits a certain individual at a particular moment. Some of the respondent's witnesses referred to unrecorded minutes of the meetings held as far back as 1996 and unwritten policies which are aimed at excising rectification and revitalisation programmes from the housing subsidy scheme. Even the witnesses for the respondent stated that one has to consult various Acts and non-existent policies as well as varying opinions to come to a conclusion that the rectification, revitalisation and building of new houses under the emergency programme is excluded from the housing subsidy scheme and, as such, the VAT is levied at standard rate." [Paragraph 28]

"… [T]he VAT Act refers to the Housing Subsidy Scheme mentioned in the Housing Act but not defined. In neither of these Acts is the term "*Housing Subsidy Scheme*" defined. A taxpayer is then required to seek the terms of reference from further official documentation. It is not an ideal situation for a taxpayer to seek clarity from more than one source outside the Act in order to determine the VAT rate applicable. In addition, the unambiguous language of the agreement between the parties on VAT treatment appears to be an official declaration by a government department and a policy maker to the taxpayer. Having regard to all the pieces of information and evidence led in this matter, the explicit clause in the agreement dealing with VAT treatment is to the effect that the payments are in terms of a housing subsidy scheme." [Paragraph 30]

"Having regard to the circumstances surrounding the interpretation adopted by various role players … including the undertaking by C, that the VAT treatment of the appellant's supply is zero-rated, I accept the appellant's explanation. The appellant submitted that … the Department's intention was to utilise the money appropriated through the Housing Subsidy Scheme (housing in emergency circumstances) … to undertake the projects. The amount used to fund the project was acquired from the money allocated to the Housing Subsidy Scheme. I find that the services rendered by the appellant to C were in terms of the Housing Subsidy Scheme and, as such, attract VAT at zero-rate." [Paragraph 32]

"The appellant submitted that it suffered prejudice because of SARS' interpretation leading to the refusal to pay the VAT refund. As a result, the appellant lost contracts and tenders in the process as it could not obtain a Tax Clearance Certificate … The appellant's business operations were negatively impacted leading to the closure of the business. Furthermore, SARS caused filing delays resulting to the late hearing of this matter. The appellant, therefore, persuaded this court to order the respondent to pay the costs of this appeal. The respondent submitted that the appellant also contributed to the delays in respect of the late filing and its resultant consequences. I … find that SARS's grounds of assessment were not unreasonable due to the confusion regarding interpretation." [Paragraph 33]

Respondent was ordered to revise the assessment, each party to pay their own costs.

CIVIL PROCEDURE

PANAGIOTOPOULOS V LIBERTY GROUP LTD (3955/2011) [2014] ZAGPPHC 229 (25 APRIL 2014)

Case heard 10 February 2014, Judgment delivered 25 April 2014

This was an application to compel the respondent to provide further and better particulars in response to the applicant's request for further particulars for the purposes of trial. In the main action, the respondent (plaintiff) sought the repayment of commissions advanced or paid out in terms of subsequently non-existent contracts.

Mali AJ held:

"It became apparent during the hearing that all the particulars required by the applicant are to be found in the respondent's summary of Transactions 2003-2012 and Policy Detail 2003-2012 consisting of 673 (six hundred and seventy three) pages. … The respondent in his answering affidavit stated that the applicant is a duly qualified Insurance Intermediary with noteworthy industry experience and therefore it is not prudent for the applicant to describe the information supplied by the respondent as "a voluminous, indecipherable document". … In the main the respondent submitted in its papers that the applicant is in possession of the information sought in its request for further particulars." [Paragraphs 8 – 10]

"The applicant in his response to the above submits that he was contractually bound to delete all the information relating to the respondent's business upon termination of the contract in 2009. The respondent does not dispute the submission. … The applicant contends that the respondent's particulars are not informative enough and the commission statements provided by the respondent are of no assistance as they comprise of repetitive entries which require clarity. In a nutshell the particulars further provided by the respondent did not inform the applicant with greater precision what the respondent sought to prove in order for the defendant to prepare his case. …" [Paragraphs 11 – 12]

"During the hearing the respondent repeatedly submitted that it did not matter for the applicant to obtain further and better particulars of the formulation of the claims. The reason advanced by the respondent is that the information required by the applicant is for evidentiary purposes. I find this response reckless. This is so considering that the respondent has pleaded its claims on the same particulars which the applicant is called upon to answer in his defence." [Paragraph 20]

"The respondent's counsel sought to demonstrate the ease of obtaining the requested information by the applicant. This was done by taking the court through the bundle … and other corresponding documents consisting of between 673 (six hundred and seventy three) pages and 1000 (one thousand) pages. In order for the court to get the detail of each and every transaction as requested by the applicant; this court had to hold three separate pages at the same time trying to link the transactions to the entries in the previous pages and or subsequent pages. In the process this court found that commission payments in respect of contract that were changed, surrendered, cancelled, were made paid up and/ or and lapsed were **all** identified by the minus signs next to the name of the policyholder, date amount, etc. without specifically referring to a category of transaction. … [D]ifferent categories of commission payments which are claimed by the plaintiff are all identified by the minus sign and nothing else. To the above, he submitted that the applicant is an expert and is not supposed to find any difficulty in identifying commission payments." [Paragraphs 21 – 22]

"I find the respondent's argument wanting and not assisting the defendant at all. The voluminous element of the documents utilised to unravel the details could not assist the court in determining the ease with which the applicant is expected to grasp and/or obtain better understanding of the particulars." [Paragraph 27]

"… [T]he response to the particulars provided to the applicant is not straight forward. The applicant is still required to look at the minus signs and reconcile the details, an exercise which the respondent seems to be well conversant with. This court anticipates a surprise during the trial which might prejudice the applicant." [Paragraph 32]

"The issue to be determined … is whether the particulars and or further particulars provided by the respondent are sufficient to enable the applicant to prepare for trial. This court has regard to the fact that the particulars required follow the respondent's precision in its particulars of claim. This court finds that the respondent is very specific in … its particulars of claim in respect to the categories of policies. However when called upon to clarify the categories the respondent gives a blanket answer requiring the applicant to conduct further reconciliations." [Paragraph 33]

"It is clear that the respondent relies, *inter alia,* on the applicant's expertise to identify and obtain the detailed information pleaded by the plaintiff to prepare for his trial. The respondent by emphasising the applicant's expertise of the industry conveniently forgets that the applicant is a litigant. … This court has to decide whether better and further particulars requested by the applicant as **a litigant** (*my emphasis)* are reasonable and valid in assisting the applicant to plead and prepare for trial." [Paragraphs 35; 37]

"The respondent opportunistically abuses the applicant's expertise. In the event that this is a valid argument, the same is applicable to the respondent. The court is of the view that if it is this easy to reconcile and get to the particularity requested by the applicant, the respondent as an insurance company itself which might be better resourced than the applicant would have simply provided the information to the applicant. I reiterate that applicant is not before this court as an insurance expert but as a litigant and therefore the respondent's submission is misplaced. In my view if it were the case in general, lawyers would be prohibited to be legally represented; and the same would apply to doctors in diagnosing other doctors when it matters." [Paragraph 41]

Respondent was ordered to furnish further and better particulars.

CRIMINAL JUSTICE

MOLEFI V S (A887/2014) [2015] ZAGPPHC 484 (4 JUNE 2015)

Case heard 2 June 2015, Judgment delivered 4 June 2015

This was an automatic appeal against conviction and sentence, the accused having been convicted of rape and sentenced to life imprisonment in the regional court.

Mali AJ (Molefe J concurring) held:

“I am satisfied that in evaluating the evidence the court a quo took into consideration that the complainant is a single witness and was very young at the time of the incident and confirmed that her evidence had to be looked at with caution. … The complainant young as she was made it clear that she harboured a desire to tell someone about the rape and when the opportunity presented itself she did not hesitate to report to her aunt. The complainant further testified in a satisfactory manner, she gave a clear account of what happened to her without any contradictions.” [Paragrapha 12 - 13]

“The appellant's version amounts to a bare denial and while there is no onus on him to prove his innocence, it is necessary to examine his version against the probabilities of the case in order to ascertain whether his version is reasonably, possibly true. I do not agree … that by the mere fact that appellant denies the allegations, the incidents of rape as alleged could not have happened. … Based on the conspectus of the evidence, I cannot find any fault with the reasoning and conclusion of the Court a quo. I find that the cumulative effect of all the evidence points relentlessly to the appellant as the person who raped the complainant. Consequently I am satisfied that the appellant's guilt was proved beyond reasonable doubt and that the conviction must stand.” [Paragraph 15 - 16]

“Counsel for the appellant submitted that that the trial court did not take into consideration personal circumstances of the appellant; that he was 34 years old single and unemployed. He also had a daughter who stays with her mother. The Counsel further submitted that the complainant suffered no injuries as a result of rape. The appellant's counsel relied on S v MM … wherein the appellant was convicted on a single count of rape following his plea of guilty. He raped his 12 year old stepdaughter in the family home. He threatened her not to scream and then forcing himself upon her. On appeal the sentence of life imprisonment was set aside and a sentence of 12 years imprisonment was imposed. … In casu the facts are very distinguishable; the appellant raped the complainant repeatedly whilst sleeping in the same room with her mother. This is subsequent to the appellant having intoxicated and drugged the complainant's mother. The complainant's mother would have protected her. The appellant is not remorseful and he is a repeat offender. Furthermore in the normal circumstances the appellant is expected to also defend the complainant as he would have been regarded as her stepfather.” [Paragraphs 17 - 18]

“It is trite law that rape of a young child such as the complainant is always an extremely serious matter, even in the apparent lack of physical injury to the complainant. With respect any form of rape is a serious violation.” [Paragraph 21]

“I am not persuaded that the Court a quo misdirected himself in any relevant respect in imposing the sentence of life imprisonment.” [Paragraph 24]

The appeal was dismissed.

SELECTED JUDGMENTS

PRIVATE LAW

COOPER V MBOMBELA LOCAL MUNICIPALITY AND ANOTHER (59120/2010) [2014] ZAGPPHC 359

Case heard 19 March 2014, Judgment delivered 30 May 2014

Plaintiff claimed damages from the Municipality and the Minister of Safety and Security for unlawful arrest and detention. Plaintiff had been a passenger in a car being driven by a friend of his, who was pulled over for speeding by a traffic officer (Mogale). When the traffic officer requested the driver to produce his driver's licence in order for a speeding ticket to be issued, the driver complied. The plaintiff then reached out and grabbed the drivers licence from the traffic officer, thus interfering with his duties. The plaintiff got out of the stationary vehicle to argue with the traffic officer, which escalated into pushing and shoving, after which the traffic officer placed the plaintiff under arrest for interfering with his duties and attempting to defeat the ends of justice. The plaintiff was acquitted of defeating the ends of justice, and now alleged that his arrest and detention were unlawful.

Maseti AJ held:

"The parties agreed that the onus of proving the lawfulness of the arrest rests with the first defendant and the subsequent detention of the plaintiff rests with the second defendant." [Paragraph 5]

"Mogale gave a clear evidence as to what happened on that day. There were some omissions in his statement to the police compared with his evidence in Court and his evidence during the criminal trial ... There were totally no contradictions in his evidence in chief and cross examination by the plaintiff. He gave a very consistent version. His version was also corroborated by the second and third witnesses for the first defendant ..." [Paragraph 21]

"The plaintiff's credibility in Court was damaged beyond repair. The version presented by Plaintiff in Court was improbable." [Paragraph 25]

"As to the balancing of probabilities, the first defendant's Counsel referred to GOVAN VS SKIDMORE ... where Selke J had this to say: "in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on EVIDENCE 3rd edition paragraph 32, select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one." In GOVAN VS SKIDMORE case SELKE 3 [sic] gave the word "plausible" a connotation which conveyed the words such as acceptable credible or suitable. ..." [Paragraph 26]

"It is for this Court therefore to look at the version of the first defendant's witnesses and that of the plaintiff and decide which of the two versions is more plausible or probable or credible or acceptable. The standard of proof would be that of a balance of probabilities or a preponderance of probabilities." [Paragraph 27]

"It is trite law and beyond any doubt that defeating the ends of justice and obstructing the police officer wilfully in the execution of his duties are both Criminal Offences." [Paragraph 30.2]

"The version of the Plaintiff is marred with incongruities and tainted with lies." [Paragraph 30.4]

"Having looked at the version of the first defendant's witnesses and that of the Plaintiff the Court is satisfied that the first defendant's version is more probable or plausible." [Paragraph 30.5]

"In the present matter the plaintiff's conduct was directed at refusing and thus obstructing the traffic officer who was lawfully executing his duties from doing so. In so doing and in view of the aforementioned cases the plaintiff indeed committed an offence. In the circumstances he opened himself to arrest without a warrant as provided for in terms of Section 40 (i)(j) of the Act [Criminal Procedure Act]. Therefore the arrest was not unlawful." [Paragraph 30.8]

"The Court is fully convinced that the first defendant has discharged the onus in a preponderance of probabilities that both the arrest of the Plaintiff … by the first defendant and the subsequent detention by the second defendant were lawful." [Paragraph 30.9]

The Plaintiff's claim was dismissed with costs.

ADMINISTRATIVE JUSTICE

ASSOCIATED EQUIPMENT COMPANY CC V INTERNATIONAL TRADE ADMINISTRATION COMMISSION AND ANOTHER (15201/2013) [2014] ZAGPPHC 154

Case heard 13 March 2014, Judgment delivered 4 April 2014

This case was an administrative review OF a decision by the respondent to prohibit the granting of a license for importation of second-hand Tractor Loader Backhoes (TLBs) to the Applicant. In terms of a policy decision to protect local manufacturers of TLBs, second-hand TLBs were prohibitted from import while local substitutes were available. However, new and unused foreign-made TLBs were not prohibitted for import purposes, and no licence was required to import them.

Maseti AJ held:

"The issues are:

1 Whether the decision taken by first respondent to refuse the import permit constituted an administrative action which is reviewable under the Promotion of Administrative Justice Act 3 …; and

2 Whether the policy decision of the first respondent recorded in its letter of 14 December 2012 should be set aside for lack of compliance with PAJA." [Paragraph 16]

"The first respondent through Collin's answering affidavit, stated "after having taken all relevant factors into account" it did not approve the application for import licence." [Paragraph 34]

"The answering affidavit of the first respondent through Collins reflected that the following factors though not limited to them, were taken into account.

1 Support to local manufacturers.

2 The impact on job creation in South Africa and the South African Economy in general.

3 The erosion of local industries by imported use of second-hand goods.

4 The ability of local manufacturers to meet demand." [Paragraph 35]

"The above factors are not supported by any evidence as they only appear to be guidelines. The following needed explanation:

1 What the impact on job creation would be and also on the South African economy in general?

2 Whether Bell alone would be able to meet the demand for TLB's or not? Why the protection is only afforded to Bell by the policy of the first respondent?

3 Whether the grant of import permits would erode the local industry or not?

These unanswered questions clearly showed that there was a lot of material factors that had not been taken into account whatsoever by the first respondent in refusing to grant the import licence to the applicant." [Paragraph 36]

"When the reasons for the refusal of the import licence were furnished on 14 September 2012 the first respondent failed to disclose the research project conducted by Collins and the conclusions arrived at as a result of Collins project. This on its own constitutes grounds for review." [Paragraph 37]

"The Court in arriving at a decision has considered the following factors:

1 The applicant's application for an import licence was refused in July 2012 by the first respondent. The research by Collins was conducted in 2011 prior to the consideration of the application for the licence. Then the reasons why the outcome of the project research and the conclusions arrived at were not communicated to the applicant as one of the factors considered in refusing to grant the import licence still remain unknown.

2 The applicant is entitled to involve the provisions of Section 33 of the Constitution as her existing rights of importing second-hand TLBs were affected or threatened. …" [Paragraph 38]

The Application was successful.

BUFFALO CITY METROPOLITAN MUNICIPALITY V UNITED METHODIST CHURCH OF SOUTHERN AFRICA (UMCOSA) (EL1327/13, ECD2827/13) [2014] ZAECELLC 14

Case heard 12 June 2014, Judgment delivered 26 June 2014

Applicant, represented by the Municipal Manager, applied for a final interdict against the respondent, to prevent it from running a connexional office within a Residential-Only zoned area within that Municipality. To secure the interdict, the applicant sought an order declaring the activity of operating a

connexional office within a Residential-Only zone, as unlawful because it contravened Zoning Scheme Regulations. The basis of this argument was that a connexional office was equated to a commercial office.

Maseti AJ held:

"A place of worship can only be lawfully conducted under primary or consent use only within areas that are zoned as Business Zoning or Institutional Zoning. Therefore where a property is zoned residentially 3A, as the one under consideration it should be used solely for the purpose of being a dwelling unit or for any other use for which consent has been granted. Therefore the applicant as one charged with ensuring and enforcing adherence to zoning regulations has a clear right in the event of contravention of the regulations to ensure compliance." [Paragraph 4]

"The issue before this Court is whether the property in question zoned for residential zone 3A purposes for primary use as a residential dwelling when used by the Respondent as the place involving prayer, worship, evangelism, Christian succour and outreach, as well as a place from which the Secretary-General of the respondent carries out his duties and responsibilities as an office-bearer of the respondent contravenes the applicant's Zoning Scheme Regulations which necessitated the granting of the orders prayed for." [Paragraph 7]

"Proof of an act actually done showing interference with the applicant's rights or of a well-grounded apprehension that acts of the kind will be committed by the respondent is required. … The injury must be a continuing one. The court will not grant an interdict restraining an act already committed." [Paragraph 9.2]

"The object of the zoning scheme is to achieve the co-ordinated and harmonious development of the city in such a way that it will contribute to the health, safety, order, beauty and general well-being of the city. A contravention of the zoning scheme has the effect of defeating the above stated objectives by possibly causing harm and compromising the health, safety, order, beauty and general well-being of the city." [Paragraph 19]

"It is … this court's view that the applicant has established an act of interference on a balance of probability. …" [Paragraph 22]

"The question is whether in the present case the Court can exercise any discretion other than granting the relief applied for. Can applicant obtain adequate redress in some other form of ordinary relief? Seeing that the respondent is adamant to continue with the illegal activity despite being advised that a place of worship can only be lawfully conducted under primary or consent use only within the areas that are zoned as Business Zoning or Institutional Zoning, it would seem that the discretion of the court to refuse a final interdict is indeed limited to the availability of an alternative remedy. In the present case there is no alternative remedy at all but to grant the relief sought." [Paragraph 23]

"In the premises the application for declaring the respondent's activities of operating an office … to be unlawful for contravening the provisions of the … Zoning Scheme Regulations succeeds." [Paragraph 24]

"The application to interdict and restrain the Respondent from conducting and or allowing any person to conduct offices upon the property described in paragraph 24 above succeeds." [Paragraph 25]

CIVIL PROCEDURE

VALUE CEMENT V ALDES BUSINESS BROKERS FRANCHISE AND OTHERS (29689/2012) [2014] ZAGPPHC 151

Case heard 14 March 2014, Judgment delivered 4 April 2014

This was an exception against an estate agent's claim for commission arising from a mandated sale. The estate agent (respondent) instituted a claim against the purchaser of the business (Value Cement) for a commission which was agreed to upon the sale of the business. The plaintiff relied on an acknowledgement of liability and undertaking to pay given by the purchaser to the plaintiff, for commission arising from the sale. The agreement in terms of which the purchaser was to pay the estate agent's commission, had been agreed to verbally between all the parties during negotiations and reduced to writing, but the document was not signed.

Maseti AJ held:

"The issue to be adjudicated upon by this court is whether plaintiff's particulars of claim is in fact and in law vague and embarrassing and lack averments to sustain a cause of action." [Paragraph 14]

"The onus rests upon the excipient who alleges that a summons discloses no cause of action; the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it." [Paragraph 23]

"An exception that a pleading is vague and embarrassing must not be directed at the particular paragraph within a cause of action. It must go to the whole cause of action which must be demonstrated to be vague and embarrassing." [Paragraph 25]

"During argument plaintiff's counsel clearly stated that the plaintiff's cause of action against the defendant is based on an acknowledgement of liability and undertaking to pay and that an acknowledgement could be oral or in writing. The excipient's counsel conceded that an oral acknowledgement of debt is enforceable. Plaintiff's counsel further argued that annexures "D" (mandate) and "F" (signed agreement of sale) do not form part of the cause of action against the third defendant and therefore no misstatement nor confusion has been brought about by the particulars of claim. The onus rests with the excipient to prove that the pleadings are vague and embarrassing and lacks the averments to sustain a cause of action." [Paragraph 35]

"A court seized with this type of an application should carefully consider whether the complaining party is in fact embarrassed or engaged in a game of delaying the prosecution of the action. The excipient in her contention under vagueness and embarrassment raises matters which are totally outside the scope of the plaintiff's particulars of claim as the particulars of claim clearly refer to an oral agreement during negotiations between the first, second and third defendants whereby the third defendant acknowledged its liability towards plaintiff and undertook to pay commission to the plaintiff. … At paragraph 10 of the particulars of claim plaintiff clearly states that the facta probanda giving rise to the cause of action against the third defendant is the acknowledgement of liability and undertaking to pay given by the excipient to the plaintiff during the negotiations between the parties." [Paragraph 36]

The exception was dismissed.

SELECTED JUDGMENTS

PRIVATE LAW

KIRSTEN CURTIS TRUST IT 318/91 AND OTHERS V BERKLEY DEVELOPMENT (PTY) LIMITED AND ANOTHER [2014] JOL 32295 (GSJ)

Case heard 14, 16 May 2013, Judgment delivered 12 June 2013

The second applicant was the managing trustee of the applicant. The trust entered into a contract of sale with the first respondent in terms of which the respondent would sell vacant land to the trust, and would build a dwelling on it for the trust. Disputes occurred regarding the progress and quality of the dwelling construction and the payments made by the applicants. After numerous attempts by the applicants to get the first respondent to perform certain acts, they informed the first respondent that the agreement was cancelled. The first respondent refused to accept the cancellation. The issue before the court was whether in the circumstances, the applicants were entitled to cancel the contract.

Mbongwe AJ considered second applicant's authority to institute proceedings:

"The written authorisation was attached to the founding affidavit. I cannot find lack of authority as alleged on two grounds; firstly, these proceedings concern the very agreement the second applicant was authorised to conclude on behalf of the first applicant and, secondly, as the managing trustee, there is an obligation on the second applicant to safeguard the interests of the first applicant. The first respondent's contention is, therefore, rejected." [Paragraph 19.1]

"It is noted that the founding affidavit was commissioned at a police station. The signature as well as the police force number of the police official who commissioned the oath, are visible on the affidavit, and so is the SAPS stamp. This manner of commissioning an oath by police officers is common practice, as opposed to that executed by lawyers. I do not think that the founding affidavit can be said to be non-compliant with the law … and accordingly reject the first respondent's contention." [Paragraph 19.2]

Mbongwe AJ then considered the qualification of the applicant's experts:

"… I note that the academic qualifications of these experts are not as elaborate as those of Munday. However, the experience they each have, according to the description of who they are on the papers, suggests that they have been involved in the business of valuating buildings for many years each. I do not believe that institutions such as banks would engage the services of Zirkia to do valuations on their behalf, unless she possessed the necessary knowledge …. The same applies to Prinsloo … The standard of reporting as seen in the report forming part of the file is impressive and leaves no doubt as to the experience of the author. I therefore accept the report for the purpose it is meant to serve and reject the first respondent's challenge in that regard. " [Paragraph 19.3]

"…In my view, and in the first respondent's own version, this breach by the applicant was cured by, and the parties proceeded on the basis of advance payments being made by the first applicant on request by the respondent … Consequently, the first respondent's contention of breach is opportunistic and accordingly rejected." [Paragraph 20]

"On these grounds alone this Court is of the view that the first respondent, despite having been given opportunities subsequent to the meeting between the parties, persistently failed to meet reasonable requests. Consequently, I find that the first applicant was justified in ultimately cancelling the agreement.

Further, it is also impossible to find prejudice that the first respondent will suffer as a result of the cancellation of this agreement by the first applicant as the first respondent was being paid in advance throughout the building operations. The first respondent is, in any event, responsible for the premature termination of the agreement. Furthermore, it cannot be denied that the relations between the parties have become severely strained and the required co-operation and trust between the parties unfathomable. The applicant has declared its intention to institute action for damages against the first respondent should the relief sought herein be granted. This indicates the extent to which the relations between the parties have deteriorated and cannot be interpreted as breathing life to such relations. It is, therefore, clear that the parties are not in any position to continue to work together as submitted in argument on behalf of the first respondent." [Paragraph 26]

"There is no doubt that the agreement lends a lien to the first respondent against the property. However, a lien goes with responsibility on the part of its holder. There was an obligation on the respondent to perform in terms of the agreement for him to sustain the lien. A failure by the holder of the lien to perform in terms of the contract giving rise to the lien necessarily adversely affects a justification for entitlement to the lien. A justified termination of such contract by the owner of the property invariably marks the end of the lien, particularly in the circumstances of this case where payment was being made in advance. The first respondent's contention that cancellation of the agreement does not affect the first respondent's lien is rejected." [Paragraph 27]

The relevant agreement was held to have been validly cancelled by the first applicant. First respondent was ordered to vacate the property, and to pay the costs of the application.

SHARMAN AND ANOTHER V NZIMANDE AND ANOTHER (6548/2013) [2013] ZAGPJHC 175

Case heard 13 June 2013, Judgment delivered 18 July 2013

This was an application for eviction in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). The parties had a lease agreement in terms of which the respondent rented the property for R12 000.00 per month. Before the lease agreement ended, the parties concluded an instalment sale agreement in terms of which the respondent was to purchase the rented property from the applicants. The issue the court had to decide was whether the applicants were entitled to pay the agent's commission from the deposit amount, and whether the lease agreement and the instalment sale agreement were validly terminated by the applicants.

Mbongwe AJ held:

"It is to be noted that, with regard to the agent's commission … the sale agreement does make provision for the payment of the commission from the first payment made by the 1st respondent and the agreement states that the commission becomes due on conclusion of the agreement. While it is unusual for an agent's commission to be paid by a purchaser, that situation was agreed upon … but appears to have been among the issues that caused an impasse between the parties that lead not only to protracted yet never resolved negotiations lasting 18 months and was accompanied by non - payments of the monthly rental and instalments by the 1st respondent. I do not believe, however, that the 1st respondent was entitled to withhold further payments for that reason and for that long. In fact, such conduct by the 1st respondent's cannot be said to be that of a committed tenant and genuine purchaser." [Paragraph 7]

Mbongwe AJ then dealt with the applicant's letters demanding payment and giving notice of termination:

"... This letter is defective as a notice in that it does not accord with the provisions of the sale agreement in terms whereof the applicants are to call upon the 1st respondent to remedy a breach within thirty (30) days from the date of the notice nor does it set out expressly the steps the applicants are likely to follow if the breach is not rectified ... For these reasons, the purported notice dated 18th May 2010 is invalid and stands to be rejected." [Paragraph 8]

"... Furthermore, paragraphs 3.3 – 3.3.5 of the sale agreement forbid the seller from terminating this contract, instituting an action unless; the seller has given written notice describing the breach, demanding rectification of such breach within a period not less than 30 days and indicating the steps the seller intends to take if the breach is not rectified within the given 30 day period. The sale agreement between the parties was, consequently, never terminate properly and consequently remained extant." [Paragraph 11]

"Having already found that the sale agreement was never properly cancelled and remains extant, the rental agreement rooted therein also remains valid. The purported termination of the non existent rental agreement dated 15 December 2008 is, therefore, rejected." [Paragraph 10]

"The pertinent legal position in this case, although not raised by the parties and particularly not relied upon by the applicants, is that the agreement between the parties which commenced on the 1st April 2010 and had a life-span of twelve months, was never renewed or extended in writing as required by the ALIENATION OF LAND ACT... was terminated on 31st March 2011 due to affluxion of time. In the result, I find that there was no valid rental and sale agreement between the parties post the 31st March 2011." [Paragraph 11]

"I therefore, find that the agreement between the parties had run its intended course despite the 1st respondent's persistent failure to pay the monthly rental and instalments inbreach of the terms and conditions thereof. I further find that the 1st respondent's claim that he is in lawful possession and occupation of the property, particularly in the light of the applicants' demand that he vacates the property, to be lacking legal grounding , extremely absurd and stands to be rejected."

The application for eviction was granted.

RAMOKONOPI V ROAD ACCIDENT FUND (2012/27618) [2013] ZAGPJHC 220

Case heard 26 – 30 August 2013, Judgment delivered September 2013

Plaintiff, a medical doctor, claimed compensation for a motor vehicle accident. The court had to deal with competing versions as to how the accident occurred.

Mbongwe AJ held:

"... [T]here are competing versions with regards to the circumstances leading to the accident. That in essence calls upon this court to consider and weigh the evidence before it with a view to arriving and identifying the most probable version. In this regards it is necessary that the court looks at the evidence of each witness, the demeanour as well as the probability of the witness's version. In respect of the first witness for the Plaintiff's case (Mr Matafeni) ... he spoke confidently when giving his evidence in chief.

However there are aspects of his testimony that are inconceivable and left such a void that one cannot but disbelieve him. Amongst others, that he never spoke to anyone at the scene of the accident and did not give his particulars to anyone and has never subsequently made a statement to the police and gave his personal details. Despite all this the Plaintiff's attorneys had been able to contact him by letter for him to call in at their office in connection with the accident ..." [Paragraph paragraph number]

"... [T]he defence argued that Mr Matafeni was a so called rented witness and did not personally witness this particular accident. It is by no means strange that, under cross examination, he could not explain how he had been identified by the Plaintiff's attorneys as an eye witness to this particular accident... [I]t was Raluswingwa's unchallenged testimony that he had spoken to the people present at the scene, seeking anyone who might have witnessed the collision, but no one came forward. This situation was compounded by the Plaintiff's failure to call a witness who could form a nexus between the witness, Matafeni, to the Plaintiff's attorneys. This failure necessarily gives credence to the Defence's argument regarding the identification of Mr Matafeni as a witness..." [Paragraph 32]

"If one looks closely at the ... evidence it becomes clear that the version of the insured driver, namely, that the Plaintiff had been overtaking, is more probable. This is further confirmed by the statement detective Mofokeng had obtained from the Plaintiff ..." [Paragraph 35]

"The evidence of the Plaintiff himself did not add any value to these proceedings, save that he was in court to state improbabilities. I now refer to some of those improbabilities. Firstly that at his age, being a medical doctor and in possession at the time of a learner's license, he did not know that an accident needed to be reported. If his evidence is anything to go by, to date, more than four years since the accident, he has not made a statement to the police regarding the accident. This flies in the face of the documentation that was completed by detective Mofokeng, who obtained all relevant personal details relating to the Plaintiff, including the statement which the Plaintiff had signed ... According to him, he believed his attorney's advice that all his three claims, namely, for damages to the vehicle, for medical negligence against the hospital to which he was admitted and for bodily injuries to himself, would all be lumped in one claim against the Road Accident Fund. I find it highly unlikely that a person of the Plaintiff's qualifications would have believed such advice if indeed it was indeed given." [Paragraph 36]

"Generally I find that Mr Matafeni was jittery, evasive and tended to take time smiling instead of responding to the question asked. Prompting the court to ask him for reasons for frequent smiles. He repeatedly responded by saying he was not going to change his version even in circumstances where the question never suggested that he change his version. He was evasive in his answers. With regard to the Plaintiff himself, clearly this witness had come to deny knowledge of all that mattered with regard to the accident and this included his pleas of ignorance whenever it suited him. This does not in any way suggest a denial of the fact that he did lose consciousness at some stage after the collision. On the other hand, I find that the defence's witnesses were honest and credible." [Paragraph 37]

"In the circumstances I find that the Plaintiff's alleged eye witness has not been a credible witness. His evidence as well as that of the Plaintiff himself, to the extent that the Plaintiff had been aware, prior to the collision, is nothing but a calculated fabrication to get compensation from the Defendant. The evidence of these two witnesses is accordingly rejected." [Paragraph 38]

The claim was dismissed with costs.

CIVIL PROCEDURE

CARRIM V LOUW & HEYL ATTORNEYS [2014] JOL 32294 (GSJ)

Case heard 10 June 2013, Judgment delivered 18 July 2013

These were interlocutory applications in which applicant sought an order to amend its particulars of claim in the main action and the respondent was seeking a condonation of the late service and filling of its answering affidavit to the amendment by the applicant. The applicant consulted the respondent, a firm of attorneys, after she sustained injuries in a motor vehicle collision. The firm advised her that the claim she wished to pursue against the Road Accident Fund (RAF) was not commercially viable. She subsequently instituted proceedings against the respondent, claiming damages in respect of compensation which she would have recovered from RAF, had the respondent advised her correctly.

Mbongwe AJ held:

"Counsel for the applicant, after arguing and pointing out alternative modes the respondent could have embarked on to reach its counsel, elected to leave the aspect of the explanation given and acceptance of responsibility by the respondent's counsel, in the hands of this Court. Counsel for the respondent is a senior member of the bar and officer of this Court. I have no reason to doubt the explanation given and I must commend counsel for the applicant for the stance she took in relation thereto. Further, this Court is satisfied that no wilfulness could be ascribed to the respondent for the late filing of the answering affidavit. … The application for the condonation of the late filing of the respondent's answering affidavit would have been granted." [Paragraph 5]

Mbongwe AJ then considered the application to amend the particualrs of claim:

"… [I]t sets out the details of the occurrence of the collision the applicant was involved in, the injuries, treatment, past and future medical expenses, sequelae and estimates of the quantum of the applicant's general and special damages. The respondent has no objection to this part of the amendment and merely notes the applicant's allegations in its answering affidavit. This Court does not find anything wrong or untoward with this part of the amendment and agrees that these averments sought to be introduced are necessary to lead evidence. Consequently, the application for amendment, by introducing the averments referred to above, would have been granted." [Paragraph 7]

"Although in this paragraph I consider the second part of the amendment sought, I deem it necessary to repeat the quotation in paragraph 8 of the applicant's short heads of arguments which reads …: "The applicant notified the respondent of its desire to introduce an amendment to set out averments setting out the particularity relating to the motor collision in question, coupled with the ostensible failure of the respondent to comply with Sections 2, 17 and 24 of the Road Accident Fund Act.'"" [Paragraph 8]

"The latter part of this statement unambiguously means the introduction of the respondent's negligence (failure) which, in the context of this case, means the introduction of an additional claim founded on negligence. It is important to note that the applicant's main claim as it stands is grounded on allegedly incorrect advice that was given to the applicant by the respondent in December 2002 and the action against the respondent was instituted in March 2008 … There is not a bit of doubt that by allowing this second part of the amendment sought, this Court would have been granting the applicant an opportunity to introduce a second or alternative cause of action against the respondent in the main action between

the parties, which claim had itself long become prescribed by the time summons was issued against the respondent." [Paragraph 8]

The application was dismissed and the applicant was ordered to pay the costs.

MASINDI V ROAD ACCIDENT FUND (21738/2014) [2015] ZAGPJHC 118

Case heard 3 June 2015, Judgment delivered 12 June 2015

The plaintiff (Masindi) instituted proceedings against the defendant for compensation for bodily injuries sustained in a motor vehicle accident which occurred on the 17th of June 2009. The parties had reached a settlement agreement on the merits and quantum, subject to the plaintiff's claim surviving the defendant's special plea of prescription. The issue before the court was whether the plaintiff's claim had prescribed when summons was served on the defendant on the 17th June 2014.

Mbongwe AJ held:

"It is common cause that … the prescribed five years period would have ended at midnight on the 16th June 2014, which was a Monday and a public holiday. It is to be noted also that Section 23 (3) does not provide for a situation where the last day of the five years period falls on a Sunday on public holiday. …" [Paragraph 4]

Mbongwe AJ then considered an argument that the plaintiff ought to have served summons on Friday the 14th of June, and that serving on the 17th of June fell outside the five year period:

"In the first instance, it is one of the cardinal rules in interpreting a statutes that the meaning given must not result in an unforeseen absurdity." [Paragraph 7.1]

"The proposition that the Plaintiff's summons should have been served on the 14th June 2014 would clearly mean that the Plaintiff is deprived of the full prescribed period of five years. This does not accord with justice, could not have been the intention of the legislature and stands to be rejected." [Paragraph 7.2]

"The submission on behalf of the Plaintiff that Section 4 of the Interpretation Act … should find application in this case appears the more plausible and just` for the reason that not only does it preclude the undesirable results stated in paragraph 7.1 and 7.2 above which may certainly not have been the intention of the legislature, but also finds support in other sources." [Paragraph 8]

"The shortcomings in the provisions of Section 23 (3) of the Road Accident Fund Act are exactly similar to those of Section 40 (2). There is no reason why the provisions of Section 4 of Act 33 of 1957 [the Interpretation Act] should not apply to the provisions of Section 23 (3) of the Road Accident Fund Act as well. I consequently find that the provisions of Section 4 of the Interpretation Act … are applicable to Section 23 (3) of the Road Accident Fund Act. On this basis I find that the Plaintiff's claim had not prescribed when summons was served on the Defendant on the 17th June 2014." [Paragraph 10]

The special plea for prescription was dismissed and the defendant was ordered to pay the agreed amount.

SELECTED JUDGMENTS

PRIVATE LAW

BRITELIGHT CO (PTY) LTD V SUB SAHARAN POWER DISTRIBUTORS (PTY) LTD, UNREPORTED JUDGMENT, CASE NO. 30533/2008, NORTH GAUTENG HIGH COURT, PRETORIA

Case heard 2 – 7 February 2015, Judgment delivered 2 April 2015

Plaintiff sought an order declaring that was the defendant's agent, based on a tacit contract of agency. It also sought a statement and debatement of account, payment of money found to be due to it in terms of the said contract, and costs of suit. The issue was thus whether such a tacit contract of agency existed between the plaintiff and defendant.

Modiba AJ held:

"The issue to be decided is a very narrow one and that is whether Chibout had the ostensible authority to conclude an agency agreement with the plaintiff on behalf of the defendant, and if so whether the defendant is estopped from denying that authority. … If I answer these questions positively, then the last question to be determined is whether the plaintiff was instrumental in securing sales of generators by FNB from the defendant during phase 2 and whether he is entitled to 10% commission on those sales. … Authority is the power to perform a juristic act on behalf of another. One person may act on behalf of another only if he or she is authorised to do so. Whether such a person has authority is a question of fact. Authorisation is granted by a principal, acting unilaterally. It may be express or tacit. It may also be general or specific. Where no authority exists, one person may nonetheless be bound to another in terms of a juristic act performed on his behalf where he has led another party to the reasonable belief that the person who ostensibly represented him had sufficient authority to act on his behalf and if the other party relying on this belief, acted to his detriment? Ostensible authority operates by estoppel. To succeed against the defendant, the plaintiff must show that: the defendant represented by words or conduct that the person acting on his behalf had the necessary authority; the defendant was aware of such representation and did not object to it; and the plaintiff acted to his prejudice on the faith of such representation." [Paragraphs 14 - 16]

"I find that Chibout had ostensible authority to represent the defendant in its dealings with the plaintiff. It was Muller's evidence that at all materials times during his dealings with Chibout, he was under the impression that he was one of the defendant's shareholders. He purported to represent the defendant. He operated from the defendant's premises. Donaldson was aware that he represented the defendant and at no stage did he inform Muller that Chibout had no authority to bind the defendant in an agency agreement with the plaintiff. On a few occasions when he had brief interactions with Muller, Donaldson only commended him for his hard work on the FNB sales. … I also find that the defendant is estopped from denying that Chibout had the authority to represent it. It honoured the terms of the agreement concluded with the plaintiff on its behalf by Chibout. Chibout sold SDMO generators to the plaintiff for on-selling to FNB at 10% less the list price. When Donaldson attended the plaintiff's premises for a meeting, he did not object to the use of the words 'Agents for SSPD SDMO' in the plaintiff's branded signage. Under cross examination, he did not deny seeing the branding. He testified that he did not pay attention to it at the time because it was not important. When FNB expressed an intention to order

SDMO generators directly from the defendant, Donaldson caused Pereira to write and send a letter … to the plaintiff changing the terms of the agency agreement." [Paragraph 20 - 21]

"I find that although Raft mentioned to Muller that he would back any business which Donaldson was behind, and despite Donaldson's apparent long standing association with Raft which Muller did not dispute, until Muller stepped into the picture that association did not secure the accreditation of SDMO generators, without which FNB would not procure the generators. Neither did it secure the defendant a contract to supply FNB with generators. … I therefore find that the plaintiff, through Muller's efforts, was instrumental in the awarding of the FNB phase 2 tender to the defendant. … In the premises, I find that the plaintiff is entitled to a statement of all sales of SDMO generators to FNB by the defendant from July 2006 to the date of summons and 10% of all sales of generators by the defendant to FNB during this period" [Paragraphs 25 - 28]

The plaintiff's claim succeeded, with costs.

CIVIL AND POLITICAL RIGHTS

LIFE HEALTHCARE GROUP (PTY) LTD AND ANOTHER V JMS (AS PARENT AND GUARDIAN OF THE INFANT CHILD MT) AND ANOTHER (34758/2014) [2014] ZAGPJHC 299

Case heard: 30 September 2014, Judgment delivered 30 September 2014

This was an application for an order authorising the second applicant to administer a blood transfusion to the respondents' infant boy child (MT) as and when, in the opinion of the second applicant, the child required a blood transfusion. The parents objected to the child being transfused for religious reasons. They expressed their desire for all alternatives to blood transfusion to be explored. When no alternatives worked, the applicants approached the court.

Modiba AJ held:

"In terms of section 129 (4) (a) of the Children's Act … the parents of a child under the age of 12 are authorised to consent to the child's medical treatment. In terms of section 129 (10), no parent may withhold consent for the medical treatment of a child by reason only of religious or other beliefs, unless the parent can show that there is a medically accepted alternative choice to medical treatment. Section 126 (9) gives the High Court or the Children's Court jurisdiction to consent to the medical treatment of a child in any instance where a person authorised by the Act to consent refuses or is unable to give consent. … This case presents several conflicting rights namely, the parents' right to freedom of religion against the child's right to life as well as the right to have the best interests of the child inform any decision concerning the child. Under the South African Bill of Rights, everyone has the right to freedom of conscience, religion, thought, belief and opinion. Everyone has the right to life. A child's best interests are of paramount importance in every matter concerning the child. … Although the rights in the Bill of Rights are entrenched, they are not unfettered. They may be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation

between the limitation and its purpose, and less restrictive means to achieve the purpose.' [Paragraphs 9 – 11]

"In my view, the limitation imposed by section 129 (10) on the parent's right to object to the medical treatment of a child for religious reasons reflects a balancing of the child's right to life and to have his best interests inform all decisions concerning the child against the parents' right to religion. … It is in the child's best interests that his life is preserved. … The parents' objection falls squarely within the ambit of the prohibition in section 129 (10). Their refusal to consent to blood transfusion for the child is unlawful. In the premises, the applicants have made a proper case for the court to exercise its powers in terms of 129 (9)." [Paragraphs 14 – 16]

The application was granted.

CRIMINAL JUSTICE

S V THABANE, UNREPORTED JUDGMENT, CASE NO. SS36/2013, SOUTH GAUTENG HIGH COURT, JOHANNESBURG (2 SEPTEMBER 2013)

The accused was charged with two counts of rape. The accused argued that there was no lack of consent.

Modiba AJ held:

"… It is the duty of the state to prove the guilt of the accused beyond reasonable doubt. The state bears the duty to prove all the elements of the offence including rebutting the defence raised by the accused. There is no duty on the accused to prove his innocence. However, where there is evidence that proves the accused's participation in the commission of an offence, a rebuttal onus arises against him. In that event it will be the duty of the accused to cast doubt on the state case by setting out his version. The overall burden of proof remains with the state. … Essentially the accused's version is that he indeed picked her up from the side of the road on the day in question, and that she was a prostitute. They had consensual sex on the day in question for which he paid her. He also had sexual intercourse with her on three subsequent occasions. She denied being a prostitute. She also denied that the sexual encounter with the accused was consensual. … Doctor Gashief concurred with the conclusion by Doctor Nkwira that the vaginal injuries … were consistent with forced sexual penetration." [Pages 3 - 8]

"The defence requested the court to treat Ms Mogomotsi's evidence with caution, because she is a single witness. I found this request very interesting because the accused is also a single witness in respect of his version. The request is not only based on double standards, it is reminiscent of the discriminatory assumptions of the past age that a complainant in a rape case is likely to be untruthful. … I am of the view that sexual encounters do not occur in public. Worse so when it is a non-consensual encounter. As a result in most rape incidents the complainant is a single witness. Treating the evidence of a rape complainant with caution simply because she is a single witness is prejudicial due to the nature of the offence. … The cautionary rule in respect of rape cases is prohibited by Section 60 of Act 32 of 2007, which states that the court may not treat the evidence of a single witness in a sexual offence case with caution by virtue of the nature of the offence. … Indeed Section 60 does not completely take away the discretion of the court in respect of the admissibility of the evidence. The court still has to satisfy itself as to the truthfulness of the evidence as well as the credibility of the complainant as a witness. … On the evidence before court, there exists no reason to treat Ms Mogomotsi's evidence with caution simply

because she is a single witness. In respect of the events after the alleged rape, I am of the view that Ms Mogomotsi's evidence has been corroborated by that of other state witnesses ..." [Pages 10 - 11]

"... I now turn to consider whether the accused's version in respect of count 1 is reasonably possibly true. ... I am of the view that the accused's version is riddled with improbabilities. He testified that on the day of the incident everything was going according to plan with the consensual sexual encounter ... until he realised after having sex with her that the condom had burst. ... She then asked him to take her to the clinic for the morning after pill. Ms Mogomotsi testified that the reason why she went to the clinic is that she wanted to do an HIV test. She did not ask for a morning after pill. This is corroborated by Ms Mokoena the HIV counsellor who attended to her at the clinic. ... In the circumstances it is improbable that Ms Mogomotsi laid charges against the accused simply because the condom burst during consensual sexual intercourse. From the evidence on record Ms Mogomotsi laid a charge of rape immediately after the rape. ... It is improbable that after laying a charge of rape against the accused, Ms Mogomotsi would agree to meet with him three or four times to sell sex to him. It is probable that if she really wanted him arrested, these meetings would have presented her with a perfect opportunity to entrap him by alerting the police ... I am of the view that the emotional state of the complainant after the alleged rape ... as well as her emotional state in court when she gave evidence is not consistent with the state of a person who had consensual sex. It is rather consistent with that of a person who has been violated and traumatised by non-consensual sex." [Pages 12 - 14]

'... I therefore accept the evidence adduced by all state witnesses in respect of count 1 in its entirety. ... Given the improbabilities in the version of the accused ... I am of the view that his evidence lacks probity. I am of the further view that the evidence of the accused is not reasonably possibly true ..." [Page 15]

Modiba AJ then considered the second count of rape:

"In my view the evidence of the accused in respect of count 2 is also full of improbabilities. ... There are striking similarities in the complainant's accounts in respect of count 1 and 2 ... From the evidence it appears that they were both vulnerable. Ms Mogomotsi was unemployed and was attracted into the accused's car by an offer of employment Ms Domingo did not have sufficient money to travel home hence she accepted a lift from the accused. ... According to their evidence they were both raped without a condom ... Immediately after the rape they sought some kind of help and reported their ordeals ... The accused's version in both counts is that the complainants were prostitutes and consented to have sex with him for an agreed amount, which he paid. ... For the reasons that I have already pointed out in respect of the improbabilities in the version of the accused, I am of the view that the accused's version in respect of count 2 is also not reasonably possibly true. ... I therefore find the accused guilty in respect of both counts 1 and 2. ..." [Pages 23 - 25]

SELECTED ARTICLES

'THE VALUE OF ADVOCACY IN PROMOTING SOCIAL CHANGE: IMPLEMENTING THE NEW DOMESTIC VIOLENCE ACT IN SOUTH AFRICA', (2000) Reproductive Health Matters, Vol 8, No. 16 pages 55 - 64

"Gender-based violence is increasingly recognised both within South Africa and internationally as a profound violation of women's human rights and a major barrier to social and economic development. This form of violence is notoriously difficult to document, and most prevalence studies are considered underestimates, given the reluctance of many women to discuss it. … A prevalence study across three provinces in South Africa found that 9.5 per cent of women had been physically abused in the previous year. … Gender-based violence in South Africa takes place within the context of a highly violent society. During the apartheid era, police-sanctioned violence was the order of the day and communities were forced to retaliate in defence of their lives. The glamorisation of the liberation armies in the eyes of youth has also contributed to the normalisation of violence. While genderbased violence exists independent of poverty and unemployment, high rates of poverty and inequity in South Africa, the legacy of apartheid, have fuelled the problem in the context of a strongly patriarchal society."

"Women's autonomy is undermined by violence, and the impact on women's sexual and reproductive health is far reaching. Domestic violence has been associated with an increased risk of reproductive organ damage, unwanted pregnancies, coerced abortions (often illegally performed), sexually transmitted diseases, pelvic inflammatory disease and infertility. … Violence against women has been identified as both a co-factor and a consequence of the AIDS epidemic. … Several South African studies indicate that conditions and timing of sex within many adolescent relationships are controlled almost entirely by male partners, including through the use of violence."

"Legislation in South Africa dealing specifically with domestic violence dates back to 1993 in the Prevention of Family Violence Act. … Gender activists criticised the new law as an inadequate and flawed response to the problem and began advocating for improved legislation. … [T]he new Domestic Violence Act (DVA) … was hailed as groundbreaking in a number of respects. It includes a comprehensive definition of domestic violence … Like its predecessor, the DVA does not recognise domestic violence as a criminal offence. It retains the speedy, inexpensive and unsophisticated civil procedure of obtaining a restraining order in a magistrate's court. Abusive conduct which is a criminal offence, i.e. assault, rape or malicious damage to property, is still criminally punishable. However, given police reluctance to intervene in domestic violence cases, the DVA is intended to facilitate the prosecution of more crimes committed in a domestic context rather than create a new set of crimes."

The article then considers barriers to implementation:

"… There were … legitimate concerns about the length of time required to train a large criminal justice system in the intricacies of the new legislation. The implications were of particular concern for the police, as failure to fulfil their duties under the new law could result in disciplinary action. Some of these duties were difficult to fulfil in the context of underdeveloped infrastructure, scarce resources, lack of interdepartmental co-operation and poorly articulated departmental responsibilities." (Pages 55 – 58)

"… The DVA has now been in operation for almost a year and organisations have been monitoring implementation closely during this period. Mixed reports are emerging concerning the quality of implementation, and the need for ongoing advocacy in this regard is becoming evident. For example, a more effective training strategy is required. Relatively few justice agents and police officials have been

trained on the DVA and the social context of domestic violence. Police officials were to train their colleagues, but often do not have the training skills to do so. Relatively few magistrates, prosecutors, clerks of the court, nurses, doctors and social workers appear to have been trained, and survivors are suffering from the repercussions of this. Lack of a training budget has been offered as an explanation for these limitations."

"Police officers have continued to refuse to intervene in domestic violence cases, and DVA procedures may not follow even if they accept a report of domestic violence. There are many reported incidents of women being turned away without protection and without their rights under the Act being explained. Abusers have been released with only a warning, and complaints of violation of protection orders are not always acted upon. Information notices and application forms are often only available in the minority English and Afrikaans languages …"

"The transition from apartheid to democracy in South Africa challenged every facet of prevailing oppression, from race and class to gender. Gender equity is firmly on the transformation agenda and has resulted in South Africa's highly regarded' Constitution and Bill of Rights, which protect the right of women to be free from violence in both 'the public and the private spheres of life'…South Africa's first democratic government was under pressure to deliver on its vision of a 'non-racist, non-sexist and democratic South Africa'. These imperatives created a favourable climate for the campaign. While extensive gender structures had been established during the first years in office, concrete deliverables were less apparent. South Africans have become increasingly impatient with the plethora of excellent policy and legislation that remains unimplemented.' (Page 59 – 62)

"Systems must be put in place to support government and vice versa. The lack of safe places where survivors can be referred must be addressed by the Welfare Department with funds from Government, the private sector and donors. Creative ways to meet these needs through the mobilisation of existing community resources must also be explored. Importantly, ongoing budgetary allocations must be made to facilitate effective implementation of the Act and any other measures adopted to address gender-based violence. Ongoing advocacy is also needed to clarify and possibly amend aspects of the new Act itself. … One emerging shortcoming of the Act is the fact that parts of it are couched in soft language which serves as a let-out clause. For example, police need only comply with their obligations where this is 'reasonable and practically' possible. Not only does this allow room for noncompliance with obligations, it makes prosecution for non-compliance virtually impossible."

"The Domestic Violence Act is but one important tool for combating gender-based violence. Ongoing gender-sensitivity training of police, magistrates and prosecutors is also essential. More attention needs to be focused on advocacy within the health sector, which is ideally placed to detect domestic violence, treat injuries and morbidity appropriately and refer women and children for help. Protocols for the detection and management of domestic violence in general need to be developed and disseminated nationally. …" (Pages 63 – 66)

SELECTED JUDGMENTS

PRIVATE LAW

E V E (2013/27961) [2013] ZAGPJHC 262 (24 OCTOBER 2013)

Case heard 14 October 2013, Judgment delivered 24 October 2013.

Applicant sought an order, pending a divorce action, for inter alia maintenance for herself, and a contribution towards her legal costs.

Mudau AJ held:

"The respondent is essentially opposing the application on two grounds. Firstly, he alleges that the applicant's monthly financial requirements are excessive and should reasonably be R19 404.08 which can be covered by her earnings. Secondly, he claims that he cannot afford to pay the amount claimed as he too has expenses totalling R17 858.00 per month." [Paragraph 7]

"… [T]the respondent can hardly be described as a man of straw. Significantly, the respondent has not placed evidence reflecting his true financial means. … It is common cause that he had bought the family house for R1 100 000.00 in cash and also gave his wife R600 000.00 to furnish it. As recent as February 2013, he issued a cheque of R100 000.00 which he claims is in settlement of a debt. In November of 2012, a similar amount had been drawn in favour of the same entity. In an email addressed to his financial broker motivating cancellation of a new policy with Sanlam as well as ''future payments into the existing Sanlam funds" the respondent writes that he will no longer be investing any money in South Africa as SARS is going through his financial affairs. … The respondent, it seems to me, has not fully, frankly and clearly disclosed his financial affairs." [Paragraphs 8 – 9]

"In this case the respondent's total monthly expenses far exceed his monthly salary which can render the estate technically insolvent if his version is accepted as correct. I have no difficulty in finding that the respondent is not candid with this court with regard to his financial affairs. It can easily be inferred from the above facts that the respondent is financially stable. … Depending on the living standard of the parties, the applicant may be entitled to maintenance provided she shows that she has insufficient means in addition she must show that her husband is able to make the required contribution. In this matter it is admitted that the applicant and the children live a comfortable lifestyle." [Paragraphs 10 – 11]

After identifying certain expenses as non-essential, Mudau AJ continued:

"… I am satisfied that the applicant has made out a case which entitles her to maintenance *pendente lite*. … It remains to deal with the application for contribution towards costs. It is trite law that the husband's duty of support includes supporting his wife with costs for her litigation against him. Before trial, the applicant is ordinarily entitled to be awarded a contribution only up to and including the first day of trial. The rationale being that the case may be settled. It was argued on behalf of the applicant that R10 000.00 contributions towards costs is justified for purposes for investigating the respondent's financial affairs. In my view however, R10 000.00 as contribution is excessive." [Paragraphs 14 – 15]

Respondent was ordered to pay maintenance pendent lite of R15 000.00 per month to the applicant, and to pay R3 000.00 towards the applicant's legal costs. Costs of the application were costs in the divorce action.

CRIMINAL JUSTICE

S V MGIBELO 2013 (2) SACR 559 (GSJ)

Case heard 14 – 17, 20 – 21, 23, 27, 29, 31 May 2013; 6, 13 June 2013, Judgment delivered 20 June 2013

The accused and the deceased had previously been in a love relationship. They had a child together, who lived in the care and custody of the deceased's mother. The accused had "planned and deliberately set on fire a shack wherein the deceased and his girlfriend were sleeping, after dousing the shack with an inflammable liquid." The deceased died from the burn wounds, whilst the girlfriend "barely survived." The accused was convicted of murder, attempted murder and arson.

Mudau AJ held:

"Murder, attempted murder and arson are not only very serious offences, but are prevalent, not only in the jurisdiction of this court, but country-wide as well. The gravity of the offences the accused has been convicted of cannot be over-emphasised." [Paragraph 4]

"The attack on the deceased and the surviving complainant can only be described as most callous, cruel and brutal. This was pure savagery. These were defenceless victims who had no means of escape, as the fire was started at the door of the shack, which had no windows. Fuelled by the inflammable liquid, the fire was quick to spread, which gave the victims no chance to break out of the burning shack. Hours later the deceased succumbed to his painful injuries, with his body almost unrecognisable, and the surviving victim scarred for life." [Paragraph 5]

"At a glance, this case has the features of a 'crime of passion', but a proper consideration of all the relevant facts shows that, on the contrary, the conduct of the accused was motivated by revenge or vengefulness. The confrontation between the accused and the surviving complainant, the threats to burn the latter's shack, started at about 09h00 on 14 November 2012. The accused, who was armed with a bottle of paraffin and a box of matches, had to be restrained before she could set the shack alight." [Paragraph 6]

"… [I]t is clear that the accused's conduct was well planned and acted upon throughout, over a period of at least 16 hours. The accused was determined to carry out her threats, which she communicated to various people. She had time to cool off and to reconsider her actions. After setting the shack alight, whilst the deceased and the complainant were fighting for their lives, the accused expressed the desire to finish off the deceased. The accused's murderous intent makes these crimes more aggravated." [Paragraph 8]

"An essential characteristic of a crime of passion is when an offence is committed 'without rational reflection whilst the perpetrator was influenced by barely controllable emotion'. … This case is accordingly distinguishable from a typical scenario 'in which an accused reacts spontaneously to perceived provocation, driven by anger, without sufficient time to consider his actions'. … [T]he accused did not unexpectedly and shockingly discover the deceased with the complainant. By her own version, she was aware of their relationship. By her version, the deceased had a history of numerous love relationships. The accused and the deceased were not married. The accused had no obligation to stay in her relationship with the deceased but could have moved on with her life." [Paragraph 9]

"... I find that hers were crimes of vengeance and clearly distinguishable from the cases referred to ... According to the version of the state, which I found to be more probable, the deceased had terminated his relationship with the accused long before the incidents of the crimes. The accused has shown no remorse for her conduct. In spite of incriminating evidence from her cellphone, the accused maintained her innocence throughout the trial. Neither did she testify in mitigation of sentence." [Paragraph 12]

"... [T]he accused is clearly not a candidate for a non-custodial form of sentence. I did not hear any argument or submission to the contrary. As the accused is a mother to two minor children, it is imperative to have regard to the interests of these children in mind when a proper and just sentence is considered. ..." [Paragraph 14]

"With due regard to all the factors in mitigation and aggravation of sentence, I fail to find in the accused's favour the presence of 'substantial and compelling circumstances' that justify the imposition of lesser sentences than those prescribed. The offences committed were unnecessary. The accused's personal circumstances are commonplace and are overshadowed by the gravity of these crimes. In respect of count 2 (attempted murder), in view of the manner in which the crime was committed, as well as the permanent scars suffered by the complainant, there is justification to consider a sentence beyond the minimum sentence prescribed." [Paragraph 17]

The accused was sentenced to life imprisonment on the count of murder; 10 years' imprisonment on the count of attempted murder; and five years' imprisonment on the count of arson. She was also declared unfit to possess a firearm.

S v CHUIR AND ANOTHER 2012 (2) SACR 391 (GSJ)

Case heard 24 April 2012, Judgment delivered 24 April 2012.

This was an appeal against sentence, the accused having been convicted of one count of kidnapping and four counts of rape in the Regional Court. The complainant was a 40 year old mother of four children. Appellants were each sentenced to five years' imprisonment in respect of the kidnapping, and to 25 years' imprisonment in respect of the rape. The effective sentence was 25 years' imprisonment. At issue on appeal was whether the court *a quo* had correctly assessed the relevant factors in passing sentence.

Mudau AJ (Classen J concurring) held:

"In sentencing the appellants, the trial court took into consideration that the first appellant was 21 years old and a first offender. He had a standard 8 level of education .The first appellant was then a father of a 2-year-old child. He worked as a panel beater earning R600 a week. At the time of sentencing the first appellant had spent a year in custody. The second appellant was 22 years old at the time and also a first offender. He too is a father of a minor child, then 3 years old. He too worked as a panel beater earning R1500 a week and had spent a year in custody before being sentenced. The trial magistrate was correct, in my view, in finding all these factors to constitute 'substantial and compelling circumstances', factors that justified the imposition of a lesser sentence than life terms of imprisonment ... It is clear from the facts, albeit not in so many words, that the learned magistrate must have found that the appellants had acted 'in the execution or furtherance of a common purpose or conspiracy' ...by virtue of his consideration of a life sentence for each of the appellants. Also, each of the appellants raped the victim whilst the other held her down." [Paragraph 8]

"… [T]he seriousness of the offences and in particular the prevalence of rape perpetrated against women and children are a scourge in our country, which warrants a long term of imprisonment. Not only is rape a serious offence, its seriousness is exacerbated by its alarming incidence. This country is reported to have some of the highest incidents of rape in the world. Not only was the victim almost twice the appellants' respective ages, but she was someone else's wife. It must, accordingly, be accepted that the complainant, who had been assaulted to subdue her, and kept against her will, must have been traumatised by her prolonged rape ordeal. In my view, the rape of a married woman and a mother cannot be categorised differently to the rape of a young virgin. In the case of a married woman the rape may negatively affect her married life. The absence of genital injuries to a mother, who has delivered four children, cannot be used to describe the rape as less serious. … In my view, the sentence imposed by the trial regional court magistrate is not too severe or shockingly inappropriate. There is also no misdirection on the part of the court a quo which will entitle this appeal court to interfere with the sentence." [Paragraph 10]

The appeal was dismissed.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE NORTHERN PROVINCES V LOURENS (64651/2014) [2015] ZAGPPHC 56 (6 FEBRUARY 2015)

Case heard 6 February 2015, Judgment delivered 6 February 2015.

This was an application to strike the respondent off the roll of attorneys. The matter was dealt with on an unopposed basis.

Mudau AJ held:

"… [T]he suspension order was granted after the respondent failed to submit his Rule 70 auditors report for the period ending 28 February 2013 to the applicant. This report had to be submitted on or before 31 August 2013. Due to his failure to submit the Rule 70 report, the respondent was notified to attend disciplinary proceedings. He failed to attend such proceedings. He further failed to reply to correspondence from the applicant. The respondent's failure to submit his Rule 70 report is a criminal offence in terms of section 81(10) of the applicant's rules. Every attorney who practices for his own account is obliged in terms of the legislation to cause his auditor to lodge a report with the applicant within six months of the annual closing of the accounting records. This requirement is to ensure that there should at all relevant times be sufficient funds in an attorneys trust bank account to cover his liability to trust creditors." [Paragraph 3]

"In terms of section 41(1) of the Attorneys Act, no practitioner shall practice or act as a practitioner for his own account or in partnership unless he is in possession of a fidelity fund certificate. This stipulation is peremptory by nature. A fidelity fund certificate is mainly issued on the strength of an unqualified auditors report as provided for in Rule 70. According to the provisions of Rule 89.11 the respondent rendered himself guilty of unprofessional, dishonourable and unworthy conduct by failing to submit his Rule 70 report. As a result of the respondent's failure … the respondent was not issued with a fidelity fund certificate for 2014. The respondent nevertheless continued practicing as an attorney without a fidelity fund certificate from 1 January 2014 until he was suspended. The respondent's failure to submit his report placed his trust creditors at risk." [Paragraph 4]

"In the meantime, the applicant received complaints against the respondent. …" [Paragraph 4 (duplicate paragraph number)]

"It is abundantly clear that there is a trust deficit in the amount of R2 453 802, 08 in the respondent's bookkeeping. I am satisfied that it has been proved on a balance of probabilities that the respondent contravened several provisions of the Attorneys Act and the Law Society rules. … The applicant contends that the respondent can no longer be regarded as a fit and proper person to continue to practice as an attorney. Accordingly, the applicant seeks an order that the respondent's name be struck from the roll of attorneys …" [Paragraph 11]

"The question whether an attorney is no longer a fit and proper person to practice as such lies in the discretion of the court. …The appropriate sanction, if the court finds that such a person is not a fit and proper person, is either to suspend him from practice or strike his name from the roll … In the present matter the Law Society, as *custos morum* of the profession, placed certain facts before the court for consideration. It is trite that the facts on which the court exercises its discretion are to be established on a balance of probabilities. The facts are to be considered in their totality …" [Paragraph 12]

"An attorney's failure to keep proper accounting records is a serious contravention and an attorney who fails to comply with this requirement is liable to be struck off the roll or to be suspended form [sic] practice… The approach of the court in relation to trust shortages and the duty of an attorney with regard to trust money was duly stated in *Law Society Transvaal v Matthews,* … where it was held that where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is that of absence of risk. It is clear in this matter that the respondent has failed to keep proper accounting records. By so doing; he, rendered himself guilty of dishonourable or unworthy conduct (in his contravention of the attorney's act and (or) the applicant's rules)." [Paragraph 13]

"… I have no doubt that the respondent can no longer be regarded as a fit and proper person to practice as an attorney. Accordingly, his name should be struck from the roll of practicing attorneys. His name should also be removed from the roll as a practicing conveyancer." [Paragraph 14]

SELECTED JUDGMENTS

PRIVATE LAW

MYHILL, ELE N.O (SWALIBE MINORS) V ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO: 2009/30430 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 5 March 2012

This was an action for the setting aside of compromises entered into 13 years previously between two minor children as represented by their mother and the Road Accident Fund. Settlement offers were made, which were accepted by the mother of the children. The main issue for decision was whether the settlement agreements could "be set aside on a legal basis affording the minors a further opportunity to claim compensation." [Paragraph 3]

Strydom AJ held:

"As far as concessions made by Mr. Dickenson relating to the reasonableness of the compromises entered into, the court should not attach much weight to these opinions. It is for the court to decide, considering the available evidence at the time, whether the compromises were in the best interest of the children. The court must decide reasonableness against objective standards." [Paragraph 25]

"… As the parties agreed to a separation of issues excluding evidence on what the payment allegedly should have been, the court will now have to decide this issue on the available evidence. For instance, as far as claim B is concerned, the court will have to decide whether, objectively speaking, the compromises were in the best interest of the children without having regard to the allegation that reasonable compensation would have been R850 000 per minor. The court will have to assess, what reasonable compensation would have been considering the seriousness of the injuries and the sequelae to such injuries." [Paragraph 28]

"… Mrs Swalibe, according to the documentation referred to in evidence, accepted the compromises without an undertaking from the defendant to pay for future medical expenses. Provision for such an undertaking appeared on the printed forms she has signed, but was deleted. Considering her knowledge at the time that the children suffered from epileptic fits, she should not have, objectively considered, accepted these settlements without an undertaking from the defendant to pay for future medical expenses. By doing this she did not act in the best interest of the minors." [Paragraph 30]

"For settlement purposes anything may be taken into account, but to consider whether a particular comprise was in the best interest of another, not only the end figure will be considered, but also how this figure was calculated and arrived at. The apportionment applied by the defendant for settlement purposes, by deducting 30% of the estimated value of the claims, was similarly not in the interest of the minor children. If the minor children's mother was contributory negligent in causing their damages, they would have had a claim against her to the extent that her negligence contributed to their injuries, alternatively, the defendant being liable for the full amount, would have had a counterclaim against Mrs Swalibe. On behalf of the defendant it was argued that the

defendant was entitled to make an offer for settlement and it clearly was entitled to take into account that it had a counterclaim on its view of the merits. " [Paragraph 31]

"The question is not whether legally some form of set-off could be applied in this kind of circumstance. It might be legally correct to do so, but is it in the best interest of the children when a mother avoids a counter-claim against her by reducing her minors' claims? I am of the view that set-off under these circumstances will not be in the best interest of minors. Considering that the amount offered is already an amount less than full value, such amount should not be reduced by 30%. The effect of the apportionment is that the minors only received 70% of that which was calculated to be the value of their claims. It would have been in the best interest of the minors to receive 100% of the calculated value of their claims. I find it difficult to understand why, under such circumstances, their claim should have been apportioned. Although possible litigation was avoided between the defendant and Mrs. Swalibe in her personal capacity, this should not have been done at the expense of the claims of the minor children. Accordingly, the avoidance of litigation between the defendant and Mrs. Swalibe is not a factor which renders the settlement figures more acceptable. The 30% reduction of the claims were substantial and not in the interest of the minor children. Considering all the evidence available at the time, I am of the view that the settlement figures were unreasonably low and, accordingly, prejudicial to the interest of the minor children. " [Paragraph 32]

"Once a finding is made that the compromises were not in the best interest of the children, the next enquiry should be whether these settlement agreements could legally be set aside." [Paragraph 33]

"The parties could not refer me to any decided cases on the issue whether a contract in the form of a compromise entered into by a guardian on behalf of a minor could legally be avoided if it was so prejudicial that the minor will suffer serious loss it is not set aside. Ultimately, the test should be whether the compromise was concluded in the best interest of the child at the time that it was concluded. In exercising the court's discretion as upper guardian, the court's paramount consideration is always the best interest of the child in question. This principle has been echoed in constitutional and international law that enshrine "the best interest of the child" standard as paramount or a primary consideration in all matters concerning children. In terms of section 28(2) of the Constitution of the Republic of South Africa … it is so legislated: "A child's best interests are of paramount importance in every matter concerning the child" This constitutional principle is also echoed in section 6(2) of the Children's Act … " [Paragraph 37]

"Mr Van der Linde, on behalf of the defendant, argued that the plaintiff's case to obtain an order for estitution in integrum, as pleaded, was premised on an absolute duty in law or in terms of the Act to pay reasonable compensation, not only in relation to claims of minors, but also in relation to all claims. He argued that, should I find that such a duty in law does not exist, then this claim for estitution in integrum should fail. I do not agree with this argument. Sufficient allegations are made in the particulars of claim, substantiated by evidence, to sustain a claim for restitution in integrum without finding that a legal duty exists to pay reasonable compensation. It is not the breach of a duty that brings a minor within the requirements for a claim of restitution. Restitutio in integrum is available to a minor who can prove that he or she was prejudiced by an agreement entered into on his or her behalf. This may be an agreement pursuant to the Act, which provides for settlement of claims, or any agreement for that matter. The court can make a finding that the plaintiff is or is not entitled to estitution in integrum without finding whether an absolute duty in law exists to pay

reasonable compensation. If I am of the view that the compromise was not in the best interest of the minor, the settlement should be set aside. … " [Paragraph 38]

"… I have already come to the conclusion that the compromises were not in the best interest of the minors. In arriving at this conclusion, I have taken cognizance of the seriousness of the injuries and the evidence of epilepsy, the 30% apportionment applied, the lack of an undertaking given to pay for future medical costs, and the fact that possible litigation was avoided. I accept that a compromise should not be lightly set aside and that, in the words of Voet, 'manifest damage in a compromise is shown with difficult'. I am of the view again in the words of Voet, 'that a clear right of minor have been foregone in a compromise;. The 'best interests of minor children' standard tipped the scale, even considering that litigation was avoided, in favour of a finding setting aside these compromises. These compromises are prejudicial to the interest of the minor children." [Paragraph 41]

"The compromise entered into on 14 May 1999 between the defendant and Martha Seani Swalibe on behalf of the minors Phillipine and Lufuno Swalibe, are set aside." [Paragraph 47.1]

The decision was upheld by the SCA on appeal in **Road Accident Fund v Myhill NO (505/2012) [2013] ZASCA 73 (29 May 2013)**.

COMMERCIAL LAW

COSIRA NAMIBIA (PTY) LIMITED V AREVA PROCESSING NAMIBIA (PTY) LIMITED AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 17248/2013 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 16 July 2013

Applicant had contracted with first respondent to perform construction services, and in terms of the contract had to furnish a performance guarantee to the first respondent. Second respondent had issued a similar guarantee to the first respondent. First respondent called up the applicant's guarantee, alleging breach by the applicant. Applicant then sought to interdict the first respondent from receiving payment pursuant to the guarantee. The decisive issue was whether the guarantee was a "demand bond" or a "surety bond".

Strydom AJ held:

"… This is a legal question and requires interpretation of the performance guarantee. A demand bond is a bond where there is no requirement of an obligation of liability on the part of the contractor under the construction contract. All the beneficiary needs to do is to demand payment and comply with the specified events mentioned in the bond. The only basis on which liability can be avoided is fraud on the part of the beneficiary. … [A] surety bond, also often referred to as a conditional bond, requires from a beneficiary to establish liability on the part of the contractor in terms of the contract. It is in the nature of a suretyship and the liability is accessory to the principal liability. A contractor may raise any defence which it has in terms of the construction contract. " [Paragraph 4]

"It is common cause that the demand was made within the time limit and was formalistically in order. … The ordinary rules applicable to contractual interpretation should be applied. The words in the bond must be given their ordinary grammatical meaning. Unless there is ambiguity when this is doen the court will not have to go beyond the interpretation of the ordinary meaning to establish the intention of the parties. … " [Paragraphs 6 - 7]

"… On a proper interpretation of the wording of the performance guarantee it becomes clear that what is stipulated as a requirement for liability is nothing more than a statement that the principal (applicant) is in breach of its obligation under the contract. It is not required go beyond [sic] a mere statement alleging that the applicant is in breach … I find that the performance guarantee is a demand bond as the undertaking to pay is not depended [sic] upon any condition or term other than receipt by the surety … of the first respondent's demand in writing … The mere statement that the principal is in breach is sufficient to create the obligation to pay. … " [Paragraph 8]

"… [T]he further issue for decision is then whether the applicant has shown … that it has a defence to prevent the payment of the guaranteed amount. The only relevant defence … is the allegation that the first respondent with full knowledge of the true situation misrepresented the facts by stating that the applicant was in breach of its obligations under the contract, whilst this was not the case. According to the applicant, the contract between it and the first respondent was terminated by agreement and consequently the applicant could no longer have been in breach …" [Paragraph 9]

"… [T]he question is … whether the applicant has shown, on a prima facie basis, that the first respondent's allegation, that the applicant was in breach of the construction contract, was knowingly false, as the construction contract was already terminated by agreement, when the statement was made." [Paragraph 11]

"… I am of the view that on the applicant's own version it has not established an agreement to terminate. …" [Paragraph 13]

"… On the contrary, on the papers before me a finding can be made that the contact was terminated as a result of the applicant's default by suspending its performance in terms of the contract. This action amounted to a repudiation of the contract which was accepted by the first respondent." [Paragraph 17]

The application was dismissed with costs.

CIVIL PROCEDURE

STAND 278 STRYDOM PARK (PTY) LTD V EKURHULENI METROPOLITAN MUNICIPALITY (23503/2014) [2015] ZAGPJHC 79 (27 APRIL 2015)

Case heard 11 March 2015, Judgment delivered 27 April 2015

Applicant sought an order declaring that it was not liable to the respondent for arrears and charges on the account held by the previous property owners, and declaring that the respondent was not entitled to terminate the supply of services on the grounds that the previous owners were indebted

to it. Several aspects of the relief sought were conceded. At issue remained a counter-application by the respondent.

Strydom AJ held:

"In effect the respondent is applying for a declarator declaring that section 118(3) of the Local Government Municipal Systems Act … ("the Systems Act") should be interpreted to mean as set out in its Notice of Motion. First, the respondent requires form this court to interpret this section to mean that the municipal debt incurred in relation to property rates, taxes and charges for the provision of municipal services pertaining to all prior owners of the property ("the historical debt") constitute charges upon the property in terms of section 118(3) of the Systems Act. Second, the respondent asked the court to label the statutory right involved "a sui generis lien having the effect of a tacit statutory hypothec, created by operation of law, over the property". Thirdly, that these properties are, upon the granting of a monetary judgment against the historical owners, or any other person legally responsible for any such municipal debt, and subject to an order to such effect being granted, to be considered executable for the sum of such judgment." [Paragraph 11]

"What the respondent is now seeking is a declaratory that should it obtain a monetary judgment in future, which remains unpaid, then this court must now, at this stage, find that execution against the applicant's property can be effected." [Paragraph 12]

"The effect of granting such an order would be that if a judgment is obtained against anybody for payment of the debt for arrear municipal fees, rates and taxes in relation to the properties of the applicant, and the judgment amount remains unpaid, the applicant's properties may be sold in execution if the applicant fails to pay the debt of the historical owners. Without a doubt such order will have far reaching consequences as the judgment will be used to declare other properties executable should there be unpaid historical debt owing to municipalities." [Paragraph 13]

"The affidavits do not record that the respondent has taken any steps yet to recover the historical debt from the parties liable therefor. Indeed, it does not appear … whether the historical debt remains claimable or even if the respondent has a valid claim therefor. … [T]he respondent has not obtained a judgment against any one of the previous owners regarding their alleged outstanding debt. In fact, the wording … of the notice of motion in the counter application makes it clear that the relief is sought subject to the granting of a monetary judgment for payment of arrear municipal debt in relation to the properties of applicant." [Paragraph 15]

"Considering that the respondent has not obtained judgment against the debtors, the debt may be disputed by the historical owners. They may do so as they may still have a monetary interest in the existence and extent of the debt as they might have indemnified subsequent purchasers against outstanding municipal fees. These debts might have prescribed. …" [Paragraph 18]

"… [T]he relief in Part B of the Notice of Motion has been conceded. What the respondent also concedes … is that it has not started to take steps against the previous owners that are responsible for the historical debts. It first wants this court to confirm the legal position and to declare the properties of the applicant executable. On the respondent's own version, the Supreme Court of Appeal delivered judgments to the effect that execution can be effected against the properties in relation to which the debts were incurred. If this is the respondent's contention, it remains unclear

why it requires from this Court to re-state the law. I am of the view that to require from this Court to declare the properties of the applicant executable to recoup historical debt without any judgment that such debt is outstanding and payable is untenable." [Paragraph 20]

"I am of the view that before a court can declare property executable, the principle obligation, i.e. the principal debt must be established and a judgment obtained. ... Once a judgment is obtained relating to the principal debt, a party can proceed to obtain an order to declare the security in relation to that debt to be executable. Without the debt being determined, there is no dispute or *lis* that exists between the applicant and the respondent. ... [T]he applicant is not liable to the respondent for arrears or charges on accounts held by previous owners of the properties. Whether the respondent can execute against the property of the applicant to obtain payment of historical debts is another matter." [Paragraph 23]

"I am not convinced of the correctness of the argument ... to the effect that a municipality, pursuant to the terms of section 118(3), can execute against properties of a current owner in relation to previous owners' historical debt outside the ambit of a transfer of the property where a preference is provided over any mortgage bond registered against the property. I do not intend to decide this issue as it is my view that without a dispute or *lis* between the parties in this matter I should not exercise my discretion in favour of the respondent to grant declaratory relief. ... [W]here no *lis* exist between litigation parties a court should not exercise its discretion in favour of ordering declaratory relief. The relief that the respondent is seeking is sought in a vacuum as there exists no judgment debt to be enforced against the applicant's property. Once such judgment is obtained and the extent of the liability is established, the respondent can approach a competent court for a declarator in terms of which the properties are to be declared executable. ..."

The counter-application was dismissed.

SELECTED JUDGMENTS

CIVIL PROCEDURE

MBUYANE COMMUNAL PROPERTY ASSOCIATION V SIBIYA N.O AND OTHERS (2014/45865) [2015] ZAGPPHC 395 (17 JUNE 2015)

Case heard 18 May 2015, Judgment delivered 17 June 2015

Applicant sought to join the chairperson of South African National Parks to a review application wherein they sought to challenge SANParks' decision to re-open Skukuza Airport in the Kruger National Park to scheduled commercial air traffic.

Twala AJ held:

"… [T]he applicant requested certain documents from SANParks including those documents that contained the decision to reopen the Skukuza Airport. Applicant was furnished with documents which did not support the view that the decision was taken by management. Applicant served and filed a rule 30A notice to compel the first respondent to file a complete and or proper record of the proceedings wherein the decision was taken by SANParks to reopen the Skukuza Airport. The first respondent responded by filing a Rule 30 notice stating that the first respondent is a Chief Executive Officer of SAN Parks. As such the first respondent is a third party as far as the decision of SAN Parks, that the applicant seeks to set aside, is concerned." [Paragraph 4]

"I agree with the respondents that the CEO of SANParks is a third party in the review proceedings. The person that the applicant should have cited in the review proceedings is the chairperson of the board of SANParks. The CEO is the executive leading the management of SANParks and he reports to the board as an ex officio member of the board. Rule 53 states it clearly that for a review application for the decision of a board, such application shall be directed and delivered to the chairperson of the board." [Paragraph 9]

"The applicant … cited the CEO of the SANParks and served all the documents on the CEO as a representative of the board of SANParks. In the circumstances, although the correct person to be cited was the chairperson of the SANParks board, these proceedings did come to the attention of the board including the chairperson who is the presiding officer of the board." [Paragraph 10]

"The submission by the respondents that the applicant has by its conduct waived its right to join the chairman of the SANParks board, is unsustainable. Nothing suggest that the applicant deliberately excluded to join the chairperson of the board in the proceedings. It is clear that the applicant at all times was seeking an order to review the decision of SANParks and not the decision of the management of SANParks. Applicant therefore believed the citing of chairperson together with the CEO of SAN Parks was ex abudante cautela. That cannot be said to be in itself a clear intention to waive the right to join the chairperson of the board." [Paragraph 11]

"Applicant has requested documents from the SANParks which relate to the decision that led to the reopening of the Skukuza Airport. Applicant was not furnished with these documents or was furnished with some documents which did not contain the information on which the decision was based. The CEO

in its Rule 30 notice stated that it was a third party and only the chairperson of the board can provide such documents." [Paragraph 14]

"It is therefore my view that there is a case for the chairperson of the board to answer in the review application. He is the presiding officer of the board and is the custodian of the minutes of the board. It is necessary to join him in the proceedings. It is therefore in the interest of justice that he be jointed in these proceedings. No prejudice will be suffered by the board or the chairperson if joined in these proceedings for the board is aware of the review proceedings. The CEO is an ex officio member of the board and all the pleadings of the review application were served on him." [Paragraph 15]

"... T[he issue whether the application for review was lodge within the prescribed time frames as required by the law is for determination by the court hearing the review application. All issues relating thereto may be ventilated in that court." [Paragraph 16]

"I am persuaded ... that a costs order should be made against the applicant for its sloppiness in preparing its papers. Applicant brought the application for a joinder because it was necessary to join the chairperson of the board in the proceedings. It is not correct to say that the joinder application is brought as a matter of extreme and abundant caution. Applicant has proceduraily [sic] failed to join the chairperson of the board although at all times it was seeking to review the decision of the board. In my view the joinder application is necessary and for that reason the applicant is to bear the costs for making such an error." [Paragraph 17]

The joinder application was granted. Applicant was ordered to pay the costs of the application, including the costs of two counsel.

MARGRO V AMALGAMATED BEVERAGES INDUSTRIES (2005/2986) [2014] ZAGPJHC 358 (3 DECEMBER 2014)

Case heard 27 October 2014, Judgment delivered 3 December 2014

Defendant objected to a proposed amendment to the plaintiff's particulars of claim, on the basis that the right of action sought to be introduced had prescribed, and that the plaintiff was mala fide in seeking the amendment, and the amendment would prejudice the defendant. Plaintiff had brought a claim against the defendant based on a written agreement.

Twala AJ held:

"In my view the plaintiff's proposed amendment does not introduce a new right of action. It amplifies the relationship between the plaintiff and Melgro Services CC. Melgro Services CC is not a party to these proceedings and it is not necessary to join it in these proceedings, since there is no contractual relationship between Melgro Services CC and the defendant. The close corporation was merely a vehicle with which the plaintiff discharged its cartage obligations to the defendant. Therefore, the issue of prescription does not arise in this instance. Further, prescription is a special plea which the defendant is entitled to raise and can be properly dealt with at the trial of the matter." [Paragraph 8]

"It is trite that an amendment to the pleadings can be effected at any time before judgment in the matter. I agree with the plaintiff ... that time is not of essence in this proposed amendment, since the trial

of the matter is only in February 2015. The plaintiff will have ample time to effect an amendment to its plea should that be necessary. The issue that the employees of the defendant, who were present at the time of the conclusion of agreement, might have left the employ of the defendant now is not an issue. The defendant has been aware of this action since 2005 and of the plaintiff's intention to amend its particulars of claim since 2009. Therefore, the defendant should have made suitable arrangements in this regard. I therefore accept the view that the defendant has not shown that the plaintiff is mala fide in bringing this proposed amendment at this stage of the proceedings. I am of the view that there appears to be no prejudice that the defendant may suffer should the amendment be allowed." [Paragraph 11]

"I disagree that the proposed amendment is tantamount to a withdrawal of an admission. The conclusion of the contract between the parties is not in dispute. The amendment does not bring a new cause of action but simply amplifies the relationship between the defendant, the plaintiff and the close corporation. It amplifies the factual basis upon which the contract was entered into by the parties. It does not withdraw the admission that the parties concluded a contract and that the plaintiff's claim is based on the terms of the contract." [Paragraph 12]

The application for leave to amend the particulars of claim was granted.

CRIMINAL JUSTICE

MATEWANE V S (A590/13) [2013] ZAGPPHC 475 (11 NOVEMBER 2013)

Appellant was convicted of robbery with aggravating circumstances, and sentenced to three years' imprisonment. This was an appeal against conviction and sentence.

Twala AJ (Fabricius J concurring) held:

"The appellant was taken to the police station where when he was searched by the police, they found two cellphones on him and one was found in his underwear in his buttocks. The complainant identified one of the cellphone as his at that time. Under cross examination the complainant also mentioned that the sister of the appellant gave the appellant a cellphone, when he was taken by ambulance from the scene to the clinic …" [Paragraph 8]

"… [C]onstable Nkomo testified that he saw suspicious people on the street and when he stopped next to them, they ran away but he managed to catch one of them and that was accused number 4 on whom he found a wallet and bank cards and a knife. This accused decided to come clean when confronted that he was not alone but with accused number 1 and Search. When the appellant came at the police station with the ambulance, he searched the appellant and found two cellphones on him, one in his underwear in his buttocks." [Paragraph 9]

"It is a principle in our law that the evidence of identification should be approached by our courts with caution. The court must look at the totality of the evidence and the probabilities in the particular case before making a decision … On the evidence on record, the complainant saw the appellant when he stopped him and asked for cigarette, when he was assaulted by his accomplices immediately after robbing him, when they fetched him at the scene and travelled with him in an ambulance to the police station and when his cellphone was found on him in his underwear in his buttocks." [Paragraphs 11 - 12]

"The appellant was further pointed out by accused number 4 ... The other name of the appellant is Search and the cellphone of the complainant was found on him at the police station. His possession of the complainant's cellphone was immediate after the robbery on the complainant took place. Moreover, why would somebody put a cellphone in his underwear and in his buttocks, for that matter? ... Having regard to the above, It is my view that the Court a quo did not err or misdirected itself in finding that the state has proved it's case beyond reasonable doubt against the appellant and correctly returned a verdict of guilt on robbery with aggravating circumstances." [Paragraph 13 - 14]

"It appears from the record that a pre-sentencing report of the appellant was requested and it could not be finalised as the family of the appellant refused to sign the address for him. It was mentioned that, according to the family the appellant is not co-operative when given community based sentence and the family feels that he is better of in prison. It was placed before the court a quo that the appellant was unemployed and did not have money to pay a fine. ... The courts have been warned not to accept flimsy excuses to justify deviating from the prescribed minimum sentence. There should be substantial and compelling factors in existence to justify deviation from the prescribed minimum sentence ... However, the legislature has limited but not eliminated the discretion of the court ... It is therefore my view that the court a quo did not misdirect itself in sentencing the appellant to three (3) year imprisonment." [Paragraphs 18 - 20]

The appeal was dismissed.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE NORTHERN PROVINCES V MABASO (67671/2010) [2013] ZAGPPHC 483 (20 DECEMBER 2013)

This was an application to strike the respondent from the roll of attorneys. It was common cause that the respondent had misappropriated trust funds and utilised trust funds for his personal purposes; delayed the payment trust funds to trust Creditors; had a trust account deficit; effected irregular transfers from his trust account to his business banking account; contravened provisions of the Attorneys Act and Applicant's rules; failed to attend disciplinary proceedings; failed to give proper attention to the affairs of his clients; was unable to keep proper accounting records and proper books of account of his practice; and failed to answer correspondence from colleagues and that of the Law Society.

Twala AJ (Mabuse J concurring) held:

"The Respondent concedes that he misappropriated trust funds but justifies it in that he was expecting money from some of his clients who failed to pay him on time as was agreed. He further contended that it was only the one client's trust funds that were misappropriated but that client did not suffer any prejudice since the client concerned was paid in full by him." [Paragraph 5]

"The Respondent contended that he did not know much about the handling of the trust account. He was first admitted and enrolled as an attorney in the Thohoyando High Court in 2001. Thereafter, he was enrolled as an attorney in Cape Town in 2004 and only admitted and enrolled in this court in 2006. In Cape Town he could not secure any employment - hence he came back to enrol his name with this Court in 2006. He only worked for about a year as a professional assistant and decided to start practising on his

own account without any financial assistance in 2007. Between the period 2001 and 2007 he was only employed as a professional assistant and was never exposed to practical administering of a trust account or bookkeeping associated with it. He admitted having a certificate in "practice management" but alleges that it was issued to him without undergoing any formal training in that regard. He is prepared to attend a formal training on bookkeeping if he can be given an opportunity." [Paragraph 6]

"The other transgressions of the respondent, though serious, are of a lesser nature as compared to the misappropriation of trust funds ... These include the respondent's failure to give the necessary attention to the affairs of his clients, the failure to respond to correspondence of the Applicant and that of colleagues and failing to account to colleagues where the respondent was acting on behalf of a colleague as a correspondent. For all these transgressions the Applicant is still at liberty to haul the Respondent to its disciplinary committee. We are unanimous in our view that the above-mentioned transgressions do not per se attract the ultimate penalty of strike off." [Paragraph 8]

"... [T]he Law Society has established the offending conduct of the Respondent. An attorney is expected to keep proper books of account and to maintain and administer its trust account in the proper manner. The trust account should be maintained in such a way that it is not a cent less than required. It must always have sufficient funds to meet its obligations. A reasonable attorney will not utilise the funds in his trust account for his own personal purposes. ... Taking a leaf from the case of Summerley vs The Law Society of the Northern Province ... the conduct of the Respondent ... is not that of a reasonable attorney and therefore the Respondent is not a 'fit and proper' person to practise as an attorney of this Court." [Paragraphs 9 - 10]

Twala AJ then turned to deal with the sanction to be imposed:

"I have no doubt in my mind that the transgressions of the respondent are serious when viewed in totality. The court has now to decide whether they were serious enough to warrant the extreme penalty of striking - off. In my view the respondent was not found guilty of dishonesty and therefor the penalty of striking off is rather too severe ... This is so because, on the respondent's version, he did not have exposure to the administration and management of the trust account since his first admission as an attorney in 2001. He only started operating a trust account after he started practising on his own account in 2007." [Paragraph 14]

"The respondent appeared in person and did not strike me as a delinquent person but as someone who is prepared to learn and continue his professional career. Given a chance, the respondent undertook to attend the practice management course being offered by the Applicant. In my view, this court can play a pivotal role in protecting the public against the respondent by extending the suspension of the respondent with a further period of one year and ordering that he does not practise on his own account until he proves himself to this court that he is fit and proper to do so." [Paragraph 15]

Respondent was suspended for one year, and was precluded from practising for his own account for two years after the expiry of the one year suspension. The decision was overturned by the SCA in Law Society of the Northern Provinces v Mabaso (20252/14) [2015] ZASCA 109 (21 August 2015). The SCA found that the High Court had misdirected itself in finding that the respondent had not been found guilty of dishonesty [paragraph 16], and expressed "grave concern" with the finding as to the respondent's appearance and willingness to learn [paragraph 17]. The SCA ordered that the respondent be struck from the roll.

SELECTED JUDGMENTS

PRIVATE LAW

MARUMO, ISAAC AND ANOTHER V MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGMENT, CASE NO 2801/98 (WITWATERSRAND LOCAL DIVISION)

Case heard 30 March 1999, Judgment delivered 1 April 1999

The plaintiffs instituted action against the defendant for damages allegedly suffered as a result of injuries sustained as a result of the actions of a police officer employed by the defendant.

"... [T]he plaintiffs found their cause of action, either on Twala's unlawful conduct, having been committed by him in the course and scope of this employment by the defendant, or on Mochologi or Moleli having breached a duty of care owed to the plaintiffs." [Page 11]

"It is trite that a master is liable for the wrongs of his servant committed in the course and scope of his employment. It is equally trite that when a servant commits an act solely for his own interests and purposes, this is not done in the course of his employment and the master is not liable. The difficulty arises from the concepts "solely"." [Page 11]

"... [T]he pragmatic approach espoused by Hefer JA in Viljoen commends itself, with respect, to me. That approach, as I understand it, is simply that whether in given circumstances the servant was still acting in the course and scope of his employment, is determined by enquiring whether the servant's deviation from his master's work is so great in respect of space and time that he can no longer reasonably be held to have been about the activities for which he had been appointed." [Page 17]

"Consequently the method I propose to adopt is to determine the number and quality of the factors which kept connecting Twala to his employment, to weigh them against the number and quality of the factors which divorced Twala from his employment, and then to ask myself whether Twala, who started out his day in the conduct of his master's duties, could no long reasonably be held to have been about his master's duties at the time of the shooting." [Page 18]

"I do not make any factual finding as to whether in fact the attack on the house was a retaliation on Twala in his capacity as policeman, and whether consequently in turn of his shooting of the plaintiffs was but a further act of retaliation by a policeman in that capacity. Instead I refer to this evidence to how that there is, at least, a real possibility that the entire affair was in fact very directly related to Twala being a policeman, and that his motive in shooting the children in the van was far more complex than simply retaliation for damaged goods." [Page 22]

"In these circumstances I am not persuaded that a factual finding can be made that Twala's motives were solely the function of the damage to his property and completely unconnected with his capacity as a policeman. ... On these facts the actions of Twala at the time of the shooting were in my view more connected with the affairs of the employer than not, and I conclude that he was acting in his capacity as a policeman and within the course and scope of his authority as such." [Page 22]

The defendant was found to be liable to the plaintiff.

CIVIL PROCEDURE

HASMUKH V INTERNATIONAL BANK OF SOUTHERN AFRICA AND OTHERS; IN RE: INTERNATIONAL BANK OF SOUTHERN AFRICA AND OTHERS V HASMUKH (2001/17748) [2014] ZAGPJHC 325 (28 OCTOBER 2014)

Case heard 16 – 17 October 2014, Judgment delivered 28 October 2014

Defendants brought an application to dismiss plaintiff's action for want of prosecution. Plaintiff in turn applied to set aside this application as an irregular proceeding, on the basis that it was brought on short form rather than long form notice of motion.

Van der Linde AJ held:

"Turning then to the plaintiff's application, the essence of the argument is that since the defendants seek substantive and final relief, they ought to have used the long form notice of motion. The submission is that even although the original application to dismiss was also on a short form notice of motion and was by definition interlocutory in nature, the fact that the plaintiff did not then object to that form of procedure, did not mean that the plaintiff cannot now object to the form of procedure which the defendants have again adopted." [Paragraph 43]

"In my view, the application to dismiss a pending proceeding for want of prosecution qualifies as an application "incidental to" pending proceedings, and therefore the short form notice of motion was appropriate. I therefore dismiss the plaintiff's application, and I proceed to deal with the merits of the defendants' dismissal application." [Paragraph 50]

Van der Linde AJ noted that the issue depended on whether there had been compliance with a previous court order, and continued:

"Paragraph 3.5 [of the previous order] concerns the question of trial documents, and in particular the obligation on the plaintiff to provide a list of documents which it required the defendants to include in the trial bundle. The list ought originally to have been provided within two months of the date of the pre-trial conference, and it was not." [Paragraph 54]

"In my view the defendants' contention is sound. The terms of the order are unambiguous. They require that the list of documents is to be provided within three weeks from the date of the order. It was not. Accordingly in this respect the plaintiff has not complied with the provisions of the order. … This failure is not irrelevant in the context of the allocation of a trial judge. Without the plaintiff's list of documents a trial bundle cannot be prepared. And according to the practice manual, it is clear that before the commencement of a trial the parties must agree the evidential status of the documents contained in the bundle. … [T]he non-compliance with paragraph 3.5 of the order is not merely technical, without consequence." [Paragraphs 57 - 58]

"In terms of paragraph 3.6 of the order, the plaintiff was to provide, within three weeks from the date of the order, supplementary responses to the defendants' request for further particulars of trial …" [Paragraph 60]

"The question … was of course directed not at the information which the plaintiff asserts … was not available to him; the question was directed at the efforts that the plaintiff had made to obtain that information. The plaintiff clearly ought to know what efforts he made to obtain that information. … The plaintiff argues that should it be contended that the replies are inadequate, it is legitimate for a party that has been ordered to reply to a request for further particulars, to answer that the information sought is unavailable and unknown to him. However, in the present case the information must by definition be within the plaintiff's knowledge. … Moreover, the information is relevant. In the defendants' amended plea a plea of prescription is raised …" [Paragraph 65 - 67]

"It follows that the plaintiff did not comply with paragraph 3.6 of the order insofar as it relates to paragraph 7.44 of the defendants' request for further particulars for trial …" [Paragraph 69]

Van der Linde AJ continued to identify other instances of the order not being complied with, and continued to consider whether the plaintiff's claim should be dismissed:

"Since the summons in this matter was first issued back in 2001, and since there is as of October 2014 no trial date yet, there has clearly been a significant delay in the prosecution of the action. The internal periods of delay over the past 14 years that are particularly significant …" [Paragraph 100]

"Since it is clear that in fact the plaintiff had not complied with the order … the defendants' inability to be ready to proceed to defend the action against them is understandable. But in any event, the primary responsibility for energising the progression of the litigation is that of the plaintiff. And what therefore confronts the plaintiff is that, apart from the inexplicable lapse of five years between 2001 and 2007, on four of the five occasions on which a trial date had been allocated for the matter, the plaintiff was not ready to proceed. … In view of these moments, therefore, the delay was clearly inordinate; and the next question is whether it was excusable." [Paragraphs 113 – 114]

"The significant delays are not excusable. Rather, the picture that emerges is that of a plaintiff who has not prioritised the prosecution of his claims, that despite the lifeline which Mathopo, J had afforded him. There was, and apparently still is, no appreciation of the escalating urgency to have the matter adjudicated upon." [Paragraph 120]

"That the defendants are prejudiced by the delay must … be accepted as uncontestable. The only point ultimately made by the plaintiff in this regard is that the defendants are also to blame for the delay. But that point does not present an answer to the application. In my view it follows that the application must succeed." [Paragraph 130]

The plaintiff's claim against the defendant was thus dismissed.

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

PRIVATE LAW

SCHMITZ v SCHMITZ, UNREPORTED JUDGMENT, CASE NO. 14396/2010 (KWAZULU-NATAL HIGH COURT)

Case heard 2 March 2015, Judgment delivered 25 March 2015

The Plaintiff claimed a decree of divorce and certain other relief. The separated issues were whether the signing of a power of attorney by the parties and the initialling of the draft Antenuptial Contract constituted concluding an Antenuptial Contract prior to the commencement of the marriage, and accordingly whether the parties were married in or out of community of property. And, in the event that the parties were married out of community of property with the application of the Accrual system, whether the date for determination of any such accrual should be litis contestation, or the date of divorce.

Kruger J held:

"It is not in dispute that the Antenuptial Contract was not registered in the Deeds Registry as is required in terms of Section 87 of the Deeds Registries Act … Because of this, there can be no doubt that no formal Antenuptial Contract exits between the parties. What however emerges is the concession by the Plaintiff that prior to the marriage the parties agreed that their (future) marriage would be governed by an Antenuptial Contract …." [Paragraph 5]

"It is clear from the provisions of Section 86 [of the Deeds Registries Act] that an antenuptial contract which has not been registered in accordance with the provisions of Section 87 is of no force or effect as against any person who is not a party thereto." [Paragraph 7]

"The Antenuptial Contract would however be valid and binding as between the parties thereto. This is because the unregistered contract clearly reflected the common intention of the parties at the time the contract was entered into." [Paragraph 8]

"I am of the view however that an informal Antenuptial Contract existed between the parties. …" [Paragraph 10]

"… It is also evident from the Antenuptial Contract annexed to the said Power of Attorney that the parties intended the marriage to be subject to the accrual system." [Paragraph 11]

"The Defendant contends that the date for determination of any accrual in the estate of the parties is … when pleadings closed and litis contestatio was reached. The Plaintiff, on the other hand, contends that the date for determination should be that of the date of divorce." [Paragraph 14]

Kruger J considered South African authorities on the issue, before continuing:

"If it is to be accepted that the date of determination is the date of dissolution, then it would result in a peace-meal adjudication of issues resulting in further litigation between the parties. … This certainly could not have been the intention of the Legislature." [Paragraph 23]

"The practical effect of litis contestatio, being the date of determination of accrual will … expedite the trial and "do much to limit the temptation to squander assets that some spouses seem to find irresistible". It will also discourage (as is frequently experienced in divorce litigation) the situation where a spouse deliberately delays the proceedings in order to increase his/her claim when the divorce order is eventually granted. In this regard it would be inequitable to allow a spouse to share in the other's estate in circumstances where the parties have been separated for a number of years and have each moved on with their lives and the one party's estate has grown over this period. Perhaps a more compelling reason for litis contestatio being the date for determination of accrual is the fact that at litis contestatio at the latest, the underlying partnership between the parties to a marriage has reached its end. This will enable the parties to correctly ascertain the accrual, if any, that has occurred during the course of the marriage." [Paragraph 24]

"I am accordingly of the view that the date for determination of accrual is at litis contestatio. This would ensure consistency and economic equity between the parties." [Paragraph 25]

It was declared that the marriage was one out of community of property and subject to accrual, and that the date for determination of accrual was litis contestatio.

CIVIL AND POLITICAL RIGHTS

THE NATAL JOINT MUNICIPAL PENSION FUND AND OTHERS V MUNICIPAL EMPLOYEES PENSION FUND AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 3144/2013 (KWAZULU-NATAL HIGH COURT)

Case heard 24 June 2014, Judgment delivered 6 October 2014

This case related to the question whether a pension fund from another province was entitled to recruit membership of KwaZulu-Natal municipal employees, and whether the employees were bound by virtue of their employment to be members of a Kwazulu-Natal Pension Fund. The First Respondent (the MEPF) contended that it was not prohibited from operating in KwaZulu-Natal, and in the alternative that such prohibition was in breach of the right to the freedom of association enshrined in Section 18 of the Constitution.

Kruger J held:

"The object of the Legislation and Ordinances is clear, viz – to establish funds to provide a pension benefit and lump sum benefits for the employees (and their dependants) of Local Authorities in KwaZulu-Natal. … In order to give effect to this the regulations obliged all Local Authorities, within the Province of KwaZulu-Natal, to be associated only with the Applicants." [Paragraph 27]

"Despite the criticism levelled at the use of the phrase "ordinary meaning of the words" as it is and has been commonly used in ascertaining the intention of the Legislature, it is clear that the intention of the Legislature, in respect of the provisions referred to in this judgment, can be ascertained simply from what the words ordinarily mean. There can be and is only on interpretation, namely, that all Local Authorities in KwaZulu-Natal are obliged to be associated with one of the Applicants and no other. This would, in my view, rule out an association with the MEPF." [Paragraph 28]

"When one considers the relationship between the Local Authorities and its employees and the obligations imposed upon the local Authorities in particular with regard to the collection and payment of contributions as well as their contributory share to the Applicants, it is not surprising that the regulations create an obligatory membership to the Applicants by the employees as well. This is the only sensible and businesslike interpretation of the ordinances and the KZN Act and their regulations." [Paragraph 29]

"A closer examination of the regulations reveal the symbiotic relationship between the Applicants, the local Authorities and their employees. … Once the employees select the fund they want to belong to, the employer (Local Authority) associates itself with that fund. If it is not one of the Applicants funds then the employer cannot be associated with it and consequently neither can the employees. This is because of the obligations imposed on the employer in terms of the Applicant's regulations." [Paragraph 30]

Kruger J then turned to consider the MEPF's alternative submission that the prohibition of association with the MEPF is in breach of the right to freedom of association:

"The difficulty with the MEPF's submission is that it lacks the necessary locus standi to raise this issue. As a pension fund, the MEPF does not independently enjoy the right to freedom of association upon which it relies. It is the individual employees of the Local Authorities who would enjoy such right. As the MEPF has instituted into the main application in its own interest and has opposed this application in his own interest, it has no legal standing to assert he right to freedom of association." [Paragraph 38]

"In any event I agree … that the obligatory membership as provided in the Ordinances and the KZN Act to the extent that they may violate a party's constitutional right, would be justifiable under the limitations clause. In deciding whether or not to take up employment with a Local Authority, a person is required to exercise his or her contractual autonomy in deciding whether or not to accept employment on the terms offered. Because association with one of the Plaintiff's funds is obligatory, should a prospective employee decide not to join one of the Applicants Funds, he or she has the right to refuse to accept the employment offered. The decision, whether to contract or not cannot be a breach of the right of freedom of association. In Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en 'n ander… it was held that an obligation to be associated with a particular pension fund in the context of conditions of service and employment benefits for employees of the entity laying claim to the right, did not amount to an infringement of the right to freedom of association." [Paragraph 39]

It was held that the MEPF was prohibited from soliciting members from the ranks of the KwaZulu-Natal municipal employees.

CIVIL PROCEDURE

KANESCHO REALTORS (PTY) LTD v MAPHUMULO AND OTHERS; CHETTY NO AND ANOTHER v THAVER AND ANOTHER; FISHER STREET INVESTMENTS (PTY) LTD v KABINAKANWA; SHAMSHA INVESTMENTS (PTY) LTD v KHAN [2005] 4 ALL SA 543 (D)

Judgment delivered 11 July 2005

The applicants sought the eviction of the respondents in terms of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE). The applications were in the form of Notices of Motion

containing a "First Order Prayed" and a "Second Order Prayed". The issue for determination was whether these applications complied with section 4 of PIE.

Kruger J held:

"The provisions of PIE were formulated to provide for the prohibition of unlawful eviction and to provide for procedures for the eviction of unlawful occupiers who reside on land ..." [Paragraph 3]

"The provisions of PIE which are of particular relevance to this matter are the following: "4(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the Municipality having jurisdiction." [Paragraph 4]

"It has also been held by the Supreme Court of Appeal that the 14-day notice period provided for in section 4(2) of PIE must be given in addition to the normal notice given to a respondent in terms of rule 6 of the Uniform Rules of Court. It accordingly follows that where persons are to be evicted from their residences they are to be afforded a greater opportunity in preparing their defences or formulating their submissions." [Paragraph 6]

"There is a misconception that the provisions of PIE, as interpreted by the Courts, will result in undue delay. Accordingly, a practice appears to be developing whereby the applicants attempt to truncate proceedings by obtaining orders of the Court which are inappropriate and are contrary to the provisions of PIE as well as the decision of the Supreme Court of Appeal. It is also often confusing to respondents. This practice is in the form of the applicants seeking a "First Order Prayed" and a "Second Order Prayed" in terms of which they attempt to comply with the provisions of PIE." [Paragraph 7]

"The orders requested in the present applications are a typical example of the procedure and practice which appears to be developing." [Paragraph 8]

"The order that has been requested is clearly incorrect and does not accord with the provisions of PIE, the interpretation of the provisions of PIE by the Supreme Court of Appeal as well as the Uniform Rules of Court. In its original form, the order did not make provision for the respondents to notify their intention to oppose the proceedings within a specified time period nor did it inform them of the right to file affidavits thereafter as provided for in rule 6(5)(b) of the Uniform Rules of Court." [Paragraph 9]

"Where an application for ejectment in terms of PIE is made, following the First Schedule, Form 2(a) Notice of Motion (the long form of Notice of Motion) three situations present themselves, viz: (a) The application may be undefended; (b) The application may be defended up to a point, that is to say, a Notice of Intention to Oppose may be delivered but the respondent may thereafter fail to deliver any answering affidavits (or indeed take any other steps to pursue such defence); and (c) The application may be defended to the full." [Paragraph 10]

"Accordingly, in my view, the procedure to be adopted, (excluding urgent applications in terms of section 5 of PIE) is as follows: (a) An applicant is to utilise a Form 2(a) Notice of Motion and claim therein the necessary relief for eviction. (b) Provision is to be made for a date to be inserted by the applicant, being a day not less than five days after service of the application, by which a Notice of Intention to Oppose must be delivered. (c) Provision is to be made for a date to be inserted being a day upon which the application will be heard, in the absence of a Notice of Intention to Oppose. (d) The date envisaged in paragraph (c) above is to be sufficiently calculated to enable an ex parte interlocutory application for the authorisation

of a notice in terms of section 4(2) of PIE to be prepared, entertained by the Court and the order granted to be served." [Paragraph 12]

"Should the aforementioned procedure be adopted and followed, the entire application ought to be disposed of in no later than five weeks. The advantage of following this procedure is that the respondents will be informed, at the very outset, that the application will be heard on a specific date, if undefended, and accordingly will not be confused by receiving either a notice which does not stipulate a date of hearing or, in the alternative, has different dates upon which the respondent is to appear in Court. A further advantage is that the section 4(2) Notice will also contain the exact same date of the hearing and will not only obviate any confusion but will also allow a respondent a further 14 days within which to oppose the application, thus fulfilling the objectives of PIE." [Paragraph 13]

Kruger J held that the 4-step procedure outlined above could be successfully used whether the matter was undefended, partly defended or fully defended, and in all instances the provisions of section 4 of PIE would be complied with.

"Further concerns have been raised regarding "Double Service" or "Double Appearance" as well as the prospect of incurring unnecessary costs. It is however noted that the provisions of PIE, coupled with the interpretation thereof by the Supreme Court of Appeal, clearly envisages two services – that of the application papers and that of the section 4(2) Notice – as well as two appearances – the first being for the authorisation of the section 4(2) Notice and the second being to obtain the relief for eviction. Accordingly these concerns are ill-founded." [Paragraph 23]

"As regards the question of costs, I am of the view that should the applicants follow the procedure as outlined above, it would not increase costs but would rather save costs. This would result as the application papers would be streamlined to deal only with the actual relief for eviction and not with issues relating to the provisions of PIE. …" [Paragraph 24]

The application was dismissed.

CRIMINAL JUSTICE

ZONDO v S, UNREPORTED JUDGMENT, CASE NO. AR118/14 (KWAZULU-NATAL HIGH COURT)

Case heard 30 January 2015, Judgment delivered 19 February 2015

This was an appeal against sentence. The appellant was convicted of raping a 10 year old child and sentenced to life imprisonment. Writing for the majority, Vahed J (Chetty J concurring) disagreed with the conclusion reached by Kruger J and stated that "to suggest … that a sentence of 15 years imprisonment is appropriate and proportionate to the crime would be doing an injustice…." The sentence of life imprisonment was set aside and substituted with one providing for a sentence of 20 years imprisonment.

Kruger J dissented:

"The judgment on sentence [in the court a quo] is very scant and is eighteen lines long. Apart from reference being made to the Appellant's age, there is no indication that the Court considered his

personal circumstances. Most of the sentence, although brief, centred around the interests of society and the reason why the Minimum Sentences Act was passed. The Court a quo concluded by holding that although it was established that the complainant "was not injured in any other way than the injuries occasioned by the rape itself", this was not sufficient to warrant a departure from the imposition of the minimum sentence of life imprisonment. The Court was of the view that as a girl under the age of sixteen years was raped, it automatically called for a sentence of life imprisonment." [Paragraph 2]

"It is … clear from … S v Malgas that it is incumbent upon the court, before imposing a prescribed sentence, to assess, upon a consideration of all the circumstances of that case, whether the prescribed sentence is indeed proportionate to the offence committed. The Court a quo, in my opinion, failed to take this into consideration and accordingly misdirected itself. Given this misdirection, this Court is entitled to reconsider the sentence imposed and to evaluate whether life imprisonment is indeed an appropriate sentence, regard being had to the test as set out in S v Malgas …" [Paragraph 4]

"As found in the Court a quo, there was no extraneous violence and no physical injury was caused to the complainant other than the physical injury occasioned by the act of rape itself. There was also no threat of any extraneous violence of any kind. The complainant certainly did not testify that she was threatened not to reveal to any person what had happened to her. As mentioned earlier in this judgment, the Court a quo found that the entire incident had no adverse effect on her school work. … [T]here is nothing on the record to measure the emotional impact of the offence upon the complainant. Notwithstanding this, I agree with the sentiments of Nugent JA in S v Vilakazi … where he remarked that: "I think it must be accepted that no woman, and least of all a child, would be left unscathed by sexual assault, and that in this case the complainant must indeed have been traumatised…"." [Paragraph 8]

"The Appellant was twenty-seven years old at the time and was a first offender. I agree with the submission by counsel on his behalf that the Appellant's actions on the day was a singular brief lapse of behaviour on his part. The Court a quo failed to take into consideration that the Appellant had spent two years in custody awaiting the finalisation of this matter. The only aggravating feature is the complainant's age. This alone, in my view, does not warrant an automatic imposition of life imprisonment." [Paragraph 9]

"… I am of the view that the imposition of the prescribed minimum sentence would be unjust and would be disproportionate to the crime, the criminal and the needs of society." [Paragraph 10]

Kruger J proposed that the life sentence be set aside and substituted with a sentence of 15 years.

S v NZAMA AND ANOTHER 2009 (2) SACR 326 (KZP)

Case heard 23 February 2009, Judgment delivered 2 April 2009

Appellants were convicted of housebreaking with intent to rob and robbery with aggravating circumstances, and of murder. The convictions rested largely on confessions they had both made to a police officer. They argued that the confessions should not have been admitted since it could not be safely concluded that the confessions had been made freely and voluntarily, because of the environment in which they had been taken. Reliance was placed on the fact that the investigating officer was a

subordinate of the police officer who took the confessions, and that certain other police officers, including the investigating officer, might have been in the room at the time the confessions were taken.

Writing for the majority, Wallis J (Levinsohn DJP concurring) held that where evidence of improper inducement was lacking or was not credible, there was no authority for holding that undesirable environmental features on their own constituted a sufficient basis for reasonable doubt as to whether or not the confession had been freely and voluntarily made. The appeal was dismissed.

Kruger J dissented:

"The onus of proof rests on the State to prove beyond a reasonable doubt that a confession was freely and voluntarily made by the accused, in his or her sober senses and in the absence of undue influence." [Paragraph 5]

"Labuschagne J, in S v Mokoena and Others … cautioned that, where statements of the accused are the only evidence implicating them in the commission of the crimes, a court must be mindful that circumstances may arise which call for a particularly careful assessment of the question whether the statements of the accused were made freely and voluntarily." [Paragraph 7]

"The assistance by fellow police officers in assisting to take a confession, particularly one from the same unit as the investigating officer, has been repeatedly criticised. … That approach is all the more applicable in casu. Captain Hodgett … took both accused's confessions in a single room, whilst both sat together, and this was done shortly after their arrest, and after both the accused had been taken on an almost four-hour journey, where the accused contended that they were assaulted. Neither the investigating officer nor Captain Hodgett who were assisted, offered to take the accused to the magistrate for the recording of such confessions, notwithstanding accused 2 having specifically requested to be taken to one." [Paragraph 32]

"It has been held that the untrustworthy evidence of an accused, even where the court did not believe the evidence of the accused and found the accused to be lying, does not automatically render the confessions admissible. … The ultimate test is whether the State has discharged its onus beyond a reasonable doubt." [Paragraph 37]

"Regard being had to the State's own undisputed testimony as to how the accuseds' statements came to be taken does in itself beg questions as to whether the accused were not influenced thereby to make such confessions. The admitted role of the police in obtaining the accuseds' statements, as discussed earlier, is of concern and leads one to the inescapable conclusion that something happened to induce the accused on that day to make the statements which they did." [Paragraph 38]

"I am not satisfied that the State has proved, beyond a reasonable doubt, that the accused were not unduly influenced to make the confessions to Captain Hodgett. The prerequisites in s 217 of the Criminal Procedure Act, especially the free and voluntary requirement, have, to my mind, not adequately been met. Accordingly, in my opinion, the State had failed to discharge the onus which rested upon it." [Paragraph 39]

"In the result, I would allow the appeal and set aside the convictions and sentences of both appellants." [Paragraph 40]

ADMINISTRATION OF JUSTICE

WICKS v S, UNREPORTED JUDGMENT, CASE NO. AR624/10 (KWAZULU-NATAL HIGH COURT)

Case heard 8 November 2012, Judgment delivered January 2013

The Appellant was convicted in the Commercial Crimes Court of three counts of fraud. The Appellant appealed against both the conviction and sentence on the merits, and on the ground that he did not receive a fair trial. The Appellant argued that there were a number of irregularities in the trial, including that the Magistrate had allegedly intervened during the proceedings in a manner that sustained the inference that the Magistrate had not been fair and impartial.

Kruger J (Moodley AJ concurring) held:

"… The trial in the Court a quo was lengthy and spanned four years. The situation in the Court was tense. All witnesses were extensively cross-examined. The behaviour of senior counsel, Mr Hewitt, in my view, contributed to much of this tension. Indeed the manner in which he conducted himself at times during the trial and the comments he made are shocking and unbecoming of an officer of the Court, especially one who holds the title of senior counsel. …" [Paragraph 30]

"The record however shows that the Magistrate constantly intervened in the proceedings and that this had the effect, at times, of impeding cross-examination. More startling is the Magistrate's constant interruption during the Prosecutor's cross-examination of the Appellant. Not only did this frustrate Appellant's counsel, but the record clearly shows that the Prosecutor became frustrated by the constant interruptions by the Magistrate. …" [Paragraph 31]

"… There are, of course, instances where the Magistrate's questioning was legitimate and sought clarification and illucidation of issues. However, the record is replete with interventions by the Magistrate, many of which were, in my opinion, unwarranted and unnecessary." [Paragraph 33]

"… What is clear … is that he descended into the arena and at times appeared to assume the Prosecutor's role in cross-examining the Appellant. …" [Paragraph 34]

"Having regard to the limitations referred to by Trollip AJA in S v Rall … I am of the opinion that because of the frequency of the interventions, the length, timing and tone of the questions, and the content thereof, an impression of non-impartiality was created. As a consequence, the Magistrate's transgressions of the limitations referred to in S v Rall … constituted an irregularity in the proceedings. Did this irregularity result in a failure of justice? I am inclined to answer in the affirmative. I am of the opinion that the Appellant was prejudiced and did not receive a fair trial. There are clear instances in the record where the Magistrate appeared to have pre-judged the case and was indifferent to the objections that he was in fact doing so and that as a consequence the Appellant was not obtaining a fair trial. As a result, I am of the view that the Magistrate was not open minded, impartial and fair during the trial. In these circumstances the proceedings are invalid and the conviction and sentence must be set aside." [Paragraph 35]

The appeal was upheld and the conviction and sentence 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 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 (K Pillay J concurring).

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

COMMERCIAL LAW

ALTON COACH AFRICA CC v DATCENTRE MOTORS (PTY) LTD T/A CMH COMMERCIAL 2007 (6) SA 154 (D)

Case heard 22 December 2006, Judgment delivered 22 December 2006

The applicant successfully applied for an order interdicting the respondent from pursuing the liquidation of the applicant pending the determination of whether there was a bona fide dispute as to the existence of an alleged debt. The dispute related to whether the alleged debt was 'due'. The 'debt' referred to damages suffered by the respondent when the applicant repudiated a contract between the parties. An order was granted in the form of a rule nisi. On the return day the applicant contended that the words 'then due' had to be understood to mean 'due and payable'. It was argued that this would exclude a claim for loss of profit. The applicant sought costs on an attorney and client scale on the basis that the respondent was merely employing a tactic aimed at compelling the applicant to pay the alleged debt, thereby abusing the court process.

Ndlovu J held:

"... [T]he words 'then due' in s 69(1)(a) of the Act must also be understood to mean 'due and payable' in terms of the interpretation of these words in GATX-Fuller v Shepherd and Shepherd ... The point raised by the applicant was therefore that the amount of R1 118 910 claimed by the respondent was, as at the time the s 69 notice was issued, not due and payable by the applicant to the respondent, in any event." [Paragraph 28]

"It follows ... that in the light of the provisions of s 66 of the Act, the word 'debt' in s 69(1), to the extent of its application to paras (a) and (b) of that subsection relates only to those debts which have become due and payable. That would therefore, in turn, relate to claims for liquid debts or liquidated amounts in money. There is no suggestion in the present instance that the amount of R1 118 910 claimed by the respondent from the applicant was either a liquid claim or a claim based on a liquid document. However, the respondent contended that the claim was in respect of a liquidated amount in money. I do not agree. In Lester Investments (Pty) Ltd v Narshi ... the Court determined that a liquidated debt sounding in money was one which was either 'admitted or its money value has been ascertained or in the sense that it is capable of prompt ascertainment'. ..." [Paragraph 32]

"... [T]he respondent's claim was not, in my view, 'easily determinable' as contended by the respondent and therefore not a claim for a liquidated amount sounding in money. It was, to my mind, clearly an illiquid claim for damages. ..." [Paragraph 33]

"...Therefore the applicant was entitled, in my opinion, to institute the current interdictory proceedings against the respondent with a view to prohibiting the already initiated liquidation process, which was clearly unjustified, from proceeding any further" [Paragraph 36]

Ndlovu J then turned to the applicant's request for a costs order against the respondent on attorney and client scale.

"Indeed, it does appear in the present instance that the respondent's setting in motion of a process aimed at the institution of the liquidation proceedings against the applicant was only a tactical device to

compel the applicant, willy-nilly, to pay the alleged debt. For instance, on the same day the respondent applied for the bond of security … the news had dissipated through to the applicant's creditors including one of the applicant's major creditors. …" [Paragraph 38]

"The respondent neither withdrew the bond of security nor advised the applicant's creditors that it (the respondent) was not proceeding with the intended liquidation proceedings. Nor did it heed the warning or threat by the applicant that upon failure by the respondent to withdraw the bond of security and to advise the applicant's creditors aforesaid, the applicant would approach the Court for an interdict. When the present application was subsequently lodged … the respondent still did not consider it appropriate to withdraw the bond of security and advise the applicant's creditors that the liquidation application would no longer be proceeded with. Instead, the respondent filed an opposing affidavit which, together with annexures … ran from pages 33 to 132 of the indexed bundle. In my view this was an absolute abuse of the Court process that warranted punitive costs against the respondent." [Paragraph 40]

The rule nisi was confirmed with costs on the scale as between attorney and client.

CIVIL PROCEDURE

ETHEKWINI MUNICIPALITY v ADMED INVESTMENTS CC AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 2604/2012 (KWAZULU-NATAL HIGH COURT)

Case heard 27 February, 15 and 19 April 2013, Judgment delivered 8 May 2013

Applicant sought interdictory relief against the first and second respondents to direct them to remove an advertising sign from vacant land. First respondent opposed the application and filed a counter-application. Since the counter-application raised constitutional challenges, the first respondent had to comply with rule 16A(1) of the Uniform Rules. The issues before the Court were the applicant's application for condonation of its late filing of the combined answering/replying affidavit, and the first respondent's non-compliance with rule 16A(1) and its application for condonation of the late filing of the rule 16A(1) notice.

Ndlovu J held:

"The provision in rule 27(3) of the Uniform Rules that "[t]he court may, on good cause shown, condone any non-compliance with these rules" clearly indicates that the Court has a discretion in determining whether or not to grant an application for condonation of non-compliance with the rules." [Paragraph 14]

"In other words, a condonation application is not just a formality or merely something for the taking; so a full and detailed account of the causes of the delay and the effect thereof must be furnished. The more serious the consequences of non-compliance, the more difficult it will be for the party seeking condonation to have its application granted. It is therefore important that a party seeking condonation must, firstly, tender an explanation in order for the Court to understand fully how the non-compliance occurred; and secondly, show that the explanation so tendered is bona fide and not unfounded." [Paragraph 5]

"At the end of the day, the Court has to be satisfied that a valid and justifiable reason exists why non-compliance should be condoned. The essence of the issue is fairness to both sides. However, when the failure to comply with the rules has been flagrant and gross, condonation will not be granted, regardless of the prospects of success on the merits of the party seeking condonation." [Paragraph 6]

Turning to the applicant's application for condonation of its late filing of the combined answering/replying affidavit, Ndlovu J held:

"In my view, lateness by only 22 days was, in the circumstances of this case, not a grave matter. Having considered the reasons proffered for this fairly short period of lateness I am satisfied that the reasons are valid and sincere. …" [Paragraph 22]

"… I am inclined to find that the applicant has shown good cause why condonation should be granted. Accordingly, the application for condonation of the late filing of the applicant's combined answering/replying affidavit succeeds." [Paragraph 23]

Turning to the first respondent's non-compliance with rule 16A(1) and its application for condonation of the late filing of the rule 16A(1) notice, Ndlovu J held:

"The word 'shall' interspersed throughout the entire rule 16A(1)doubtlessly demonstrates the degree of peremptoriness and importance of the rule. The rule was clearly intended to serve a specific public service. Indeed, it has been said that as constitutional matters often have consequences that go beyond the parties concerned, such matters should be brought to the attention of those who may potentially wish to intervene in the proceedings." [Paragraph 28]

"Rule 16A(1) leaves no doubt or uncertainty as to the stage of proceedings when the notice must be filed … This must happen "at the time of filing the relevant affidavit or pleading" unless the Court, in the exercise of its discretion, as envisaged in terms of sub-rule (9) of the rule, directs otherwise." [Paragraph 29]

"The first respondent conceded … that the rule 16A(1) notice ought to have been filed by it "when it raised the constitutional issue in June 2012". However, for no apparent valid and just cause the first respondent elected not to comply with the rule. …" [Paragraph 44]

"… I am satisfied that the explanation proffered by the first respondent for its failure to comply with rule 16A(1) is neither valid nor bona fide. … [T]he first respondent has dismally failed to furnish a valid, bona fide and justifiable reason why non-compliance should be condoned. … [T]here was virtually no explanation at all for the non-compliance…." [Paragraph 48]

"… I am not satisfied that the first respondent has made out a case for condonation … The application for condonation must, therefore, fail." [Paragraph 51]

"The next question is what effect or impact my refusal to grant condonation should have on the first respondent's case. … [B]y the nature of its peremptoriness … rule 16A is certainly a very important provision which parties contemplating to raise any constitutional challenge ought to be warned not to pay lip service to. It seems to me that in an appropriate case where a party has deliberately, grossly or flagrantly flouted the rule, the consequence may well be the dismissal of the application/action or the defence concerned, as the case may be. Such should be the consequence here." [Paragraph 52]

"Mr Van Niekerk submitted that in dismissing the counter application the Court should mark its displeasure by awarding costs against the first respondent on the scale as between attorney and client. The SCA intimated in Phillips, that it is now settled practice by the Courts to recognise "…the possible 'chilling effect' that an award of costs may have on litigants wishing to vindicate their constitutional rights, where the litigation in question is not frivolous or vexatious." … However, a distinction should be made in cases, such as the present, where the constitutional litigation is commercial in nature and the losing party is, after all, making money out of the commercial business concerned. …" [Paragraph 55]

"Indeed, whilst the first respondent's apparent deliberate and somewhat arrogant conduct in its dismal and unashamed handling of the rule 16A issue would ordinarily tend to persuade the Court to seriously consider awarding costs against the first respondent on a punitive basis, I am persuaded to lean in favour of leniency in this regard and to award costs on party and party scale." [Paragraph 56]

The first respondent's counter-application was dismissed with costs. The applicant's main application succeeded.

CRIMINAL JUSTICE

S v KHESWA AND ANOTHER 2008 (2) SACR 123 (N)

Case heard 20 October 2006, Judgment delivered 14 November 2006

This was a special review regarding certain sentences imposed by a regional magistrate.

Ndlovu J (Reyden and Nicholson JJ concurring) held:

"… The treatment of the three accused was completely devoid of a fair trial to which they were entitled in terms of the tenets of natural justice and the Constitution (s 35(3) of the Constitution …." [Paragraph 15]

"It follows that the sentences imposed on both accused cannot stand and they both fall to be reviewed and set aside. What then remains is whether full effect must be given to both orders as they appear in McCall J's judgment. Indeed, the case of accused 2 is clear that he must be dealt with as ordered by the learned judge. However, with regard to the order pertaining to accused 3, I would propose a variation of the order for the reasons which I set out presently." [Paragraph 16]

"Since the learned judge dealt with the matter (in respect of accused 2 and 3) on the basis that he was not satisfied that the s 112(1)(b) questioning was properly conducted to justify the convictions, he ought, with respect, to have invoked the provisions of s 52(2)(c)(i) and not s 52(3)(b) of the Act, as he did. …" [Paragraph 17]

"Section 52(3)(b) of the Act was …specifically intended to apply in instances where an accused pleaded not guilty in the regional court (the trial which followed resulting in a referral under ss (1)(b)). On the other hand, in cases where an accused pleaded guilty, as in the present (resulting in a referral under ss (1)(a)), s 52(2)(c) applied. In the event of some doubt whether the proceedings in the regional court were in accordance with justice this court shall, in the former situation (involving s 52(3)(b)), call for the regional magistrate's statement setting forth his or her reasons for convicting the accused…; whereas in

the latter instance (involving s 52(2)(c)) the court shall enter a plea of not guilty and direct that the matter be proceeded with as a summary trial before the court. This procedure is clearly peremptory. …" [Paragraph 18]

"Clearly, the procedure under s 52(2)(c) does not allow the court to question the accused afresh but instead it enjoins the court simply to enter a plea of not guilty and proceed with the matter as a summary trial. …" [Paragraph 20]

"It is however unclear to me why the Act did not empower the court to apply the procedure of questioning the accused afresh in terms of s 112(1)(b). The accused concerned may indeed have truly and sincerely desired to plead guilty but only for the regional magistrate who conducted the s 112(1)(b) questioning improperly or irregularly. It seems to me therefore that the implementation of the s 52(2)(c) procedure does result, in some cases, in an unnecessary waste of time and expense on the part of all concerned in the criminal trial at hand, which absurd consequence was, I believe, not what the legislature foresaw when it passed the Act." [Paragraph 21]

"Therefore, in the present instance, until such time that the legislature attend to the apparent detrimental effect of the s 52(2)(c) procedure, the court may not question accused 3 in relation to the charges with a view to verifying his guilty plea explanation thereto. The court is obliged to enter a plea of not guilty and direct that the matter be proceeded with as a summary trial before the court." [Paragraph 22]

"… [D]oes the court have the power to vary the order made by McCall J? Would the variation not amount to reviewing a judicial decision made by a judge? Indeed, neither at common law nor under any statute is such a step permissible." [Paragraph 23]

Ndlovu J considered South African case authority on the issue, before continuing:

"It is therefore now settled that a judicial decision made by a judge can only be appealed against but is not subject to review under any circumstances. Significantly, however, for such a decision to be appealable it must be a final decision and not a provisional or interlocutory one. In civil proceedings it is trite that an interlocutory order may at any time before final judgment be rescinded or varied by the judge who made it or by any other judge (in the event of the judge who made the order not being available) under certain circumstances." [Paragraph 27]

"Interlocutory and provisional orders include interim relief, ex parte orders and rulings. There is no reason, in my view, why the same principle applicable to these types of orders (pertaining to their variation as discussed above) should not be applied in criminal proceedings as well where it is appropriate and suitable to do so." [Paragraph 31]

"McCall J's order (when he invoked s 52(3)(b) of the Act) in no way disposed of this matter, but it essentially served as a directive addressed to the regional magistrate in relation to further conduct of proceedings in the matter. The directive related only to the procedural aspect of the case. It follows, accordingly, that the order was in the nature of an interlocutory order which was subject to be varied or set aside, by virtue of its patent deficiency either by McCall J himself or by any other judge serving in this division. …" [Paragraph 32]

The sentences imposed on accused 2 and 3 by the regional magistrate were set aside.

S v DAMANI, UNREPORTED JUDGMENT, CASE NO. DR224/14 (KWAZULU-NATAL HIGH COURT)

Judgment delivered 9 December 2014

This was an automatic review in which the question arose whether any of the 11 official languages may be used at any stage of the criminal proceedings, at the instance of an accused or at the discretion of the court concerned; or whether a language of record should be prescribed for court proceedings.

Ndlovu J (Nkosi J concurring) held:

"A magistrate's court is established under, and governed by, the provisions of the Magistrates' Courts Act. Section 6(1) of that Act provides, inter alia, as follows: "Medium to be employed in proceedings (i) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used."" [Paragraph 7]

"Obviously, section 6(1) of the Magistrates' Courts Act, above, must be read with section 6(1) of the Constitution which provides that "[t]he official languages of the Republic are Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu". Taken literally, therefore, any of the 11 official languages "may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used". This was a drastic, but necessary, departure from the pre-1996 Constitution era where, in terms of the repealed Republic of South Africa Constitution Act, only English and Afrikaans were the official languages of record." [Paragraph 8]

"It is common knowledge that, during the pre-1996 period aforesaid, the indigenous languages of the people of this country did not receive proper recognition, in comparison to English and Afrikaans. Hence the Constitution put in place appropriate provisions to redress that discriminatory imbalance. …" [Paragraph 9]

"As to the question of language to be used during criminal proceedings, the Constitution stipulates that "[e]very accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language." It is clear, however, that this provision does not extend to, or confer upon, an accused person a right to be tried in a language of his or her own choice. … The provision simply means that an accused is entitled to understand the language used during the proceedings either directly or through an interpreter. In other words, it seems to me, the language used need not be the mother tongue of the accused concerned; but it must the language which the accused understands." [Paragraph 10]

"Indeed, it would be a constitutional ideal to cherish the day we saw every court in the country operating in the language predominantly used in the area or region where the court is situated. … [F]rom a theoretical perspective, any of the 11 official languages may be used at any stage of the court proceedings and the evidence be recorded in the language so used. However, it seems to me, from empirical perspective, that the realisation and implementation of this constitutional ideal has, thus far, proved elusive or impracticable. …" [Paragraph 12]

"… {I]t should be borne in mind that the Constitution envisages … that any process aimed at realising and implementing the constitutional imperative of promoting the use of indigenous languages in court proceedings should be embarked upon "taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned" …" [Paragraph 13]

"Given the constitutional imperative in this regard, the use of any of the 11 official languages in courts is no doubt a constitutionally noble idea and the measure would go a long way towards realising and facilitating the people's right of access to courts and to justice. Therefore, all attempts and efforts that are aimed at elevating, promoting and advancing the status and the use of indigenous languages in courts, particularly the lower courts at this stage, are to be welcomed and encouraged. Having said so … this process should be embarked upon in an orderly and less disruptive manner, so as to ensure that the finalisation of cases is not unduly delayed. To my knowledge, at the moment there seems to be no proper structures in place that could adequately and timeously attend to the transcription of court records from the nine indigenous languages, for purposes of appeals or reviews. It follows, therefore, that undue delays in finalising those cases would most certainly occur. Such outcomes would have dire and prejudicial consequences to the accused concerned – unfortunately being the people whom the proposed measure or system is otherwise intended to benefit. …" [Paragraph 20]

"Therefore, given the fact that a decision by any Magistrate, at his or her discretion, to conduct court proceedings in any of the nine indigenous official languages, is likely to have administrative and/or budgetary implications on the part of the Government or the Office of the Chief Justice, it is not, in my view, a salutary and desirable thing for any Magistrate to do at this stage, until such time that the issue of language policy during court proceedings in the lower courts is officially resolved and determined upon by a competent authority" [Paragraph 22]

The proceedings were certified to be in accordance with justice.

S v NKOSI 2008 (1) SACR 87 (N)

Case heard 18 October 2007, Judgment delivered 18 October 2007

This was an automatic review of the decision of a magistrates' court to convict the accused of robbery and sentence them to three years' imprisonment suspended 'on condition that the accused is not again convicted of housebreaking with intent to steal and theft committed during the period of suspension'.

Ndlovu J (Ntshangase J concurring) held:

"The Office of the Director of Public Prosecutions … points to the aggravating circumstances in this matter where, in the commission of the robbery, apart from the theft of the complainant's property, he was threatened with a knife, throttled and stabbed, which resulted in his hospitalisation for two weeks. There is evidence that even after his treatment he walked with the support of crutches after his discharge from hospital. All of this, coupled with accused's relevant previous convictions, so the memorandum submits, placed the matter beyond the pale of the penal jurisdiction of the magistrates' court and called upon the trial magistrate to exercise his discretion to stop the proceedings and to commit the accused for sentence by the regional court in terms of s 116 of the Act, and for treatment of the matter in terms of s 51 of the Criminal Law Amendment Act … It urges for remittal of the matter to the court a quo for such course to be followed." [Page 88 I – 89 B]

"… [I]t is necessary to point to the fact that, although the memorandum correctly submits that the robbery in this case falls within the ambit of Part II of Schedule 2 to the Criminal Law Amendment Act by reason of the presence of aggravating circumstances, the provisions of that Act were throughout the proceedings not invoked or brought to the attention of the accused, who in this matter conducted his

own defence. It would have been necessary to do so if it were intended to invoke such provisions 'at the outset of the trial, if not in the charge-sheet, then in some other form. ... To invoke such provisions now ... would do violence to the constitutional demand for substantive fairness which is to prevail in a trial." [Page 89 B-D]

"In the present proceedings therefore this court, on review, can neither increase the sentence nor remit the case to the court a quo for that purpose. It is indeed an anomaly in our law of criminal procedure that this court may increase a sentence on appeal but not on review, even where to do so would be imperative if the ends of justice are to be met. The undesirability of placement of the convicted person again in peril after conclusion of his case, and that s 310A of the Act adequately provides for supervision of the sentencing function to ensure balance in the sentencing process in the lower courts, have been expressed as reasons for sustaining the position. With such views I am in respectful disagreement." [Page 90 B-E]

"In regard to the first-named reason, I am of the view that where the sentence of the lower court is disturbingly inappropriate by reason of being unduly light, the empowerment of the court on review by legislative provisions which allow for the convicted person to be heard would place such person in no greater peril than is occasioned by the right of the prosecution to appeal against sentences in terms of s 310A of the Act after conclusion of the trial or to seek an increase of sentence in a cross appeal." [Page 90 E-F]

"As to the second-named reason, it may be observed that, although the prosecution's right of appeal would appear to provide an adequate mechanism to supervise the process of sentencing, good reason for empowering the review court to increase the sentence in appropriate cases becomes apparent when there has been an improper failure by the prosecution to exercise its right of appeal as appears to have occurred in this matter. ... Otherwise confirmation of the sentence would inevitably have to follow in proceedings which, on review, are found to be clearly not in accordance with justice by reason of an improper and impeachable exercise of penal discretion by the presiding officer." [Page 90 F - 91 A]

"In the circumstances I would confirm the proceedings as being in accordance with justice but would amend the sentence to the extent of deleting from the condition of suspension of the term of imprisonment the reference to 'housebreaking with intent to steal' as being an unrelated component of the offence of which the accused was convicted, and by substituting it with the following: 'robbery or any offence which constitutes a competent verdict to robbery, committed within the period of suspension and for which he is sentenced to a term of imprisonment without the option of a fine'." [Paragraph 91 B-D]

The conviction was confirmed and the sentence altered.

S V TAKI (CC 188/08) [2011] ZAKZDHC 91 (19 JANUARY 2011)

Judgment delivered 19 January 2011

This was a decision on the sentencing of the Umzinto Sugar Cane Serial Killer. The Accused had been convicted of 13 counts of murder and robbery with aggravating circumstances. It was established in evidence that the accused's typical modus operandi was to trick his victims (all young females) into believing that he was an employment agent and that he was recruiting for companies. Using this tactic,

the accused lured 11 of his victims to certain areas, where he ended up robbing the victims of their personal items and then killing them by strangulation or through other unknown means.

Ndlovu J held:

"This is one of the relatively few cases in the history of our criminal justice system, involving, amongst others, the serial killing of human beings on a fairly large scale. … All the charges were subject to the provisions of section 51 (1) of the Criminal Law Amendment Act (the Act). In other words, unless I am satisfied that there are substantial and compelling circumstances as envisaged in section 51(3) of the Act, I shall be obliged to impose on the accused at least the respective minimum terms of imprisonment prescribed in the Act in respect of each of the robbery and murder counts." [Paragraph 1]

"The traditional approach in sentencing is that the courts look at three factors when determining an appropriate sentence, namely, the personal circumstances of the accused, the nature and extent of the crime and the interests of society. At the same time the four-fold objects of punishment are also to be taken regard of, namely, deterrence, prevention, rehabilitation and retribution." [Paragraph 3]

"There can be no doubt that, particularly considering his modus operandi and the large number of victims robbed and murdered, the accused has been convicted of the most atrocious and heinous crimes and, for that, he deserves nothing but severe custodial punishment." [Paragraph 7]

"All persons are entitled to enjoy the basic and fundamental right to life, which is not only enshrined and entrenched in the Constitution, but also declared therein as a non-derogable right. Therefore, the unlawful and intentional taking of human life is always treated as one of the most serious crimes in the list of all crimes. On this basis and depending on the circumstances of the case, the most severe punishment ought to be meted out to offenders convicted of unlawful and intentional homicide." [Paragraph 9]

"In the circumstances of this case I have reason to believe that had the accused not been apprehended … he would have continued on his killing spree. In my view, there is simply no prospect that he would ever become rehabilitated. He is an extremely dangerous person who deserves to be removed from society permanently. His presence outside of prison would always remain an imminent deadly threat to any young woman whom he met in the street. Therefore, his permanent incarceration is the only way to ensure that he does not commit similar crimes again. It is also the only way to bring some degree of consolation to those parents whose children they will never see again as a result of the accused's wicked and malicious actions." [Paragraph 15]

"… I am satisfied that there are no substantial and compelling circumstances present … in respect of all 26 counts, which would justify me to impose lesser sentences than the sentences prescribed in the Act." [Paragraph 16]

"The effect of this sentence is that the accused is sentenced to 13 life sentences plus a total of 208 years imprisonment, subject to the order preceding hereto. The sentence is to reflect my intention that the accused should remain in prison for the rest of his life. The relevant authority in the Department of Correctional Services is earnestly urged to take serious cognizance of this intention and to refrain from ever considering the accused for release on parole." [Paragraph 17]

The accused was sentenced to 16 years imprisonment on each of the 13 counts of robbery and to life imprisonment on each of the 13 counts of murder.

PRIVATE LAW

SCOIN TRADING (PTY) LTD v BERNSTEIN NO 2011 (2) SA 118 (SCA)

Case heard 19 November 2010, Judgment delivered 1 December 2010

This was an appeal against a judgment granting a claim for payment of the balance of the purchase price of a gold coin, but refusing the claim for interest against delivery of the coin. The issue on appeal was the liability of the estate of the deceased for the payment of interest. The respondent made two primary submissions. First, that the deceased was not at fault in failing to make payment of the balance of the purchase price, by reason of his dying before the debt became payable, and therefore was not liable to pay mora interest. Second, that the death of the deceased made performance impossible.

K Pillay AJA (Harms DP and Snyders JA concurring) held:

"The starting point is … an examination of the meaning of mora. The term mora simply means delay or default. This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus, when the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. The fixed time, figuratively, makes the demand that would otherwise have had to be made by the creditor." [Paragraph 11]

"In this case it has been established that the date agreed for the payment of the balance of the purchase price was 31 December, and that the debt was not paid on this date. This is therefore a situation where mora ex re applies." [Paragraph 13]

"If a debtor's obligation is to pay a sum of money on a stipulated date and he is in mora in that he failed to perform on or before the time agreed upon, the damages that flow naturally from such failure will be interest a tempore morae or mora interest. The purpose of mora interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking. …" [Paragraph 14]

"It was submitted before this court by counsel for the respondent that, to be in mora, failure to perform must be due to the culpa of the debtor and that mora is referred to as the 'wrongful delay or default' in making payment or the failure without lawful excuse to perform timeously." [Paragraph 15]

"This approach is erroneous. That mora interest is sometimes regarded as a kind of penalty for a failure to pay on due date does not mean that the breach of contract is a delict, or that a breach of contract is only established if the debtor acted 'wrongfully' or 'culpably'. … [U]nlike damages for delict, in cases of breach of contract, damages are not intended to recompense the innocent party for their loss, but to put them in the position in which they would have been if the contract had been properly performed." [Paragraphs 17-18]

"… [C]ontractual damages do not depend on fault. All that the creditor is required to prove is that the debtor is in mora. …" [Paragraph 20]

Turning to the second submission made by the respondent, K Pillay AJA held:

"… This submission is untenable. The law does not regard mere personal incapability to perform as constituting impossibility. The payment of the debt is not rendered impossible by the death of the

deceased — as performance of a personal nature, like singing in an opera, would have been." [Paragraph 22]

"The argument that the deceased's estate is not liable for mora interest, on the facts of the present case, is in any event self-defeating since the respondent conceded liability for the balance of the purchase price, despite the death of the deceased. The executor, as administrator of the estate, is obliged to pay the debt. Part of the debt is the interest. …" [Paragraph 27]

The appeal was upheld with costs.

HOLDERNESS N.O. AND OTHERS v MAXWELL AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 6518/11 (KWAZULU-NATAL HIGH COURT)

Judgment delivered 31 July 2012

The Applicants sought an order inter alia directing the sale of a herd of cattle which was in the possession of the First Respondent. The First Respondent brought a counter-application, seeking an order directing the attachment of the herd to secure certain claims which he alleges he has against the insolvent estate on the basis that he has a landlord's hypothec over the herd. Ownership of the herd was disputed and the Court had to consider the position if the herd was owned by a third party (the Trust).

K Pillay J held:

"The Applicants contend that if the herd is the property of the Trust, in order to establish a hypothec over the herd, the First Respondent was obliged to obtain attachment of the herd prior to gaining knowledge of the Trust's claim to ownership of the said herd." [Paragraph 23]

"The landlord's tacit hypothec refers to the security a landlord retains under common law over his tenant's movables situated on the leased premises for unpaid rent. However, this hypothec can also extend over the movables owned by third parties brought onto the premises." [Paragraph 24]

K Pillay J considers South African authorities detailing when the hypothec can be extended to property of third parties, before continuing:

"As the basis of extending the hypothec in this way is either that of implied consent or a form of estoppel the evidentiary burden in this particular aspect rests on the third party to show that the landlord knew that the tenant was not the owner or that the landlord was not induced by an erroneous belief and he therefore knew the true state of affairs. However, the landlord is to a certain extent also expected to exercise reasonable care in that he cannot heedlessly turn a blind eye to the facts before him." [Paragraph 28]

"The issue of whether or not the hypothec continues if, prior to attachment, the landlord subsequently becomes aware that the property belongs to a third party, was considered in Eight Kaya Sands v Valley Irrigation Equipment. This decision confirmed that a third party who creates the "appearance" that his/her goods, which were available to the tenant are in fact the goods of the tenant exposes those goods to the landlord's hypothec this changes once ownership of the goods are made known to the landlord. Consequently once this "appearance" is removed the basis for the extension of the hypothec is also removed. There exists no legal obligation between the third party and the landlord, and there is no

justification for a third party's property serving as security for a tenant's debt. Consequently, if the appearance disappears before the movables have been attached, the landlord must return the goods to the third party." [Paragraph 30]

"It is common cause between the parties that the First Respondent, as landlord, was made aware on 25 February 2008 that the Trust was the owner of the herd and at this time had not sought to attach the herd and thereby perfect any hypothec he may have had. …" [Paragraph 31]

"The crucial issue in this matter consequently, is whether or not this court should follow the majority decision of Eight Kaya Sands. …" [Paragraph 32]

"Counsel for the First Respondent … made further submissions similar to that of the minority judgment in Eight Kaya Sands, namely that Webster v Ellison, read correctly, is not authority for the proposition that 'perfection' is a requirement for the creation of the hypothec." [Paragraph 32]

"… [T]he stumbling block to Counsel's further argument is that it appears to somewhat misconstrue the issue being not whether perfection creates the real right afforded to a landlord, but rather whether the landlord's subsequent knowledge of the true owner prior to perfection destroys it. The majority decision in Eight Kaya Sands is far more convincing." [Paragraph 34]

"Secondly, as discussed in Eight Kaya Sands, there is no legal relationship between the landlord and the third party and there can be no justification to attach such property as security for the debt of the tenant. To hold that even where the landlord becomes aware of the true owner prior to perfection, the hypothec continues, would create a situation where the property of a third party becomes security for the debts of another." [Paragraph 35]

The first respondent's counter-claim was dismissed with costs.

CRIMINAL JUSTICE

S v MSELEKU 2006 (2) SACR 574 (D)

Case heard 25 April 2006, Judgment delivered 9 May 2006

This case was referred to the High Court by a regional court for the sentencing of the accused, who had been convicted of raping a 12-month-old child, in terms of s 52 of the Criminal Law Amendment Act (the minimum sentencing legislation). The indictment had made no mention of either the age of the complainant or of the State's reliance on the sentencing provisions of the Act. The trial court appeared to have relied on the fact that the accused was legally represented for an assurance that he understood that life imprisonment was a possible consequence of being convicted of such a rape.

K Pillay J held:

"… Firstly, it is certainly not my experience that an assumption can safely be drawn on the competence of a legal representative. Neither is it, I venture to add, the attitude of some of my Colleagues in this Division. In the vast majority of cases, accused are represented by counsel or attorneys appointed by the Legal Aid Board, and more recently counsel employed by the Justice Centre. While one cannot generalise, the inexperience of counsel is not an unusual occurrence. Judges in this Division have frequently been

forced to play more than an active role, to assist counsel on either side, where weakness in representation becomes evident, in order to ensure that an accused receives a fair trial." [Pages 578 H-579 B]

"The assumption could result in an accused not receiving a fair trial and spending a lifetime in prison. An accused person may well have conducted his defence differently had he been aware of the gravity of the sentence he faced. ..." [Page 579 B-D]

"... The omission of any reference to the Act is, to my mind, inexcusable and can, as in this case, lead to speculation as to whether an accused understood the provisions of the 'minimum sentences Act'. It is better for the presiding officer to exercise caution rather than assume that the legal representative must have been au fait with its provisions and therefore have drawn the accused's attention to the gravity of the sentencing provisions of the Act, notwithstanding that the indictment makes no reference thereto." [Page 579 E-G]

"In casu neither the indictment nor the magistrate made it known to the accused that he faced the prospects of life imprisonment upon conviction. It is accepted that he was told that the victim was 12 months old. To have drawn the assumption that his legal representative would, because of that fact, have explained the provisions of the Act (where the indictment is silent on the State's reliance on the Act), to my mind, cannot be justified in circumstances where the consequences for an accused person is a sentence which is the most severe a Court can impose." [Page 579 H-J]

"In my view, it cannot in the circumstances be said that the accused in casu received a fair trial which is in accordance with justice or his constitutional rights." [Page 580 G]

"In summary, based on Ndlovu's case, I come to the conclusion that if any reference is made in the indictment to the State's reliance on the 'minimum sentences Act', a court may well be justified in assuming that counsel would have drawn that to the accused's attention. Where no mention is made, notwithstanding its factual framework, the provisions should be brought to the attention of the accused by the court whether the accused is represented or not. Where mention of the Act is made in the indictment, and the accused is unrepresented, the court must pertinently draw the accused's attention to its provisions." [Page 581 C-E]

K Pillay J then turned to consider the conviction on the merits.

"I can by no means say that I have no doubt as to the guilt of the accused. The State relies entirely on circumstantial evidence. Although the magistrate's reasons for conviction at first glance may appear convincing, it seems to me that it is based largely on the suspicion of the victim's mother." [Page 581 E-F]

"The evidence shows that several people could have had access to the child. Reasonable inferences can only be drawn from proved facts, not facts based on suspicion. They must exclude all other reasonable inferences." [Page 581 H]

"There is no onus on the accused to offer evidence to show that other reasonable inferences could be drawn, save the one sought to be drawn. On the facts, I am unable to accept that any adverse inference can be drawn by the accused's election not to give evidence. The State's version is in my view based largely on suspicion. That cannot form the basis for a conviction. I have doubts as to the guilt of the accused although I suspect that he may well be the culprit." [Page 582 C-D]

The conviction was set aside.

MHLONGO v S, UNREPORTED JUDGMENT, AR NO. 272/14 (KWAZULU-NATAL HIGH COURT)

Case heard 19 February 2015, Judgment delivered 27 February 2015

This was an appeal against conviction and sentence, the appellant having been convicted of raping a minor child and sentenced to life imprisonment.

K Pillay J (Chili J concurring) held:

"The pivotal attack against the conviction is directed at the trial Court's failure to conduct a competency test prior to the complainant being sworn in. The complainant was 12 years old at the time. It is submitted that the aforesaid failure thus rendered the complainant's testimony inadmissible against the appellant." [Paragraph 14]

"Section 162 (subject to Sections 163 and 164) of the Criminal Procedure Act prescribes that no person shall be examined in criminal proceedings unless he/she is under oath." [Paragraph 15]

"… [F]or a child witness to be considered a competent witness, he or she must be able to demonstrate that he or she understands the difference between truth and lies." [Paragraph 17]

"In this case no attempt whatsoever was made by the trial Magistrate to establish whether the child, who was 12 years old, knew the difference between truth and lies. He also failed to question the child on whether she understood the nature and import of an oath. The child's level of intelligence was not canvassed. It is not clear whether she attends school." [Paragraph 18]

"At no stage during the entire trial was the child's competency considered. The trial Court in my view misdirected itself by simply accepting the say so of the young complainant that she knew what it meant to take the oath. In this regard he clearly ignored the statutory and evidentiary requirements concerning child witnesses" [Paragraph 19]

"Whilst the need for flexibility regarding the establishment of competence and the administration of the oath to a child witness was affirmed in Mangoma v S [2013] ZASCA 205 it still requires at the very least some enquiry into whether child witnesses understand the meaning of telling the truth. The absence of such an enquiry in this case resulted, in the evidence being inadmissible and in my view a failure of justice. There is unfortunately no other evidence implicating the appellant in the commission of the crime." [Paragraph 20]

"However, that said, this aspect related to a procedural issue and the interests of justice require that this matter be referred back to the DPP KZN, to consider whether the appellant should be prosecuted." [Paragraph 21]

The conviction and sentence were set aside and the matter referred back to the DPP, KZN.

ADMINISTRATION OF JUSTICE

WASTEMAN HOLDINGS (PTY) LIMITED v SERFONTEIN AND OTHERS [2013] JOL 30406 (KZD)

Judgment delivered 20 December 2011

The case concerned the validity or otherwise of a search and seizure warrant issued by a magistrate in respect of the Applicant's premises. Applicant was a waste disposal company which collected and disposed of medical waste for their clients, and was under investigation for allegations of the illegal disposal of medical waste. The First Respondent and others effected the warrant. The warrant did not clearly state the offence of which Applicant was suspected of having committed. The Applicant was only provided with the affidavit containing the offences which it was suspected of having committed sometime after the search and seizure operation was conducted.

K Pillay J held:

"It is well established that search and seizure operations by state officials are by their nature intrusive on an individual's constitutionally protected rights, particularly those of privacy and dignity. … However, they serve a valuable purpose in enabling the State to carry out its constitutional mandate to prevent and detect criminal activities. These conflicting interests have to be counter poised and the traditional manner in which this is achieved is by requiring firstly that State officials who wish to intrude on the right to privacy do so by obtaining search and seizure warrants, unless they can justify not doing so for valid reasons, and secondly by insisting on strict compliance with the parameters of the search set out in the warrant." [Page 9]

"In balancing the conflicting interests, two important points relevant to this matter must be mentioned. The first is that where the right to privacy is sought to be enforced by a juristic person, the Constitutional Court, in determining whether the right to privacy has been infringed, has said that a business generally has a lower expectation of privacy than an individual. Furthermore, a business that is public in nature, is involved in an industry that is regulated by legislation, or conducts activities that are potentially hazardous to the public will also possess an attenuated right to privacy." [Page 10]

"Secondly, if an invasion of privacy such as a search is primarily intended for criminal enforcement purposes, it will attract a far greater level of scrutiny than an invasion that is merely a regulatory inspection for the purpose of legal compliance. This would be so even if the invaded premises are commercial in nature." [Page 10]

With regard to the issue of whether the magistrate applied his mind before granting the search and seizure warrant, K Pillay J held:

"This section [Section 25 of Act 51 of 1977] permits a Magistrate to issue a search warrant if there exist reasonable grounds for believing that an offence has been or is likely to be committed. A Magistrate who is faced with such an application has to exercise a judicial discretion, which discretion is difficult to challenge. Reasonable grounds, do not amount to a belief that a criminal case has been made out, but that reasonably seen, there are grounds for a belief that a person may have in his possession, or under his control, an article, which can be of use in proving a criminal case, and it must be clearly worded." [Page 12]

"In Mandela v Minister of Safety and Security the Court noted that, reasonable grounds for believing does not require grounds that measure up to an objective standard, but rather grounds which in the subjective opinion of the Magistrate are reasonable. Thus, the Court may not interfere with the Magistrate's decision merely because it views his/her conclusion as incorrect. To justify interference, the Court must be satisfied that the Magistrate did not apply his/her mind to the matter." [Page 13]

"I agree … that the Magistrate was entitled in his discretion, to reasonably infer that the complaints of the public and reports of responsible State officials of non-compliance with permit conditions gave rise to a reasonable suspicion of contravention. I am therefore not persuaded that the Magistrate did not act within the prescripts of Section 25 …" [Page 15]

Turning to the issue of whether the warrant was invalid because it did not expressly state the offence which the applicant was suspected of having committed, K Pillay J held:

"Powell NO and Others v Van der Merwe NO and Others, emphasised the need for scrutinising search warrants with rigour and exactitude – "indeed, with sometimes technical rigour and exactitude". Given that South Africa's history evidences a particular need for this approach, and the fact that the common law rights which were sought to be protected are now part of the constitutional order, this approach is as apt today as it has been in the past." [Pages 15-16]

"In Thint v National Director of Public Prosecutions, the Constitutional Court assessed the validity of a warrant. … In dealing with the requirement of intelligibility … it said that this was determined objectively. A warrant must be 'reasonably intelligible' in the sense that it is reasonably capable of being understood by the reasonably well informed person who understands the relevant empowering legislation and the nature of the offences under investigation." [Page 17]

"The latest decision in this matter viz, in Minister of Safety and Security v Van Der Merwe and Others, places the issue beyond the pale. In this case the Constitutional Court said that the approach adopted in Powell and Thint indicated that the specification of the offence in the warrant furthered the warrants intelligibility. Intelligibility itself has its roots in the rule of law, and has as some of its attributes, comprehensibility, accountability and predictability. This in turn means that it is essential that the person being searched knows why they are being searched." [Page 17]

"Allowing a warrant devoid of an expressly stated offence to stand on the basis that the alleged offence can be inferred from what is being sought and the ambit of the search, would be to lean towards the vagueness and lack of precision which the South African Courts have up to this point sought to prevent. This approach would make it more difficult for an individual being searched to determine why they are being searched, as it would require of them to 'connect the dots' that may or may not be contained in the warrant. It would remove clarity from the very thing intended to protect the individual from unlawful state intrusion, and would be a step away from the rigour and exactitude that is required of warrants both in terms of the common law and the constitution." [Page 19]

The search and seizure warrant was set aside.

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

CIVIL AND POLITICAL RIGHTS

SPIER FILMS SA AND ANOTHER V THE FILM AND PUBLICATION BOARD, FIL AND PUBLICATION APPEAL TRIBUNAL 2/2013, 20 AUGUST 2013

This was an appeal against the classification of the film "Of Good Report". A Classification Committee had refused classification of the film, thereby effectively banning it, on the basis that it contained a scene of child pornography.

Govender (Chairperson) held:

"… The fleeting and brief scenes of humour in the film are barely noticeable, and are deeply buried under the intensity of the themes and by the unrelenting discomfort of witnessing a sexual predator who easily gains the confidence of decision-makers who run schools, and then preys on young girls …" [Page 2]

"One of the central objectives of any society is to protect its children and allow them to enjoy their childhood without premature exposure to adult experiences, and without their having to experience damaging, harmful and inappropriate behaviour, whether directly or indirectly. … child pornography is a scourge that causes serious harm to our society … Legislation that criminalises child pornography is a manifestation of our commitment to protecting our children, and an affirmation of their right to human dignity. …" [Page 3]

"It is common cause that the Committee did not have regard to the guidelines and framework laid down in [the Constitutional Court decision of] De Reuck. There must be a clear and unequivocal legal justification for not doing so, and in this case there simply was no legal basis for the view put forward that the reasoning in De Reuck was not binding on and applicable to the classifiers. …" [Page 4]

The precedential value of past decisions of the Tribunal was then considered:

"Officials of the Board and the Committees are not permitted, in their own discretion, to decide whether decisions of the Tribunal are correct or incorrect and then just apply those decisions that they deem to be correct. This would be a direct violation of the Act … and it would be contrary to the principles of the rule of law, which require certainty only gained through consistency in interpretation. … " [Page 6]

"The Committee assessed the first sexual scene … as being child pornography and stopped watching the film immediately it became apparent that Nolitha was a child and a learner at the school. … " [Page 6]

"… [O]n a proper reading of section 18(3) of the Act, together with the definition of child pornography … it becomes apparent that context must be taken into account in determining the initial enquiry into whether the film … contains child pornography; and once it is determined that the film does indeed contain child pornography, the proviso … has no application. It is therefore imperative that the initial appraisal … must be made with regard to the context. If this was not so, then – given the width of the definition of child pornography and sexual conduct under the Act – a written description in a newspaper of a paedophile stalking and then engaging in sexual conduct with his victims … would constitute child pornography. The effect of this would be that freedom of expression would be unreasonably and unjustifiably infringed …" [Page 7]

The Tribunal then considered an argument that the De Reuck decision was no longer applicable since the passing of the new Sexual Offences Act in 2007:

"… There are material and significant differences between the Films and Publications Act definition, which was found to be constitutional in De Reuck, and the very broad definition that is contained in the Sexual Offences Act. … " [Page 8]

"Taken to its logical conclusion, the argument by the respondent is tat the definition in the Sexual Offences Act supplanted and replaced the definition in the Act. But this conclusion is untenable in law … The Tribunal in XXY held that the change in wording did not materially impact on the definition of child pornography laid down in De Reuck …" [Page 10]

Having rejected the argument that the definition of child pornography in the Sexual Offences Act was applicable to the classification of films, the Tribunal turned to apply the relevant principles to the film:

"The first scene, together with te scenes of lesser concern, must be assessed in the context of the film as a whole. The intent of this film is to convey serious messages, and is patently not to stimulate sexual arousal in the target audience. The film reflects on the consequences of poverty, the vulnerability of girl children (even within the school environment) to paedophiles 'of good report', the 'sugar daddy' phenomenon, the challenges facing adolescents as they make unfortunate choices even though they are able to analyse Othello "as a man who hates women" … This is a serious film that endeavours to encourage debate about a number of important and pressing issues on which we as a society need to reflect more fully and urgently. …" [Page 17]

"This film is also about the excesses of an obsessive relationship between an adult teacher and a minor learner, about gender violence and lays the tragic and bitter consequences uncompromisingly before the viewer. The supposed seductive appeal of a legally forbidden relationship is totally outweighed by the grim and devastating consequences of such a relationship. Given this, the complexity of the themes considered, and the fleeting scenes of sexual activity, this film cannot reasonably be deemed to be one that stimulates erotic sentiments or stimulates sexual arousal within its target viewers. …" [Page 18]

The decision to refuse classification was set aside, and the film classified so that it could not be seen by anyone under the age of sixteen.

CRIMINAL JUSTICE

S V NTULI AND OTHERS, UNREPORTED JUDGMENT, CASE NUMBER CC 166/11, KWAZULU-NATAL HIGH COURT, DURBAN

Case heard XX, Judgment delivered YY

The accused stood trial on 2 counts of murder, 2 counts of attempted murder, 4 counts of robbery with aggravating circumstances, and one count of theft. The charges related to what the court described as "a concerted and planned endeavor to steal an amount of R520 000 … from Cash Paymaster Services".

In the course of the judgment, the court considered an application by the state to cross examine accused number 1 on the contents of a previous statement.

Govender AJ held:

"The purpose and objective of the trial within a trial was to determine whether the state has proved beyond reasonable doubt that the confession was made freely and voluntarily, by the person in his sound and sober senses and without being unduly influenced as required by section 217 of the CPA. The accused made a number of allegations against the police alleging sustained torture … and then alleged that he had no knowledge of where the contents of the statement came from. …" [Pages 92 – 93]

"The statement itself is generally not admitted in the trial within a trial as the contents are not relevant to the issue as to whether the statement is admissible … However the statement may be admissible if it would assist the key enquiry of whether it was made freely and voluntarily by the accused in his sound and sober senses and without being unduly influenced. Therefore the issue … is whether the statement should be admitted to assist the court appraise whether Accused 1 is telling the truth when he states that he had no knowledge of where the contents of the statement came from …" [Page 93]

"The statement only becomes admissible if the accused chooses to testify. … [A]ccused 1 chose to testify … his version was that the contents of the statement did not emanate from him … [I]t appears to me to be appropriate to allow the state to cross-examine the accused on the contents of the statement in order to test the truthfulness … of the assertion made by the accused that the statement was not something that he had supplied to the police." [Page 94]

"… [T]here is a 'close logical correlation' between the assertion made by the accused that he had no knowledge of where the information came from to whether the statement was freely and voluntarily made by the accused. The cross-examination on the statement will place the court in a better position to determine whether the accused is telling the truth. … [T]he application … to cross-examine the accused on the statement was allowed." [Page 95]

Later in the trial, the state applied to have a confession which had been deemed admissible against accused number 2, made admissible against accused 1 and 3. Govender AJ held:

"It was accepted by all the parties that the statement made by accused 2 … was to be treated as a confession. …" [Page 96]

"The statement … implicates both accused 1 and 3 in the planning and commission of the offence. Accused 2 states that he, accused 1 and 3, amongst others, were at a meeting during which the parties planned the commission of the offence. …" [Paragraph 97]

"Ms Harrison [for the state] sought to rely on section 3 of the Law of Evidence Amendment Act … which allows hearsay evidence to be admitted in defined circumstances. … She submitted that the evidence was of high probative value as it linked accused 1 and 3 to the crime, that there was no prejudice as the opportunity for cross-examination existed when accused 2 and the other witnesses testified and that it was in the interests of justice for the evidence to be admitted. …" [Page 98]

"Subsequently, the CC considered the applicability of section 3 of the Evidence Amendment Act in S v Molimi. … The net effect is that section 219 of the CPA takes precedence over section 3(1)(c) of the law of Evidence Amendment Act and the latter section has no applicability to confessions." [Paragraphs 98 – 99]

"Thus is the statement is a confession, the state will not be able to use section 3(1)(c) … to get the statement admitted against one of other of the co-accused. … It is also pertinent for me to consider

whether the rights to a fair trial as contained in section 35(1)(3) of the Constitution will be unreasonably compromised and infringed if this application is allowed." [Page 99]

"… [A] confession may result in the conviction of the accused provided there is confirmation of the confession in a material respect or there is some evidence aliunde of the commission of the offence. An accused cannot be convicted solely on the basis of an admission. In this case, all three accused planned their defence on the basis that they were dealing with confessions and not admissions." [Pages 101 – 102]

"I am of the view that permitting this application, would be akin to requiring the accused to 'go into legal battle without the sword of cross-examination' and to grant the state's application would result in a violation the rights [sic] of accused 1 and 3 to a fair trial. … When the state … argued that the statement … was a confession and that it was freely and voluntarily made, it signalled certain legal points to the accused. It signalled … that they had to contend with a confession and not an admission. … The choice facing accused 1 and 3 at the trial within a trial was this – Either the confession of accused 2 was inadmissible in which event, it would have no further evidentiary value and therefore they would not have to respond to it. Alternatively, if it was admitted as a confession, it would as consequence of section 219, only be admissible against accused 2 … Thus during the trial within the trial, there would be no cause or necessity to cross-examine accused 2 on statements made by him incriminating accused 1 and 3. …" [Page 103]

"The difficulty of allowing the state to now reclassify the statement as an admission … is that accused 1 and 3 are now denied the opportunity of cross-examining accused 2 on the contents of what he said about them. … The trial within the trial against accused 2 is over and the opportunity to cross-examine has now passed. I am of the view that it would be unacceptably prejudicial to allow the state at this stage to change its mind and describe the statement … as an admission and not a confession. I am satisfied that to do so would be contrary to the requirements of a fair trial as it denies the accused the opportunity to cross-examine on a critical issue." [Pages 103 – 104]

SELECTED ARTICLES

'JUDICIAL REVIEW OF THE PARDON POWER IN SECTION 84(2)(J) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996', 2012 Stellenbosch Law Review 490

The article argues that, the President's obligation to follow the Constitution means that, when exercising the power to pardon, the President must demonstrate objectively that the pardon is in the public interest and advances the public good, thus justifying the effective overruling of decisions of the courts.

"… [T]he Constitution entrenches the independence of the judiciary while simultaneously affording the power of pardon to the head of the executive. Requiring the President to demonstrate that his or her decision advances the public good may be the most appropriate way of ensuring that institutional damage to the integrity of the judiciary is minimised by the exercise of the power to pardon …" (Page 491)

"The requirement that public power be exercised in furtherance of the public good is uncontroversial. Thus the pardon granted must be in the public interest, and not solely in the interest of the individual or group of individuals that are the recipients of the pardon. The public interest must be identifiable and there must be a causal connection between the act of pardoning the individual and the attainment of the identifiable public good. The public interest may include the need to right an obvious wrong or to act in a merciful and proportionate manner. As the judicial process is a transparent and reasoned one, the process that seeks to overturn the result produced by the judicial process should also be transparent and reasoned. It would be totally counterproductive to allow a closed and unreasoned process to produce a result that effectively overrules the decision of the judges. If the President fails to establish that a particular pardon advances the public interest, and that an appropriate process has been followed, the decision to pardon should be set aside." (Page 492)

The article examines the development of the power to pardon from a prerogative to a constitutional one, before considering whether the power to pardon can be classified as administrative action.

"The definition of administrative action in the Promotion of Administrative Justice Act … is an example of the "belts and braces" approach – taken to extreme lengths. This penchant for layers of qualifications has been counter-productive, as it has led to confusion. A plethora of qualifications are welded onto the various component parts of the definition, which is subsequently qualified by the list of categories of decisions which are deemed to fall outside the definition of administrative action. …" (Page 495)

"Paragraph (aa) of the definition of administrative action excludes, inter alia, the powers and functions referred to in section 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k). The notable omissions from this list is section 84(2)(e) and (j). These relate to the powers of the President, other than as head of the national executive, to make appointments required by the Constitution and legislation, and the power to pardon or reprieve offenders respectively. Thus the drafters of PAJA appear to have taken the view that the powers identified in section 84 of the Constitution, may fall within the generic definition of administrative action, and thus the necessity for the specific exclusion. Based on this logic, not including the power to pardon or to reprieve offenders from the specific list of exclusions means that when the President reprieves an offender, she or he may be engaging in administrative action. Had there been a more generic and broad definition, some of this confusion would have been obviated. The fact that section 84(2)(j) was omitted from paragraph (aa) of the definition of administrative action in PAJA, convinced Seriti J in Centre for the Study of Violence and Reconciliation v President of the RSA, that the

granting of a pardon was administrative action and therefore had to comply with the constraints, including that of procedural fairness … It is submitted that the Constitutional Court is likely to take a broader view and interpret the definition of administrative action in PAJA in a manner that is consistent with the demarcation in the Constitution between executive and administrative power. The decision to pardon would appear to be closer to being of an executive nature as opposed to being administrative. …" (Page 496)

"The SARFU, Albutt and Democratic Alliance cases suggest that the exercise of the pardon power in terms of section 84(2), is the exercise of executive power. Furthermore, the cases suggest that it is unlikely to be classified as administrative actions, thus removing them from the purview of section 33 of the Constitution, and from the reach of PAJA." (Page 498)

The article then discusses the review of the exercise of the pardon power under the principle of legality.

"It is submitted that the reasoning and logic of the court in Albutt should apply in all pardon cases. As emphasised repeatedly in the judgments, the exercise of the pardon power is an exercise of public power. It is not an exercise of unfettered discretion that resides in the monarch or head of state. The broad objective of the exercise of public power is that it must advance the public good, and particularly the exercise of executive power must, in the final analysis, be in the best interests of the nation. The classification of the power to pardon as a public power, unequivocally means that it must accord with the letter and spirit of the Constitution." (Pages 501 - 502)

"In effect, the right of the victim to obtain redress and justice is sacrificed at the altar of what is in the best interests of the nation when offenders are pardoned. As in the reconciliation process, the victims surrender something so that the broader society can prosper. A pardon, in whatever context, extinguishes legal culpability of the perpetrator, and effectively sets aside the outcome of the judicial processes that precede it. Factually, the tangible and intangible losses and deprivation remain with the victims. They continue to bear the costs. It is incongruent for the Constitution to allow a person the right to have justiciable issues determined in a court of law or another independent body, and not be entitled to participate in the subsequent process that has the potential to fundamentally undermine the earlier judicial determination." (Page 502)

SELECTED JUDGMENTS

CIVIL PROCEDURE

NATIONAL MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND ANOTHER V ETHEKWINI MUNICIPALITY; IN RE: INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA V ETHEKWINI MUNICIPALITY AND OTHERS (6957/2010) [2014] ZAKZDHC 42 (6 OCTOBER 2014)

Case heard 4 August 2014, Judgment delivered 6 October 2014

The applicant Ministers sought to exclude various documents from those required, by a previous court order, to be dispatched to the registrar of the court. The respondent opposed the application and instituted a counter-application to strike out the applicant's opposition to its review application, and to declare the Ministers in contempt of court. The underlying review application was an attempt by respondent to set aside the decision by the applicants to amend regulations under the Local Government: Municipal Property Rates Act. The records to be furnished related to that decision.

Marks AJ held:

"The Ministers now seek in the main a declaratory order that this Court should declare that the court order … must be interpreted to exclude documents from the record required to be dispatched by the Ministers to the Registrar of the Court, based on the argument that they are privileged and/or confidential and/or are internal memos or tools designed to assist the Ministers in their decision-making." [Paragraph 8]

Marks AJ then considered whether an amended notice of motion and supplementary affidavit, relied on by the Ministers, had been properly before the court:

"The contention by the Ministers that Rule 28 of the Uniform Rules is applicable to amendment of pleadings only is misplaced. … Rule 28 … governs amendments to pleadings and documents and sets out succinctly the procedure to be followed. The Rule is not confined to pleadings only, it includes all documents and even includes affidavits. The language of the Rule is clear and unambiguous. … At the date of the hearing the Ministers had not given notice of its intention to amend their notice of motion … In fact, the amended notice was not properly filed in the papers before court either. Neither did the Ministers made a substantive application to amend the notice of motion in court. The application to amend the notice of motion was found in the supplementary affidavit that was filed in the papers. This supplementary affidavit was also filed without any substantive application being made … It is clear that there is merit in the argument that an irregular step has been taken … and Ethekwini is fully justified in noting an objection … " [Paragraph 11.1 – 11.4]

"However, Rule 28(10) of the Uniform Rules empower the Court at any stage before judgment to grant leave to amend any pleadings or documents on such terms as to costs or other matters as it deems fit. … [T]he Court has a discretion whether or not to grant the amendment which discretion must be exercised judicially taking into account various factors, including but not limited to prejudice that would be suffered should the amendment be allowed or disallowed and it depends on the facts in any particular case." [Paragraph 11.5]

"Both parties argued the matter, and both parties were invited to file supplementary heads of argument which they did. Furthermore, the original heads of argument filed on behalf of the ministers clearly deals with the declaratory order sought in the amended notice of motion. No issue was raised in objection to the relief that was argued in the heads of argument. Ethekwini knew what case to meet in court ..." [Paragraph 11.10]

The non-compliance was condoned, and Marks AJ turned to the merits of the application:

"... [T]he argument ... that it could never have been the Court's intention is based on his mistaken submission that in ALL cases the right of professional privilege is an absolute limitation of a party's constitutional right of access to information. ... Moreover, the office of the Ministers is a constitutional body with a public interest duty. It must operate with transparency and accountability. The Ministers have a duty to explain to the public how they arrived at the decision that Ethekwini now seeks to review. The documents sought by Ethekwini will assist in the enquiry into the rationality of the decisions taken by the Ministers. It cannot simply be stated now that these documents are covered by privilege or confidentiality. ... Furthermore ... the exercise of all public powers must comply with the Constitution ..." [Paragraphs 14.3 – 14.5]

"... [T]his Court is not empowered to determine whether MURUGASEN J was correct or incorrect in granting the final order. All the Court is empowered to do is to interpret the intention of the order. ... In order to do this the Court has to first look at the language of the order. ... [N]otwithstanding that the documents to be dispatched by the Ministers were not listed the interpretation of the order is that ALL of the documents, including those which the Ministers now seek to claim as confidential, irrelevant and privileged were included in the order to be dispatched. In other words, the Court's intention was not that a "reduced record" be dispatched by the Ministers to Ethekwini." [Paragraphs 15.2 – 15.4]

"The extrinsic facts reveal that these particular documents were the subject matter of the court order that was granted when the application to compel was brought ... To my mind, if it was the Court's intention to exclude these documents then the order would have stated such. Moreover, on the date that the order was granted there was no opposing affidavits filed on behalf of the Ministers that the documents sought were irrelevant, confidential or privileged." [Paragraph 15.6]

The Ministers' declaratory order was dismissed. Marks AJ then considered the contempt application:

"... [I]n this application it is not sufficient to show that the order of the court was disregarded by the Ministers but that by "non-compliance" ... the Ministers not only disregarded the court order, but that this was a deliberate and intentional violation of the Court's dignity repute or authority. A deliberate disregard is not enough since the non-complier may have genuinely albeit mistakenly believed him or herself entitled to act in the way claimed. ... To my mind, this is exactly what occurred. The Ministers appeared to be under the belief (albeit mistakenly) that they were entitled to withhold certain documents ... To my mind eThekwini has failed to discharge the onus upon it. Therefore the application for contempt of a court order became premature and cannot be granted. To my mind it should be adjourned *sine die*." [Paragraphs 17.2 – 17.3]

The application to strike out the defence was similarly dismissed.

BRIAN ROSS V BRACKENHYRST BODY CORPORATE AND ANOTHER, CASE NO. 4810/2010, INCORPORATING BRACKENHYRST BODY CORPORATE V BRIAN ROSS, CASE NO. 2613/2010, UNREPORTED JUDGEMENT (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 5 December 2012, Judgment delivered [?] February 2013

Both applications related to arbitration proceedings. In case number 4810, applicant sought to have a decision of the second respondent arbitrator set aside. In the second case, applicant sought to make the arbitrator's ruling an order of court. At the conclusion of the arbitration proceedings, the arbitrator had made a part award in favour of the first respondent (in case number 4810), with a directive that the parties attempt to arrive at an agreement as to how applicant would remedy certain defects. The parties were given time to return with a written agreement. Applicant did not adhere to the award, hence the first respondent instituted proceedings under case number 2613. Applicant under case number 4810 sought to set aside the award on the basis of several alleged misdirections by the second respondent, and one ground of gross irregularity relating to the second respondent's possession of a "secret" letter.

Marks AJ considered whether the applicant had established special cause for extending the time limits in which to bring the review, and held:

"Having regard to the evidence in the filed affidavits and the probabilities, I find it improbable that briefs or other documents would lie around unattended in the "post room" due to the very nature of the urgent matters and specified time frames … Moreover there are no confirmatory affidavits filed by either the Applicant's attorney or the counsel initially briefed … It is further improbable that any attorney or advocate would have handled this matter in such a negligent and shoddy fashion. The court cannot accept that the instructing attorney would: … Send unmarked files to initial counsel without any direction as to which advocate the papers should be delivered to. .. Not make any follow up enquiries whether counsel has received the file. The probabilities indicate that the applicant only decided to launch this application after the respondent launched the application to make the award an order of court." [Paragraph 10]

"The applicant has failed to establish that he has a reasonable prospect of success in the review proceedings. … There is nothing … in the record to indicate that the second respondent misdirected himself at any stage. To the contrary his award in the two parts displays an unbiased disposition. …Moreover, the so-called secret letter … was not secret at all. It was part of the bundle of documents that were referred to in the arbitration proceedings. The applicant and his legal representative must have been aware of it … at the very least when the Part 1 Award was made. They could have at that stage noted their objection and requested recusal. They did not. … " [Paragraph 11]

Marks AJ thus refused condonation, and turned to consider the application under case number 2613:

"… [T]here were several contraventions of the Conduct Rules, and the deliberate non-compliance with the instructions from the Board of Trustees as was determined by the Arbitrator. … Having perused the entire record of the arbitration proceedings and having found no misdirection, misconduct, mistake, bad faith or carelessness on the part of the Arbitrator, the Court finds in favour of the applicant …" [Paragraphs 14.5 – 14.6]

"… [T]he court needs to determine whether there are circumstances justifying a special costs order on an attorney and client scale. As the body corporate in essence reflects the interests of all the Sectional Title holders, neither the body corporate, nor the Sectional Title holders should be forced to bear the costs of

the respondents refusal to adhere to Arbitration Award. Considering that the Body Corporate had not [sic] other option but to approach the Court … and also have a duty to contain expenses, they should not be forced to bar the costs of the applications and should not be out of pocket for the legal epenses incurred." [Paragraphs 15.2 - 15.4]

In case number 4810, the application for condonation was dismissed with costs. In case number 2613, the application was granted, with costs awarded on an attorney and client scale.

CRIMINAL JUSTICE

BRIAN ALI AND ANOTHER V THE STATE, UNREPORTED JUDGEMENT, CASE NO: AR354/12 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Appellants had been convicted on one count of robbery with aggravating circumstances, and two counts of murder, by the High Court, and sentenced to 15 years imprisonment in respect of the robbery, and life imprisonment in respect of both counts of murder. The appeal was against sentence only.

Marks AJ (Bezuidenhout AJ and Balton J concurring) held:

"… [C]ounsel for the appellant conceded that the murders were committed in an aggravating and serious manner. He nevertheless argued that the appellant should receive lengthy sentences short of life imprisonment. He based his assertions primarily on the fact that they were first offenders, that they were 'relatively young', that they had confessed, co-operated with police and had pleaded guilty and not wasted the court's time." [Page 3]

"The issue is … whether or not there was either a material misdirection by the trial court in determining an appropriate sentence or whether such sentence was so shockingly inappropriate that it can be inferred that the trial court's sentencing discretion was not properly exercised. …" [Pages 4 - 5]

"… While youthfulness is generally regarded as a mitigating factor, this is not by virtue of the offender's age per se, but rather because of the immaturity associated with being of a youthful age. … The appellants were at the time they committed the offences aged 23 and 27 respectively, well beyond ther teenage years and therefore not considered to be prima facie immature. … The manner in which the offences were committed does not suggest that they are individuals with a particularly low level of immaturity. There is thus nothing to suggest that their maturity levels are below that which can be expected of an adult, and it cannot therefore be said that their ages constitutes either wholly or in combination with other factors, a substantial and compelling circumstance." [Pages 6 - 7]

"Another ground which the appellants allege as a substantial and compelling circumstance, is the fact that they are remorseful. … A guilty plea on its own is, however, not a suitable demonstration of remorse and the courts have warned against inferring genuine remorse simply because an appellant has pleaded guilty and co-operated with authorities. … A court must look at the intensity, longevity and foundation of the appellant [sic] remorse to determine if it is sincere or whether it merely constitutes regret at getting caught." [Page 7]

"The argument for the appellants alleging remorse … are largely based on their plea of guilty, their co-operation with police officials and taking the court into their confidence. … [T]his is not enough and far more is required before genuine remorse will be inferred. Nothing further was pro-offered to

substantiate the alleged remorse … No apparent demonstration of genuine penitence on their part can be drawn from anything on record, nor is there any kind of attempt made at seeking amends or apology to the families of the deceased. There is therefore, nothing … to conclude that the appellants' alleged remorse is such to constitute a substantial and compelling circumstances warranting a lesser sentence." [Page 9]

The appeal was dismissed

SELECTED JUDGMENTS

PRIVATE LAW

FIRSTRAND BANK LIMITED T / A FNB INSURANCE BROKERS V PRITHIPAL AND ANOTHER [2015] JOL 32993 (KZD)

Case heard 6 March 2015, Judgment delivered 18 March 2015

The applicant sought to enforce a restraint of trade agreement against the first respondent, who, upon leaving the applicant's employ, assumed employment with the second respondent.

Thatcher AJ dealt first with an amount paid to the first respondent, allegedly to induce him to sign the contract, and held:

"It would have been a relatively simple matter for the applicant to state that the amount of R200 000 was paid to the first respondent for the latter's goodwill. However it did not do so. It is clear from both the founding affidavit and the answering affidavit that the amount was paid to the first respondent to induce him to conclude a contract to work for FNBIB for five years." [Paragraph 19]

"It is thus not correct to describe the payment of R200 000 as the purchase price of the first respondent's goodwill. Therefore the analogy of the restraint binding a seller of his business, including his sale of his goodwill, from canvassing customers of the business at the time of the sale, is not correct and is not evidence that the first respondent's customers became the applicant's." [Paragraph 20]

"The applicant placed no evidence before the court to rebut this evidence of the first respondent by, for instance, putting up evidence of the manner in which the fist respondent and those who do the same work as the first respondent carry on business. … The applicant provided no evidence of the contact it had made with these customers since the first respondent's departure in order to ascertain the reason for their moving their business from the applicant. At the very least I would have thought that the applicant would have provided evidence of its attempt to contact these customers, and if those attempts had not met with any success, to inform the court of this. That the applicant appears not to have made any attempt to contact any of these customers is supported by the allegation by the first respondent that no attempt has been made by the applicant to establish any form of relationship with those clients since his departure. … The first respondent in fact alleges that he did not canvass them to leave and that they had in fact signed statements indicating that they were not solicited, canvassed or induced or persuaded in any way to appoint the second respondent as their brokers, and he put up examples of two such letters. …" [Paragraph 23]

"Accordingly the first respondent in my view has discharged the onus which rests upon him to prove that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the applicant, over and above that which previously existed. Thus I find that the applicant has no interest that deserves protection after the first respondent left the applicant's employ." [Paragraph 24]

"If I am incorrect in this regard, I must consider whether that protectable interest is threatened by the first respondent, and if that is the case, whether that interest of the applicant weighs qualitatively and quantitatively against the first respondent not to be economically inactive and unproductive. I have set out earlier in this judgment the applicant's work experience. It is common cause that the first respondent

is capable of carrying out the functions for which the applicant employed him. He has a wife of 63 years' old who has never been employed and together they have a combined retirement some R2 100 000. A living annuity purchased with this would give him a monthly income of some R10 500 per month upon which he could barely survive. Accordingly it is imperative for him, and his wife, that he continue in employment for as long as he is able." [Paragraph 25]

"In contrast, the applicant is one of the four largest banks in South Africa. The consequence to the first respondent of being unemployed is, vis à vis him and his wife, far more serious than the impact would be on the applicant if the first respondent is able to work." [Paragraph 26]

"Thus the interest of the applicant does not outweigh the first respondent's interest in not being economically active." [Paragraph 27]

"In the particular circumstances of this case, and I refer specifically to the personal circumstances of the respondent I have set out above, public policy requires that the restraint should not be enforced." [Paragraph 31]

The application was dismissed with costs, including the costs of senior counsel.

ETHEKWINI MUNICIPALITY V GUMBI AND OTHERS (6652/2014) [2015] ZAKZDHC 24

Case heard 6 March 2015, Judgment delivered 17 March 2015

The applicant was the owner of a tract of land known as Umlazi Infill part 4 Phase 1, where people had settled and built informal dwellings. The municipality decided to develop the land, and sought an order to eject the respondents. The question the court had to decide was whether in the circumstances it was just and equitable in terms of section 6 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE) that an order be granted for the eviction of the respondents.

Thatcher AJ held:

"… [T]he circumstances identified in section 6 are not the only circumstances to which the court may refer in deciding what is just and equitable. The court must give consideration to all circumstances that might be relevant including for instance those mentioned in section 4, namely the elderly, children, disabled persons and households headed by women. The application of the Act depends upon the facts of each case, and each case may require a different approach. … [T]he courts must have regard to the interests 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. Provided it acts reasonably, the applicant, like the State, must be afforded some leeway in the design and structure of housing." [Paragraph 8]

"It is unclear … precisely when the sites were demarcated by the applicant. The agreement was concluded in May 2009 and presumably planning for the demarcation commenced approximately at or soon after that date. The applicant contends that the respondents have known since approximately August 2012 that there was a prospect of them having to move." [Paragraph 10]

"It is common cause that a house has been constructed on No.1661 W, Extension 2, Umlazi, and according to the respondents is occupied by the first and second respondents. Given that this application

was launched on 9 June 2014, it can be assumed that the first and second respondents have enjoyed occupation of their new home from a date prior to the launching of this application and in all probability at a time when the third respondent could validly be considered a dependant of her parents." [Paragraph 11]

"It appears … that the Mchunu family, to whom the applicant has allocated the property, are the children of Mr Mchunu who has apparently passed away. The children of Mchunu are described in the replying affidavit as orphans. According to the applicant, they meet its criteria entitling them to have a low cost house built by the applicant on the property and to have it registered in their names." [Paragraph 12]

"The applicant is endeavouring to upgrade the living environment of the occupants of Umlazi Infill Part 4 Phase One. The first and second respondents have benefited from the applicant's endeavour in that they have been allocated a site and had constructed for them a house in which they are now living. It is probable that at the time the allocation was made and their house constructed, the third respondent, if she was not a minor, certainly had no dependant, and was, not unreasonably, regarded by the applicant as being a dependant of the first and second respondents." [Paragraph 16]

"Even if that assumption is incorrect, there is nothing on the papers to indicate that the third respondent does not have alternative accommodation. She has not disclosed any facts supportive of the notion that she is not able to live in the house where the first and second respondents are living. While she may not regard this as ideal, her desire to have a house of her own must at this stage yield to the opportunity the Mchunu family have of benefiting in the same way in which the first and second respondents have benefited, namely by having a house constructed for them of which they can receive title and in which they can live. There is nothing in the papers to suggest that the Mchunu family has access to alternative accommodation." [Paragraph 17]

"… The respondents have not incurred any legal costs in opposing the application and I do not propose to make any order for costs against the respondents … To avoid any uncertainty, I think it appropriate that an order issue that all of the respondents and any person occupying through them be ordered to vacate the property. The first and second respondents will suffer no prejudice if I make such an order. " [Paragraph 19]

"Insofar as the date by which the property has to be vacated is concerned, it is reasonable to afford the respondents a period of twenty (20) days of the service of this order upon them to vacate the property." [Paragraph 20]

An eviction order was granted.

COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LIMITED V HARILALL (6565/2014) [2015] ZAKZDHC 33

Case heard 2 March 2015, Judgment delivered 9 April 2015

Plaintiff concluded an instalment sale agreement with the defendant, Marlene Harilall, in terms of which the defendant was to repay the principal debt and interest in 60 monthly instalments. In 2011, the magistrates' court granted a debt restructuring order in favour of the defendant and her husband, to whom she was married in community of property. The plaintiff brought an action in terms of section 86

(10) of the National Credit Act, terminating the debt review process, despite the existence of the debt restructuring order. The court had to decide whether the plaintiff was entitled to claim back the car from the respondent under the NCA, considering the payment history of the defendant.

Thatcher AJ held:

"On the face of it, the defendant was not in breach of the debt restructuring order when this action was instituted." [Paragraph 12]

"As I understand it, for the defence of impossibility to succeed, it must be objective impossibility, not subjective impossibility. … It is not open to a party to plead impossibility of performance because in a commercial situation, through changed financial circumstances the payment has become difficult, expensive or unaffordable." [Paragraph 16]

"… She failed to place any evidence before the court that the institution of the action … rendered it impossible for her to maintain the payments in terms of the debt restructuring order. The defendant had succeeded in persuading a magistrate's court that she was over indebted. It is probable therefore that the financial circumstances of the defendant were constrained and that any unforeseen, additional, expenses with which she was subsequently saddled would place her under further financial strain … it was incumbent upon her to place evidence before the court as to what her personal financial circumstances were … that rendered it impossible for her to comply with the debt restructuring order. She did not place any evidence before the court on this aspect. She has therefore not discharged the burden which rests upon her to establish impossibility." [Paragraph 17]

"The plaintiff, did not, by electing to accept the instalments after the non-payment of the four instalments in 2012, elect to keep the debt restructuring order in place. In August 2012, a short period after the defendant had defaulted on the debt restructuring order, the plaintiff instituted an action in which it sought cancellation of the instalment sale agreement. This conduct of the plaintiff, far from constituting an election to treat the debt restructuring order as binding, is precisely the opposite. Thus the acceptance by the plaintiff of instalments in terms of the debt restructuring order after they resumed in June 2012 cannot in my view be regarded as the plaintiff electing to abide by the debt restructuring order." [Paragraph 20]

"The plaintiff's institution of the action in August 2012 under case number 8272/2012 gives the lie to this [claim that plaintiff consented to the defendant withholding payments]. In that action the plaintiff specifically relies upon the defendant's default in paying the instalments for January to May 2012 inclusive." [Paragraph 21]

"I accordingly find that the plaintiff is entitled to an order cancelling the contract and an order that the defendant restore possession of the vehicle to the defendant." [Paragraph 22]

"It must be borne in mind that the plaintiff is one of the four largest banks in South Africa. The defendant, on the other hand, is an individual who does not have at her disposal the financial resources that the plaintiff can call upon. Indeed, having opposed the application for debt review, the plaintiff and its then attorneys must have been acutely aware of the defendant's parlous financial situation. …" [Paragraph 28]

"Ordinarily, the unsuccessful party is ordered to pay the successful party's costs. A successful party however may under certain circumstances be ordered to pay the costs of the proceedings, but this is a very unusual order, seldom given." [Paragraph 30]

"… This conduct of the plaintiff arising from the instalment sale agreement constitutes serious oppression of the defendant. In the circumstances, and in the exercise of my discretion, I am of the view that it is appropriate that the plaintiff pay the defendant's costs of this action." [Paragraph 34]

CIVIL PROCEDURE

W v C (13778/2013) [2015] ZAKZDHC 25

Case heard 10 March 2015, Judgment delivered 18 March 2015

The plaintiff and the defendant had been married to each other, and had two children. They divorced in 1996, and an order was made that the plaintiff pay maintenance to the defendant for the minor children. The plaintiff claimed that he had mistakenly increased maintenance payments, and that the defendant was thereby unjustly enriched. The defendant raised an exception, arguing that the plaintiff failed to plead the essential elements of an enrichment action, and that the maintenance paid did not enrich the defendant, but was for the children. The court had to deal with whether the pleadings by the plaintiff showed a cause of action or whether they were vague and embarrassing.

Thatcher AJ held:

"In terms of Rule 18(4), every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his claim "with sufficient particularity to enable the opposite party to reply thereto." The pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto … A pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are." [Paragraph 10]

"It is true that there is no precise allegation that the plaintiff paid the defendant R49 571,21 in excess of what he was obliged to pay and that he was correspondingly impoverished and she correspondingly enriched in that amount. However it is alleged that the plaintiff made payment in terms of the divorce order which surely must mean that he paid and that the payments were made to the defendant. There is sufficient definition of the issues enabling the defendant to know what they are." [Paragraph 12]

"It is also true that one cannot discern exactly how the amount of R49 571,28 is calculated, but it is clear … that that amount is calculated using the Weighted Consumer Price Index over the relevant period. It is open to the defendant in a request for further particulars for the purposes of preparation for trial to seek particularity on how the amount … is calculated." [Paragraph 13]

"In any event, the claim is not one for damages. … Here Rule 18(4) only has to be complied with and in my view it has been." [Paragraph 14]

"… [I]t is true that both parents have an obligation to contribute towards the expenses of the child. However it is open to the defendant … to plead as much, and in her plea to disclose the amount of maintenance she has received from the plaintiff for the child and to disclose whether the payments

alleged by the plaintiff to have been made in error were in fact used to maintain the child so that she, the defendant, has not been unduly enriched." [Paragraph 15]

"In the alternative the plaintiff pleads that if her application in the maintenance court fails, he in any event has a claim against her for one half of the expenses incurred by the plaintiff on behalf of I[...] from 1 January 2012 to date, namely R272 529,50. Whether this is a claim properly described as a claim for unjust enrichment or whether it is a claim by the plaintiff against the defendant arising from their joint responsibility for maintaining I[...] is unclear. However the pleading identifies the issues in such a way that the defendant is in a position to know that they are. Obviously this claim cannot be adjudicated before the maintenance court proceedings are determined. ... In the meantime, the defendant is able to discern what the issues are and can plead to them" [Paragraph 17]

The exception was dismissed with costs.

LABOUR LAW

NDLELA V METRORAIL AND OTHERS (D628/2011) [2014] ZALCD 78

Case heard 12 November 2013, Judgment delivered 08 December 2014

The applicant was employed as a section manager by Metrorail when his vehicle was hijacked. He was found guilty of misusing company property, and sought to review and set aside an award and substitute it with an order that his dismissal was procedurally and substantively unfair. The main question before the court was whether the findings of the arbitrator fell within the range of decisions to which a reasonable decision maker could have come.

Prinsloo AJ held:

"The test to be applied on review is well-established. A review application is not an appeal. The review court is required to determine whether the decision to which the arbitrator came falls within the bands of decisions to which a reasonable decision-maker could come on the available material. Any process-related conduct on the part of an arbitrator for example a failure to have regard to particular evidence, or the manner of the assessment of that evidence, is of no consequence unless it had the result of an outcome that is unreasonable." [Paragraph 16]

"The test to be applied is a stringent one, concerned only with the question whether the decision of the arbitrator is reasonable." [Paragraph 18]

Prinsloo AJ then dealt with the arbitrator's interpretation of clause 4.4 of the Metrorail Disciplinary Code & Procedure, and on the failure by the applicant to raise a jurisdictional point:

"… It should have been clear to the arbitrator that the Applicant's challenge to the application of Clause 4.4 amounted to a dispute regarding the interpretation or application of the said clause and that she had no jurisdiction as Clause 17.1 of the Code confers jurisdiction in respect of the interpretation of the Code to the Transnet Bargaining Council." [Paragraph 21]

"Be that as it may, at no point did the Applicant raise a jurisdictional point nor did he indicate … that the issue was about the interpretation of an agreement and she had no jurisdiction to determine that. The jurisdictional point is raised for the first time in the Applicant's review papers." [Paragraph 29]

"The arbitrator cannot be faulted in the finding she made, more so since no jurisdictional issue was raised during the arbitration. It is not open for the Applicant to seek to review the findings of the arbitrator on the ground that she exceeded her powers when she determined an issue raised by the Applicant." [Paragraph 30]

"I cannot find that the Applicant presented a 'classic case of victimization' that was missed by the arbitrator. The evidence that was adduced does not support this ground for review" [Paragraph 35]

"In reviewing the arbitration award I must consider the totality of the evidence adduced and decide whether the decision made by the arbitrator is one a reasonable decision maker could make. This Court is not to consider every factor individually or independently, but is to consider the evidence and the award in its totality and holistically." [Paragraph 44]

"Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I cannot find that the arbitrator's decisions do not fall within the band of decisions to which a reasonable decision maker could come." [Paragraph 46]

The application was dismissed with costs.

NGWENYA AND OTHERS V ADMINICLE TRADING 17 CC (JS1229/2009) [2014] ZALCJHB 37

Case heard 3 February 2014, Judgment delivered 11 February 2014

The applicants approached the court for relief, claiming that they were dismissed solely because they had joined a trade union and that their employer did not want to deal with a trade union. The issue before the court was whether the applicants' dismissals were automatically unfair, alternatively whether their dismissals were substantively and procedurally fair, and what relief they would be entitled to.

Prinsloo AJ held:

"… I have to say that it is unusual to approach the Judge President for a postponement the Friday before the Monday the matter is to go on trial, especially where no effort was made to approach the Applicants' attorneys for a postponement." [Paragraph 9]

"Be that as it may, the Respondent's attorney was not at Court, nor was any person from the Respondent present. The Respondent displayed an attitude that a postponement would be granted merely because it was asked for." [Paragraph 10]

"After I considered the merits of the application for postponement and the submissions of the Applicants, I found that the application was without merit and that it would not be in the interest of justice to postpone the matter. The Applicants were dismissed six years ago and the matter had been dragging on since 2009." [Paragraph 17]

"Justice delayed is justice denied and I refused the application for postponement and ordered that the matter proceed on the merits. At this point Ms Pather formally withdrew … as she was only briefed to argue the application for postponement and not for trial." [Paragraph 18]

"In view of the fact that no process was followed prior to the issuing of the retrenchment letters … and no attempt was made to comply with the provisions of section 189 of the Act, I cannot but find the Applicants' dismissals procedurally unfair." [Paragraph 41]

"The only reason for retrenchment was the loss of a tender. There was no evidence of the Respondent's financial position before this Court, nor was there any proof of the contract or tender that the Respondent lost. There was no evidence before this Court to convince me that the Respondent's financial position was such that it had to resort to the retrenchment of the Applicants and that their retrenchment in any way assisted to salvage the Respondent's financial position." [Paragraph 45]

"I therefore find the dismissal of the Applicants substantively unfair." [Paragraph 46]

"Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness." [Paragraph 48]

"In considering fairness, this Court has held that the conduct of the parties should be taken into account and that mala fide, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship." [Paragraph 50]

"The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation." [Paragraph 51]

"I take into consideration that the Applicants were represented on a pro bono basis and that they had not incurred an expense in that regard. I also considered the fact that the Applicants are re-instated and that being so would constitute an ongoing relationship a cost order may damage." [Paragraph 52]

The applicants' dismissals were held to be procedurally and substantively unfair, and the respondent was ordered to re-instate the applicants with retrospective effect from the date of dismissal. No order was made as to costs.

SABAWO OBO MEMBERS AND OTHERS V STAFFGRO (PTY) LTD (J2192/08) [2013] ZALC 2

Case heard 25, 26 and 27 November 2013, Judgment delivered 18 December 2013

The applicant trade union approached the court on behalf of its members for relief in terms of section 187 of the Labour Relations Act. Their claim was that their dismissal was automatically unfair in that they participated in a protected strike. In the alternative, the applicants argued that their dismissal was unfair in that they participated in an unprotected strike and the respondents failed to comply with the provisions of the Act, specifically procedural requirements, prior to their dismissal.

Prinsloo AJ held:

"After considering the submissions made in respect of the two points in limine it is evident that the Court order declaring the strike action unprotected stands and that the issue is indeed res iudicata and cannot be determined afresh. The strike action is unprotected and it follows that the Applicants' claim in terms of the provisions of section 187(1)(a) cannot be sustained." [Paragraph 7]

"The parties disregarded the importance and significance of the pre-trial minute and they filed a document not even worth the paper it was written on. For instance the pre-trial minute made no mention of any points in limine, despite the fact that it is an aspect to be addressed in a pre-trial minute. On the day of the trial the Respondent wanted to raise two points in limine, which should have been dealt with prior to the trial. Further the parties agreed that it was disputed that the Applicants embarked on an illegal strike on 20 November 2007, yet there was a Court order issued declaring the strike was unprotected. How this issue could have been disputed after the Court order, is astonishing. There are many more aspects where the pre-trial minute is lacking and simply not assisting and not achieving the objectives of Rule 6(4) of the Rules of this Court." [Paragraph 13]

"I subsequently decided to hear the matter as the parties indicated that the matter was set down for trial on 26 August 2013 but they were crowded out due to unavailability of judges. The matter dates as far back as 2007 and the only reason why I proceeded with the matter, despite the problems with the pre-

trial minute, was because the matter was dating back since 2007 and it would be in the interest of all the parties to bring finality to the matter." [Paragraph 15]

"I do not accept that the striking employees were told to stay at home on 21 November 2007. Not only was this version not supported by the Applicants' evidence but it in fact was contradicted by the witnesses who testified that they participated in the strike as from 20 November to 11 December 2007 and did not stay at home; … I cannot accept that the union did not receive the fax on 21 November 2007 notifying it about the disciplinary enquiries scheduled for 23 November 2007, nor can I accept that the union had not received the notices that were sent by way of courier on 7 December 2007 to its physical address. There was no one from SABAWO who adduced evidence before this Court to deny receipt of the documents and in the absence of such evidence, I have to accept the Respondent's version that the notices were faxed and couriered to the union on 21 November and 7 December 2007 respectively and that it was in all probability received" [Paragraph 79]

"The Respondent indeed communicated with the union and an ultimatum was issued on 20 November 2007, therefore there was compliance with Item 6 of Schedule 8. The Applicants' reliance on Item 4 of Schedule 8 of the Act is misplaced and not applicable in cases of dismissal for participation in unprotected strike action." [Paragraph 86]

"The Respondent did not proceed on 23 November 2007 when no one showed up, but postponed the disciplinary enquiries to 11 December 2007. This is not the conduct of an employer that wants to dismiss its employees at the first possible opportunity and that wants to deny them the right to attend and to be heard." [Paragraph 91]

"I am satisfied that the Respondent made two attempts to hold disciplinary enquiries for the Applicants and that the striking employees were indeed afforded an opportunity to be present at the enquiries and to state their cases." [Paragraph 92]

"… I accept that service on the union is as good as service on the members of the union themselves and with regard to the giving of the opportunity to be heard, the employer is entitled to deal with the union. The Respondent's services of the notices to attend the disciplinary enquiry on the union constituted proper service and the Respondent was entitled to serve the notices on the union." [Paragraph 104]

"There is no merit in the Applicants' claim that they were not notified about the disciplinary enquiries because they were not personally served with the notices to attend disciplinary enquiries." [Paragraph 105]

"There was proper service and it begs the question why did the Applicants fail to attend the disciplinary enquiries. The only inference that can be drawn is that the Applicants' persisted with the view that the strike action was protected and there was no need to attend disciplinary enquiries. …" [Paragraph 107]

"The striking employees' belief and insistence that their participation in the strike was protected, is unfortunate. They should have been aware that their belief was a mistaken one when they were notified about the Court order declaring the strike unprotected. They must bear the consequences of the fact that they ignored the Respondent and accepted advice from their union when such advice was wrong." [Paragraph 109]

"SABAWO is a well-established trade union that should be able to advise its members properly, especially in instances where the employer has obtained a Court order declaring a strike unprotected. SABAWO did

not advise the striking employees properly when they were told that the strike action was indeed protected and that they should continue to strike, despite the Court order … This persistence with unprotected strike action resulted in disciplinary action and dismissal. The litigation that followed this ill advice was equally ill considered. This Court has to discourage ill-conceived litigation, especially where the Applicants had failed to establish any basis for their claim. Fairness dictates that the Respondent cannot be expected to endure enormous costs defending litigation that ought not to have been brought in the first place." [Paragraph 115]

It was held that the dismissal was not automatically unfair; alternatively the dismissal was procedurally fair.

RADIANT GROUP (PTY) LTD V NAICKER AND ANOTHER (J 592/2013) [2013] ZALCJHB 158

Judgment delivered 1 July 2013

This was an urgent application to interdict and restrain the first respondent from soliciting the custom of, or transacting any business or dealing with any person who was the client of the applicant at any time during the 36 months immediately preceding the date of termination of his services with the applicant. The main issue before the court was whether a restraint of trade agreement was reasonable and enforceable.

Prinsloo AJ held:

"I accept that this Court has jurisdiction to adjudicate this matter as the restraint of trade agreement was indeed incorporated into the contract of employment and it is therefore a dispute this Court could determine." [Paragraph 46]

"The main issue to be decided, in view of the fact that Naicker is not disputing the terms of the agreement but the reasonableness thereof, is whether the agreement is indeed reasonable and enforceable. Two main issues have to be considered namely the period of the restraint and the geographical area." [Paragraph 47]

"In Reddy v Siemens Telecommunications (Pty) Ltd the Supreme Court of Appeal upheld a 12-month restraint against an employee who had joined a competitor … It was stated that it was not necessary for the Court to find that the employee would use his previous employer's trade secrets and confidential information in his new employment but that it was sufficient if he could do so." [Paragraph 48]

"I am convinced that Naicker has personal, intimate and in depth knowledge of the Applicant's pricing structures and strategy, profit margins and the Applicant's customers' specific needs. He has a long standing and personal relationship with the Applicant's customers and is ideally situated to persuade those customers to use the products of his new employer or order from the Second Respondent rather than to purchase the products supplied by his old employer or rather than to place orders with the Applicant. Considering the facts of the matter and in view of the dicta referred to, I am of the view that there is indeed a protectable interest and the first question … namely whether there is an interest of the one party that is deserving protection at the termination of the agreement, is answered positively. The Applicant has a protectable interest." [Paragraph 51]

"The third consideration is how does the Applicant's interest weigh qualitatively and quantitatively against the interest of Naicker not to be economically active and productive. This is a value judgment with two principal policy considerations to wit the first is that the public interest requires that parties should comply with their contractual obligations and the second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or professions. Both considerations reflect not only common-law but also constitutional values. It has to be emphasized that contractual autonomy is part of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life." [Paragraph 53]

"... A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. I already found that the Applicant has an interest that deserves protection." [Paragraph 54]

"Naicker left the Applicant's employ of his own accord and he decided to take up employment with a direct competitor of the Applicant. It is interesting that at the time of his resignation he informed the Applicant that he would be joining 'a smaller organisation which does not pose any threat to Radiant in any way" yet in this application he conceded that the Second Respondent is in fact a direct competitor of the Applicant." [Paragraph 55]

"... In my view there is no aspect of public policy that militates against the enforcement of the restraint. This is not a matter where the restraint is so unreasonable as to make it unenforceable." [Paragraph 57]

"The area is the whole of South Africa. It is common cause that Naicker has approached clients of the Applicant and solicited business from them and that he went to Durban, Cape Town, Witbank, Nelspruit and Gauteng to see the Applicant's customers after he left the employ of the Applicant. The Applicant has customers across South Africa and the Applicant is seeking to protect its proprietary interests in relation to its economic activity. I am of the view that the geographical area is not too wide and the Applicant's interests would not be sufficiently protected if Naicker is allowed to work for the Second Respondent in the Western Cape." [Paragraph 59]

"... This Court has in the past remarked that it is undesirable to cut and trim a manifestly overbroad restraint at the behest of the party who drafted it, but in circumstances where the period of the restraint seems to me to be the only unreasonable part of it, and where the restraint agreement stipulates that each of the undertakings shall be regarded as distinct and severable, it seems to me to be in the public interest to restrict that separate part of the restraint to a period of 12 months." [Paragraph 60]

"I have come to the conclusion that the restraint of trade agreement is enforceable and that the Applicant has interests worth protecting. It is axiomatic that the Applicant will suffer irreparable harm if it is not enforced. The potential harm caused by an employee who is in a position to divulge trade secrets to and exploit customer connections in favour of his new employer cannot be easily remedied by a damages claim in due course." [Paragraph 61]

"I find that the Applicant has established a clear right to the relief sought and has satisfied the requirements of the interdict it seeks, subject to the limitation of the operative period of the restraint to 12 months." [Paragraph 62]

The order was granted.

DAVIDSON V EMVEST ASSET MANAGEMENT (PTY) LIMITED 2013 JOL

Case heard 25, 26 April 2013, Judgment delivered 28 May 2013

The applicant was employed by the respondent after the restructuring of the group. He resigned from employment on the 9th of January 2012 and claimed outstanding remuneration for January 2012, including payment of accrued leave. The defendant argued that the applicant was remunerated in South Africa and Mauritius, and that no tax was deducted from his remuneration paid in Mauritius. The main issues before the court were whether the applicant was entitled to payment in respect of the outstanding remuneration and accrued leave; and whether the respondent was liable to pay the amounts claimed.

Prinsloo AJ held:

"In respect of Mr Le Roux [respondent's Human Capital Manager], I make the following comment: he was an honest witness, placed in an extremely difficult position to defend a case and to testify on behalf of his employer when the defence put up by the respondent was almost not defensible at all." [Paragraph 28]

"I cannot agree with the submission that a person could be a full-time employee of only one employer. In Footwear Trading CC v Mdlalose the Labour Appeal Court accepted that it was possible for an employee to have more than one employer." [Paragraph 31]

"This Court has to decide two main issues. Firstly, whether the applicant is entitled to payment of R17 775,87 in respect of outstanding and unpaid remuneration and R63 248,73 in respect of accrued leave. Secondly, whether the respondent is liable to pay the amounts claimed or whether respondent's defence should succeed as reason for not paying the applicant." [Paragraph 32]

"The applicant was employed by the respondent and upon his resignation, he is entitled to be paid pro rata remuneration and accrued leave. The respondent did not dispute this and I cannot put find that the applicant is entitled to payment of R17 775,87 in respect of outstanding and unpaid remuneration and R63 248,73 in respect of accrued leave." [Paragraph 35]

"The applicant was also employed by a Mauritian entity and he instituted civil proceedings in a Mauritian court for payment of outstanding salary. His claim was successful and it is not related to the claim he instituted in this Court." [Paragraph 36]

"The only defence put forward by the respondent for not paying the applicant is that the applicant earned income in Mauritius and was liable to pay tax on the income so earned in South Africa in accordance with the Income Tax Act. No tax was deducted and hence the respondent is liable to deduct these taxes from the applicant's remuneration. Section 34(1)(b) of the BCEA permits deductions if the deduction is required or permitted in terms of a law. The respondent is obliged in terms of the Income Tax Act to deduct and claim the outstanding taxes from the applicant's salary and to pay it over to SARS." [Paragraph 38]

"The respondent spent much time and effort during trial to establish that the applicant was indeed a South African tax resident for purposes of paying tax to SARS. It is not for this Court to determine the applicant's status as tax resident. However, the evidence … was that even if the applicant was a indeed tax resident, the payment of tax in respect of income earned in Mauritius, would be an issue between the

applicant and SARS and the respondent has no liability whatsoever to deduct tax on the income paid by the Mauritian company." [Paragraph 43]

"I therefore find that the respondent is liable to pay the applicant R17 775,87 in respect of outstanding and unpaid remuneration and R63 248,73 in respect of accrued leave." [Paragraph 46]

Judgment was given in favour of the applicant, with costs awarded on an attorney and client scale.

SELECTED JUDGMENTS

SENEKAL V ANCRO BUILDING PROJECTS CC (JS 1090/13) [2015] ZALCJHB 132

Case heard 7, 8 August 2014 and 8 December 2014, Judgment delivered 15 April 2015

The applicant claimed that her dismissal by the respondent was due to her pregnancy and was thus automatically unfair as contemplated under the s 187 (1) (e) of the Labour Relations Act. The respondent argued that the dismissal was due to the applicant's inability to perform her duties.

Tlhotlhalemaje AJ held:

"With ordinary cases of dismissal falling under the provisions of section 186 of the LRA a duty is imposed on an employee to establish the existence of a dismissal, and it is thereafter for the employer to prove that the dismissal was for a fair reason … Where an employee however alleges that a dismissal was based on prohibited reasons such as pregnancy, more than a mere allegation in that regard is required. At most, the employee must establish that the dismissal was indeed related to the pregnancy, which fact the employer was well aware of" [Paragraph 50]

"In this case, and in regards to whether a dismissal was established, it was common cause that the applicant was informed on 15 October 2013 of the termination of her services. … According to the respondent, a formal letter of termination was issued to the applicant on 18 October 2013, albeit the latter contends that she only received it on 13 November 2013. In this letter, the applicant was informed that the termination of her services was with effect from 15 October 2013, on account of 'your inability to perform the Recon duties"." [Paragraph 52]

"It was further common cause that the applicant had informed Maryna and Wayne of her pregnancy on 1 October 2013. With the dismissal having been established and further with the respondent having been made aware of the applicant's pregnancy, the next leg of the enquiry pertains to causation. Thus, what needs to be determined is whether the applicant's pregnancy or reasons relating to her pregnancy was the 'dominant', 'proximate', or 'most likely cause' of her dismissal." [Paragraph 53]

"Thus if it is shown that the most probable cause for the dismissal was as a result of the employee's pregnancy or reasons related to her pregnancy, then it can be said that the dismissal was automatically unfair in terms of section 187(1)(e) of the LRA. If however, that probable inference cannot be drawn, and it is established on the facts that the dismissal was due to some other unrelated reason or considerations, that should be the end of the enquiry." [Paragraph 54]

"It is my view that when the courts refer to section 187 of the LRA as imposing an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place, … such evidential burden is indeed onerous. Thus conjecture and subjective perceptions as to what could have led to a dismissal as evident from the above summation of the applicant's case would not carry weight in discharging that onus." [Paragraph 60]

"On the whole, it is my view that the applicant has not produced evidence, which is either sufficient or probable to raise a credible possibility that her dismissal was on account of her pregnancy. In my view, she was not a credible witness, and her testimony consisted of inherent improbabilities and contradictions, coupled with a demeanour that did not display openness or honesty. In the end, it is my view that the issue of her pregnancy was red-herring, conjured up to conceal the real reasons for the

dismissal, being her inability to perform the tasks required of her. She proffered no evidence to support any contention that her pregnancy was the proximate or most probable cause of her dismissal." [Paragraph 61]

"In conclusion therefore, the applicant has not discharged the evidentiary burden placed on her to show that her dismissal was consequent upon her disclosing her pregnancy to the respondent. There is no basis for a probable inference to be drawn that indeed her pregnancy was the proximate cause of her dismissal." [Paragraph 62]

"I am in agreement … that the evidence led in regards to assisting or counselling her might have fallen short of the requirements of Schedule 8 of the LRA. It did not appear to be seriously challenged that the applicant was dismissed without a warning or hearing, nor was she afforded an opportunity to challenge the decision why she should not be dismissed. The applicant was barely 19 days in the employ of the respondent, and to the extent that the respondent might be found wanting with the manner with which she was dismissed, it cannot nevertheless be said that the dismissal was on a prohibited ground … The reason for the dismissal pertained to the applicant's performance, and this court lacks jurisdiction to determine such an issue, as it falls within that of the CCMA or Bargaining Councils. To this end, the applicant's claim should fail." [Paragraph 63]

"It has already been concluded that the applicant failed to establish that her dismissal was consequent upon her disclosing her pregnancy, and had more to do with her performance. In the light of the doubts expressed about the fairness of her dismissal (which had nothing to do with her pregnancy), it is my view that considerations of law and fairness militates against an order of costs, as she might have had cause to complain about the fairness of her dismissal. She nevertheless had no basis for approaching this court." [Paragraph 64]

The application was dismissed.

SOLIDARITY AND OTHERS V SOUTH AFRICAN POLICE SERVICES AND OTHERS [2015] 7 BLLR 708 (LC)

Case heard 27 January 2015, Judgment delivered 2 April 2015

It was contended that the second to fourth applicants were unfairly discriminated against by not being selected for promotions in accordance with a new ranking structure, as effected by a collective agreement between SAPS, POPCRU and SAPU. The applicants further challenged the lawfulness and validity of the agreement. The main issue before the court was whether the Collective Agreement was unlawful under the Employment Equity Act, and whether it was unconstitutional.

Tlhotlhalemaje AJ held:

"… [I]t cannot … be correct that this Agreement is not binding on members of Solidarity, who are in the service of the SAPS. The submission made on behalf of Solidarity that clause 8 of the Collective Agreement is irrelevant has no merit in that by virtue of the provisions of section 23(1)(d)(i) and (ii) of the LRA, its members have been identified and/or expressly deemed to be bound by clauses 6 and 8 of that Agreement. More significantly, I did not understand from Solidarity's pleadings that it had always been its case that the Agreement was not binding on it, and for all intents and purposes, since arguments in this regard appear mainly to have been made from the bar, nothing further turns on them." [Paragraph 14]

"The fact that the Collective Agreement is binding on members of Solidarity is however not the end of the matter, as … a Court should intervene where the provisions of an agreement which is the product of collective bargaining offends against the principles and values of our Constitution, or where the enforcement of a collective agreement provision may result in an injustice or unfairness, or where the provisions are plainly unlawful." [Paragraph 15]

"A collective agreement such as the one that is being impugned given its context and purpose is subject to the Constitution and the Employment Equity Act, and the fact that it was a product of negotiation does not necessarily make it fair or lawful. Section 3 of the EEA requires that Act to be interpreted in compliance with our international law obligations and in particular, International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation. … [P]arties may not contract out of the fundamental rights and protections afforded under the Constitution or the EEA to the undue detriment of non-parties to that agreement." [Paragraph 16]

"Human dignity, the achievement of equality, the advancement of rights and freedoms, non-racialism and non-sexism are the founding values of our constitutional democracy. It was contended … that Solidarity was not entitled to rely directly on the provisions of the Constitution when there was legislation which gave effect to the right in issue, and that the principle of constitutional subsidiary prohibited the direct reliance on the Constitution. … [T]he arguments raised … goes to the heart of our employment equity dispensation, and it would be remiss of this Court not to consider this matter within the context of our constitutional framework." [Paragraph 17]

"In the light of our painful history of sustained and institutionalised discrimination, the debates surrounding the purpose, efficacy and even the legitimacy of affirmative action measures will linger on for generations. The overall consequences of the legacy of institutionalised discrimination are deeply embedded in the polity, society and economy of the country and will not be resolved overnight, even in the face of the political transformation that has occurred and the elimination of discriminatory laws and practices." [Paragraph 22]

"The drafters of the EEA never envisaged the implementation of reverse racism when they had affirmative action measures in mind. Their intentions were always noble and in addressing the imbalances of the past, it was indeed foreseen that the implementation of remedial measures such as affirmative action will always lead to unequal treatment of others in the short term, in the interests of ultimately achieving equity in the long term. It was in the light of these considerations that the provisions of section 15(4) of the EEA were carefully worded to ensure that those excluded from affirmative action measures do not face absolute barriers in their future or continued employment, it being appreciated that that they also enjoy protection against discriminatory policies and practices." [Paragraph 23]

"It should not be forgotten that the apartheid government used the public service with good effect in effecting its wayward policies including job reservation. To put on blinkers to these historical realities in our approach towards an equal society, and to attempt to redress inequality with the starting point as the adoption of the new Constitution … is doomed to fail. Our struggle for equality goes beyond 1996, and any contrary approach would merely address the symptoms rather than the root cause of inequality." [Paragraph 26]

"The Constitutional Court in Barnard accepted that the EEA did not allow strict and rigid quotas to be enforced, but did allow an employment equity plan to set targets to be pursued by an employer. It was also held that rigid quotas would in effect place an absolute bar on the employment or promotion of a

member of a privileged group, and having considered the SAPS' employment equity plan, the Constitutional Court also held that it did not impose such rigid quotas and neither did the manner in which the Plan was being implemented." [Paragraph 49]

"The Constitutional Court in Barnard held that a measure taken pursuant to section 9(2) and falling properly within the scope of the section will not offend the provisions of section 9(3) as it will not be unfair discrimination on the grounds of race. … I am satisfied that the scheme of the Agreement, as implemented together with the Plan, met the requirements of section 15(1), (2) and (3) of the EEA, and does not offend against the provisions of section 9(3) of the Constitution." [Paragraph 77]

"… Importantly, the Agreement … strives for substantive equality, and does not impose substantial and undue harm or disproportionate burdens on those who might find themselves excluded from it. In fact, there appears to be even more members of SAPS who fall within the designated group that have not benefitted from the scheme, and who might even have more cause to feel aggrieved. There is therefore no basis upon which it can be concluded that the scheme, as implemented in terms of the Plan and the Agreement, or the Collective Agreement on its own results in, or amounts to unfair discrimination." [Paragraph 78]

"POPCRU's contention was that it was joined to these proceedings and wished to pursue costs as Solidarity's case was vexatious. I agree that Solidarity's attack on the Collective Agreement was untenable, and considerations of law and fairness dictate that the respondents, with the exception of the fourth, should be entitled to their costs." [Paragraph 79]

The application was dismissed

TSHIDZIAMBI V UNIVERSITY OF VENDA (JS1145/12) [2014] ZALCJHB 125

Case heard 4 September 2013, Judgment delivered 28 January 2014

This was an opposed application for condonation for the late filing of the Applicant's statement of case. The Applicant's main claim was based on an alleged automatically unfair dismissal on the ground of sex as contemplated in section 187(1)(f) of the Labour Relations Act. Secondly, she claimed to have been discriminated against as contemplated in section 6 of the Employment Equity Act. In the alternative, she alleged that she was unfairly dismissed. Applicant had averred that the delay in filing her statement of case was approximately four months. In her written heads of argument, it was contended that the delay was only 49 days. Respondents contention was that the delay was 150 days.

Tlhotlhalemaje AJ held:

"It is my view that a lack of funds as an explanation for a delay in complying with time frames should not always be regarded as being reasonable and acceptable. Each case needs to be looked at in terms of its own circumstances, and an evaluation should be made as to whether that explanation should indeed be acceptable. It is not unusual for unrepresented parties, especially indigent and unsophisticated employees who have lost their jobs to directly approach this Court and lodge their claims by completing the standard Form 6. Some of these statements of claim might in the end appear incomprehensible, but at most, an attempt has been made to comply with the prescribed time frames. …" [Paragraph 23]

"The Applicant … cannot by all accounts be described as needy or unsophisticated. In referring all her disputes to the CCMA, she had always been legally assisted, when at that stage there was no need for legal representation. In as much as her endeavours to secure the assistance of the Legal Aid, Law Society and Commission for Gender Equality are acknowledged, at the same time, her attorneys of record throughout had an obligation to advise her that she could have approached the Court on her own and timeously filed her statement of claim whilst pursuing other avenues in securing funds. It was not sufficient for her attorneys to simply inform her that her case could not be taken on account of lack of funds as there were other avenues open to her as directly pointed to on behalf of the Respondent." [Paragraph 24]

""[T]he Applicant could simply have been advised to approach the Court on her own and filed a statement of claim on time. Being a Professor, it is doubted that she would have encountered any difficulties in completing a simple standard Form 6. That Joubert attorneys insisted on some funds before the Applicant could be assisted is beyond comprehension. In my view, the delay in this case in filing a statement can not be attributed to the Applicant's lack of funds alone. It was purely due to bad legal advise or no advice at all from her attorneys of record, who were more concerned with their fees than giving the Applicant proper advice that would cost her nothing. To this end, given the Applicant's personal circumstances, her explanation in regard to the late filing of the Applicant's statement of claim is not regarded as reasonable or acceptable." [Paragraph 25]

"The Applicant's case in the alternative rests on an allegation of automatically unfair dismissal, more specifically surrounding the allegations of sexual harassment. … If condonation is not granted, it would imply that these issues, which are of importance to the community of the Respondent and the public at large are not properly ventilated. … It can thus not be in the interest of justice that these issues remain unresolved." [Paragraph 32]

"The contentions made on behalf of the Applicant that the importance of this case lie in the fact that the purpose in pursuing it is to protect the rights of the Applicant or those of other woman faced with discrimination and or sexual harassment should be viewed with scepticism. In fact, these submissions amount to red herring given the facts of the case and more specifically, the belated manner with which the Applicant had made allegations of impropriety against Mbiti. In my view, the importance of this case lies in the fact that the allegations and counter-allegations between the Applicant and Mbiti emanate within their relationship in a public institution. If there is any truth in any of these allegations and counter-allegations which are now in the public domain, it would not only be in the interest of justice, but also in the interest of the Respondent and its community that they be properly ventilated in Court by way of a trial" [Paragraph 34]

The application for condonation was granted.

AFRICAN BANK V MAGASHIMA AND OTHERS (JR2419/12) [2014] ZALCJHB 298
Case Heard: 5 December 2013, Judgment Delivered on: 5 August 2014

A commissioner had found that the dismissal of Magashima was substantively unfair and ordered that she be reinstated with retrospective effect, and be paid back-pay. Applicant sought an order that the award be substituted with a finding that the dismissal was fair. Magashima was responsible for reviewing loan applications before approving them. The control procedures provided for a separation of duties in

order to prevent errors or fraud, hence a person responsible for reviewing loan applications could not capture loan applications. At a disciplinary enquiry, Magashima conceded having assisted sales consultants with the capturing of loan applications and using their passwords to do so. She denied that she was paid any commission by the sales consultants. She was subsequently found guilty of the charges and dismissed. A dispute was referred to the CCMA, and when conciliation failed, the matter was then referred for arbitration. The Commissioner accepted the concession made by Magashima that indeed she had shared passwords with consultants, and had completed loan applications on their behalf. However the Commissioner found that Magashima's dismissal was however unfair as she was treated differently from two other individuals.

Tlhotlhalemaje AJ held:

"It is not sufficient for an employee facing allegations of misconduct to simply shout; 'Inconsistency!', and automatically be absolved from the consequences of his or her acts of misconduct. Where an employee claims inconsistency, firstly, the onus is on that employee to demonstrate in what material respects employee X was treated differently from him or her, when both have committed the same or similar form of misconduct, and why that was unfair. Secondly, it is for the employer to justify the differentiation in the treatment of the two employees. In the absence of evidence to demonstrate that the employer had acted capriciously or was motivated by some irrelevant or unfair considerations in instituting disciplinary measures or handing out sanction between the two employees, it should be concluded that the employer's decision to differentiate between the two is fair." [Paragraph 22].

"In my view, the submissions made on behalf of Magashima are akin to an employee claiming inconsistency and expecting to be automatically absolved from the consequences of her misconduct. It appears that the Commissioner was clearly persuaded by this mere allegation and fell into the trap that *Sidumo* warned against, i.e. that Commissioners should not approach the matter on the basis of what decision they would have made had they been the employer. A commissioner's task as explained in *Sidumo* is not to ask what the appropriate sanction is but whether the employer's decision to dismiss was fair. It is apparent that the Commissioner from his reasoning and conclusions reached misconstrued his mandate and failed to take into account essential material facts, and came to a conclusion which a reasonable decision could not have come to on the material before him." [Paragraph 25].

"By solely relying on the claim of inconsistency, and also not applying or properly considering the principles surrounding the application of the parity principle, the Commissioner arrived at an unreasonable result. Nowhere in the award was it shown that in not dismissing Maphiri, the Applicant had acted capriciously and arbitrarily, or that the Applicant had other motives. The Commissioner failed to take into account the importance of the rules and policies breached, the operational risk posed as a consequence of Magashima's conduct; the fact that Magashima had conceded to breaking the rules but also sought to justify it, which in my view did not amount to a show of remorse; and that as a consequence of the misconduct and the position Magashima held, it could not be expected of the Applicant to trust her thereafter. Magashima had thirteen years of service, and for her to have denied knowledge of the rules was clearly improbable as correctly established by the Commissioner. In the light of these irregularities, the Commissioner arrived at an unreasonable result, rendering his award one which a reasonable decision maker would not have arrived at in the light of the material before him. Consequently, the award stands to be set aside." [Paragraph 26]

MODIBEDI AND OTHERS V MEDUPI FABRICATION (PTY) LTD (JS742/10) [2014] ZALCJHB 154

Case Heard: 26, 27, 28, 29, 30 August 2013; 2 and 3 September 2013, Judgment Delivered: 6 May 2014

The applicants were dismissed by the respondent on 30 March 2010 following upon their participation in unprotected industrial action. The vast majority of the applicants were employed as artisans (welders, boilermakers, machine operators and riggers). They fell under the category of core employees and commenced employment at varying times during 2009. They were employed in terms of project and task specific limited duration contracts. On 15 October 2009, the respondent called a meeting with the representatives of recognized unions to discuss the need to employ a limited number of expatriate artisans in order to boost production. The employees were assured that these moves would not in any way jeopardise their employment opportunities. On 17 October 2009 the majority of the applicants who were unhappy with these developments refused to commence the day shift, and insisted on being addressed by management. After the employees went back to work, they were issued with final written warnings. Further, the respondent deducted a pro-rata portion of the applicants' bonus and also one hour's pay from their salaries. The respondent issued letters of caution to the employees. Disciplinary enquiries commenced and the employees raised certain objections at the commencement and during the disciplinary hearing. The applicants declined to present their case and walked out of the process. The chairperson recommended the dismissal of the applicants and management then informed the applicants of their dismissal on 30 March 2010. Following the non-resolution of the dispute at the Metal and Engineering Industries Bargaining Council, the applicants approached the court to challenge the substantive and procedural fairness of their dismissal. They sought retrospective reinstatement, or in the alternative, compensation equivalent to 12 months remuneration in the event that it is found that their dismissal was unfair.

Tlhotlhalemaje AJ held:

"Notwithstanding the supposedly contentious nature of the food issue, it was again raised as part of the general concerns surrounding the work stoppage of 7 and 8 January 2010. In an endeavour to attend to the problem, a meeting was arranged between management, employee representatives, and IPS, which was to be followed by an inspection of the catering facilities. The employees however did not attend that meeting or inspection, as they were 'tired' from attending other meetings pertaining to the work stoppage. The attitude of the employees indicated the seriousness with which they regarded the issue of catering. Be that as it may be, management had on its own, had a meeting with IPS and done an inspection. Nothing untoward was found, and it was established that there was no merit in the complaint that IPS did not serve name brand food." [Paragraph 64].

"Amongst other demands made by the employees was that the respondent must buy them groceries and that they would prepare their own meals. This notwithstanding the impracticalities with this approach. When the respondent refused to consider this option, like the bullies they were, the employees threatened retribution in the form of work disruption. Notwithstanding the problems with the grocery option, employees were told to compile a list whilst the respondent's board was to consider their demand. The grocery lists compiled by the employees according to their houses/units range from basics like mealie meal to luxuries such as prawns. In some instances, the grocery list included red wine, and toothpaste. Probably this was meant to be flippant." [Paragraph 69].

"The unreasonableness of the applicants' attitude in my view became abundantly clearer with the list of ten 'non-negotiable' demands tabled on 8 March 2010. Despite the respondent having acceded to eight

of those demands, the employees were uncompromising nevertheless in respect of the other two, which the respondent could not yield to on the basis of practical considerations and the fact that to give in to them would clearly put the respondent in conflict with the provisions of the PLA. Nkosi and the other employees were aware of this conflict, but his view was that the respondent could go contrary to the provisions of the PLA in order to meet their demands. This sense of self-righteousness was to prove to be the demise of the applicants. In my view, whatever solution the employees were looking for was in respect of a problem which they had created themselves. They were unrelenting in respect of demands which were clearly unreasonable." [Paragraph 71].

"As already indicated, the employees were always looking for a fight, and ultimately, it was no longer clear what their grievances, if any were, as they kept changing their demands with little regard to the consequences of those demands or their actions. If ever there was any form of provocation, it was instead on the part of the employees. In my view, they were looking for a reason for the respondent to terminate their services, and unfortunately, they got their wish." [Paragraph 72].

With regard to the procedural fairness of the dismissal, Tlhotlhalemaje AJ held that:

"Where the chairperson of the enquiry was presented with the undisputed version of the employer in circumstances where an employee failed to exercise his or her right to be heard, I fail to appreciate how that employee can present his or her mitigating factors in a vacuum. In my view, since the employee waived his or her rights to be heard, it would place an onerous burden on the employer to make a finding on 'guilt' and thereafter call upon that employee to plead in mitigation. There would be no logic in this approach as in my view, the employee has waived his or her rights for all intents and purposes, and that waiver cannot be merely in respect of presenting one's case. The waiver should be construed as being in respect of the disciplinary process as a whole. To this end, the applicants in this case by refusing to take part in the disciplinary enquiry waived their rights to be heard, including the right to plead in mitigation." [Paragaph 92].

It was held that the dismissals were substantively and procedurally fair.

NGOBENI V MINISTER OF COMMUNICATIONS AND ANOTHER (J08/14) [2014] ZALCJHB 96

Case Heard: 20 March 2014, Judgment Delivered: 3 April 2014

The applicant was a whistleblower who exposed malfeasance in his department, the disclosures revealed possible breaches of legal obligations and criminal conduct. He approached the court for a declaratory order, seeking that the disclosures he made during the execution of his duties be deemed to qualify for protection in terms of the provisions of the Protected Disclosure Act (PDA). He also sought an order prohibiting the Minister and the Director-General from subjecting him to occupational detriment in contravention of section 3 of the PDA. The respondents opposed the application and argued that the disclosures were not made in good faith; and that the applicant has not been subjected to any occupational detriment. The respondents further argued that there was no causal relationship between the disclosures and a pending disciplinary enquiry against him for alleged misconduct. Respondent further argued that the allegations raised by the applicant are presently the subject of investigation by the SIU, and that the alleged misconduct by the applicant was investigated and is the subject of a pending disciplinary enquiry.

Tlhotlhalemaje AJ held:

"...[F]actors such as lack of honest intention, malice, ulterior motive, a quest for revenge, reckless abandon, a quest for self or others advancement, and attempts to divert attention from one's or others' wrong doing and involvement in criminal or acts of misconduct will negate the requirement of good faith. In this regard, the onus will be on the employer to establish the lack of good faith. The absence of good faith however does not detract from the fact that a disclosure was made. Even if the disclosure was made in pursuance of ulterior motives, it is still incumbent upon the employer to investigate the veracity of the allegations and to take appropriate steps where required. Where however it is found that a protected disclosure was made in good faith, and it is still nevertheless established that the whistle-blower himself or herself is or might be involved in acts of impropriety, the question is whether he/she should be immune from answering to those allegations." [Paragraph 54].

In deciding whether the disciplinary action intended against the applicant constituted an occupational detriment Tlhotlhalemaje AJ examined whether the disciplinary action was to be instituted on account, or partly on account of the applicant having made a protected disclosure, and found that:

"[T]he intended disciplinary action against the applicant can be said to have been brought partly on account of the protected disclosures the applicant had made. It is said partly in that the other part to the instituting of the disciplinary action pertains to the actual allegations of impropriety on the part of the applicant. Notwithstanding the fact that the applicant had made a protected disclosure and in good faith, the allegations against him remain untested. It could not have been envisaged by the drafters of the PDA to exonerate whistle-blowers regardless of other prevailing circumstances including the fact that they themselves may be involved in acts of misconduct. Inasmuch as the PDA is intended to protect whistle-blowers, there is no provision for sacred cows." [Paragraph 70].

" [T]he mere fact that the disclosures were made before the investigations in respect of the Nkowankowa event does not absolve the applicant from having to answer to equally serious allegations against him. The applicant's brave action of exposing malfeasant in the department is commendable. However, he must also answer to the allegations against him, no matter how spurious and unsustainable they may appear." [Paragraph 71].

The application was dismissed.

SELECTED JUDGMENTS

CIVIL PROCEDURE

SOBSON COAL MINING SERVICES AND EXPLORATIONS CC AND 2 OTHERS V S AND R CONNEXION MINING AND PROJECTS AND 2 OTHERS, UNREPORTED JUDGMENT, CASE NUMBER 227/2011 (NORTHERN CAPE HIGH COURT)

Case heard 27 June 2011, Judgment delivered 19 August 2011

Applicants sought an order compelling the First and Second Respondents to cede, transfer and make over their rights and interests to various prospecting licenses.

Erasmus AJ held:

"The relief sought ... is based on a written agreement, the memorandum of understanding ('the MOU'). ... It was entered into by the First and Second Applicants and the First and Second Respondents ..." [Paragraph 8]

"Clause 10 of the MOU contains an arbitration clause. It is formulated to make provision for any dispute, of whatsoever nature, which arise out of or in connection with the MOU, which has not been resolved by way of mediation, to be submitted for arbitration ... The only exception pertains to ... approaching a court ... for interim relief on an urgent basis, pending the decision of an arbitrator." [Paragraph 10]

"The arbitration clause ... does not deprive the court of its jurisdiction ... Should a party institute proceedings in a competent court, in spite of the arbitration agreement, the respondent or defendant has the option apply [sic] for a stay of the proceedings. ... A stay of proceedings for purposes of arbitration should not be granted unless there is a genuinely triable issue between the parties."" [Paragraph 10.1]

"... The Applicants should ... have referred the issues arising from the MOU for arbitration. Given the facts and circumstances of this application ... I am of the view that there are no genuinely triable issues for arbitration and that the matter should be dealt without further delay ..." [Paragraph 10.2]

"The authority of the deponents of the founding and confirmatory affidavits, to represent the Applicants ... was challenged from the onset and denied in the opposing affidavit." [Paragraph 11]

"... [T]he general approach ... in the face of disputes of fact in motion proceedings where final relief is sought, is that the case must be decided on the versions of the Respondents and those averments by the Applicants which were not disputed by the Respondents. The founding papers of the Applicants do not contain any resolutions to the effect that they were authorised ... and the Applicants have not filed replying papers addressing these issues. The denial by the Respondents did not constitute a blunt denial. This issue must therefore be decided on the version of the Respondents. I find that ... Gijana ... and ... Mazomba ... were not authorised to institute proceedings ... and that the Application falls to be dismissed on those grounds." [Paragraphs 11.1 – 11.3]

"Should I not be correct ... the application also falls to be dismissed if I should find that the Third Applicant does not exist. ... In terms of ... the MOU, the parties agreed that a special purpose vehicle

('SPV') would be set up in the form of a company through which the project would be conducted. The SPV would be named Sannas Mineral Resources (Pty) Limited." [Paragraphs 12 - 12.1]

"There are no documents supporting any of the allegations pertaining to the registration of Sannas Mineral Resources (Pty) Limited ... [I]t must then be concluded that the Third Applicant does not exist. If the Third Applicant does not exist, I fail to understand how the cession and/or transfer of the prospecting rights and/or interest therein to Sannas ... can take place." [Paragraphs 12.7, 12.9]

The application was dismissed. First and Second Applicants were ordered to pay costs on the attorney and client scale, on the grounds that the application had been based on misleading and/or untruthful allegations; the founding papers contained numerous duplications and irrelevant documents; applicants had approached the court in motion proceedings despite being aware of factual disputes; and the dispute should have been resolved by mediation or arbitration [paragraphs 16.1 – 16.4]

CRIMINAL JUSTICE

S V EA 2014 (1) SACR 183 (NCK)

Case heard 3 June 2013, Judgment delivered 28 June 2013

The accused was convicted on three counts of assault with intent to do grievous bodily harm in the magistrates' court. After conviction but before sentencing, it emerged that the accused had been diverted from the criminal justice system in respect of two of the counts, and had successfully completed a diversion programme for juvenile offenders. As a result, the charges were withdrawn, only to be reinstated later. The case was sent to the High Court on special review.

Erasmus AJ (Kgomo JP concurring) held:

"The diversion of juvenile offenders is currently regulated by the Child Justice Act ... In terms of s 59(1)(a), which specifically deals with the legal consequences of a decision to divert an accused, a prosecution based on the same facts may not be instituted against an accused who has completed a diversion programme successfully. However, the Child Justice Act first came into operation on 1 April 2010. In terms of s 98(1) thereof, all criminal proceedings instituted against children, and which had not been completed before the commencement of the Act, must be continued and completed as if the Act had not been passed. The Act has no retrospective provision." [Paragraph 4]

"The right to a fair trial was recognised before the Constitution ... came into operation and operated as the foundation of our legal system. In appeal or review proceedings though, the question was simply whether there was an irregularity which resulted in a failure of justice. The investigation is now wider and it must also be determined whether the prosecution, including the decision to prosecute, was in accordance with the basic principles of equity and justice ..." [Paragraph 8]

"... [A] prosecutor stands in a special relationship to the court and this required and still requires that an accused be treated fairly. The NPA, when deciding whether to institute or continue a prosecution, must consider and give effect to the provisions of the Constitution and the principles enshrined therein, and any other applicable legal principles and legislation. Failure to comply with these principles will result in the decision being subject to review and intervention by the courts. ..." [Paragraph 9]

"The CPA provides no guidance ... It does not prohibit the reinstatement of the prosecution, as the case against the accused was previously withdrawn and the prosecution was not stopped ... The Child Justice Act does not apply. Before its commencement there was no other legislation in place that regulated the diversion of juvenile offenders." [Paragraph 10]

"There was legally no prohibition against the reinstatement of the prosecution against the accused, except if the court so directed in terms of s 342A(3) of the CPA. In the present case there are no irregularities that constitute grounds for interference. There were no mala fides on the part of the prosecutors and/or the NPA that influenced or motivated the decision to prosecute the accused again. We deem it necessary to mention, though, that we find it disturbing that the accused was summonsed and brought before court in August 2009 when the decision of the DPP was still pending. ..." [Paragraph 12]

"The accused was diverted and the case was withdrawn after he completed the programme successfully. ... It can be safely inferred that the prosecutor informed the court accordingly when he withdrew the case. These facts suggest that an expectation was created that the accused would not be prosecuted again on the same facts. This must be accepted in his favour. There is no evidence that the representation by the prosecutor was unqualified or that it was unreasonable. Had the prosecutor not informed the court of the reasons for the withdrawal in this manner, the accused could have been prejudiced, in that there would not have been any record of the reason for the withdrawal of the case. ..." [Paragraph 16]

"It was, in the circumstances of this case, unfair and not in accordance with the notions of basic fairness to prosecute the accused again. We are therefore entitled to interfere in this matter, a decision we have not taken lightly. The NPA should be kept to the expectation that the prosecutor created. ..." [Paragraph 19]

The convictions on the relevant counts were set aside, and the case was remitted to the magistrate for sentencing on the remaining ground of conviction.

THE STATE V SULEIMAN HARDIEN, UNREPORTED JUDGMENT, CASE NUMBER KS 28/10 (NORTHERN CAPE HIGH COURT)

Case heard 13 – 15 June 2011, Judgment delivered 22 June 2011.

The accused, a 35 year old male, was convicted of robbery with aggravating circumstances and murder. It was found that the murder was pre-meditated, and that the accused had acted with *dolus directus*.

Erasmus AJ delivered judgment on sentence:

"Sentencing the accused is the most difficult part of the criminal proceedings. When imposing sentence, the objectives of punishment, namely deterrence, prevention (which includes the reformation of the accused) and retribution must be taken into account [citation to S v Rabie 1975 (4) SA 855 (A) and S v Khumalo and Others 1984 (3) SA 327 (A)]. In South Africa today, in view of the violence and serious crime, the objectives of retribution and deterrence are accentuated." [Paragraph 3]

"... [T]he sentence must fit the offender and the crime as well as serve the interests of society. Anything that affects the accused as a direct result of the crime must be considered when deciding on a suitable

sentence. Ingrained traits and habits of the accused cannot be ignored ... When considering the interests of the community, it should be taken into account that the community must be able to sense that the Courts are striving to maintain peaceful and safe living conditions. ..." [Paragraph 4]

"With regard to the personal circumstances of the accused ... The accused is 35 years old. He attended school until Grade 11. He is not married, but had two children ... Both children have passed away. He is the youngest of four children. His father is currently in an old age home. He has a continuous work record up until 2008, after which he did not work. ... The accused has one previous conviction for assault with intent to do grievous bodily harm. ... The accused is not considered to be a first offender ... This crime was committed at the time the accused started using drugs. ..." [Paragraph 5]

"... The accused was well-known to the family and friends of the deceased. I accept that the death of the deceased impacted heavily on the family of the deceased. ... The implications of drug abuse and the consequences of using it, the influence it has on the commission of other crimes cannot be underestimated and the community should take note of that. The community has an interest in that sentences imposed should act as a deterrent to members of the community ..." [Paragraphs 6 – 7]

"The accused committed a callous murder. The degree of violence used by the accused is shocking. ... He sold the deceased's property and misled the friends of the deceased, by pretending that he was still alive and having conversations with him. ... The accused's conduct after the crime speaks of a lack of compassion and greed." [Paragraph 8]

"The accused had a suspended sentence hanging over his head. It did not however deter him from committing violence against the deceased ... I have already found that the murder was pre-meditated. The provisions of section 51(1) of Act 105 of 1997 therefore apply. A sentence of life imprisonment should ordinarily be imposed unless substantial and compelling circumstances exist that justify the imposition of a lesser sentence." [Paragraphs 9 – 10]

"The accused's personal circumstances are taken into account as a mitigating factor. I also take into account the fact that the accused was addicted to 'Tik' and that he used drugs before the murder. I take into account his inhibitions and judgment might have been affected as a result of this addiction and use of 'Tik'. I find, in favour of the appellant, that these constitute substantial and compelling circumstances that justify the imposition of a lesser sentence and that I am therefore not compelled to impose a sentence of life imprisonment on the charge of murder." [Paragraph 10 pages 6 – 7]

The accused was sentenced to 15 years imprisonment on the count of robbery and 21 years imprisonment on the count of murder, both sentences to run concurrently. The accused was declared to remain unfit to possess a firearm.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE CAPE OF GOOD HOPE V VAN DER WESTHUIZEN (272/2013) [2013] ZANCHC 15 (31 MAY 2013)

Case heard 26 April 2013, Judgment delivered 31 May 2013

Respondent had been involved in falsely certifiying that an ante-nuptial contract had been signed prior to the date of a couple's marriage. Respondent pleaded guilty to a subsequent complaint, explaining that he had acted as he did "because of an inexplicable and insane moment."

Erasmus AJ held:

"The profession of an attorney requires absolute honesty, integrity and reliability from a practitioner. Where he acts for others, the law expects uberrima fides, which means the highest possible degree of good faith. He owes the highest standard of trust not only to the Court and the public at large, but also to the Law Society of which he is a member" [Paragraph 5]

"The Applicant's conduct falls far short of the standards the Court expects from an attorney. He has contravened the Act and the applicant's rules. He is guilty of unprofessional, dishonourable and unworthy conduct and has brought the attorney's profession into disrepute. His conduct was potentially prejudicial to third parties and was prejudicial to his creditor." [Paragraph 10]

"The sanction to be imposed lies within in the sole discretion of the court. Courts have generally required Law Societies to take a view on a matter to assist the court in deciding on the necessary sanction, which it has done in this matter. Given the respondent's immediate acknowledgment of his guilt, his regret and contrition and the fact that he neither made an attempt to conceal the truth, nor to mislead the applicant and the court, the view taken by the applicant cannot be faulted." [Paragraph 11]

Respondent was suspended for a period of one year from practicing as an attorney for his own account, as a director of a professional company, or as a professional assistant in charge of a branch office of any practice. The suspension was suspended for a period for 5 years on certain conditions. Respondent was ordered to pay the costs of the application on the attorney and client scale.

SELECTED JUDGMENTS

CIVIL PROCEDURE

NICOR IT CONSULTING (PTY) LTD v NORTH WEST HOUSING CORPORATION 2010 (3) SA 90 (NWM)

Case heard 21 May 2009, Judgment delivered 21 May 2009

The plaintiff (excipient) claimed moneys allegedly due from the defendant (respondent) in terms of certain written agreements. Defendant filed a special plea and plea, alleging a failure to give notice in terms of s 3(1) of the Institution of Legal Proceedings against certain Organs of State Act (the Act). Plaintiff filed an exception to the special plea, alleging that the defendant did not qualify as an organ of state, and that, as plaintiff was claiming specific performance, the claim did not qualify as a "debt" as defined by the Act.

Lever AJ held:

"... The definition of organ of State in the Act as contained in clauses (a), (b) and (c) of such definition [in the Act] is essentially the same as that set out in s 239 of the Constitution. ... [T]he definition in the Constitution includes a functionary or institution that exercises a public power or performs a public function in terms of any legislation. The definition in the Act does not go that far and does not include any functionary or institution performing a public power or performing a public function in terms of any legislation." [Paragraph 7]

"... [O]ne must look to the Constitution to determine whether the defendant derives any power or function directly from it in order to determine if the defendant is an 'organ of State' as contemplated in the Act. ... [T]he National Gambling Board case ... does illustrate the point that different functionaries or entities obtain their powers and status as an organ of State from different parts of the definition set out in s 239 of the Constitution. ..." [Paragraph 11]

"Although Mr Hitge did not articulate it in that way, the effect of his argument is that he wants the court to read para (c) of the definition of 'organ of State' contained in the Act as if the words 'in terms of the Constitution' meant nothing more than 'set out in the Constitution' or 'contained in the Constitution'. If, this were so it would lead to anomalies and an untenable situation. If, for example, a non-government organisation (NGO) had as its main objective the raising of funds for the provision of low-cost housing and in fact provides such housing to the indigent in South Africa, on the reading of the definition implied ... that NGO, for the purpose of the Act, would be an 'organ of State' ..." [Paragraph 12]

"In the context of the possible anomalies ... and in the light of the decision of the Constitutional Court in ... Mohlomi v Minister of Defence, ... the words 'in terms of' must be narrowly construed. This approach is supported by the fact that para (b) (ii) of s 239 of the Constitution has been left out of the definition of

'organ of State' in the Act. It is further supported by the fact that such corporate entities, that the legislature intended the Act to apply to, are specifically identified in paras (d), (e) and (f) of the definition 'organ of State' ... It is also supported by the fact that, from the title of the Act and its preamble, it is clear that the legislature did not intend the Act to apply to all organs of State." [Paragraph 13]

"In this context the words 'in terms of the Constitution' connote that both the identity of the functionary or institution and the power or function that he, she or it exercises are identified in the Constitution itself. Put differently, the power or function exercised by the functionary or institution arises directly from the Constitution, as is illustrated by the case of National Gambling Board v Premier, KwaZulu-Natal, and Others. Clearly then, the defendant does not derive its powers or functions 'in terms of the Constitution', it derives its powers and functions from its enabling Act, the North West Housing Corporation Act. It therefore follows that the defendant is not an organ of State as defined in the Act. This would be sufficient basis to uphold the plaintiff's exception to the defendant's special plea. However, in case I am wrong ... I turn to the second issue raised in the plaintiff's exception." [Paragraph 14]

"... The effect of the Act is to limit a creditor's right of access to the courts, which is enshrined in s 34 of the Constitution. The purpose of the Act in this context is not merely to provide uniform periods for providing the required notice, but to bring the limitation of the right to access the courts ... within the parameters of s 36 of the Constitution. It is in this context that the definition of 'debt' contained in the Act must be interpreted." [Paragraph 28]

"When a right is adversely affected by legislation and particularly when such right is one contained in the Constitution, the offending provision must be interpreted restrictively. If in interpreting the definition of 'debt' para (b) qualifies the whole of para (a), then the notice ... would only have to be given when the claim is one for damages. If on the other hand para (b) qualified only (i) and (ii) of para (a), then any action would be subject to the provisions of s 3 of the Act." [Paragraph 29]

"On a careful reading of the definition of 'debt' contained in the Act, it is clear that para (b) qualifies para (a) as a whole. This in my view is the 'ordinary and natural meaning' of the words as they are set out in the definition of 'debt' in the Act. ... This 'ordinary and natural' meaning has been considered within the context and purpose of the Act and I find that it does not offend against the purpose of the Act. More significantly, this 'ordinary and natural' meaning makes fewer inroads into the rights of access to courts and equality enshrined in the Bill of Rights in the Constitution. As such, this ordinary and natural meaning is to be preferred above the wider interpretation of the definition of 'debt' contended for by the defendant. Accordingly, I find that ... a 'debt' for the purposes of the Act is confined to a claim for damages ..." [Paragraph 30]

The exception was upheld, and the special plea struck out.

CRIMINAL JUSTICE

BOTHA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2014 (1) SACR 479 (NCK)

Case heard 29 October 2013, Judgment delivered 29 November 2013

This was an application to review and set aside a decision by the third respondent magistrate to allow the second respondent, the National Director of Public Prosecutions, to exhume the body of the deceased in terms of the provisions of the Inquests Act. Applicant was the son of the deceased, whose mother (the deceased's spouse) was on trial for the murder of the deceased.

Lever AJ (Kgomo JP concurring) held:

"… As we understand it, the dispute in the murder trial revolves around the question whether the deceased committed suicide or was murdered. The deceased suffered two gunshot wounds to the head … The one bullet did not penetrate the skull, and lodged between the skin and the skull; the other entered the skull, passed through the brain and exited the skull. The pertinent question in the murder trial, as we understand it, is, if the shot whose projectile lodged between the skin and the skull was the first shot, what would have been the capacity of the deceased to talk and ultimately shoot himself in the head a second time?" [Paragraph 11]

"The method of interpretation that the applicant seeks to impose upon this court is pedantic and mechanical. It moves from one provision of the Act to the next like the workings of an old, mechanical analogue clock. This method of interpretation is no longer favoured by our courts. Our courts have now adopted the 'purposive' method of interpretation of statutory enactments. Whichever method of interpretation is used, the purpose of such interpretation is to seek the intention of the legislature concerned. The former method relies solely on the wording of the relevant enactment itself, and the latter method of interpretation seeks to establish the purpose of the relevant Act and thereafter determines the intention of the legislature concerned by reading the provisions of the Act concerned within the context of the purpose so determined." [Paragraph 20]

"… [I]t becomes clear that the ambit of the Act goes well beyond what is disclosed by the long title. Sections 3, 4 and 5 of the Act clearly relate to gathering information required for the purposes of a prosecution and/or the conduct of a formal inquest. The purpose of Parliament in enacting the said Act must have included the provision of information for both the prosecution of an accused or the conduct of a formal inquest. At the hearing of this matter counsel for both applicant and NDPP were asked if they were aware of any other legislation dealing with the examination and processing of human remains to determine the cause and circumstances of the relevant death, within the context of criminal law/procedure. Neither counsel was able to direct the court to any such legislation. This court was also unable to find any such legislation. " [Paragraph 21]

"It must be remembered that society in the broader sense has an interest in seeing that justice is done in a particular instance where death is caused by means other than natural causes. In our view the mechanism to obtain information for the prosecution provided by s 3(4) as read with s 3(2) of the Act is available to the DPP at any stage of criminal proceedings up to the stage of acquittal of the accused. After conviction different considerations would apply. After conviction the DPP may invoke the said provisions

if he or she has reason to believe that there has been a miscarriage of justice in a particular case. … [A]ny other interpretation of the said Act could potentially lead to absurd results." [Paragraph 25]

"… Our position is supported by looking at the general purpose of an inquest, which is generally accepted to be to consider whether a prosecution should result from a death caused by means other than natural causes. Section 17 of the Act determines that the inquest report be submitted to the … DPP. The report would not be submitted to the DPP for any other purpose, but to consider a prosecution. It is instructive to note the provisions of s 17(2) of the Act which provides that, even after receipt of the inquest report, the DPP may order the reopening of the inquest for the purpose of gathering further evidence, which may include exhumation of the remains and the examination of the remains or any part thereof. … Accordingly, we find that Magistrate Wessels did have the power to consider and grant the relevant permission at the material time." [Paragraph 26]

Lever AJ then considered an argument that the magistrate's decision was an administrative action governed by PAJA:

"… It is clear from the reasons submitted that Magistrate Wessels reached the conclusion that further investigations into the circumstances and causes of the deceased's death were called for. … Section 3(4) of the Act does not require notice to be given to any person. In the context of a criminal investigation or a criminal trial an ex parte application is appropriate. The exhumation of the deceased is regulated by statute. It is clear from Magistrate Wessels' reasons that he has considered and applied the relevant statute. Evidence on oath has been placed before Magistrate Wessels. … From the reasons supplied by Magistrate Wessels, he has evaluated this evidence. From the reasons supplied by Magistrate Wessels it is clear that he has brought a judicial discretion to bear on the relevant request to exhume the body of the deceased." [Paragraph 35]

"In these circumstances we conclude that the act of considering and granting the permission to exhume the deceased is a judicial act, which is not subject to the provisions of PAJA. In these circumstances the application must fail." [Paragraph 36]

The application was dismissed with costs.

S v MAFORA 2010 (1) SACR 269 (NWM)

Case heard 2 July 2009, Judgment delivered 2 July 2009

The accused was charged with, and convicted of, escaping from custody in contravention of section 51(1) of the Criminal Procedure Act, and sentenced to two years' imprisonment. On review, the question arose as to whether the trial court had had sufficient information at its disposal to determine whether the accused had contravened section 51(1).

Lever AJ (Gura J concurring) held:

"The record does not support the learned magistrate's contention that the accused escaped after he had been locked up in a prison. The closest the record comes is where the accused answers a question about where they had come from before being taken to the van, and he replies, '(f)rom the courts cell'. From

the record we do not know if the accused was 'lodged' in the court cell. He may simply have stood outside or next to the court cell. There is an element of doubt as to whether the accused was 'lodged' in the court cell and as a result no such finding can be made. In these circumstances the accused cannot be convicted under the provisions of s 117*(a).* The question that then arises is, does the plea of guilty and the answers given in terms of s 112(1)*(b)* disclose an offence in terms of s 51(1) of the Criminal Procedure Act?" [Paragraph 7]

"Although s 51(1) of the Criminal Procedure Act refers to 'custody', as opposed to 'lawful custody', Du Toit in their commentary on s 51(1) of the Criminal Procedure Act state that the custody should be lawful. ... The effect of this argument ... is that, if this element of control is voluntarily relinquished, 'lawful custody' ceases. If an arrest is lawful, it usually follows that the custody is lawful. It does not necessarily follow that the custody remains lawful. It does not necessarily follow that Public policy dictates that the provisions of s 50(1) (c) and (d) of the Criminal Procedure Act must be taken into account. If those provisions are not complied with, the custody cannot remain lawful. In our constitutional dispensation the law cannot countenance 'unlawful custody'. This would be an infringement of the rights contained in s 12(1) (a) and (b) of the Constitution. In the present case, it does not appear from the record that the custody of the accused was lawful." [Paragraph 10]

"The accused has admitted the escape and sufficient evidence is disclosed on the record to show that he indeed had the necessary mens rea." [Paragraph 11]

"The fifth requirement set out by Du Toit is that there must have been an arrest for a crime. This is justified on the basis that escaping from an arrest effected under a civil warrant does not constitute a crime in terms of s 51(1) of the Criminal Procedure Act. This fifth requirement has probably fallen away. This is because the common law rule to found or confirm jurisdiction in a claim sounding in money of an incola plaintiff by way of a mandatory arrest of a foreign peregrinus has been abolished by the Supreme Court of Appeal, who developed the common law to found or confirm jurisdiction on other grounds. Further, as a result of a ruling of the Constitutional Court, imprisonment for civil debt is no longer possible." [Paragraph 12]

"In the circumstances of this case, where it cannot be established that the accused was 'lodged' in the court cell, no offence in terms of s 117*(a)* of the Correctional Services Act can be established. Further, where the record does not disclose that the 'custody' was lawful, no offence in respect of s 51(1) of the Criminal Procedure Act has been established. In these circumstances the conviction and sentence must be set aside and the matter is referred back to the magistrates' court to commence *de novo* before a different presiding officer." [Paragraph 13]

CHILDRENS' RIGHTS

HJC AND ANOTHER V OV AND ANOTHER (2039/13) [2015] ZANCHC 4 (27 FEBRUARY 2015)

Case heard 3 December 2014, Judgment delivered 27 February 2015

Applicants, the parents of two minor children, sought an order compelling the respondents to reveal the identity or identities of the informant(s) who reported to the second respondent the possible sexual abuse of the applicants' two children. First respondent was a registered public school, and the second respondent was the school's principal at the relevant time.

Lever AJ held:

"… [T]he applicants' version … is that … the second respondent visited the second applicant at the applicants' home. During that visit second respondent informed second applicant that two persons had reported to her that the applicants' son "F" raped his younger sister "A" every night. Furthermore, that the second applicant was present when this occurred and did not intervene. Second applicant requested that the identity of the persons who made the reports be disclosed to her. Second respondent refused to disclose the identities of the persons who made the said report. Second respondent informed second applicant that she and the children must see a social worker … The second applicant accepted the second respondent's instructions and second applicant and the children saw a social worker and a counselling psychologist for assessment. …" [Paragraph 9]

"… Having regard to the fact that the children involved are very young, as well as the nature of the allegations involving such children, the agreement of the parties that the matter should proceed in camera and also the circumstances in which the second respondent filed her substantive answering affidavit … I ordered that the matter should proceed in camera." [Paragraph 18]

"It is one of the core values of our society that children must be protected. In this context children are protected by the provisions of section 28(1)(d) of the Constitution. Similarly, section 110 of the Children's Act also evidences the value placed on the protection of children by our society. In this context where a report is made bona fide and not frivolously or maliciously a court will generally not order the disclosure of the identity of the person who made the report. To do otherwise would make it almost impossible to implement the protections set out in section 110 of the Children's Act or to give effect to the value of protecting children enshrined in the Constitution, because people will simply look the other way if they fear being put to the time, trouble and expense of defending themselves in court." [Paragraph 21]

"… [T]here are important disputes of fact. From the papers filed … it cannot be said that the version put up by the second respondent is inherently improbable. Applicants' have chosen not to file a reply to second respondent's substantive affidavit. In these circumstances I have to accept that applicants cannot dispute the second respondent's version." [Paragraph 24]

"In exercising this court's discretion, I must also place in the scales, the conduct of the person who made the report as well as the conduct of the second respondent. It cannot be disputed that the person who made the report did so in circumstances where he/she made an appointment to see the second respondent. At the material time the second respondent was the principal of the school the children attended. In the circumstances … it was reasonable for the report to be made to the second respondent.

The report was made behind closed doors and the second respondent avers that in her opinion the report was made bona fide. The report was also made to the second respondent in confidence. The second respondent sought the help of two social workers in taking the matter forward. In the circumstances I consider this to be both reasonable and responsible. Second respondent sought to speak to the second applicant alone. It was the second applicant who involved other people. It is understandable that the second applicant would contact her husband … but it is neither understandable nor reasonable for the second applicant to relay the report to her employee. The social worker found that there were incidents of sexual experimentation between the brother and sister … This report was not disputed … This finding by the social worker supports the original report as disclosed by the second respondent." [Paragraph 26]

"In the circumstances I conclude that the report was made bona fide. Furthermore … I believe that I should exercise this court's discretion and not order the disclosure of the identity of the person who made the report …" [Paragraph 27]

"I enquired whether applicants were willing to have second applicant and the children undergo the necessary sessions with the social worker to establish the boundries for sexual conduct between the children. Applicants agreed … I required the Order to make provision for consultation with a social worker or a social welfare organisation to cater for the establishment of sexual boundries and therapy for the children and to report to the Registrar … that the situation had been appropriately dealt with, failing which the Registrar was to report the matter to the Department Of Social Welfare for further investigation. In taking such approach I do not make any judgment on the applicants as parents. The fact that they readily agreed to such an Order shows that they are willing to act in the best interests of their children." [Paragraph 31]

"… In taking such approach, it is also important that one does not take a knee jerk reaction to any allegation of sexual conduct between the children and think the worst, but against this must be weighed the fact that timely and appropriate intervention may prevent one or both of the children suffering emotional or physical damage later in their lives. In these circumstances, it is always better to take responsible and appropriate action rather than to ignore warning signs of a potential problem." [Paragraph 32]

The application was dismissed with costs.

SELECTED JUDGMENTS

PRIVATE LAW

TROGER NO AND ANOTHER V HUNT AND OTHERS [2015] JOL 33725 (NCK)

Case heard 6 November 2012, Judgment delivered 22 February 2013

The applicants' mother had been married out of community of property to the father of the two respondents. The applicants sought a declaratory order that the fideicommissum created by the deceased in favour of the first and second respondents in respect of the immovable property be declared pro non scripto (as if not written). The applicants also sought an order declaring that certain properties of the deceased estate fell into their mother's estate.

Mamosebo AJ held:

"The testator in a straightforward manner devised by will as follows in the introductory part. "I hereby bequeath my estate, movable and immovable of every description and wherever situate as follows: (a) To my wife Kathryn Elaine Hunt: "What is noteworthy is that there is no interruption or intervention between the testator's express intention to give or bequeath his estate and to whom he does so." [Paragraph 19]

"The bequest in clause 3(a)(i) is to the testator's wife, Kathryn Hunt. That immovable property is meticulously described, as in a deeds register. ... In the same clause ... the testator says that: "On the death of my wife this property ---- shall go to one of my sons Sydney Reginald Hunt or Mark Hugh Hunt". Kathryn Hunt had to stipulate in her will who of the two must inherit the farm, in default of which Mark Hugh Hunt becomes the beneficiary. I cannot see how "this property" can give rise to any speculation." [Paragraph 18]

"In clause 3(a)(ii) the "All the rest of my immovable property with the exception of the farm Rietput" is the title of the subject matter which the testator dealt with next. "All the rest of my immovable property" means that leaves out "a portion of Sydneys Hope" because I have already dealt with it in clause (a)(i) and as far as Rietput is concerned I deal with it later in clause 3(b) and 3(c). Clause 3(a)(ii) therefore deals with nine (9) of the eleven (11) properties ..." [Paragraph 21]

"I therefore find ... that the rest of the testator's immovable properties (excluding only the two immovable properties that I have distinguished) are bequeathed to Kathryn Hunt, subject to a fideicommissum in favour of Sydney Reginald Hunt and Mark Hugh Hunt and on their respective deaths the properties shall devolve upon Geoffrey Edward Hunt. This is, indeed, a classical fideicommissum that was established by virtue of the stipulation in clause 3(a)(ii) of the Will." [Paragraph 24]

"The rights of alienation of the property of the fiduciary are therefore limited, as the object of the fideicommissary is to provide for the benefit to be passed on to another beneficiary ..." [Paragraph 32]

"It could never have been the intention of the Legislature to deprive beneficiaries of their inheritance purely based on the restrictive interpretation of section 3 of the Subdivision of Agricultural Land Act ... Respondent's counsel has correctly pointed out that the provisions must be read in its entirety and not piecemeal. The Minister can still be approached for his consent and the provisions of section 5(1) and (2) can be applied ..." [Paragraph 33]

"I have already referred to the Constitutional Court's view in Wary Holdings … that the intention of the Legislature with the Subdivision of Agricultural Land Act was to ensure the continued existence of agricultural land and the Minister's control over it irrespective of the establishment of transitional Councils. Clearly, first and second respondents are farming on this land and must continue to do so until the property vests in the third respondent according to the testator's will. I do not see how their use and enjoyment of such property subject to the fideicommissum can in any way contravene the Act or the wishes of the testator." [Paragraph 34]

The application was dismissed, with costs, including the costs of two counsel, being costs in the administration of the estate.

CIVIL PROCEDURE

LINKS V MEC, DEPARTMENT OF HEALTH, NORTHERN CAPE PROVINCE (1870/2012) [2013] ZANCHC 26

Case heard 22 April 2013, Judgment delivered 24 May 2013

Defendant raised a special plea of prescription to plaintiff's medical negligence claim.

Mamosebo AJ held:

"The plaintiff certainly knew the identity of the debtor(s) from the outset. What remains to be answered is whether the plaintiff had actual or deemed knowledge of "the facts from which the debt arises", as required by s12 (3), before 06 August 2009 when the summons was issued." [Paragraph 16]

"Applying the law to the facts of this case, the plaintiff's cause of action was complete and the debt of the defendant (MEC) became due and payable as soon as the first known harm was sustained by the plaintiff. The cause of action arose on 26 June 2006 when plaintiff first presented himself in hospital for medical treatment. This was however denied by the plaintiff who alleged that he only became aware of the facts by end of January 2007, from what he was informed upon his discharge from the hospital that he will not regain the use of his left arm." [Paragraph 22]

"The plaintiff in this case became aware of the amputation on 05 July 2006. He had suspected prior to this date while still in hospital that something was not right. In my view, plaintiff ought reasonably to have realised on or about 15 July 2006 that the operation was not successful; alternatively that the subsequent treatment was not properly done or that there was no proper remedial medical follow up action. The plaintiff's knowledge can be imputed to him from the time the plaster cast was removed. From the papers I have not discerned any event that interrupted or could be construed to have interrupted the running of the prescription." [Paragraph 26]

"Consequently, it becomes apparent that the plaintiff's claim has prescribed. It has taken the plaintiff more than three years before issuing summons against the MEC. It is my view that the plaintiff was in possession of sufficient information to lodge a valid claim against the defendant." [Paragraph 29]

"The second special plea is that of failing to give notice within the prescribed period. … I have not discerned any event that interrupted or could be construed to have interrupted the running of the prescription. If the plaintiff's claim had not prescribed, I would have condoned his default in giving

timeous notice to the defendant … This aspect is also relevant in the event that it could be found that I was wrong in finding that the plaintiff's cause of action had prescribed." [Paragraph 30]

"I do not see any point why the Legal Aid Board attorneys invited the plaintiff to their offices on numerous occasions. Clearly a lot of nonchalance was displayed. In one of the letters informing him of progress in the matter … The Legal Aid Board stated that the subject matter was "Re: your matter : divorce". The plaintiff's matter before them was about medical negligence and not divorce. This was utterly ridiculous even for a candidate attorney. On the facts before me my sense is that they did not cover themselves in glory. It is undesirable at this stage to say more on this aspect because the Legal Aid Board is not a party to these proceedings. … It follows that the defendant's special pleas must unfortunately succeed." [Paragraph 41]

"The costs must follow the result. The defendant is indigent and was carried by the Legal Aid Funding for a considerable period. The cost order may be an empty shell. I will grant it on principle nevertheless." [Paragraph 42]

"Due to the relative complexity of the case I will exercise my discretion to allow a fee for two counsel." [Paragraph 43]

The defendant's special plea of prescription was upheld, and the plaintiff's claim dismissed with costs.

CONSTITUTIONAL INTERPRETATION

NAMA KHOI MUNICIPALITY AND OTHERS V MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, NORTHERN CAPE PROVINCIAL GOVERNMENT AND OTHERS [2013] JOL 30646 (NCK)

Case heard 1 July 2013 Judgment delivered 8 August 2013

The first applicant was a municipality established in terms of section 12 of the Local Government, Municipal Structures Act. The remaining applicants included the speaker, mayor and councillors of the municipality. The applicants sought to maintain the status quo of the municipality, the municipal council and the councillors until proposed review proceedings were finalised, and to restrain and prohibit the first respondent (the MEC) from interfering in the activities of the municipal council. At the centre of the dispute was a struggle between councillors from different political parties for control of the municipality.

Mamosebo AJ held:

"…I should point out that the presence of the MEC in court in an application was not a legal requirement. Counsel submitted that the MEC's procrastination to remove the second to ninth respondents, who belong to his party, and the fact that he gave written instructions to the Municipal Manager, a member of the Coalition, amounts to interference with the functioning of the municipality which the Court must prohibit through an interdict…" [Paragraph 15]

"I have noted the order by Williams J which directed the MEC to apply his mind to consider whether the second to ninth respondents should be removed from office as councillors. Item 13 of the Code …

requires the Chairperson, who is also the Speaker, to submit a report to the MEC after he had investigated the matter and afforded the respondent councillors an opportunity to comment as required by the Code. However, this requirement has been superseded by the court order Williams J … directing the MEC to apply his mind …" [Paragraph 19]

"I have further noted the order by Williams J directing the municipality to take such steps as may be deemed necessary to pass its Annual Municipal 2013/2014 Budget … in any event as soon as practically possible. This order, coupled with the undertaking to hold the meeting on 20 June 2013 by the applicants, cannot be seen as interference by the MEC because he was mandated to carry out certain official functions." [Paragraph 21]

"I have noted that the municipality has not adopted any Uniform Standing Procedures which are essential for the municipality to address issues of governance and regulate the conduct of councillors. In my view, failure by the municipality to develop such procedures should not be used as a scapegoat to hamstring the effective and efficient functioning of a municipality in line with its constitutional imperatives. Rules of natural justice ensure the safeguarding of the principle of audi alteram partem. It promotes and respects the participation of those who will be affected by the outcome but also aims at improving the quality and rationality of administrative decision-making." [Paragraph 24]

"I am satisfied that the application by the applicant Coalition is not bona fide. It anticipates the inevitable. The Coalition has realised and has in fact said so in so many words that the ANC majority (with the addition of Apollis) intends to bring a motion of no confidence in the DA/Cope Mayor and Speaker and institute their own executive. Well, this is how democracy works." [Paragraph 26]

"… [I]t is not necessary for me to determine the issue of the removal of the ANC councillors. However, I would be failing in my duty if I did not point out that it is the height of irresponsibility to default on attending a properly scheduled council meeting on the flimsy pretext that they, the ANC councillors, were canvassing for votes. I will leave it there for present purposes." [Paragraph 28]

"It is not the purpose of this application to decide whether the nine ANC councillors must be removed. This application has to determine whether the minority DA/Cope Coalition must remain in power pending the determination by the municipal council or the MEC or the Court in a review application on whether the nine ANC councillors disqualified themselves as councillors through their alleged failure to attend three consecutive council meetings." [Paragraph 28]

"It is up to the DA/Cope Coalition to bring the review application for the removal of the nine ANC councillors … irrespective of the fact that they are unsuccessful in this application. …" [Paragraph 29]

The application was dismissed with costs.

CHILDRENS' RIGHTS

T MC V T C (268/2013) [2013] ZANCHC 25

Case heard 22 February 2013, Judgment delivered 15 March 2013

The applicant sought an urgent order to have his minor children returned by their mother. The uncertainty of the children's' permanent residency, and pending divorce proceedings between the parties, contributed to the urgency of the matter. The main issue the court had to decide related to what amounted to the best interests of the minor children involved.

Mamosebo AJ held:

"The guiding principle when a court is faced with issues involving minor children is to move from the premise that their best interests are of paramount importance as provided in s 28(2) of the Constitution ... This standard is echoed in s9 of the Children's Act ... " [Paragraph 13]

"International law also requires parties to adhere to the standard of the best interest when dealing with the issues of children. See art 3(1) of the United Nations Convention on the Rights of the Child (CRC) and art 4(1) African Charter on the Rights and Welfare of the Child (ACRWC)..." [Paragraph 14]

"I must agree ... that Mrs T could not unilaterally decide to relocate without proper consultation or agreement with the father of the minor children and while the legal processes were pending. Her conduct would also delay the legal process for the interim relief sought by the applicant and the compiling of the report by the Family Advocate ..." [Paragraph 15]

Mamosebo AJ then dealt with an argument that the relocation of the minor children was a change for the better:

"This is mere speculation. There is no evidence before me that the environment in the applicant's home is detrimental to the welfare of the children." [Paragraph 20]

"It is quite evident that the removal of the minor children from their home was not carefully thought through. The decision that was taken was not to enhance the best interests of the children as paramount but to address an employment need for Mrs T." [Paragraph 21]

"I am enjoined as the upper guardian of these two minors to judiciously exercise my discretion and to ensure that their best interests are not compromised by spousal feud and spite at the expense of stability for their care, protection and wellbeing." [Paragraph 23]

"I have made the initial order to apply with immediate effect and have asked that the Family Advocate, Kimberley, immediately investigate the matter further and to provide an updated report to this court. It is not in dispute that the matter needs to be prioritized by their office in the circumstances." [Paragraph 24]

"I now turn to the order for costs. ... It matters in which the custody of children are involved, there is no winner or loser because what matters is the best interests of the child. For that reason, unless there are compelling circumstances to order otherwise, which none exist, the most appropriate allocation ought to be that there be no order as to costs or each party pays his/her own costs." [Paragraph 25]

Respondent was ordered to return the children to the applicant.