SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORDS OF NOMINEES FOR APPOINTMENT TO THE SUPREME COURT OF APPEAL, HIGH COURT AND LAND CLAIMS COURT

APRIL 2015

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INTRODUCTION

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

2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, observing and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for JSC interviews in September 2009, October 2010, April and October 2011, April, June and October 2012, February, April and October 2013, and April and October 2014.

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 Limpopo Judge Presidency, we have attempted to focus on decisions that might bear in some way on leadership and administrative qualities, where such judgements are available. Therefore, in respect of some of these candidates, there may not be as wider range of cases presented as in the case of other candidates.

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

7. 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 (regarding structural provisions of the Constitution);
    - 10.7. Environmental Law;
    - 10.8. Labour Law;
    - 10.9. Civil Procedure;
    - 10.10. Criminal justice;
    - 10.11. Childrens' 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. In our submission for the October 2014 interviews, we offered some thoughts about what we believe to be some of the most significant general issues relating to the judicial appointments process. We do not intend to repeat these points here, but those points continue to inform our views on what, we submit, are questions of key importance for the JSC in carrying out its constitutional mandate.

14. In this submission, we confine ourselves to two points of a more procedural (but nonetheless, very important) nature: the time available for interested organisations to make submissions to the JSC; and the shortlisting process followed ahead of the April 2015 interviews.

Timeframe for submissions

15. We raised this issue in our submission for the April 2014 interviews. We noted that there was effectively 3 weeks or less available for interested organisations to conduct research on shortlisted candidates' judicial track records (as well as any other pertinent aspects of their background),disseminate that research to other interested stakeholders, and draft comments on their views on candidates' suitability for appointment, based on that research.

16. We noted further that many organisations prepare carefully considered submissions within the time available, but submitted that the time available to prepare submissions is too short. We urged the JSC to take any steps necessary to its timeframes to allow for a longer time period between the announcement of the shortlist and the interviews taking place.

17. We submitted that such an increase a time would facilitate greater public participation in the judicial appointments process, especially by "grass roots" community organisations, whose clients are often regular users of the courts. We submitted further that it would also be to the benefit of the JSC, by facilitating the preparation of detailed and carefully considered submissions to place before the commission.

18. The relatively small number of candidates interviewed in the JSC's October 2014 sitting meant that this issue was not as pressing on that occasion. For the current sitting, however, the amended shortlist of candidates was released on 11 March. The JSC secretariat requested that comments be received by no later than 27 March, a period of just over two weeks. The initial shortlist was released on 5 March. This means that a period of just over three weeks were available to conduct research into the initial sixteen candidates, and just over two weeks to conducted research into the additional seven candidates added to the shortlist. (Of course, as research on the initial sixteen would be very difficult to complete within a week, the last two weeks would involve research into significantly more candidates that the seven subsequently added to the shortlist).

19. We respectfully submit that this gives insufficient time to conduct adequate, in depth research into the judicial backgrounds of the candidates. This is especially so in respect of the candidates for these interviews where, similar to the situation in April 2014, the majority of the candidates are seeking appointment to leadership or appellate court positions. This means that most of the 23 candidates are current judges, and have in most cases been judges for a considerable time. Most of the candidates have thus produced a significant number of judgements.

20. We believe that it is important that research into candidates' judicial backgrounds does not focus only on high profile reported decisions, but covers as wide a range of judgements as possible. An apparently unexceptional, everyday judgement may still contain interesting insights into a candidate's judicial philosophy.

21. We firmly believe, and wish to re-emphasise, that the JSC itself would benefit from extending the time frame for the preparation of submissions. We have observed several instances in the past where commissioners have expressed frustration with submissions made about particular candidates. There may be various reasons for this, some entirely unrelated to the time frame issue. But we submit that it must be the case that having more time available to prepare comments and submissions must, more often than not, assist in improving the quality of those submissions. This can only be to the benefit of the JSC, other stakeholders, and indeed to our constitutional democracy.

22. We also submit that the appointments system introduced by the Constitution contemplates inputs from a broad spectrum of society, in contrast to the "tap on the shoulder" system of appointments utilised in the pre-constitutional era. We submit that the JSC should strive to ensure that its procedures assist in allowing as wide a range of input into the process of judicial appointments as possible.

The shortlisting process for these interviews

23. As alluded to above, the shortlisting process for these interviews was unusual, in that, after the initial shortlist of candidates was released, an amended shortlist was released, dated 11 March 2015. The amended shortlist explained that the sifting committee of the JSC had released the names of the shortlisted candidates and then, after the committee's consultation with the Chief Justice, additional names were added to the shortlist for the Supreme Court of Appeal and the Limpopo Judge Presidency.

24. It must first be acknowledged that the addition of names to the shortlist is contemplated by rule 3(f)(ii) of the Rules on the Procedure of the Commission, made under the Judicial Service Commission Act.

25. The rule contemplates the addition of candidates to the short list who were "duly nominated but … not included in the short list". All of the candidates added to the shortlist are currently sitting judges, and it must be assumed that they were properly nominated, in order for them to fall under rule 3(f)(ii).

26. It is therefore puzzling that these candidates were not shortlisted in the first place. We submit that it is in the interests of an open, transparent and accountable appointment process that the JSC provide an explanation into the circumstances of how the additional candidates came to be shortlisted when they did.

27. The shortlisting process is clearly a crucial part of the judicial appointments process, but it is a process about which the general public knows relatively little. We submit that greater openness and transparency around the shortlisting process is important in order to ensure public confidence in the integrity of the judicial appointments process.

ACKNOWLEDGEMENTS

28. 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, Martin-Michail Alexidis and Sarai Chisala, DGRU research assistants.

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DGRU

27 March 2015

SELECTED JUDGMENTS

PRIVATE LAW

PASSENGER RAIL AGENCY OF SOUTH AFRICA V MASHONGWA (966/2013) [2014] ZASCA 202

Case heard 4 November 2014, Judgment delivered 28 November 2014

This was an appeal against a judgment of the High Court which found the appellant (PRASA) liable for damages suffered by the respondent, in consequence of a robbery and assault perpetrated on him whilst he was a fare-paying passenger on a train. The question was whether the respondent had discharged the burden of establishing on a balance of probabilities that the security measures put in place by PRASA were inadequate in the circumstances, and that had certain additional measures which he argued should have been taken, had indeed been taken, the attack would not have occurred.

Dambuza AJA (Ponnan, Majiedt, Pillay and Zondi JJA concurring) held:

"What constitutes reasonable measures depends on the circumstances of each case. The presence of Ms Mothotsi and her colleague Mr Malatji at Rissik Street Station is evidence that there were security measures in place and that guards had indeed been deployed. …" [Paragraph 7]

"… Whether there were security guards on the other coaches is unclear. What is clear is that there were no guards in his coach. It is also clear that to avert the attack there would have had to have been at least one security guard in his coach. … [G]iven the number of attackers, a single security guard may well have made no difference. But even if one were sufficient to avert the attack, the question remains whether it would be reasonable to require PRASA to have a security guard in every coach. To insist on such a requirement would exceed by far the precautionary measures to be expected of PRASA … In Shabalala Scott JA accepted that in order to avert the attack on the appellant, there would have had to be, at least, one security guard in Mr Shabalala's coach. But in view of the brazen nature of the attack, where the assailant had shot Mr Shabalala three times when he said he had no money on him, the learned judge found that it was doubtful that one guard, even if armed, would have made any difference. Like Scott JA, I too have my doubts whether the presence of a guard in the particular coach would have made any difference in this case." [Paragraph 9]

"… Having decided that they were going to remove Mr Mashongwa from the train after robbing him (probably to avoid identification), nothing would have stopped them from forcing the coach doors open and throwing him out. The evidence was that the doors could be forcibly opened from the inside – they were deliberately designed in that manner to allow for an exit from the coach in cases of emergency. The highly speculative submission … that had the doors been closed the assailants would have struggled to open them until the train reached the Rissik Street Station, is untenable. No evidence was adduced as to precisely how long it would ordinarily take to open the doors of a coach in a moving train. Nor, for that matter, was any evidence adduced as to the time that it takes for the train to make its way from the one station to the next. The evidence is to the effect that Mr Mashongwa was thrown off the train in close proximity to the platform of the Rissik Street Station. It therefore must follow that the fear of reaching the following station did not deter the assailants. It follows that the appeal must succeed." [Paragraph 10]

The appeal succeeded and the plaintiff's claim was dismissed.

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

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

The plaintiff claimed damages in delict, seeking to hold the first defendant vicariously liable for his loss flowing from having followed the advice of one of the bank's employees to take funds out of a money market account and place them in an offshore investment. The defendants claimed not to have assumed liability for the performance of the plaintiff's offshore investment, relying on a clause in the agreement between the bank and the plaintiff which provided that: 'We do not assume responsibility for the performance of investments.' The defendants also claimed that it had not been on the second defendant's advice that the plaintiff decided to invest his funds offshore but, rather, on the subsequent advice of his own financial advisers.

Dambuza J held:

"The defence that the plaintiff is bound by the terms of investment agreement and that the defendants never assumed liability for performance of the investment does not, in my view, afford the defendant's any assistance. … A contract needs to be closely examined before one can say that exemption from such negligence is agreed upon. In this case the very same document in which there appears to be exclusion of liability also anticipates that the first defendant may be held liable for professional negligence of its consultants. Read against this clause, the exclusion of liability for the performance of the investment becomes ambiguous. It seems to me that if there was little or no exercise of skill and care to determine whether the offshore investment was likely to yield a better return than the money market account, the defendant's cannot simply hide behind the exemption clause. …" [Paragraph 10]

"The contention by the defendants that the investment was made on the advice of persons other than the second defendant can also not stand. Even if I were to accept that the Plaintiff discussed the investment … there is, in my view, no sufficient evidence to conclude that it is those discussions that led to investment. In any event it is not in dispute that it is the defendants that owed the plaintiff a duty of care. …" [Paragraph 11]

"Rule 10(2)(a) of the Insurance Brokers Registration Council Rules provides that a firm shall not recommend a transaction in a relevant investment to an advisory client unless it has reasonable grounds for believing that the transaction is suitable for the client having regard to the facts known. … It is my view that the position held by the second defendant is comparable to that of an Insurance Broker. The principle expresses in this Rule, is in my view, relevant in the determination of the degree of skill and care that is required of persons in the position of the second defendant.....I cannot find the basis on which he concluded that the offshore investment was suitable for the plaintiff. … [T]he advice to invest offshore was a breach of the second defendant's duty of care to the plaintiff." [Paragraphs 15 - 16]

The defendants were found liable to the plaintiff.

SOCIO-ECONOMIC RIGHTS

MALAN V CITY OF CAPE TOWN (CCT 143/13) [2014] ZACC 25

Case heard 20 February 2014, Judgment delivered 18 September 2014

The appellant, a state pensioner, leased a house from the City of Cape Town at a subsidised rental. She breached the agreement, causing the city to cancel it and apply successfully to the High Court for her eviction. She appealed to the Constitutional Court.

Writing for the majority, Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron, Jafta, Khampepe and Van der Westhuizen JJ concurring) held that a public authority, such as the City, was entitled to cancel such a lease on the basis of arrears alone, provided the lessee was given a proper opportunity to settle them. The majority also found that the City could lawfully cancel the lease on the basis of so-called "illegal activities clauses", due to criminal activity having been carried out on the property. The High Court had thus correctly found that was just and equitable to order eviction. The appeal was dismissed.

Dambuza AJ (Froneman and Madlanga JJ concurring) dissented:

"… [T]he agreement in this case was concluded long before the advent of democracy and was assimilated into the new constitutional dispensation. … Some of its terms, however, are still reminiscent of the language and rigidity of the times during which it was concluded, some of which may not be consistent with the level of respect accorded to all members of the South African society today." [Paragraph 4]

"…The lease cannot be viewed as a pure exercise of private contractual power. This is so in respect of both the lessor and the various lessees. It is the instrument through which the City fulfils the constitutional obligation on the state to provide housing to Ms Malan and millions of other persons of similar social standing and through which indigent persons exercise their rights to housing. … If certain clauses offend public policy as Ms Malan contends, they are unenforceable. The manner in which these contracts are crafted and enforced is of important public interest. …" [Paragraph 21]

"The test for determining whether a contractual clause passes constitutional muster was laid down in Barkhuizen: "There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause…"" [Paragraph 23]

"…[I]n the new constitutional dispensation, fairness is often central in the determination of whether a clause in a contract is against public policy. …" [Paragraph 25]

"…[L]ocal authorities should be mindful that their primary role in this context is provision of homes to qualifying members of the public, and that crime fighting and prevention must be done within the parameters of the rights and obligations arising from the leases concluded with tenants." [Paragraph 27]

With regards to the clause that allows termination on one month's notice, Dambuza AJ held:

"…However, insofar as the City contended that this clause entitles it to terminate the agreement on notice, without cause, its application would be unfair and against public policy. In the context of its subject-matter, public housing, the application of the clause as contended can easily facilitate arbitrary evictions by public officials. The result would indeed be erosion of the lessees' security of tenure." [Paragraph 30]

"…[A]t no stage is the lessee given an opportunity to protest the City's conclusion on a perceived breach or to rectify the breach prior to cancellation of the lease. …" [Paragraph 35]

"…The conclusion must be that the arrear rentals were not the real reason for cancellation of the agreement" [Paragraph 37]

"From the record it is clear that cancellation was, in fact, an attempt at assisting the SAPS in its crime combating endeavours. …" [Paragraph 38]

Regarding termination of the lease on the basis of the conviction of the occupants of the house for certain offences, Dambuza AJ held:

"… That summary cancellation is at variance with the provisions of section 26(1) of the Constitution." [Paragraph 40]

"Even if cancellation was premised on clause 23, having found that it is imperative that lessees in public rental housing schemes be afforded opportunity to rectify a breach, the question would be whether Ms Malan was afforded such opportunity in respect of the illegal activities prior to the lease being cancelled. I did not understand it to be the City's case that she was; and I can find no legal basis for a conclusion that she was not entitled to a notice affording her an opportunity to rectify the breach of "allowing illegal activities". It seems to me that opportunity to rectify was particularly necessary in this case since cancellation was based on the conduct of third parties rather than Ms Malan's conduct, even though some of the real culprits are her own children." [Paragraph 44]

"For these reasons I would have upheld the appeal." [Paragraph 50]

Zondo J wrote a separate dissenting judgment, holding that the city failed to show that Ms Malan allowed the impugned activities and that there was any breach on that basis, and that even if this had been shown, the City would first have to have taken certain procedural steps before cancelling the lease, which it had failed to do.

CONSTITUTIONAL INTERPRETATION

MDODANA V PREMIER OF THE EASTERN CAPE AND OTHERS (CCT 85/13) [2014] ZACC 7

Case heard 13 November 2013, Judgment delivered 25 March 2014

The applicant, a subsistence farmer in the Eastern Cape, sought confirmation of a High Court order which declared unconstitutional and invalid certain provisions of the Pounds Ordinance 18 of 1938 passed by the Provincial Council of the Province of the Cape of Good Hope. In the High Court, he had sought an order for the return of his two goats which were impounded in terms of the Ordnance, and an order declaring the provisions in terms of which the livestock was impounded unconstitutional. Prior to the High Court proceedings, an agreement between the applicant and the local Municipality that had impounded the livestock led to the release of the livestock and an exemption from paying the penalty fees. What remained was the constitutionality of the provisions that provided for impoundment of livestock, destruction of impounded livestock in certain circumstances, assessment of moneys payable by a livestock owner in trespass and other fees, and sales of impounded livestock.

Dambuza AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron, Froneman, Jafta, Madlanga, Nkabinde and Zondo JJ and Mhlantla AJ concurring) held:

"The applicant contended that his rights to protection against arbitrary deprivation of property, just administrative action and access to courts, as enshrined in sections 25, 33 and 34 of the Constitution, had been violated through the enforcement of the impugned sections of the Ordinance. The complaint was that, to the extent that the Ordinance imbues a landowner with the authority to determine when trespass has occurred and to instigate impoundment, section 23 of the Ordinance permits arbitrary deprivation of property. The applicant contended further that the impugned sections of the Ordinance sanction disposal of livestock without provision for representations by the owner, unconstitutional disqualification of certain groups of people from participating in the trespass penalty assessment process, and exclusion of judicial supervision over sales in execution." [Paragraph 10]

Dealing with the jurisdiction of the court, Dambuza AJ held:

"Where an order of constitutional invalidity relates to legislation other than national or provincial Acts, there is no need for what SARFU called this Court's "supervisory role". Under section 172(2) of the Constitution, the High Court and the Supreme Court of Appeal are empowered to make effective orders of constitutional invalidity in respect of any laws (other than those mentioned in sections 167(5) and 172(2)(a)). …" [Paragraph 23]

"The issue whether this Court has jurisdiction to confirm the declaration of invalidity arises because there is uncertainty regarding the status of the Ordinance: whether it is a provincial Act, the declaration of invalidity of which is susceptible to confirmation by this Court." [Paragraph 24]

"... In Zondi, because the Provincial Government had appealed against the High Court order of invalidity, this Court left open the question of whether an ordinance similar to the one before us is a provincial Act for the purposes of confirmation by this Court ... The issue of confirmation of the invalidity was decided on the merits of the appeal. Unlike Zondi, this case comes before us purely as an application for confirmation of the order; the question of the status of the Ordinance is the primary issue." [Paragraph 29]

"It is my view that in circumstances as peculiar as in this case, where in one territory there is parallel legislation on the same subject, a conclusion that the Ordinance is a provincial Act would be inappropriate. In this case, contrary to the usual territorially-binding effect of a provincial Act, there are two sets of laws which regulate impoundment in the Eastern Cape Province. There is no indication ... of a specific exercise of power by the Eastern Cape Provincial Legislature that the High Court can be said to be trespassing on. The Ordinance we are confronted with in this case does not satisfy the "criteria" of a "provincial Act" as envisaged by the Constitution." [Paragraph 36]

"...The applicant submitted that even if, on a technical interpretation, it is found that the Ordinance does not constitute a provincial Act, that should not be a reason for this Court to refrain from confirming the High Court order because the question whether or not to confirm any declaration of invalidity is one of substance, not form. ... [I]n the context of the Ordinance being applicable only in parts of the Eastern Cape Province, I do not think that it can be said that the Provincial Legislature has embraced the Ordinance, nor can it be concluded that, in substance, its effect is the same as that of a provincial Act. ..." [Paragraph 37]

"Further, while I accept that the anomaly arising from the fact that the High Court's declaration of constitutional invalidity is effective in one province when the Ordinance remains "alive" in the other two provinces is undesirable, I do not think that is a proper basis for this Court to assume jurisdiction not sanctioned by the Constitution. The relief sought will not cure the "irregularity" that prevails in the Eastern Cape Province as a result of the two legislative regimes over impoundment." [Paragraph 38]

"The amici expressed a concern that if we decline to confirm the declaration of invalidity, the hardship confronting rural stockowners will endure. I do not agree. The declaration of invalidity by the High Court remains intact and effective in the Eastern Cape Province. I think that once the relevant authorities in the other two affected provinces become aware of the order, they will take it into account when they are called upon to implement the impugned provisions." [Paragraph 39]

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

LABOUR LAW

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS OBO MANI AND OTHERS v NATIONAL LOTTERIES BOARD 2014 (3) SA 544 (CC)

Case heard 19 November 2013, Judgment delivered 14 March 2014

The issue in this case was the fairness of the Lotteries Board's dismissal of employees for insubordination and disrepute because they had, inter alia, lodged a petition against their CEO. After a dispute had been referred to the CCMA the union, responding to a CCMA request, addressed a letter to the Board listing the employees' complaints against the CEO. The complaints were trenchant and the letter was leaked to the press. The employees then sent a 'Vote of No Confidence in the CEO' petition to the Board and urged the Board to request the CEO to resign. The

Board charged unrepentant signatories with insubordination, disrepute and refusal to work. They were found guilty and dismissed. The dismissals were upheld in the Labour Court and the Supreme Court of Appeal.

The majority per Zondo J (Moseneke ACJ, Jafta J, Madlanga J, Mhlantla AJ and Nkabinde J concurring), held that the dismissals were automatically unfair and the employees entitled to reinstatement. The majority held that the petition *urged* the Board — without demanding dismissal or threatening work stoppage — to offer the CEO a severance package in return for his resignation. It was lodged in pursuit of and during the conciliation process, and this was part of collective bargaining, which is a lawful, core union activity.

The minority per Froneman J (Skweyiya ADCJ and Cameron J concurring), held that the dismissals were fair and should stand. The employees' conduct amounted to insubordination and disrepute.

Dambuza AJ wrote a separate judgment concurring with the majority but finding the dismissal substantively, rather than automatically, unfair [paragraph 208].

"... [M]y view is that the charge of insubordination and disrespectful behaviour is unfounded. However, I agree that dissemination of the letter ... could have the effect of bringing the name and integrity of the Board and the CEO into disrepute. It is also my view that the acts of both disseminating the contents of the letter ... and seeking termination of the CEO's employment contract are a departure from the dispute-resolution procedures provided for under the Act. ..." [Paragraph 209]

"... [I]nsubordination occurs when an employee refuses to accept the authority of a person in a position of authority over him or her. Insubordination is misconduct because it assumes a calculated breach, by the employee, of the duty to obey the employer's lawful authority. I accept that in expressing unwillingness to 'bear with [the CEO] anymore' or to 'spend a day with [him] . . . at the helm of this organisation' the employees signified a repudiation of the CEO's authority." [Paragraph 213]

"... A threat to repudiate authority must be understood in the context in which it occurs. The full conduct of both the employer and the employee must be taken into account in determining whether a threat actually constitutes insubordination. ..." [Paragraph 124]

"The threat was made after many attempts to alert the Board to the employees' complaints about the CEO. ... I am not pronouncing on the veracity of the complaints. But the Board's unwillingness to deal with the allegations and the consequent disrespect shown to the employees is a significant factor in the assessment of the employees' conduct." [Paragraph 215]

"The disregard by the Board of the trouble that the union and the employees had taken to comply with the interim ruling of the Commissioner was, itself, disrespectful. The Board never signalled an intention to respond to the letter ..." [Paragraph 216]

"The conduct of the Board is unacceptable. In terms of the collective agreement, both parties undertook to negotiate and consult in good faith in seeking reasonable and satisfactory solutions to their disputes. My view is that the conduct of the Board was in breach of its duty to negotiate in good faith and, in fact, constituted an abuse of power. Such lack of good faith by the Board features throughout the process of attempting to resolve the dispute ..." [Paragraph 219]

"The conduct of the employees following the petition is also relevant in determining the reasonableness of their conduct. ... Although the contents of the petition exceeded the parameters of the dispute-resolution processes ... the post-petition correspondence ... showed the union and employees' clear desire to have their grievances resolved through discussions. ..." [Paragraph 221]

"In this context, I cannot agree that the threat to repudiate authority constituted insubordination and disrespectful conduct. ... That said, I cannot agree that the call for termination of the CEO's contract of employment is a lawful act

under the Act. That is not to say the conduct is proscribed under the Act. But a call for termination of the services of an employee violates the right to fair disciplinary procedures. I can find no reason why the employees did not agitate for disciplinary process if that were what they intended. ...” [Paragraph 222]

“The union and employees strayed from the dispute-resolution mechanisms provided for under the Act, insofar as they disseminated the contents of the letter ... and petitioned their employer, calling for termination of the CEO's services. ... Apart from the fact that I can find no express or implied reference in the Act to the right to freedom of expression (other than within the context of protected processes), I do not think that this right was envisaged in the protection provided under s 187. This must be because this right is often subject to legal limitations...” [Paragraph 225]

Dambuza AJ then proceeded to deal with the issue of bringing the Board and the CEO into disrepute:

“... While I accept the rights of the employees and the union to make their grievances available for publication, it does need to be said that the rights of the subject of the publication should also be borne in mind. Whereas the disseminated allegations may be proved to be incorrect, the implications or effects of publication may be irreversible. For that reason the right to publish is subject to some limitations and I can only conclude that the legislature intentionally omitted it from general protection under the Act.” [Paragraph 226]

“Whether or not a dismissal is automatically unfair requires a factual enquiry to establish the true reason for the dismissal. The legal issue is whether the identified reason is covered by one of the provisions of s 187. In this case, it is my view that both the dissemination of the letter ... and the contents of the petition ... are not rights or conduct envisaged in ss 5 and 187 of the Act. It is for this reason that I cannot find that their dismissals were automatically unfair.” [Paragraph 227]

“However, in terms of s 188 of the Act, a dismissal that is not automatically unfair may still be substantively unfair ... Both the Labour Court and the Supreme Court of Appeal did not take into account the disrespectful conduct of the Board. It is this conduct that drove the union and employees to resort to measures outside of the Act.” [Paragraphs 228 - 229]

Dambuza AJ concluded that the dismissals in this case were substantively unfair and agreed that the dismissed employees should be reinstated and costs awarded in their favour.

CRIMINAL JUSTICE

MENTYISI AND ANOTHER V S (CA77/2010) [2011] ZAECGHC 85

Case heard 24 October 2011, Judgment delivered 1 November 2011

The two appellants appealed against a sentence of life imprisonment imposed against each of them pursuant to a conviction of murder, having acted with common purpose in killing the deceased. The deceased was the mother of the first appellant.

Dambuza J (Eksteen J and Mageza AJ concurring) held:

“The appeal in respect of the first appellant is brought on the grounds that in sentencing the first appellant the Judge a quo misdirected himself in failing to find that her age and other personal circumstances constitute substantial and compelling circumstances.” [Paragraph 4]

“The trial court weighed the mitigating circumstances against the aggravating circumstances. In doing so the court considered the seriousness and prevalence of murder in this country, the relationship between the deceased and

the first appellant and the manner in which the deceased was killed. The court found that the mitigating factors were outweighed by the aggravating factors and that no substantial and compelling circumstances existed to justify departure from the minimum sentence ... The judge a quo found that the murder had been premeditated, that the deceased had been murdered in the sanctity and security of her home, that the first appellant had betrayed the deceased in relation to whom she was in a position of trust and that the crime had resulted in devastating loss to the children and grandchildren of the deceased. The first appellant had a previous conviction of theft." [Paragraph 8]

"...The main submission on his behalf is that because of his young age he is a good candidate for rehabilitation and the court a quo should have considered this factor together with "other factors" (presumably mitigating factors favourable to the second appellant) as constituting substantial and compelling circumstances. ..." [Paragraph 9]

"... I do not agree that any of the grounds advanced, either individually or cumulatively justify interference by this Court with the sentence of life imprisonment imposed. ... Only in those cases where there is a "striking disparity" between the two sentences may an inference be drawn that the trial court acted unreasonably and the sentence altered." [Paragraph 10]

"The offence committed by the appellants in this case is one of those in respect of which the Legislature has deemed it necessary to prescribe sentences to be imposed on conviction. It is only where certain circumstances (described as "substantial and compelling circumstances") exist or where the prescribed sentence would be unjust in a particular case that departure from the prescribed sentence is justified." [Paragraph 11]

"The absence of previous convictions is not, per se, a substantial and compelling circumstance ... Neither is the youth of the offender." [Paragraph 12]

"It is so that youth has, in certain cases, been found to justify departure from a prescribed sentence. ... But even in that case [S v Meiring] the court highlighted that youth should be considered a factor compelling departure from the prescribed sentences only in those instances where the imposition of the prescribed sentence on a youth offender would result in such injustice as could not have been intended by the Legislature. ...Even where an offender is a juvenile, the court, in exercising its discretion, has to have regard to the purpose of the Minimum Sentences Act and in doing so it can impose the prescribed sentence of life imprisonment if the circumstances of the case justify it. In this case my view is that the appellants are not so young that their conduct could be mainly attributed to immaturity. They planned and executed the coldblooded murder of a parent and neighbour. The first appellant's relationship to the murder victim is a particularly aggravating and repulsive feature of the offence of which the appellants were convicted. ..." [Paragraph 14]

"Therefore there is no general principle or approach by the courts that the youth of the offender necessarily translates to a lesser than the prescribed sentence or a lesser sentence than would otherwise be considered appropriate for the offence committed." [Paragraph 16]

"In the court a quo Tshiki J did take into account the traditional sentencing approach set out in S v Zinn, together with the provisions of the Minimum Sentences Act. The Learned Judge correctly considered himself bound to impose the sentence of life imprisonment prescribed in the Minimum Sentences Act unless he found circumstances justifying the imposition of a lower sentence. ... The approach of the trial court in determining the sentence in this matter cannot be faulted" [Paragraph 17]

"...The court correctly rejected a submission, on behalf of the first appellant, that a lighter sentence should be imposed on her than that imposed on the second appellant because of the "limited" role played by her in the offence. The role played by the first appellant in this case was not accessory in nature. Her role was, in fact, crucial to the success of the intended crime. She was the originator of and set the stage and/or provided the opportunity for the murder to take place. The murder was a direct consequence of her conduct ..." [Paragraph 18]

The appeal was dismissed and the sentence imposed by the trial court confirmed.

HOCO v MTEKWANA AND ANOTHER 2010 (2) SACR 536 (ECP)

Case heard 25 May 2010, Judgment delivered 29 June 2010

The Plaintiff was arrested on 13 February 2008 and was detained until 18 February 2008 in Port Elizabeth, and thereafter transported by members of the South African Police Services to Gugulethu Police Station in Cape Town, where he was detained overnight before being released on 19 February 2008. He claimed damages for the arrest and detention. The issue was the lawfulness of the detention from 15 February to 19 February 2008, being the period subsequent to the expiry of the first 48 hours after the arrest of the plaintiff.

Dambuza J held:

"... [T]here is no evidence to support the submissions made on behalf of the defendants. As I stated earlier, no evidence was led on their behalf. There is no explanation before me that, for some reason it became impossible for the plaintiff to be brought before a court within 48 hours. It was incumbent upon the police, having arrested the plaintiff, to make arrangements that he be brought before a court within the prescribed period. ..." [Paragraph 14]

"...[T]he defendants' reliance on s 51(3)(d) [of the Criminal Procedure Act] cannot stand as the plaintiff was not in transit at the time of the expiry of the 48 hour period. He was still in detention in Port Elizabeth." [Paragraph 15]

"My further view is that in any event, the defendants' admission that the detention of the plaintiff on 16 and 17 February 2008 [which was a weekend] was unlawful is self-defeating as regards to the period of detention subsequent thereto. If the detention during this period was unlawful, I have difficulty in understanding how it again became lawful in respect of the period subsequent thereto, without a fresh warrant authorising re-arrest and further detention." [Paragraph 16]

"Consequently I am satisfied that, the plaintiff's detention from 12 noon on Friday, 15 February 2008 until 19 February 2008 when he was released, was unlawful." [Paragraph 17]

"...[T]he plaintiff was in unlawful custody for almost four days, two and a half of which he spent in police custody at Humewood Police Station, Port Elizabeth, one day in transit and in police cells at the Gugulethu Police Station, and the last few hours at Athlone Magistrate's Court in Cape Town." [Paragraph 18]

"In this case the conduct of the police leaves an impression that they did not appreciate the seriousness of depriving the plaintiff of his liberty through arrest and incarceration. It appears that they became content in the knowledge that the accused had been arrested and failed to take reasonable and necessary steps to protect his interests and to comply with the law relating to arrest and detention. ..." [Paragraph 22]

"In the result I make the following order: Judgment is granted in favour of the plaintiff against the defendant in the sum of R80,000.00 together with costs." [Paragraph 24]

ADMINISTRATION OF JUSTICE

EASTERN CAPE SOCIETY OF ADVOCATES V JACOBS (2232/2011) [2012] ZAECPEHC 51

Case heard 23 March 2012, Judgment delivered 20 August 2012

The applicant sought to have the respondent's name struck off the roll of advocates, on two grounds. First, that the respondent had been convicted of theft, and second, as a result of investigations conducted by the applicant which, it argued, revealed the respondent's involvement in a "pyramid scheme". Criminal proceedings in which the respondent has been charged with fraud relating to that scheme were pending before the Regional Court.

Dambuza J held:

"... It is in his answering affidavit that the respondent stated that he had expressed his intention to petition the President of the Supreme Court of Appeal. In that answering affidavit the respondent also stated that he had already drawn his petition to the Supreme Court of Appeal and was in the process of drawing papers for an application for condonation of the late filing thereof, which he intended to file with the Registrar of the Supreme Court of Appeal during November 2011." [Paragraph 4]

"The respondent's contention is that this application should await the results of his petition ... But when the matter came before me on 22 March 2012 the respondent had not filed any substantive application for postponement of the application. There was also no evidence that he had filed his petition with the Registrar of the Supreme Court of Appeal. ..." [Paragraph 5]

"I was persuaded that the respondent's plea for a further postponement was, indeed, a further attempt at delaying the hearing of the application. The respondent had undertaken, as far back as in October 2011, to file his petition with the Registrar of the Supreme Court of Appeal in November 2011. The appeal judgment had been handed down a year before he made the undertaking. He had furnished no explanation as to why the petition had not been filed within the period prescribed by the Rules of Practice in this Court, or within a reasonable time thereafter. ..." [Paragraph 9]

"...The respondent was admitted as an advocate on 30 March 2000. On 17 October 2001 a provisional order was granted by this Court declaring the respondent to be insolvent. The order was confirmed on 12 December 2001. At the time of the hearing of this application he had not been rehabilitated." [Paragraph 14]

"... The respondent accepted moneys from clients, but had no bank account due to his estate having been sequestrated. He therefore used Bok's [a fellow advocate in his chambers] cheque account to run his practice. The respondent also had no book keeper and did not keep proper books of account. The record reveals that at the criminal trial he admitted that neither his nor Bok's accounting skills were "up to standard but we had some idea of what was paid in what". He admitted that the moneys paid to him were not administered correctly. ..." [Paragraph 15]

"In the respondent's appeal against his conviction for theft the appeal court found that the respondent's conduct was unprofessional. I agree. The danger of advocates handling funds without safety nets such as those provided by the Attorney's Act has been repeatedly highlighted by the courts." [Paragraph 16]

"It is common cause that in his practice the respondent accepted instructions from members of the public without the intervention of an attorney or attorneys; he accepted moneys directly from members of the public without keeping a separate trust banking account and without being in possession of a fidelity insurance, or keeping proper books of account as obliged to do so in terms of sections 78 and 79 of the Attorneys Act ..." [Paragraph 17]

"In the appeal judgment Pickering J cited, with approval, the paragraph in De Freitas... Reference to that judgment is made in the applicant's Heads of Argument. Yet when Mr Swanepoel made submissions before me, relying on the judgment in De Freitas the respondent responded by stating that he was not aware of the court's decision in De Freitas, a statement which, in my view, reveals a serious lack of basic litigation and which is an indication that the respondent is not a fit and proper person to practice as an advocate. In fact I can only conclude, from the manner in which the respondent conducted his own case in this application, that he poses danger to members of the public who might turn to him for assistance with their legal affairs" [Paragraph 18]

"It is in this context that I formed the view that the respondent's expressed intention to lodge a petition against the appeal judgment was only an attempt to delay the obvious outcome of this application. But even if the respondent was bona fide in his intention to lodge such a petition there are no reasonable prospects that the intended application to the President of the Supreme Court of Appeal will succeed. The common cause or undisputed facts referred to above constitute evidence which proves gross unprofessional conduct on the part of the respondent. Such conduct does not only relate to the general manner in which he conducted his practice but is proved in the conviction for theft ..." [Paragraph 19]

"I am satisfied that the conviction of theft and dismissal of the respondent's appeal, sufficiently proves misconduct on the part of the respondent. But even if I were to disregard the conviction, the underlying common cause facts relating to the manner in which the respondent dealt with funds received by him … shows a total disregard of basic rules of practice, a conduct which placed his clients at great risk regarding their legal affairs. In fact it is evident that he should not have been accepting funds if he was unable to run a bank account." [Paragraph 22]

"Regarding the appropriate sanction, I am satisfied that the respondent's conduct merits that he be struck off from the roll of advocates. … [T]he respondent's conduct show a serious lack of appreciation of basic rules of practice. He conducted his practice in a manner that placed his clients at great risk of financial loss whilst he had no security in place to reimburse or compensate them in case of loss. He engaged in acts of blatant criminal conduct. His conduct brought the legal profession into disrepute. I am of the view that members of the public need to be protected from him and that this can only be achieved by his removal from the realm of legal practitioners." [Paragraph 25]

SELECTED JUDGMENTS

PRIVATE LAW

STANDER AND OTHERS V SCHWULST AND OTHERS 2008 (1) SA 81 (C)

Case heard 11, 14 September 2007, Judgment delivered 21 September 2007

First to third respondents, respondents in the main case where applicants sought their removal as trustees, applied to be authorised to withdraw funds from the trust to defend the application, and to intervene in the removal application in their capacity as trustees, the application having been brought against them in their personal capacities. The removal application was based on serious grounds, including dishonesty and lack of good faith,

Erasmus J first dealt with the respondents' contention that they should have been cited in their representative, rather than personal capacities:

"An application for the removal of a trustee is a claim against the trustee in his personal capacity, in much the same way as is a beneficiary's claim against a trustee for damages for breach of trust. … The contention that they should have been sued in the main case in their representative capacities would not affect the costs issue now under consideration and … is, incorrect in law. …" [Paragraphs 32 - 33]

"A claim should be brought against a trustee in his representative capacity where he is alleged to be liable in that capacity … Where a trustee is sued for breach of trust … the claim is obviously against him personally. The claim arises because the trustee assumed the office of trustee, but the complaint is that he violated the trust or the office. The whole point in such proceedings is that the trust (as represented by its trustees in their representative capacities) is not liable. If it were otherwise, beneficiaries would always be the ultimate losers where trustees act in breach of trust." [Paragraphs 34.1; 34.3]

"Particularly in the case of removal, the claim is personal. A trustee as a representative of the trust (as distinct from his personal capacity) cannot be removed. The correct metaphor is that of an office ... The office is unaffected by the removal. It is the individual who is removed from the office." [Paragraph 34.4]

"The answer to the costs aspect of the current application is the same whether the trustees are regarded as being parties to the main case in their personal capacities or in their representative capacities. Accordingly, the proposed 'intervention' by the trustees in their representative capacity in the main case does not alter the position." [Paragraph 35]

"On first principles one would expect costs in a removal application to follow the result. … As regards the payment of the trustee's own costs in such cases, if he is removed for improper conduct or breach of trust it would obviously be unjust for the trust estate to have to bear the expense of his unsuccessful defence. Since the claim is against the trustee in his personal capacity, his defence is not in his capacity as a trustee and one would thus not in principle expect him to be entitled to have recourse to the trust estate, particularly where he is removed for misconduct." [Paragraphs 36 - 37]

"The question can be viewed from the perspective of the more general question as to a trustee's right of reimbursement for trust expenditure, particularly insofar as it relates to legal expenditure. The general rule is that a trustee is entitled to an indemnity in respect of expenses properly incurred, and this applies inter alia in respect of legal expenses incurred by the trustee when sued in his representative capacity. …

However, and even where the trustee is properly a party to legal proceedings in his representative capacity the trustee will be held personally liable for the costs if he acted mala fide or unreasonably or improperly in bringing or defending the proceedings." [Paragraphs 38 - 39]

"Schwulst refers … to clause 9.3 of the trust deed … This clause refers to a claim or demand made against the trustees in their capacity as such. An application for their removal is not a 'claim' or 'demand' made upon trustees arising out of the exercise of their powers under the trust deed. In any event, a clause such as this will always be construed as covering only expenses properly incurred. Since the trust deed does not empower the trustees to act improperly, the misconduct which would form the basis of their removal would not constitute the exercise by them of powers conferred by the trust deed. … " [Paragraph 45]

"Schwulst says … that if the court does not come to the trustees' aid they will simply have to accede to their removal. … This stance is quite unjustified …" [Paragraph 46]

Erasmus J then analysed commonwealth case law:

"It is clear that on the approach reflected in the Commonwealth cases the current application would have to fail, and that this conclusion accords with the principles of our own law … As a matter of basic principle, therefore, an application of the kind now made by the trustees is fundamentally misconceived. They ask in advance for an order that their defence of the application for their removal be funded by the trust estate. Since they would only be entitled to such an indemnity if their opposition were justified, the court could not make such an order without deciding the main case. In effect, the trustees ask the court to rule that regardless of whether or not they are acting reasonably in opposing the main application, they are entitled to an indemnity. The making of such an order is contrary to all authority …" [Paragraph 58]

The costs and intervention applications brought by the trustees were accordingly dismissed.

SOCIO – ECONOMIC RIGHTS

CITY OF CAPE TOWN V UNLAWFUL OCCUPIERS, ERF 1800, CAPRICORN (VRYGROND DEVELOPMENT) AND OTHERS 2003 (6) SA 140 (C)

Case heard 13, 19 – 20, 24 – 25 March 2003, Judgment delivered 20 May 2003

An application was made under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act [PIE) for the removal of various occupiers from a development at Vrygrond. It had been agreed that houses built first in the area would be allocated to "bona fide Vrygronders" as per a list compiled in 1998. The majority of the erven comprising the development had houses erected on them, while some remained as serviced erven.

Erasmus J held:

"This application is concerned with the very difficult and pressing question of the State's constitutional obligatio [sic] to provide access to adequate housing. Many South Africans still live in intolerable conditions and, as this case demonstrates, there is a very real danger that communities will be tempted to take the law into their own hands in order to escape these conditions. …" [Page 143]

"In order for civil services to be installed and houses built it was necessary for the land to be vacated by the bona fide Vrygronders. ... The applicant argues ... that ... no one (except two or three beneficiaries who had been granted subsidies and had complied with the procedures set out below) had permission to occupy any of the houses or serviced erven because, first, some of the subsidies had not yet been approved and, even if they had been, the applicant prescribes a strict procedure which is to be followed for the orderly occupation of houses and erven. ... Shortly after the houses were completed ... certain of the respondents started to occupy the houses and erven. ... The respondents claim that, at first, they did not occupy the land but after the first phase of houses had been built, unidentified persons (not bona fide Vrygronders) moved into them. ..." [Page 145]

"I now proceed to consider whether an order evicting respondents is just and equitable considering all the circumstances of this case including the rights and needs of the elderly, children, disabled persons and households headed by women from the point of view of both the parties. ... The application is opposed by the respondents represented by Ms Lulu Agnes Mtini who deposed to the main answering affidavit. ... Applicant argued that Mtini could not represent those who did not sign confirmatory affidavits. I do not agree. Section 38 of the Constitution allows anyone to approach Court on behalf of others. Subsection (c) in particular provides that a person may approach a court if acting 'as a member of, or in the interest of a group or class of persons'. I cannot imagine that this section requires the representative of the group to obtain confirmatory affidavits from every member of the group. ... " [Page 149]

"... The respondents are disadvantaged and continue to live on the margins of society in intolerable conditions. ... They have waited over five years for their houses, an unacceptably long wait. ... Respondents have a constitutional right to access to adequate housing. ... [I]n cases like the present, most, if not all of the socio-economic rights of the Bill of Rights find application. Indeed, all the rights in the Bill of Rights are inter-related and mutually supporting. The right of access to adequate housing cannot therefore be viewed in isolation. The State is obliged to take positive action to meet the needs of those living in homelessness or intolerable housing. ..." [Page 150]

"This judgment is not concerned with evaluating applicant's fulfilment of its constitutional obligations. I have raised it simply because, in my view, if it were shown that applicant was failing substantially in the fulfilment of this duty, this would weigh in favour of the respondents in a consideration of all the relevant circumstances of the case. ... It was not argued ... that the applicant's policies are not consistent with its available resources. ... I cannot fault the applicant's housing development policies or their implementation."

"Turning to a consideration of applicant's interests, it obviously has an interest in ensuring that its housing development programs are implemented in a predictable and fair manner. ... I accept that it is necessary to draw up a list of potential beneficiaries and then have a cut off date after which no more applications will be accepted for a particular development. ... [T]he most compelling factor weighing in applicant's favour is simply that it is imperative that land invasions are denounced and rejected as an appropriate way to enforce one's constitutional right to access to adequate housing. ... " [Pages 151 – 152]

Erasmus J then divided the respondents into three categories: those who were on the 1998 list, who had their subsidies approved, were allocated a house and were in occupation of a house or serviced erf; those on the list who had subsidies approved, but had not been allocated a house yet were in occupation;

those in the list with no subsidies approved and nevertheless in occupation; and those not on the lsit at all. Erasmus J then held:

"The respondents in group 1 have done everything that is required of them except that they have not signed a first delivery certificate, snaglist (if applicable) and final delivery form. These are mere formalities ... I do not believe it is just and equitable to evict these respondents.

The respondents in group 2 also qualify for a house and again it would not be just and equitable to evict them simply because the bureaucratic step of allocation has not been performed by applicant.

The respondents in group 3 are different because they may or may not qualify for a house. If their subsidies are not approved, they will only qualify for a serviced erf. These respondents have not applied for subsidies and this, in my view, sets them somewhat apart from the first two categories of respondent. In my view, if any of these respondents are elderly, disabled or women who head households, it would not be just and equitable to evict them. If they do not fall into these exceptions ... it is just and equitable to evict them pending their application for subsidies.

The respondents in group 4 may or may not have applied for subsidies but do not *prima facie* form part of the Vrygrond community. In my view, it is just and equitable to evict them ..." [Page 152]

CIVIL PROCEDURE

HANO TRADING CC V JR 209 INVESTMENTS (PTY) LTD AND ANOTHER [2013] 1 ALL SA 142 (SCA)

At issue in this appeal was whether the court a quo should have allowed the filing of further affidavits in terms of rule 6(5)(e) of the Uniform Rules of Court, and whether first respondent (applicant in the court a quo) had been entitled to a declarator that an agreement entered into between itself and the appellant was valid and binding. Appellant argued that the agreement was not enforceable, as it had been validly cancelled.

Erasmus AJA (Mthiyane DP, Bosielo, Mhlantla and Van Heerden JJA concurring) held:

"The respondent relied to the answering affidavit and laid a basis, by referring to common cause facts ... to infer that the averments made by the appellant were unsustainable. In particular, that there was no proper compliance with clause 14 of the agreement upon which the appellant could rely for its insistence that it had cancelled the agreement." [Paragraph 5]

"No new issues were raised in the replying affidavit ... but the appellant deemed it necessary to obtain various affidavits and documentation ... The appellant filed these documents ... and placed them on the court file without leave of the court as envisaged in rule 6(5)(e) ..." [Paragraphs 6 - 7]

"... Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets. It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. ... Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. ..." [Paragraphs 10 - 11]

"To permit the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions. Furthermore, no reason was placed before the court *a quo* for requesting it to exercise a discretion in favour of allowing the further affidavits. Consequently, the court *a quo* was correct in ruling that the affidavits were inadmissible." [Paragraph 14]

"I now turn to the appellant's reliance on compliance with clause 14 of the agreement. In order for the appellant to succeed in this regard it had to show that it complied strictly with the peremptory provisions of clause 14. The appellant was obliged in terms of the said clause to notify the respondent in writing, of the breach complained of. The appellant further had to prove that the respondent received such notice. ..." [Paragraph 31]

"The notice that the appellant relies on ... was despatched by registered post. ... [T]he appellant addressed the notice to JR 29 Investment (Pty) Ltd instead of JR 209 Investments (Pty) Ltd. The address also did not indicate that it was in "Boardwalk Office Park". It would appear that the failure to identify Boardwalk Office Park would have rendered delivery of the notice impossible ...[O]n a closer analysis of the notice itself, it is evident that it entirely fails to indicate, and call on the respondent to remedy, any particular breach ... It thus fails to comply with the requirements of clause 14. " [Paragraphs 33 - 34]

"In my view, the non-compliance with clause 14 prevents the appellant from relying on any of the three breaches on which it purported to rely to cancel the agreement." [Paragraph 35]

The appeal was dismissed with costs.

CRIMINAL JUSTICE

S V SM 2013 (2) SACR 111 (SCA)

Case heard 28 March 2013, Judgment delivered 28 March 2013

Appellant was convicted in the High Court on charges of rape, indecent assault, crimen injuria, contraventions of the Film and Publications Act relating to child pornography, contraventions of the Drugs and Drugs Trafficking Act, and Fraud. He was sentenced to an effective 15 years' imprisonment. The appeal was against the convictions for rape and indecent assault, on the grounds that the complainant had consented, and that the appellant was under the impression that the complainant had legally consented. There was also an appeal against the sentence of 15 years' imprisonment imposed for rape.

Erasmus AJA (Maya and Shongwe JJA concurring) held:

"... [I]t must be assessed whether, on the facts of this matter, the apparent submission and acquiescence of the complainant amounted to consent in the legal sense." [Paragraph 39]

"The law requires ... that consent be active, and therefore mere submission is not sufficient. While ... consent could encompass submission, the converse is not always true. One has to have regard to the totality of facts in order to determine whether acquiescence to certain sexual conduct also constitutes consent. This is particularly so, as there are various factors which may operate to nullify consent. These include age, considerations of public policy and a failure to appreciate the nature of the conduct being consented to. " [Paragraphs 40 - 41]

"... [I]n the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny, with particular attention to be paid to the fact that the person giving the consent is a child. The inequalities in the relationship between the child victim and the adult perpetrator are of great importance in understanding the construction, nature and scope of the child's apparent consent to any sexual relations. These inequalities may most likely influence the child's propensity to consent to sexual relations ... " [Paragraph 42]

"In S v Marx, Cameron JA (dissenting) recognised the extent to which apparent consent by a child to sexual relations with an adult acquaintance does not render such conduct lawful, absent a clear understanding of the surrounding circumstances which underlie the child's acquiescence. In particular, the child's vulnerability and resultant openness to manipulation are deserving of heightened scrutiny. ..." [Paragraph 43]

"It is accepted that sexual grooming consists of the perpetrator of the subsequent sexual abuse utilising and manipulating a position of authority over the victim and the victim's environment in a manner which opens the victim up to the intended abuse itself. ..." [Paragraph 45]

"The facts indicate that the complainant did not consent to the acts ... Moreover, the complainant had consistently registered her objection throughout the earlier incidents of inappropriate touching by the appellant. ... The manner in which the appellant leveraged gifts, privileges and threats created a situation wherein the complainant felt indebted and fearful, vitiating any perceived consent to the sexual activities. " [Paragraphs 47 - 48]

"In respect of ... the first instance of sexual intercourse between the appellant and complainant, it is clear that the complainant was not in a position to physically exert her resistance ... because of her state of inebriation. She did not consent to the sexual intercourse, which is sufficient for the conviction of rape to be sustained. The court further found that the grooming of the complainant, by the appellant, also affected her ability to consent and his claim in regard of mens rea cannot be sustained." [Paragraph 49]

"The appellant had manipulated the complainant's fragile state and his stature in the community to his advantage, slowly inviting her to acquiesce to his advances. This was improper and calculating, and rendered the appellant culpable. In particular, the complainant's compliance with the appellant's demands was a consequence of his conduct and a direct result of his calculated distortion of his position of authority over her. This calculation encompassed his provision of drugs and alcohol, which were utilised in order to further weaken the complainant's resistance and cloud her judgment. Consequently, the appellant went out of his way to entice the complainant's consent by effectively subduing her ability to give consent freely and voluntarily. ... Having found that real consent was absent ... the appellant's claim that he was under the impression of real consent need only be stated to be rejected." [Paragraphs 52 – 53]

Erasmus AJA then turned to the question of sentence:

"It is submitted on behalf of the appellant that his age and the fact that the complainant did not sustain any injuries during the incidents should have been accorded more weight by the trial court. I strongly disagree. The appellant exploited his superiority in standing, age and familial power to manipulate and subordinate the complainant ... There is no reason to interfere with the sentence imposed. If anything ... having regard to the continuous and relentless manner in which the appellant groomed the complainant into sexual conduct, and the negative effects this has had on her and the family's life, the appellant

should consider himself fortunate to have been sentenced to only 15 years' imprisonment." [Paragraphs 59 - 60]

The appeal was dismissed.

S V WILLIAMS 2005 (2) SACR 290 (C)

Case heard 15 April 2005, Judgment delivered 15 April 2005

This case was referred to the High Court by a magistrate, who had discharged the accused on charges of possession of an unlicensed firearm, and discharging a weapon in a public place, in terms of the Arms and Ammunition Act 75 of 1969. The magistrate found that the State had incorrectly relied on the definition of a weapon in the 1969 Act, which had been repealed by the Firearms Control Act of 2000, and that it was the requirements of the latter Act which had to be proved. Subsequently, the magistrate doubted the correctness of this decision, but being functus officio was unable to correct the mistake. Hence the matter was submitted for special review.

Erasmus J (Potgieter AJ concurring) held:

"In considering the merits of the finding, two questions fall to be decided. The first is whether a mistake has been made and, if so, whether the mistake is one of law or fact, and the second is whether the matter is, in fact, reviewable. …" [Paragraph 11]

"… [T]he magistrate overlooked the significance of the inclusion of the word 'any' in s 1 of Act 60 of 2000 …Based on this mistaken interpretation of law, the magistrate found that the State had failed to prove the charge." [Paragraph 18]

Erasmus J then turned to consider whether this error gave grounds for review:

"… It is clear that neither the automatic review provisions contained in s 302 nor the special review provisions under s 304(4) of the Criminal Procedure Act apply to the present situation in that the accused was legally represented … and no sentence was passed … Are the proceedings nonetheless reviewable in terms of s 24 of the Supreme Court Act?" [Paragraph 20]

"Broadly speaking, this section enables proceedings in inferior courts in respect of which there is a complaint against the method of the proceedings, as opposed to the result, to be brought before a higher court. In the latter instance, the correct remedy is by way of appeal. … In the present case, the review has been requested by the magistrate. This creates a procedural problem in that s 24, read in conjunction with Rule 53 of the Uniform Rules of Court, clearly contemplates a review brought before the High Court by one of the parties to the proceedings sought to be reviewed. …" [Paragraphs 21; 23]

"In addition, s 24(1)(d), upon which the magistrate specifically relies, requires that there must have been prejudice, actual or probable, failing which, any review or, where applicable, appeal, would be merely academic and thus impermissible. … Whilst there can be no prejudice to either the accused or the State in instances of acquittal … prejudice can include prejudice to the prosecution and will arise where the prosecution is prevented from prosecuting. In the present case, the prosecution was not so barred." [Paragraph 24]

"... [T]he magistrate avers ... that, pursuant to a mistaken interpretation, competent and admissible evidence was erroneously rejected. The transcribed court proceedings do not, it would appear, support this conclusion. ... [I]t seems to me that the matter does not fall within the ambit of s 24(1)(d)." [Paragraphs 25 - 26]

"Neither does it qualify for review in terms of s 24(1)*(c).* A mistake of law is generally speaking not *per se* an irregularity. ... Mistakes of law are, however, under certain circumstances, liable to lead to the review of decisions made in consequence thereof. ... [I]n determining whether a mistake constitutes an irregularity, it is necessary to draw a distinction between mistakes of law which lead to a situation where the law is not applied at all, as opposed to situations where the law is applied, but incorrectly. ... [A]s the magistrate evaluated a set of facts against a legal standard, albeit the wrong standard, the mistake does not amount to an irregularity in the proceedings." [Paragraph 27]

Erasmus J then considered the argument that the Court should review the matter based on its inherent jurisdiction in terms of s 173 of the Constitution. After reviewing case law, Erasmus J noted "a reluctance on the part of our courts to exercise its inherent jurisdiction, particularaly in criminal matters" [para 33], and held:

"Although the mistake in the instant case is regrettable, it would seem to me that no special circumstances exist. The accused has not been heard and all the legal remedies have not been exhausted. There is thus, in my opinion, no basis upon which the provisions of s 173 can be invoked." [Paragraph 38]

"A decision to acquit on the basis that there is no evidence upon which a reasonable person can convict is a question of law involving 'the social judgment of the court' ... and, as such, is appealable ... In the circumstances, it appears to me that the matter has been erroneously submitted on review. I would merely note that the matter was submitted on review and make no ruling in respect of the matter. The Director of Public Prosecutions is at liberty to institute appeal proceedings to have the mistake of law corrected." [Paragraphs 39 – 40]

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V PROPHET 2003 (2) SACR 287 (C)

Case heard 24 February 2003, Judgment delivered 22 May 2003

Applicant sought civil forfeiture of property, previously placed under a preservation order, under the Prevention of Organised Crime Act (POCA). The Act required that the Court "shall" grant a forfeiture order if it found, on a balance of probabilities, that the property was an instrumentality of a listed offence, or the proceeds of unlawful activities.

Erasmus J held:

"The Act ... is a response to a perceived growth in organised and related criminal activities. It was enacted in response to a belief that 'South African common law and statutory law had failed to deal effectively' with such criminal activities. In this regard the Act is in line with international trends, as it encompasses not only criminal forfeiture but also the relatively new concept, to South Africa at least, of civil forfeiture. The intent behind the inclusion of civil forfeiture appears to be twofold. To provide the means to forfeit the proceeds of crime and in the process remove the incentive for crime and to seize assets that are used

to facilitate unlawful activities and thus remove these instrumentalities from criminal control." [Paragraph 3]

Erasmus J then dealt with an application for a stay of proceedings. After finding that the application had not been properly brought, Erasmus J held:

"... [A]t no stage ... does the respondent suggest that, in order to deal with the Applicant's supplementary affidavits, he will be compelled to incriminate himself before the state has produced evidence in the criminal trial. In any event, an application for the stay of civil proceedings pending the determination of related criminal proceedings will only be granted in those cases where the accused is under a legal compulsion to give evidence in the civil proceedings. A legal compulsion must be distinguished from pressure to testify in civil proceedings in order to rebut incriminating evidence. Even in cases where the accused is legally compelled to incriminate himself in civil proceedings before the state has produced its evidence in the related criminal proceedings, which is not the case in the present matter, the Courts have not generally suspended the civil proceedings. Instead the criminal court could order that the relevant element of compulsion not be implemented. ..." [Paragraph 9]

"... [T]he respondent cannot be allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal trial to escape responding to matters pertaining to the civil proceedings. ... [I]t is a matter not of compulsion but of choice, 'hard as the choice may be, it is a legitimate one' ... In principle then, in every such case where civil and criminal proceedings are instituted by the same activity the respondent is called upon to make a tough choice. He must weigh up the consequences and resolve the 'dilemma' in which he finds himself. The respondent in this matter clearly made his choice by filing a comprehensive answering affidavit. Accordingly no good grounds have been made out for suspending the civil proceedings." [Paragraphs 10 - 11]

Erasmus J then turned to consider the meaning of the term "instrumentality of an offence":

"Civil forfeiture in South Africa is based largely on statutory provisions in the USA and New South Wales in Australia. The Australian approach ... provides for forfeiture orders for 'tainted property', used in, or in connection with the commission of a serious offence. ... It becomes more difficult where the property is merely the place where the offence was committed. Merely being the locus in quo and nothing more would not be sufficient. ..." [Paragraph 22]

"Generally the US courts have adopted either the 'instrumentality test' or the proportionality test or one that combines both of these. In terms of the instrumentality test the forfeited property must have a sufficiently close relationship to the illegal activity. ... [T]he potentially harsh results of the instrumentality test, when applied alone have made some Courts hesitant to accept it as the sole test and some have favoured the adoption of a proportionality test. ... It is clear that such tests have to be seen in the context of the differing statutory requirements and standards of proof that exist in the US. Unquestionably the law in this area is still fairly unsettled ... However, the American and Australian approaches do provide some guidance in the process of determining the type of relationship that needs to exist between the property to be forfeited and the crime in question. The essential element that emerges is the idea of a 'nexus' connecting the property to the unlawful use and consequently 'tainting' it. The determining question is whether the confiscated property has a close enough relationship to the offence to render it an 'instrumentality'. ..." [Paragraphs 24 - 26]

"The facts of this matter dispose the court to believe that on a balance of probabilities the property … was in fact an instrumentality of the offence …" [Paragraph 27]

"There is no doubt that civil forfeiture is a controversial mechanism but it has been accepted by many nations as a legitimate law enforcement tool to combat serious crime. Forfeiture both prevents further illicit use of the property and imposes an economic penalty, thereby rendering illegal behaviour unprofitable. … [I]t is now widely accepted by the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime. This approach has similarly been adopted by our legislature." [Paragraph 28]

"It is clearly essential that at no stage should the effects of civil forfeiture be treated in a 'predetermined, mechanistic manner – the rationality, fairness and justifiability of each case should be judged on its own merits and treated accordingly.' It is critical … that a balance is struck 'between the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws.'" [Paragraph 29]

The application for a forfeiture order was granted. An appeal to the Supreme Court of Appeal was unsuccessful: Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA). A further appeal to the Constitutional Court was also unsuccessful, the court rejecting a challenge to POCA which had not been raised in the High Court: Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC).

CHILDRENS' RIGHTS

SENIOR FAMILY ADVOCATE, CAPE TOWN, AND ANOTHER V HOUTMAN 2004 (6) SA 274 (C)

Case heard 22 October 2003, Judgment delivered 9 February 2004 (order made 3 December 2003)

Applicant sought the summary return of E, a minor child ages 3 years and 9 months, in terms of the Hague Convention on the Civil Aspects of Child Abduction, and the enabling South African legislation. Respondent was the mother of the child. Both the mother and the father were born in South Africa, and the father also held Dutch citizenship. The mother and father married in South Africa before moving to the Netherlands for the father to study for a post-graduate degree. It was disputed as to whether this was intended to be a permanent or temporary move. The child was born in the Netherlands and acquired both Dutch and South African citizenship. The parents experienced difficulties in their marriage, and the mother and child returned to and settled in South Africa. The father alleged that he consented to the trip only as a holiday visit. The mother had instituted divorce proceedings in the Cape High Court.

Erasmus J held:

"The gravamen of the Convention is to deter international abduction while preserving the child's right to regular contact with both parents. The emphasis is placed on restoring the pre-abduction status quo. The Convention seeks to secure the prompt return (usually to the country of their habitual residence) of children wrongfully removed or retained in any contracting state. This is founded on the belief that the courts of the state of the child's habitual residence are best suited to determine disputes regarding the residence and welfare of the child. …" [Paragraph 5]

Erasmus J dealt first with the issue of the child's habitual residence:

"... This concept is key to the operation of all aspects of the Convention, and yet, it is not defined by the Convention itself. Consequently, the expression habitual residence has been interpreted according to 'the ordinary and natural meaning of the two words it contains, [as] a question of fact to be decided by reference to all the circumstances of any particular case'. ... [T]he fact that there is 'no objective temporal baseline' on which to base a definition of habitual residence requires that close attention be paid to subjective intent when evaluating an individual's habitual residence. When a child is removed from its habitual environment, the implication is that it is being removed from the family and social environment in which its life has developed. The word 'habitual' implies a stable territorial link; this may be achieved through length of stay or through evidence of a particularly close tie between the person and the place. A number of reported foreign judgments have established that a possible prerequisite for 'habitual residence' is some 'degree of settled purpose' or 'intention'." [Paragraphs 8 - 9]

"... In practice, ... it is often impossible to make a distinction between the habitual residence of a young child and that of its custodians ... It then becomes necessary to analyse the parents' shared intentions regarding the child's residence. Where there is contrary expressed parental intent, as in this instance, it then becomes necessary to determine whether the child has a factual connection to the state, and knows something of it, culturally, socially and linguistically." [Paragraph 10]

"... On the evidence in this case, I am not persuaded that the parents ever formed a settled or shared intention to remain in the Netherlands. When the parties first travelled to the Netherlands, they did so with the intention of returning to South Africa after a two-year period. ... The return of the mother and child to the Netherlands was based on an agreement that it would be on a temporary basis, for a trial period, to allow the father to complete his studies. Additionally, there is no substantive evidence of a real and active connection between the child and the Netherlands." [Paragraph 11]

"... The child did not, over the period of time it lived in the Netherlands, learn to speak Dutch. The attendance of the child for two mornings a week at a play group cannot be said to qualify as integration into Dutch society. In my view, there should be a strong and readily perceptible link between the child and that state 'for a return to be merited'. Although the very nature of Hague applications means that time does not permit more than a quick impression gained from evidence presented to the Court, there is no evidence here of such a link. Consequently, I cannot find that the Netherlands is the forum conveniens for a future custody determination." [Paragraph 12]

Erasmus J then considered the exceptions to the mandatory return of the child, dealing first with the question of whether the father had acquiesced:

"... [I]t becomes necessary for the Court to examine the 'outward conduct' of the wronged parent. Consequently, the 'subjective intention of the wronged parent is a question of fact for the trial Judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent'." [Paragraph 17]

"In this matter, the father, through his failure to act expeditiously, created the impression that the child would remain in South Africa indefinitely. The father made an election to pursue the divorce and even custody of the child through the South African Courts while, simultaneously, holding out the issue of the alleged 'abduction' of the child as an option he might possibly pursue at a later stage. His behaviour was not indicative of someone prepared to take the necessary steps to insist on a summary return. This runs contrary to the intentions of the Convention. It cannot be used as a bargaining chip or potential threat in divorce proceedings. ..." [Paragraph 18]

"... He did not demand the return of the child to the Netherlands pending the finalisation of the divorce. Nor is there any evidence that the father made any attempt to contact the relevant authorities in the Netherlands in order to establish what his 'rights' were regarding the 'abduction' of the child. The impression created ... is that it was only when the father eventually came to South Africa, in July 2003, and was unhappy with the access to his daughter that he took steps to initiate Hague proceedings. ... The father knew of the whereabouts of the child and, through his conduct, appeared I to acquiesce to the retention of the child in South Africa." [Paragraph 19]

"... [I]t would clearly be contrary to the intention and terms of the Convention were a court hearing an application under the Convention to allow the proceedings to be converted into a custody application. ... In this instance ... it is hard to conceive of any benefit to the child to return her to the Netherlands in order to have questions of custody and access determined by a Dutch court." [Paragraph 25]

The application was dismissed.

ADMINISTRATION OF JUSTICE

In **City of Cape Town v Premier, Western Cape, and Others 2008 (6) SA 345 (C)**, the court held that the proclamation establishing a commission of enquiry, chaired by Erasmus J and established to investigate possible maladministration, corruption, fraud or other malpractice in the city of cape town and George municipality, was unconstitutional and invalid. Swain J (Nicholson J concurring) held inter alia that the appointment of a serving judge to chair the commission was incompatible with the separation of powers and therefore unlawful and invalid (paragraph 213).

The court held that: "the Premier did not possess an honest belief that good reasons existed for establishing the Second Erasmus Commission, and that he acted with the ulterior motive of embarrassing political opponents", making "the inference irresistible that one of the reasons why the Premier appointed a judge to chair the Commission was in order to cloak his ulterior motive with the neutral colours of the judicial office." (Paragraph 176).

Swain J held further that:

"I wish to make it absolutely clear that I do not suggest that Erasmus J was in any way a party to such conduct, but what this starkly illustrates is the care which must be exercised by any judge in deciding whether or not to accept an appointment to chair a commission at the behest of a representative of the executive." (Paragraph 177(2)). The court noted that the applicant did not challenge the suitability of Erasmus J to chair the commission (paragraph 198).

In the course of a different aspect of the case, the court found that Erasmus J had acted contrary to relevant regulations in releasing an interim report prepared by the commission's evidence leader to the Premier (paragraph 136). The information in the summary was held to have been unlawfully obtained by the Premier (paragraph 138).

SELECTED JUDGMENTS

COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LTD v HALES AND ANOTHER 2009 (3) SA 315 (D)

Case heard 2 February 2009, Judgment delivered 11 February 2009

This case concerned the application of section 85(a) of the National Credit Act, which deals with court referrals of a matter for debt review. The defendants held a mortgage bond over immovable property in favour of the plaintiff as security for a loan, and the plaintiff sought to foreclose on the bond. The defendants requested the court to refer the matter for debt counselling in terms of section 8(a) of the National Credit Act. The question was what discretion the court had in ordering such a referral, and what factors the court must consider for such an order to be made.

Gorven J held:

"…[T]he section provides that 'the court may' take the step of referral to a debt counsellor. The word 'may' vests the court with a discretion as to whether or not to take that step." [Paragraph 7]

"Ordinarily, the party alleging the right to a specific order bears the onus of proving its entitlement to such order. In Pillay v Krishna and Another 1946 AD … the following was said: 'Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.' However, the plea does not amount to a defence to the claim. It goes no further than to request the court to refer the matter to a debt counsellor in terms of s 85(a). This is no more than a request that the court exercise a discretion in their favour. Since the debt counsellor is obliged to make a recommendation to the court in terms of s 86(7), this is, at most, a dilatory plea rather than being in the nature of a confession and avoidance which would attract an onus. There is, therefore, no onus to discharge once the two factors are admitted to be present. There are no facts to prove on the part of the defendants which would discharge an onus. Instead, the defendants have only to persuade the court to exercise its discretion in their favour." [Paragraph 10]

Gorven J held that the legislature has not enumerated specific factors which the court should consider, but section 3 of the Act, which set out the purposes of the Act, and other relevant sections must be considered as they provide a backdrop against which the discretion must be exercised. The court must exercise this discretion judicially:

"It should not be exercised capriciously or upon any wrong principle, but for substantial reasons… [T]he court must have regard to a conspectus of all relevant material. It follows that it is in the interests of both parties, but in particular the party desiring the referral to a debt counsellor, that as much relevant material is placed before the court as possible to assist in this exercise. [Paragraph 12]

"Ms Olsen, who appeared for the defendants, urged me to find that the mere fact that the over-indebtedness was admitted was decisive in the exercise of the court's discretion. She was constrained to do so, I suspect, by the paucity of evidence placed before me by the defendants. Her submission cannot be correct. If it were correct, the legislature would have made it plain that proof of over-indebtedness would oblige the court to take the step set out in s 85(a). The section would have been framed differently

and at least eliminated reference in that circumstance to s 86(7)(a) and (b), since these leave open the possibility that the debt counsellor will conclude that the consumer is not over-indebted. The fact… cannot be decisive" [Paragraph 13]

"…Since s 3 lists a number of purposes, it cannot be that the protection of consumers is the sole purpose. Neither can it be said that this is the chief purpose. No prioritisation is provided. A number of the listed means by which the purposes are to be achieved include the protection of consumers, but not all do so. Others include a balancing of rights and responsibility of consumers and credit providers, as well as enforcement of debt. Whilst consumer protection is a clear object, it is one factor, albeit a very important one, in the purposes of the Act." [Paragraph 13]

"It appears from the monthly commitments of the defendants that, even without the instalment due to the plaintiff, they would be marginally over-indebted. This means that there appears to be little potential for successfully rescheduling the indebtedness under the mortgage bond. Even ignoring the other monthly amounts required to service their debt commitments, the defendants would only have an amount of R1 342,20 to pay towards the mortgage bond indebtedness to the plaintiff. This would leave a monthly shortfall to plaintiff of R8 692,74, without taking into account the overdraft indebtedness and those to the Ethekwini Municipality and Wesbank. Whilst I have no evidence of how the term of the mortgage bond would be increased if an instalment of only R1 342,20 were paid, it is clear, taking into account compound interest, that this would not be a feasible way of rescheduling the mortgage bond. The defendants have not paid a single instalment in some 14 months. A further suspension of instalments is only likely to increase their indebtedness in the absence of additional income. … [T]he defendants have not mentioned this as a possibility. If it is not feasible to extend the mortgage-bond debt or for the defendants to recover financially after a further suspension of instalments, it is difficult to see how a debt counsellor could make one of the remaining available recommendations in terms of s 86(7)." [Paragraph 23]

"Ms Olsen urged me to find that the grant of the order sought would infringe the defendants' right to housing afforded them in s 26 of the Constitution… Although an order declaring the property executable is sought by the plaintiff, the defendants have not placed any relevant material before the court as to how this would result in an infringement of their right to adequate housing. Nor can they complain that they did not know that they should do so. The summons pertinently drew their attention to the provisions of s 26 and indicated that: Should they claim that the order for execution will infringe that right it is incumbent on them to place information supporting that claim before the court." [Paragraph 25]

"I am, therefore, of the view that there is no evidence before me to show that the grant of an order declaring the property executable will undermine the rights of the defendants accorded them by s 26 of the Constitution." [Paragraph 25]

"In all the circumstances … I am not disposed to exercise my discretion in favour of the defendants and take the step referred to in s 85*(a)*. That being the position, the stated case requires that I grant judgment for the plaintiff as prayed." [Paragraph 26]

Gorven J therefore handed judgment in favour of the plaintiff and ordered the defendants to pay jointly and severally the sum owing plus interest, as well as an order declaring specially executable the immovable property in question.

This interpretation of the Act has since been referred to, discussed, and/or applied in a number of other cases including by the Supreme Court of Appeal *in Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) and in *Seyffert and Another V Firstrand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA).

CIVIL PROCEDURE

LANDER V O'MEARA AND ANOTHER 2011 (1) SA 204 (KZD)

Case heard May 13, 2009, Judgment delivered May 13, 2009

This case was about assessing an attorney's fees for non-litigious work, and under what circumstances a court should interfere with the discretion of a committee appointed by a law society to make the assessment. The applicant, an attorney, charged the client R45 000 and the KwaZulu-Natal Law Society appointed the first respondent as a committee to tax the fee after the client expressed dissatisfaction. The fee was then adjusted R9 000. The applicant was dissatisfied and applied to have it reviewed.

Gorven J held that the Law Society acted correctly in appointing a committee to assess the fee in question and the court had jurisdiction to hear this application. As to how a review should be handled, he held that:

"... [A] review of this assessment is dealt with as if it were a determination by the taxing master in the High Court. Rule 48 of the Uniform Rules of Court governs the procedure. ... A court is very reluctant to interfere with the exercise of a taxing master's discretion. The review is in the nature of the third species of review referred to by Innes CJ in the JCI case. The approach has more recently been stated as being 'that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling'" [Paragraph 13]

"If, accordingly, the taxing master did not exercise his or her discretion properly, did not apply his or her mind to the matter, disregarded factors or principles which were proper for him or her to consider, or considered others which it was improper to consider, has acted upon wrong principles or wrongly interpreted rules of law, or has given a ruling which no reasonable person would have given, or is clearly wrong, interference on review is justified." [Paragraph 13]

"In particular, it has been held that fees allowed to counsel are pre-eminently left to the discretion of the taxing master, and the court will not interfere with the exercise of this discretion unless the taxing master has acted upon a wrong principle or exercised his or her discretion in a wrong manner. This is so because there is only a limited tariff for counsel's fees in specified cases and the taxing master is enjoined 'to allow such fees as he considers reasonable'" [Paragraph 14]

Gorven J considered the present matter as akin to that relating to fees allowed to counsel. There is no specified tariff, but only general principles.

"In such a matter, where reasonableness is the criterion, the general reluctance to interfere on review with a determination arrived at by the exercise of a discretion is even more pronounced. It goes without saying that this never reaches the point where the right of review is rendered nugatory." [Paragraph 16]

"The court will substitute its own opinion for that of the taxing master when the matter is one in which the court is as well able to judge as the taxing master is. This is not such a matter. The first respondent, as an attorney, is in a better position to assess the reasonableness of the fee charged for drafting an agreement than is the court." [Paragraph 17]

"Applying the general principles to the present matter, accordingly, I am only entitled to interfere with the first respondent's assessment on limited grounds." [Paragraph 18]

"I am of the view that none of the submissions set out by the applicant demonstrates that the first respondent disregarded factors or principles which he should have considered, or approached the matter on a wrong principle. There is therefore no basis for interfering in his assessment along these lines". [Paragraph 24]

"In the light of the first respondent having taken into account all the relevant factors, and in the light of his reasoning I am not satisfied on an overall conspectus that he was clearly wrong in arriving at his assessment." [Paragraph 25]

The application was accordingly dismissed with costs.

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

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

The three applicants sought to interdict the second and third respondents, who were advocates, and the fourth respondent, who was an attorney, from examining the applicants at an enquiry in terms of section 417 of the Companies Act 61 of 1973. The basis was that the applicants were former clients of the respondents, and that the respondents were subject to conflict of interests and were privy to confidential information. In effect, however, the clients had been the companies which the applicants represented, not the applicants in their personal capacities.

Gorven J held:

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

or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.' Only once these have been proved does an evidential burden shift to the solicitor to show that there is no risk to the former client if the solicitor acts in the matter." [Paragraph 26]

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

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

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

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

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

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

"This means that, applying the principles of our law as it stands at present, the issue as to standing must be decided in favour of the respondents. Properly construed, it seems to me that the right asserted by the applicants in support of their claim to a final interdict is a right not to be examined by the respondents in the s 417 enquiry. Within the context of this application on the present state of our law, proof of that right would require proof that: (1) the applicants had a previous attorney-client contract with the respondents; (2) confidential information of the applicants was imparted or received in

confidence as a result of that contract; (3) that information remains confidential; (4) that information is relevant to the matter at hand; and (5) the interests of the present client of the respondents are adverse to those of the former clients. None of the first four of these requirements is met. In the present case, therefore, no legal duty on the part of the respondents arose towards the applicants or is present now." [Paragraph 50]

In the result, the application was dismissed with costs.

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

CRIMINAL JUSTICE

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

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

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

In considering sentence, Gorven J held:

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

"I was invited to accept that the ipse dixit of the accused was to the effect that his criminal responsibility was diminished. He does not, however, say so in terms. What he says is that he was 'severely emotionally overwrought' and was 'emotionally disintegrated' whatever these phrases may mean. He also significantly said: 'I was still able to differentiate or appreciate between right and wrong and I was able to act in accordance with such appreciation'. I therefore need to evaluate the facts of the case to see whether there was a reduction in the capacity of the accused to appreciate the wrongfulness of his actions and whether he acted in accordance with that appreciation." [Paragraph 17]

"Unlike in so many cases involving one lover killing another, there was no history of abuse. The history was of the deceased's infidelity. This took place while they were not yet married, even though part of the

ilobola had been paid and a child had resulted from the union. The history was also of the accused's jealousy and his refusal to accept that the deceased may desire someone other than him... His primary motivation was to prevent any desire of his fiancée to have a relationship of her choice if he should die. He decided to rather kill the deceased (and risk killing the complainant in count 1) than to either simply stay in the vehicle in the hope that his assailants would stop shooting for fear of killing innocent occupants or to shoot back at them. In my view none of this establishes that the accused had 'diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of the wrongfulness'. His ipse dixit is to the contrary." [Paragraph 21]

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

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

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

"A 2012 study by the Medical Research Council showed that, of every two women who are murdered, one is killed by her partner. This means that the proprietorial attitude of men towards women has reached extremely serious proportions in our society. This attitude makes a mockery of the right to life accorded by the Constitution ... If a person kills another, this is the ultimate negation of the right to life. This set of attitudes also fundamentally undermines, during life, many of the other rights of women, including the right to equality, the right to human dignity, the right to freedom and security of their person, the right not to be subjected to servitude, the right to privacy and the right to freedom of association contained in the Bill of Rights. This proprietorial attitude is inimical to a democratic society based on values of human dignity, equality and freedom. It is clear that, in addition to depriving the deceased of her right to life, the accused infringed at least some of these other rights afforded to the deceased by our Constitution. It is my view that the nature of the offence and the interests of society demand that the crimes committed by the accused be severely punished." [Paragraph 29]

"...[The] legislature has distinguished between offenders who ought to be removed from society and those who, although deserving of punishment, do not...[I]t is my view that, despite the recommendation

of the probation officer, the accused falls into the category of those who must be removed from society" [Paragraph 32]

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

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

S V HOUSTEN (136/2012) [2012] ZAKZPHC 76 (7 DECEMBER 2012

Case heard 29 November 2012, Judgment delivered 7 December 2012

The appellant was convicted of raping a 31 year old woman at gunpoint and was sentence to eight years imprisonment. This was an appeal against the conviction. The only state witnesses were the complainant and her boyfriend, while only the appellant testified in his defence, raising an alibi.

Gorven J (Koen J concurring) held:

"The crime of rape is a serious scourge on our society. It is, in essence, a crime of violence involving the assertion of power over women by the rapist… The founding values of our Constitution include human dignity, the achievement of equality and non-sexism. The Bill of Rights enshrines every person's 'inherent dignity and the right to have their dignity respected and protected'. The crime of rape clearly negates that right in a most fundamental way." [Paragraph 7]

Gorven J remarked that the cautionary rule that was previously applied to rape complaints "clearly negated the right to equality" and "[i]t is thanks to the values in our Constitution that this approach has been decisively rejected in *S v Jackson*…" [Paragraph 8]

"[I]n sexual assault cases a double cautionary rule was often invoked; that applying to single witnesses and the one now rejected. This was because such cases overwhelmingly rely on a single witness because the brazenness of the perpetrator does not often extend to committing the offence in the presence of any other witnesses. This made it exceptionally difficult for the state to obtain a conviction. It is believed that rape survivors often chose not to press charges as a result of these impediments, to their detriment and that of justice in society". [Paragraph 8]

"Having said this, there is an unacceptable tendency in certain sectors of our society to assume that, if someone is charged with the crime of rape, that person must be guilty. This is probably at least partly as a result of the impediments mentioned above and is, to that extent, understandable. It finds expression in comments within the media and in public demonstrations outside courts in support of convictions in rape cases. If a person accused of rape is acquitted, the response of such people is that an injustice has

been perpetrated and that rapists should not be allowed to go free. This attitude is inimical to the proper functioning of the criminal justice process. It substitutes the decision of the court of public opinion for that of a court of law. It is designed to place pressure on a court of law to convict a person when the evidence may not support such a conviction. If a conviction does not follow the court is criticised for siding with rapists against rape victims." [Paragraph 9]

"At the heart of the criminal justice system is the presumption of the innocence of an accused person until convicted in a court of law. This presumption, accepted in almost all jurisdictions in the world, has been enshrined in s 35(3) of the Constitution." [Paragraph 10]

"The complainant was a single witness as to the occurrence of the incident in question. It is so that an appeal court seldom will seldom [sic] interfere with findings of fact unless there have been misdirections on the part of the trial court. This is not an inflexible approach…" [Paragraph 11]

"In the present matter it is my view that the learned Magistrate misdirected himself in his findings of fact. First, his judgment was premised on a finding that it was proved that a rape had taken place on the evening in question. … Apart from the evidence of the complainant, however, there is absolutely no evidence that this was the case. The report, whose contents were admitted as true, did not even go so far as to say that his findings were consistent with rape. He said that his findings were 'consistent with genital penetration'. But he also recorded that, three days prior to his examination which took place 14 days after the incident, the complainant had engaged in consensual sexual intercourse. In these circumstances, it would be extremely surprising if his findings were not consistent with 'genital penetration'. The doctor was not called to give evidence. There is a worrying tendency not to call expert medical witnesses to testify. The state satisfies itself with handing in reports with or without an admission that the contents are accurate. This is often so in circumstances where the findings and reasons for the findings could make the difference between an acquittal and a conviction." [Paragraph 12]

"It is necessary to recapitulate briefly the approach of courts to medical evidence. First, this usually involves giving opinion evidence. For such evidence to be admissible, the person giving it must be an expert in the field. …In addition, the expert witness must not only give her or his opinion, but must give reasons why this opinion has been arrived at for it to be admissible and of any use." [Paragraph 13]

"When medical reports are handed in without the expert witness being called, the significance of factual findings and the reasons for them might not form part of the report and most certainly cannot be interrogated by way of cross examination or clarifying questions by the court. … It may be that, if the doctor in question had been called to testify, he could have given evidence distinguishing features of genital penetration by way of consensual sexual intercourse from genital penetration by way of rape and have explained which of the two was, in his opinion, more likely to have taken place and why he formed that opinion. The medical report handed in studiously avoids any finding that it was consistent with rape, even though it was reported to the doctor that this had taken place. I am of the view that the report is of no assistance. As it is, the finding of the magistrate that the appellant could not dispute that the complainant had been raped has no basis in the medical evidence and amounts to a misdirection." [Paragraph 14]

"In the second place, the magistrate misdirected himself in ignoring serious contradictions in the evidence of the complainant. … The third misdirection was that the magistrate failed to consider the

contradictions between the evidence of the complainant and that of other evidence relied on by the state." [Paragraphs 15 - 16]

"Contradictions are not necessarily an indication that no reliance can be placed on the evidence of a witness or witnesses. However, these are material contradictions. It can hardly be imagined that the complainant would not remember whether a firearm was banged on the gate and produced prior to her opening the gate or whether it was only produced after she had opened the gate. She did not claim that she could not remember whether the appellant had gestured to her to enter the bedroom or had instructed her to do so, emphatically denying the latter. It seems difficult to believe that she could not recall whether or not she had consumed alcohol after the incident. Her emphatic denial and subsequent testimony that she had a glass or two cannot both be correct. This is also true of her testimony as to whether she visited the tavern that afternoon." [Paragraph 17]

"In contrast, the appellant had raised a detailed alibi defence as early as his bail application. He was not shaken in cross-examination. There was nothing inherently improbable in his defence. The magistrate ought to have found that his evidence was reasonably possibly true and given him the benefit of the doubt." [Paragraph 18]

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

SELECTED JUDGMENTS

PRIVATE LAW

PAIXAO AND ANOTHER V ROAD ACCIDENT FUND (05692/10) [2011] ZAGPJHC 68

Case heard 19 May 2011, Judgment delivered 01 July 2011

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

Mathopo J had to determine whether it would be appropriate to allow the applicants to claim for loss of support given that she was not married to the deceased:

"At issue … was i) whether the deceased whilst still alive was under a legal duty to support the plaintiff which duty was enforceable by the plaintiff against the defendant and whether that duty translate into a right of support which is worthy of protection by law and thus enforceable against third parties." [Paragraph 9]

"It was submitted on behalf of the plaintiffs that their case did not arise by virtue legal consequences of a marriage (sic) but based on a contractual relationship between the parties (that is the deceased and the First Plaintiff) which created a legal obligation on the deceased to maintain and support the First Plaintiff as well as the Second Plaintiff. … Counsel submitted that it makes no difference whether it was an express or tacit or a combination of both forms since a binding contractual agreement came into existence because the deceased had assumed a contractual duty of support towards the First and Second Plaintiff." [Paragraph 19]

"It was submitted … that a contractual obligation whereby a party is bound to maintain and support has been recognised in our law following the decision of the Constitutional Court in Satchwell v Republic of South Africa and Another … where Madala J said the following: 'The law attaches a duty of support to various family relationship, for example, husband and wife and parent and child. In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same sex life partnerships. Whether such a duty of support exists or not will depend on the circumstances of each case.' Right at the outset, I must state that reliance on this passage is misplaced. In the same judgment … Madala said the following which negate the aforesaid paragraph: "Same sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage. In my view, it is unnecessary to consider the position of heterosexual partners in this case (my emphasis). As was stated by this Court in the National Coalition v Home Affairs … case, the submission by the respondents that… gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction." It is quite inappropriate in these confirmation proceedings for this Court to decide on the rights of unmarried heterosexual life partners which raise quite different legal and factual issues (my emphasis). This matter was raised by the respondents in this court for the first time in their written submissions and it is, therefore, not appropriate for the court to consider it." It is therefore clear that the position of heterosexual partners was left open and undecided by the Constitutional Court in the Satchwell case …" [Paragraph 20]

"Counsel further rightly submitted that no claim for loss of support exists purely because the parties agreed to maintain or support each other and argued that it is wrong to suggest that because a legally binding agreement exists between the parties, same should be elevated to a legally enforceable right worthy of protection against third parties. More crisply, he contended that it is quite clear that an agreement to get married does not establish any legal duty of support between the parties…" [Paragraph 24]

"In my view the contention by the plaintiffs that the evidence of the first plaintiff, that Mr Gomes promised to take care of her and her children was unchallenged, and therefore they have in discharging the onus that there was an agreement to marry (sic). This contention is misplaced. It is now settled law that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. …" [Paragraph 27]

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

"… Experience has taught us that people make promises, not intending that those promises should be construed or elevated to animus contrahendi. This case falls within that category. I am persuaded that even if there was an agreement (which I did not hold), a mere contractual right to support is on its own is not sufficient to give rise to a claim for loss of support and such a right cannot translate into a right of support which is worthy of protection by law and enforceable by the third parties. …" [Paragraph 30]

"In my view, it is impermissible to elevate a promise to "take care of you" to a legally enforceable obligation. To the extent that Plaintiffs seek to rely on the promise made by the deceased to them, such a promise was not only vague, but one akin to an offer made within a family in circumstances which negative an intention to be legally bound. …" [Paragraph 31]

"Our law does not recognise a dependant's claim every time there is an agreement. … The agreement or promise to support does not mean that Mr Gomes was bound to support them for the rest his life. …" [Paragraph 34]

"I need to emphasise that in terms of common law marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of co-habitation and support. The formation of such relationship is a matter of profound importance to the parties and indeed to their families and it is of great social value and significant. …"Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in case of unmarried cohabitants (my emphasis)" [quoting Skweyiya J Volks v Robertson and others 2005 (5) CLR 496(CC) who quoted with approval the comments made in Dawood & Another v Minister of Home Affairs & Others 2000 (3) SA 936 CC at paragraph 31]" [Paragraph 36]

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

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

ADMINISTRATIVE JUSTICE

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

Case heard 24 July 2013, Judgment delivered 16 August 2013

The then Acting National Director of Public Prosecutions (ANDPP), Mr Mpshe, had withdrawn charges against Mr Jacob Zuma (the third respondent). Subsequent to a High Court application for the release of records upon which the ANDPP claimed to have based his decision, the Supreme Court of Appeal ruled that a telephonic recording and transcript, as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and or transcript, except "the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching the representations (the reduced record), be released". The applicant also sought to have the first respondent held in contempt of the SCA order for failing to produce the complete said

reports. A reduced record was produced, and this application was to compel the ANDPP to release the complete said records as per the order of the SCA, after he failed to produce the records within the 14 day period set in the SCA order, and after the applicant requested the records. The case thus revolved around the interpretation of the SCA's order.

Mathopo J held:

"With regard to the outstanding documents which formed part of this application, the first respondent invoked paragraph 33 of the SCA judgment and order … which among others, directed that the concern expressed by the third respondent that there might be material in the record of decision which might adversely affect his rights be met by an undertaking on behalf of the first respondent that the National Director of Public Prosecutions office would inform the third respondent of its contents. … Hulley & Associates representing the third respondent wrote to the office of the State attorney advising that the third respondent's position was that it neither consented nor waived the confidentiality provisions which underpinned the representations." [Paragraph 9]

"The third respondent did not file any affidavit opposing the relief sought instead he filed a notice in terms of rule 6(5)(d)(iii) wherein he raised a point of law namely that in terms of the SCA order, the material in issue do not form part of the qualified record of the proceedings. In short, the position adopted by the third respondent is that production of the transcripts as well as written or oral representations are excluded and protected by the confidentiality, as prescribed by the SCA order." [Paragraph 12]

"It should have been obvious to the third respondent that, in the absence of any countervailing evidence particularly since the parties accorded different interpretations to the SCA order, more was required to clarify his position instead of seeking refuge on a point of law. The objective facts submitted by the applicant cried out for an answer, yet the third respondent elected not to respond. … The third respondent imperilled his position … by failing to put up any cogent explanation as to why he is entitled to the confidentiality." [Paragraph 22]

"Another compelling reason advanced by the applicant is that because a substantial portion of the transcripts have already been disclosed and is in the public domain, the contention that the third respondent is entitled to confidentiality in respects of the transcripts is misplaced. It was submitted that at no stage during the public disclosure by Mpshe, did the third respondent raise any privilege or confidentiality and neither did he raise breach of confidentiality before the SCA." [Paragraph 23]

"It seems clear to me that both the applicant and the first respondent understood the order of the SCA to exclude the transcripts. The third respondent however seems to have obfuscated the issues by contending that Mpshe, in his address included the transcripts as part of the representation. … The effect of the third respondent's argument is that Mpshe in his public address breached the confidentiality or privilege of the third respondent by releasing the transcripts. This submission in my view is devoid of merit. No compelling evidence has been adduced … as to how and in what respect Mpshe breached his confidentiality. This issue was not raised nor debated before the SCA. It is opportunistic for the third respondent to now contend that there was a breach of confidentially when he benefitted from the alleged disclosure." [Paragraph 24]

"… It is desirable that the transcripts be produced to test and properly contextualise whether the decision of Mpshe was based on rational grounds or not. I must also add that the remaining parts of the transcripts will complete a picture and give true meaning to that decision." [Paragraph 25]

"As indicated earlier, the first respondent was merely given access to and not copies of the recordings or transcripts. Mr Mpshe in his statement … did not acknowledge that the transcripts emanated from the third respondent. This in my view gives credence to the proposition that there is no legal basis to withhold them." [Paragraph 26]

"I fully agree with the applicant that on a proper construction of the SCA order, confidentiality does not extend to the transcripts. To now assert privilege or confidentiality is without foundation. The third respondent furthermore did not raise any prejudice. …" [Paragraph 27]

"In my view it is not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the ipse dixit of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical. … The third respondent has not put up any case why the representations are confidential. … Paragraph 33 of the SCA order makes it clear that the concerns of the third respondent must be addressed. No such concerns have been raised by the third respondent. In the absence of such concerns the first respondent has no right to independently edit the record. It must produce everything. To the extent that the third respondent claims confidentiality, he must set out the relevant facts why he is entitled to confidentiality. … In my view none has been shown to exist. " [Paragraph 29]

"The submission by the third respondent that the transcripts are inextricable and formed part and parcel of the entire representation is rejected. Equally, untenable is the submission that producing the transcripts would infringe the third respondent's right to fair trial. No cogent or plausible evidence has been advanced by the third respondent to show that producing the transcripts would adversely or materially affect his rights. … [T]he third respondent has failed to demonstrate that he will suffer any prejudice if the documents are released. " [Paragraph 31]

"… The applicant went on to submit that relying exclusively on the value judgment of the first respondent, as the final arbiter on the question of whether the documents are disclosable or not is untenable, because the third respondent did not file any contrary evidence suggesting that he will suffer prejudice if the documents are disclosed. Since no legal impediment to the disclosure has been demonstrated by the third respondent, I agree with the applicant that relying on submissions from the bar as a ground for confidentiality or is misplaced." [Paragraph 39]

"The first respondent, as an organ of state, has a duty to prosecute without fear, favour or prejudice by upholding the rule of law and the principle of legality. It is also a constitutional body with a public interest duty. It behoves its officials to operate with transparency and accountability. The first respondent has a duty to explain to the citizenry why and how Mpshe arrived at the decision to quash the criminal charges against the third respondent. In pursuance of its constitutional obligations it is incumbent upon the first respondent to pass the rationality test and inform the public why it quashed the charges. In my view, the converse would make the public lose confidence in the office of the NDPP. The documents, sought by the applicant, will assist in enquiring into the rationality of the decision taken by Mpshe. It cannot simply be said that all the documents submitted, whether oral or written, are covered by privilege. That would amount to stretching the duty of privilege beyond the realms of common sense and logic." [Paragraph 40]

"The order of the SCA does not envisage a blanket prohibition to disclosure. The order specifically excludes only matters that the third respondent may consider confidential or privilege. … The third respondent must specify and itemise the relevant material and state in what respect he is protected by privilege or confidentiality. … In the absence of any, he cannot seek to rely on the SCA order." [Paragraph 41]

Regarding the question of contempt, Mathopo J found that:

"The submission advanced on behalf of the first respondent is that the delay if any, was occasioned by the third respondent's legal representative in considering whether to object to the transcript or not. Thus no fault could be attributed to the State attorney or first respondent because in terms of the SCA's order, the first respondent was obliged to afford the third respondent, an opportunity to indicate whether he has any objection or not. I agree … that affording the third respondent an opportunity to raise his concerns was in line with the SCA order. This conduct in my view cannot be regarded as deliberate or wilful non compliance with the order. It follows that the contempt of court application must be dismissed". [Paragraph 50]

An order was made for the First Respondent to comply with the order of the Supreme Court of Appeal within five days. The order was upheld by the SCA in *Zuma v DA* (836/2013) [2014] ZASCA 101 (28 August 2014).

CIVIL PROCEDURE

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

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

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

Mathopo J held:

"It appears to me that when the original ex parte application was sought before Moshidi J, he was satisfied that there was prima facie proof of the fact that the respondent's contemplated departure was with the intention of evading or delaying payment of his debt or, at least, that the applicant had reasonable grounds for such apprehension. Now ... I must decide whether there is sufficient proof to sustain the applicant's case." [Paragraph 5]

"Mr Roos [counsel for the applicant] submitted that the summons was issued against the respondent on 29 May 2009 and he entered appearance to defend on 17 June 2009. Any judgment obtained against the respondent would be a hollow judgment because he has no assets in South Africa or security for the satisfaction of any judgment to be obtained against him. It was submitted that the court should infer that the respondent's conduct in purchasing air tickets, engaging contractors, and obtaining quotations for the removal of his assets, was sufficient evidence of someone who was desirous of leaving the country permanently with that intention." [Paragraph 11]

"In my view, service of the summons by the applicant, the purchasing of tickets and the obtaining of quotations for the removal of assets by the respondent per se do not constitute sufficient grounds to warrant arrest. The undisputed facts reveal that the respondent made arrangements to depart from the Republic of South Africa well before the summons was issued and served on him..." [Paragraph 14]

"The sole purpose of the procedure of arrest is to prevent flight with the intention of evading or delaying payment of one's debts. The intention to depart is to be inferred from the circumstances of each case. A distinction must be drawn between a departure with an intention to evade or delay payment and an innocent departure which may coincidentally lead to that result. The onus rests on the applicant seeking such an order to satisfy the court that there is prima facie proof of that fact or, at least, to show that there is a reasonable apprehension that the flight is being undertaken with the requisite intention. All that the respondent has to do is to show absence of intention to flee. ..." [Paragraph 16]

"... [T]he procedure of arrest was not devised to prevent a debtor's departure from the court's jurisdiction, but to prevent flight, ie to prevent his departure with the intention of evading or delaying payment. ... It is not the effect, but the requisite intention, which is material." [Paragraph 17]

"... I am of the view that the applicant has failed to prove that the respondent made the arrangements to depart, with the intention of evading or delaying payment of his debts. Service of the summons cannot turn an already planned innocent departure into a flight with requisite intention. The respondent did not have the requisite intention to depart from South Africa permanently, with the intention of evading or delaying payment of his debts. ..." [Paragraph 18]

"As a result I come to the conclusion that the contemplated departure is not a flight and that the respondent is not subject to arrest. .... Another reason why this application should be dismissed is the constitutionality of the arrest." [Paragraph 19]

"...[N]o other country...currently utilises arrest as a prerequisite for the exercise of civil jurisdiction." [Paragraph 26]

"Neither counsel referred me to any legislation or case law after 1994 which justifies the arrest of an individual pending the provision of security. ... To order the arrest of the respondent on the basis that he is unable to give security, would in my view offend his right to dignity, equality and freedom of movement as enshrined in the Bill of Rights. The continued arrest in such circumstances would be tantamount to coercing security or payment, especially where it is manifestly clear that his liability has still not been established and is disputed." [Paragraph 28]

"I do not think that the cases cited ... are authority for the proposition that the arrest is constitutional because all these cases were decided before the adoption of the Constitution. These cases are all silent on the individual's rights to liberty and freedom of movement." [Paragraph 29]

"I do not agree with the applicant's submission that, for as long as a litigant fails to pay security, he should be detained indefinitely. In my view it is unfair to expect a litigant who is detained suspectus de fuga to litigate under such handicaps (in prison). To rule or order otherwise would mean that a foreign national who enters into a contract with a resident plaintiff, if there is a dispute and he is unable to pay any security, must be prevented from returning to his home country until the case has been finalised. If this were to be sanctioned, such conduct would seriously erode the confidence which the rest of the world has in our legal system. Our Constitution frowns upon such conduct, especially where rights of individuals (debtors) are limited because of yet to be determined debts." [Paragraph 31]

"... [I]f a creditor (or alleged creditor) in the position of the applicant wishes to protect his position in respect of the person leaving the country, it must use other legal remedies that do not allow or violate the personal freedom of the debtor (respondent)." [Paragraph 33]

"... [T]o the extent that the common law may be at odds or at variance with the Constitution, it should be developed, because an arrest under such circumstances cannot pass the limitations test in s 36, as it is contrary to the spirit, purport and objects of the Bill of Rights. However, since this point was not argued extensively by the parties, I will refrain from making any pronouncements in this regard. In the light of my earlier finding, my views are obiter, particularly since no notice of the declaration of invalidity was served on other interested stakeholders, inter alia, the Minister of Justice." [Paragraph 35]

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

CRIMINAL JUSTICE

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

Case heard 29 May 2014, Judgment delivered 15 July 2014

Prinsloo, a white male, had been convicted by the Magistrate's Court for two counts of crimen injuria and assault for an altercation over parking that occurred at the University of Free State with a Ms Mkiwane, the complainant. Prinsloo physically assaulted her and uttered racially offensive words to her. The accused had also said to the complainant that she did not have a driver's licence because she was black. The counts were taken together for

sentencing and the accused was sentenced to a fine of R6 000 or twelve months imprisonment, conditionally suspended for five years. The accused appealed unsuccessfully to the Free State High Court against his conviction only, and then to the SCA.

Mathopo AJA (Bosielo and Saldulker JJA concurring) held:

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

"In this court the main thrust of the appellant's contention was that the Magistrate misdirected herself in that she failed to specifically mention in her judgment that she had considered the credibility of the each of the witnesses. It was contended that in so doing she had adopted a piecemeal approach to the evaluation of the evidence. In my view, this contention is misplaced. Although the Magistrate did not explicitly state that she considered the credibility of each of the witnesses, it is clear from her judgment as a whole, that in arriving at her conclusion, she had had regard to the credibility of the witnesses. On the contrary, the record reveals that the Magistrate made a proper assessment and analysis of all the evidence by, amongst other things, weighing the strength and the weaknesses of the state's case vis-à-vis that of the appellant, including the probabilities and improbabilities of both versions of events. …" [Paragraph 14]

"An attempt was made to discredit Ms Zintle [complainant's daughter and State witness] on the basis that she deviated from her statement to the police. In my view, the alleged discrepancies are not material and cannot affect the probative value of the evidence of the State witnesses. … In all likelihood she did not intend this statement to replace the evidence which she would give in a subsequent trial. In short, the making of a statement is not the same as giving evidence in court, where in many instances crucial evidence only will only come to light through cross-examination. …" [Paragraph 15]

"I find the following pieces of evidence by the appellant to be destructive to his credibility and reliability as a witness: first, the appellant fared badly when he was confronted with the evidence of the State witnesses that he had to be dragged from the scene by his girlfriend in order to put a stop to the first altercation at the car; secondly, it is telling that, after being pulled into the dormitory, he returned a few seconds later, still aggressive, and continued insulting them. Furthermore, the appellant contradicted himself concerning the question whether he was angry or not at the material time. … It is no doubt this contradiction is the result of a poor attempt … to deny the fact that he was angry and that he blurted these derogatory words while in that state. This contradiction between the appellant and his witness is destructive of their credibility." [Paragraph 17]

"The Magistrate delivered a well-reasoned judgment which accounted for all the proven facts. She found the following serious improbabilities in the appellant's version; first, that the defence witnesses did not hear the appellant swearing at the State witnesses, but they heard Ms Ayanda calling the appellant a racist; secondly, whilst this incident happened at the same place, it is clear that they chose to hear and testify about what was favourable to the appellant; thirdly, although present at the scene, none of them witnessed the appellant grabbing Ms Mkhiwane by her shirt; fourthly, they could not explain why Ms Ayanda reacted in an aggressive manner to the appellant, if he was indeed calm and had only politely informed them that they had parked in an unauthorised place; fifthly, that Ms Mkhiwane, who on the appellant's version, alighted from her vehicle in a calm and composed manner, suddenly and for no reason, hurled abuses at the appellant; sixthly, that Ms Mkhiwane would utter such abusive words in the presence of her own daughters; and lastly, why Ms Blaauw had thought it necessary to pull the appellant away from the parking lot into the dormitory if he was as composed as he alleged. These improbabilities demonstrate unquestionably that the appellant and his witnesses' evidence is unreliable, as correctly found by the trial court. …" [Paragraph 19]

"Against this backdrop I have no doubt that the appellant behaved in a high-handed and cantankerous manner, and further that he uttered the words attributed to him. The word kaffir is racially abusive and offensive and was used

in its injurious sense. This was an unlawful aggression upon the dignity of the complainants. … It is trite that in this country, its use is not only prohibited but is actionable as well. In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants. I agree with the trial court's finding that such conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms." [Paragraph 20]

"In conclusion, I find that the trial court was correct in finding that the appellant uttered the words allegedly used, and further that he had intended to and did in fact humiliate, denigrate and injure the dignity of the complainants." [Paragraph 21]

The appeal was dismissed.

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

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

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

Mathopo AJA (Lewis JA and Gorven AJA concurring) held:

"The statement of the complainant is riddled with inconsistencies."

"In her statement to the police dated 9 January 2010, the complainant stated that she had been with her female friend R[…] at a shop in Bluebird Lane when the appellant accosted her and took her by force. She did not disclose that she had been at a party with her boyfriend (L[…]). She later deposed to an affidavit … where she stated that she had been with her boyfriend. When asked why she gave different versions she said she was scared to tell the truth because her parents did not give her permission to go to the party. It was clear that the statements contradicted each other and her evidence in court. When asked to explain the discrepancies she admitted to lying. When pressed further she said she lied because her father and sister were present when she wrote the first statement. In her second statement she admitted that she had sexual intercourse with L[…] once and this was at her boyfriend's friend's house. This piece of evidence was in stark contradiction to the evidence of the boyfriend who testified that they had sexual intercourse three times that afternoon at the complainant's friend's house. Another disconcerting aspect of her evidence is that she told the doctor that she was a virgin. This was clearly untrue because she had sexual intercourse with her boyfriend that afternoon. She explained that she lied to the doctor because she thought the doctor would tell her mother." [Paragraph 5]

"Dr J D G de la Cruz examined her at 05h00 in the morning and he noted in the medical report … that the complainant was neat and tidy and that he did not observe any bleeding either vaginally or anally. She had not bathed at that stage. This contradicted her evidence that the appellant tore her skirt and shirt during the incident. She told the doctor that she was penetrated vaginally and anally. However she was not sure whether the appellant ejaculated or not. On examination of the vagina the doctor found no bleeding or tears. … The doctor said that on gynaecological examination of the vagina the redness and erosion could have been caused by the sexual intercourse with her boyfriend earlier." [Paragraph 6]

"The trial court and the court below were satisfied that the discrepancies in the complainant's evidence were not material and described the evidence as understandable and acceptable in the circumstances. After applying the cautionary rules both courts were satisfied that she had told the truth when testifying." [Paragraph 11]

"The State … submitted that the fact that the complainant admitted to lying in certain parts of the evidence does not necessarily mean that her evidence should be rejected as a whole. Counsel contended that evaluating her evidence as a whole, she was a credible and reliable witness who told the truth. … [C]ounsel relied on the evidence of L[…] and Ismail as sufficient corroboration of the complainant's evidence. I do not agree. The complainant contradicted the evidence of Ismail, L[…] and De la Cruz. …" [Paragraph 15]

"The complainant was a single witness with regard to the rapes. It is trite that when dealing with the evidence of a single witness such evidence must be approached with the necessary caution. Before a court can convict, it must be satisfied that such evidence is clear and satisfactory in all material respects. …" [Paragraph 16]

"It is clear from the judgments of both the courts below that they, in spite of material discrepancies in the complainants evidence, wrongly held that it was true and reliable. I find it untenable that both the trial court and the high court found the complainant's evidence credible and reliable in all material respects notwithstanding the glaring contradictions if not blatant lies, in her evidence." [Paragraph 17]

"I accept that the appellant was also an unsatisfactory witness. … While the falsity of the appellant's evidence, and the fact that he did not seriously contradict the complainant's evidence on that score, are factors to be taken into account when weighing the evidence, it cannot be elevated beyond its due." [Paragraph 18]

"It is trite that there is no obligation upon an accused to prove his innocence. The State bears the onus of proving the commission of an offence. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is not plausible. … It is and remains the State's duty and not the appellant's to discharge the onus and it should not be reversed. …" [Paragraph 19]

"The unreliability of the evidence as to rape is such that the State has not proved its case beyond reasonable doubt and the appellant must be acquitted." [Paragraph 22]

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

K v S (076/14) [2014] ZASCA 136

Case heard 9 September 2014, Judgment delivered 25 September 2014

The appellant, a police inspector, was convicted by the Limpopo High Court on two counts of raping his two daughters, Ms N and Ms T, between 1991 to 2001. As the complainants were children at the time the offences were committed, a prescribed minimum sentence of life imprisonment for each count applied under the provisions of section 51(1) of the Criminal Law Amendment Act (the Act), unless there were substantial and compelling circumstances justifying a more lenient sentence. No such compelling circumstances were found by the trial court, and a combined sentence of life imprisonment was imposed. The appeal was against conviction and sentence.

Mathopo AJA (Brand and Mbha JJA concurring) first addressed the delay that had occurred in bringing the matter on appeal:

"For reasons that do not emerge clearly from the record, this appeal was prosecuted after 12 years. This court has in many judgments, especially those emanating from where this appeal comes from, bemoaned the fact that practitioners should guard against inordinate delays which have become rampant and systemic. It would seem that despite repeated warnings by this court, its advice has not been heeded. Such a state of affairs cannot be allowed to

continue because such inexplicable delays will make society lose confidence in our courts and innocent persons may unduly or unjustly be incarcerated for a long period of time. Fortunately in this matter, as the analysis of the evidence will show, the appellant did not suffer any injustice." [Paragraph 2]

"In cross-examination, Ms N disputed that she had been influenced by her mother to incriminate the appellant. She reiterated that the reason why she did not tell her mother earlier is that the appellant had threatened to kill her, and that he assaulted her several times when she refused to submit to his sexual advances. … [S]he testified in the appellant's favour that he paid her university fees. Yet she was adamant about the rapes and the threats he had made." [Paragraph 7]

"In this court, the main thrust of the appellant's contention was that he suffered prejudice by reason of the admission of the evidence of the complainants, which ought not to have been admitted because the complainants were influenced by their mother to report the alleged rapes which they would otherwise not have reported. …" [Paragraph 15]

"I accept, as this court did in Maseti v S, that an accused who claims to have been falsely accused is under no obligation to explain the motives of his accusers, and should not be asked to do so as there is no onus on him to convince the court. Where an accused proffers a reason for the accuser's motives, as in this case, such alleged motives must be analysed together with all the evidence given by the accusers. If, after all the evidence has been thoroughly examined, the trier of fact is convinced that there is no basis for imputing the false accusation on the accuser, the next enquiry is to establish whether the State has proved the guilt of the accused beyond reasonable doubt. In the present matter, the trial judge conducted a proper assessment and analysis of the evidence by, amongst other things, weighing the strengths and the weaknesses of the State's case as opposed to that of the appellant, including the probabilities and improbabilities of both versions. The judge correctly rejected the appellant's evidence." [Paragraph 16]

"The evidence of the appellant is inconsistent and improbable in various respects. He denied raping his two daughters. When confronted with the allegations that he impregnated his younger daughter, and arranged for the termination of her pregnancy … he denied the allegations in spite of the overwhelming evidence against him. …" [Paragraph 17]

"The complainants were extensively cross examined … and they did not lose focus when recounting the details of how they were raped by the appellant. The trial judge took into account the tender ages of the complainants when the rapes were committed, and carefully dealt with the inconsistencies in their evidence, which were not material. He commented favourably on their demeanour, a finding which an appeal court is slow to interfere … A perusal of the evidence of the complainants confirms the findings of the trial judge that the complainants were good witnesses who satisfied the cautionary rules relating to the evidence of young witnesses and single witnesses." [Paragraph 18]

After identifying aspects of the evidence which were destructive of the appellant's credibility and reliability as a witness [paragraph 19], Mathopo AJA continued:

"The reprehensibility of the appellant's conduct, is exacerbated by the fact that a few weeks after he had apologised and had Ms T's pregnancy terminated, he instructed Ms N not to lock the door. Clearly he was unrepentant and wanted to continue with his heinous activities. …" [Paragraph 20]

"In the light of the findings of the trial judge on the reliability of the complainants and their mother, I am satisfied that the evidence of sexual penetration found by the doctor was compatible with the complainants' evidence. … Accordingly there is no merit in the appeal against the convictions and it must fail." [Paragraph 21]

"… [T]here is no doubt that the rapes had a serious effect on the complainants. What is more aggravating is the fact that the rapes were committed by their father in the sanctity of their own home, where they ought to be safe. The rapes were committed over a long period of time when they were still young and immature. The appellant abused

his position of trust. The complainants looked to him for protection and guidance. As a result of the rapes, the trial judge correctly remarked that the complainants' future has been ruined." [Paragraph 23]

"The evidence reveals that after the appellant asked for forgiveness, the complainants and their mother forgave him and were prepared to not report the matter to the police. Sadly for them, the appellant was unrepentant because shortly thereafter he went to the complainants' room under false pretences, wanting to continue with his unlawful activities. ..." [Paragraph 24]

"It cannot be denied that the rape of young girls by their father is not only scandalous but morally reprehensible. ... The appellant showed no remorse for his actions and persisted in his innocence and subjected the complainants to the nightmare of the trial. This experience was traumatic. It cannot be disputed that the impact is both devastating and far-reaching..." [Paragraph 25]

"The reluctance on the part of the appellant and his counsel to adduce evidence to assist the court in establishing whether substantial and compelling circumstances existed to justify the imposition of a lesser sentence could have occurred as a result of the appellant having realised that the evidence against him was overwhelming and that it would be futile to attempt to convince the court otherwise. ... As a result ... there were no facts placed before the trial court to determine what constitutes mitigation and/or substantial and compelling circumstances." [Paragraph 27]

"...His argument that the trial court should have found that substantial and compelling circumstances existed is not supported by any evidence due to the appellant's reluctance to adduce any such evidence. As a result of that approach, the trial judge had no option but to apply the provisions of the Act ..." [Paragraph 28]

"The sentence was undoubtedly one befitting the crimes committed by the appellant. The most aggravating feature of this matter is that the appellant raped his own children over a long period of time. He knew that his actions were wrong and dastardly. ... However where the overwhelming evidence points towards his guilt and the accused persists in protesting his innocence, finding of remorse cannot be made. In the present matter the appellant elected not to testify, and the evidence demonstrates that he was unrepentant. In my view there are no prospects that he will be rehabilitated. It follows that the appeal against sentences must also fail." [Paragraph 29]

Mathopo AJA further found that the trial judge inappropriately granted leave to appeal, mero motu, on a case that had no merit at all. The appeal was dismissed.

SELECTED JUDGMENTS

PRIVATE LAW

GREENBERG V DU PREEZ AND ANOTHER (23302/2002) [2013] ZAGPJHC 67 (31 MARCH 2013)

Case heard 29 January - 1 February 2013, Judgment delivered 31 March 2013

Plaintiff claimed damages for wrongful arrest and detention. The first defendant, a detective sergeant stationed at the SAPS Edenvale at the time, had arrested him and plaintiff alleged that he was wrongfully deprived of his liberty for a period of almost sixteen hours.

Meyer J held:

"... At the commencement of the trial the defendants' counsel ... informed the court that the defendants rely only on s 40(1)(q) of the CPA read with s 3 of the Domestic Violence Act ... ('the DVA'). S 40(1)(q) of the CPA provides that '[a] peace officer may without warrant arrest any person - ... who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.' S 3 of the DVA provides that '[a] peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.'" [Paragraphs 2-3]

"The plaintiff and his former wife ... went through a very acrimonious divorce. He left their former common home at about the end of April 2000. On 9 June 2000, Mrs Greenberg obtained an interim protection order in terms of s 5(2) of the DVA against him. The plaintiff was in terms of the order prohibited from entering their former matrimonial residence ..." [Paragraph 4]

"The plaintiff testified that Ms Rose Malotane, who was employed as a domestic worker at Mrs Greenberg's residence, telephonically informed him on 5 July 2000 at about 7.00 pm that the son of the plaintiff and of Mrs Greenberg ... had disappeared from Mrs Greenberg's residence. The plaintiff, accompanied by a co-worker ... thereupon went in search of their son. The plaintiff met Mrs Malotane and her husband at a garage ... The garage was about 400 metres away from Mrs Greenberg's residence. The plaintiff arrived at Mrs Greenberg's residence at about 7.15 pm. His intention was not to enter her residence and merely to enquire via the intercom system about the disappearance of their son. He ran into a large open park situated across the road from Mrs Greenberg's residence, calling the name of their son to no avail. ... Mrs Greenberg approached the gate that gives access to her residence from the street at a time when Mrs Malotani opened it for her and her husband to enter. The plaintiff was standing on the street next to his car. He asked Mrs Greenberg about the whereabouts of their son. A verbal altercation ensued between the two of them. A police officer, Sgt Richard Kgomo, arrived at the scene. The plaintiff testified that Mrs Greenberg was 'hysterical and screaming' saying that she had a domestic violence interdict and that the plaintiff should not be at her residence. The plaintiff testified that he at all times remained calm and standing at his car. He explained to Sgt Kgomo that he was looking for his son who had gone missing. Sgt Kgomo requested him to leave and to go to the Edenvale police station. The plaintiff complied with his request." [Paragraphs 5 - 6]

"The first defendant testified that he came across a heated argument between the plaintiff and Mrs Greenberg when he walked into the charge office. It appears that it was a continuation of the argument that had erupted between them outside Mrs Greenberg's residence. ... A uniformed police officer was

trying to attend to them to no avail. The first defendant considered it appropriate for him to intervene and he then attempted to establish what the problem was between them. Mrs Greenberg was, according to the first defendant, hysterical and the plaintiff was domineering. The first defendant testified that whenever Mrs Greenberg tried to furnish him with her version the plaintiff interrupted and did not give her an opportunity to speak. This, according to the first defendant, is why he decided to detain the plaintiff in the holding cells area. The plaintiff denied that he conducted himself in the way alleged by the first defendant. The first defendant, according to the plaintiff, merely locked him up in the holding cells area without more soon after he had entered the charge office. I find the evidence of the first defendant to be more probable ... It is common cause that the first defendant detained the plaintiff in the holding cells area ... The plaintiffs unchallenged time estimation is that his detention commenced at about 8:15 pm ... The first defendant testified that while the plaintiff was kept in detention in the holding cells area he obtained the version and sworn statement of Mrs Greenberg. She also produced the interim protection order. Her assumption was that the plaintiff acted in breach of the interim protection order by having followed her ... The first defendant testified that he also telephoned Mrs Malotane. She, according to the first defendant, contradicted the version of the plaintiff. ... [First defendant] testified that he formed the prima facie view that the plaintiff had acted in breach of the Interim Protection Order ..." [Paragraphs 11-12]

"The evidence of the plaintiff that his release on warning or on bail was initially refused despite the endeavours of his attorney ... and of his counsel ... and that it was only through the intervention of a Mr Peter Uko, who discussed the matter telephonically with the station commander, Lt - Col Swart, that he was ultimately released into the custody of Mr Uko during the early morning hours on 7 July 2000, is more probable. It is consistent with the entries made in the official registers and with the unchallenged evidence of Mr Uco. ... The date and time of the plaintiffs arrest that was recorded in the docket was 6 July 2000 at 10:30. The date and time of his release that was recorded in the investigation diary was 7 July 2000 at 0:45. His release from the holding cells area accordingly only occurred two hours and fifteen minutes after he had been arrested. ...." [Paragraphs 15-16]

The plaintiff testified that he was released into the custody of Mr Uko at about 12.30 am on 7 July 2000 and that he thereafter spent the rest of the night at the home of Mr Uko. He testified that his liberty was curtailed and he was not free to go to his own home. Mr Uko took him to the Magistrates' Court in the morning. The evidence of Mr Uko ... is unchallenged. ... Mr Uko and the plaintiff arrived at Mr Uko's house at about 1.30 - 2.00 am where the plaintiff spent the night. The plaintiff, according to Mr Uko, 'was not a free man.' ... This was also the testimony of the plaintiff. Mr Uko testified that he duly took the plaintiff to the Magistrates' Court the next morning where he handed the plaintiff over into the custody of the clerk of the court. The plaintiff testified that he was thereafter locked up and detained in the 'interview cells' at the Germiston Magistrates' Court from where he was moved to a cell which adjoins the court in which he appeared at about noon when he was released on warning ...

"The inevitable conclusion is that the arrest and detention of the plaintiff were unlawful in all the circumstances. S 3 of the Domestic Violence Act authorises the arrest of a person without a warrant in circumscribed circumstances. The jurisdictional facts which must exist before an arrest without a warrant is authorised in terms of that section were not met in this instance. ..." [Paragraphs 17-18]

Second defendant was ordered to pay the plaintiff R30 000 damages in respect of his unlawful arrest.

ADMINISTRATIVE JUSTICE

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

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

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

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

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

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

"One of Fidelity's grounds for review is that its disqualification was unlawful. A stated reason for disqualifying Fidelity was that it had not responded to queries … regarding the blacklisting of Jack [one of its directors]. The evidence, however, reveals that during November 2011, and before the decision to disqualify Fidelity had been taken, it appraised Mogale City of the facts that it only became aware of the blacklisting of Jack on 4 September 2011; that he amicably resigned on 6 November 2011; and that Mahlangu was appointed as a new director of Fidelity in his stead. Fidelity also furnished Mogale City with supporting documentation, including a formal announcement that Mahlangu had replaced Jack on Fidelity's board of directors; the resolution of the board of directors appointing Mahlangu as a director; a certificate of good standing from the Private Security Industry Regulatory Authority issued on 14 October 2011, confirming that Jack was no longer a director of Fidelity; and documents from the Companies and Intellectual Property Commission confirming Jack's resignation. The inescapable conclusion on all the evidence presented in this application is that members of the BEC received Fidelity's response and the documents which Fidelity furnished to Mogale City and that such information and documents served before and were considered by the BEC and the BAC in connection with the bidding process in question. The fact that Mogale City initially requested the information and that it was furnished by Fidelity in connection with the contract concluded between them pursuant to another tender … do not advance the case of Mogale City." [Paragraph 26]

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

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

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

"I am in all the circumstances of the view that the decision to award the tender to Mafoko and the contract that was concluded between Mogale City and Fidelity pursuant to such decision should be

reviewed and set aside and that an order … should be granted remitting the matter for reconsideration by Mogale City." [Paragraph 38]

The application was granted.

ENVIRONMENTAL LAW

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

Case heard 25 November 2013, Judgment delivered 4 December 2014

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

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

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

"In Harmony supra this court held that '(t)he task of construing s 19 must commence with reference to s 24 of the Constitution'. It confers on everyone the right 'to an environment that is not harmful to their health or well-being' and 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that — (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. …" [Paragraph 20]

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

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

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

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

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

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

The appeal was thus dismissed.

LABOUR LAW

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

Case heard 31 October 2011, Judgment delivered 16 November 2011

Appellant appealed against the judgment of the court *a quo* dismissing his application for specific performance of his employment contract – for re-instatement as the Chief Executive Officer of Eskom retrospectively - or for the payment of damages of nearly R86 million. The Court *a quo* had found that appellant had made a clear, unequivocal, and unconditional resignation offer to the Eskom Board, that the Board had accepted that resignation, and that the consensual termination of his contract of employment had been effective once the acceptance of his offer of resignation by the Board had been communicated to him during the evening on 28 October 2009. The central question which the court had

to examine was whether indeed the appellant could have been said to have tendered a resignation from his employment.

Meyer J (Makhanya and Coppin JJ concurring) held:

"... On Eskom's version, Mr Maroga informed the board members present at the Eskom Board meeting on 28 October 2009 that he had thought long and hard about the matter and that he had concluded that he could not continue to work with Eskom's Chairperson, Mr Godsell. He then made an offer to resign. Following his offer to resign, Mr Godsell also offered to resign. Mr Maroga and Mr Godsell later recused themselves from the board meeting so that the remaining members of the board who were present could decide whose offer of resignation to accept. After due consideration, the Eskom Board resolved unanimously to accept Mr Maroga's offer of resignation. Two directors were mandated by the Eskom Board to convey its decision to Mr Maroga and to Mr Godsell. A dinner was arranged with them that evening at a hotel. The Eskom Board resolution was communicated to them and Mr Maroga did not object to the communication that the board had accepted his resignation. The four directors, including Mr Maroga, parted ways fully recognising that Mr Maroga's employment contract had been terminated by the Board's acceptance of his resignation offer and it was agreed that the calculation of his final payout would be done later. The next morning, 29 October 2009, Mr Maroga handed out copies of his letter to the Eskom directors present at the resumed board meeting and to the Minister, who joined the meeting, wherein he stated that, upon reflection overnight, his 'remarks of frustration' could not be construed as an offer to resign." [Paragraph 3-4]

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

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

"It was submitted on behalf of Mr Maroga that even if Eskom's version is accepted the offer of resignation made by Mr Maroga was not clear and unequivocal and is accordingly not legally effective or that it was conditional. Counsel referred to decided cases ... in support of the legal propositions that a voluntary resignation, which is accepted by an employer, brings about the termination of the employment contract by mutual and voluntary agreement between the parties, but to be legally effective, an employee, either by words or conduct, has to evince a clear and unambiguous intention not to go on with his or her contract of employment - the employee has to lead a reasonable person to the conclusion that he or she does not intend to fulfill his or her part of the contract - and resignations in the heat of the moment have been held not to be effective. ... On Eskom's version, which must in these proceedings be accepted, there is no room for finding that Mr Maroga's words and conduct did not evince a clear and unambiguous intention on his part not to go on with his contract of employment should his offer of resignation be accepted or that the Eskom Board's conclusion that he did not intend to fulfill his part of the contract in such event did not meet the reasonable person requirement or that Mr

Maroga's offer to resign had been made in the heat of the moment. The undisputed facts also do not support the contention that Mr Maroga's resignation offer had been a conditional one, and such contention was, in my view, correctly rejected by the Court *a quo*." [Paragraph 8]

"I now turn to the next question, which is whether the Eskom Board had the authority to accept Mr Maroga's offer to resign. It was contended … that the Eskom Board did not have the power in law to terminate his contract of employment. The high water mark of this contention was that Article 10.4 of the Eskom Articles of Association vests the power to appoint its CEO in the Minister and, because the Eskom Articles are silent on the power to terminate the CEO's contract of employment, the principle laid down by the Constitutional Court in *Masetlha v President of the Republic of South Africa and Another* … finds application, which is that the person who has the power to appoint also has the power to dismiss. This contention, which was in my view correctly rejected by the Court *a quo*, is refuted by the provisions of the Eskom Articles of Association and particularly Article 16.1 thereof, by the conclusion of a contract of employment between Eskom and its CEO, by the distinction between the CEO's capacity as a director and his or her capacity as an employee … and the unreported decision of Malan J in *Daloxolo Mpofu v South African Broadcasting Corporation Limited (SABC) and Others* … and by the fundamental distinguishing features between *Masetlha* and the present matter. [Paragraph 8]

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

"In conclusion … there would not have been any valid basis for the Court *a quo* to have rejected the version of Eskom or of the Minister in these motion proceedings on the materially disputed issues of fact. The Eskom Board … had the authority to accept Mr Maroga's offer to resign. Masipa J … correctly accepted the version of Eskom that Mr Maroga had made a clear, unequivocal, and unconditional offer to resign to the Eskom Board, which offer had been accepted by the Eskom Board, and that the consensual termination of his contract of employment had been effective once the acceptance of his offer of resignation had been communicated to him at the dinner during the evening of 28 October 2009." [Paragraph 15]

CHILDRENS RIGHTS

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

Case heard 5 December 2011, Judgment delivered 7 December 2011

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

Meyer J held:

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

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

"Ms Mansingh submitted that, in the exercise of the discretion arising under art 13, the court may not have regard to welfare considerations, but must only balance the nature and strength of the child's objections against the Hague Convention considerations. There is ... no merit in counsel's submission ... It is not consistent with the obligation to treat as paramount, in every decision affecting a child, the wellbeing or best interests of that child — the paramountcy principle — which is enshrined in s 28(2) of our Constitution. Counsel's submission is also in conflict with clear authority of the Constitutional Court. ..." [Paragraph 7]

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

"... [I]t is not disputed that K objects to being returned to Australia. I return to his objections. The second question, whether or not he is of an age and maturity at which it is appropriate to take account of his views, should in my view also be answered in the affirmative. ... K's legal representative, Mr *Baer*, informed this court that K impressed him 'as an intelligent young man, who understands the nature of the present proceedings and knows what he wants'. ... I interpolate to add that I observed K carefully during the hearing, which lasted several hours. He sat listening attentively throughout. My subsequent interview with K in chambers confirmed to me the recommendation of the family counsellor and the observations of K's counsel ... K ... was nervous, but confident, and he addressed me appropriately. He is articulate. He answered my questions appropriately and directly without touching on unrelated matter. When I required elucidation, he furnished it without hesitation. His views are firm and cogent. He fully

appreciates that the present proceedings are only jurisdictional in nature. I have no hesitation in finding that he is of above-average intelligence, despite his academic performance at school. It is, in my view, not only appropriate to take K's views and strength of feelings into account, but they should be given considerable weight." [Paragraph 11]

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

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

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

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

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

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

SELECTED JUDGMENTS

PRIVATE LAW

B V B 2008 (4) SA 535 (W)

Case heard 20 November 2007, Judgment delivered 18 December 2007

The applicant sought certain interim relief, including interim custody of two minor children. The respondent had issued summons for divorce, claiming custody of the minor children. The divorce action was pending and the issue in this application was to determine what was in the best interests of the minor children pending the divorce action. Prior to the divorce action being instituted, respondent had had applicant evicted from the matrimonial home pursuant to an interim protection order issued under the Domestic Violence Act. A settlement agreement was then reached regarding the protection order. At the hearing, respondent raised two points in limine: whether the Court had the necessary jurisdiction to set aside an interim protection order obtained in proceedings that were still pending in the Magistrate's Court; and that there existed no grounds for urgency.

Moshidi J held:

"... It is trite law that the interests of minor children are of paramount importance ... A matter such as the current matter, where there is a need to remove uncertainty about the future, safety and well-being of minor children, will always be urgent (see Terblanche v Terblanche 1992 (1) SA 501 (W)). I therefore deemed it necessary to deal with this matter as one of urgency. The second point in limine, in my view, is equally based on shaky grounds. For the argument to succeed, the respondent bears the onus of proving that the pending matter in the Randburg Magistrate's Court is an action instituted; that the parties are the same; and that the cause of action is the same. In the matter in the Randburg Magistrate's Court, the cause of action is allegedly (the applicant contests the allegations) to prevent violence from being inflicted upon the respondent and/or the minor children ... Nowhere in the Act are the words "access" or "custody" defined. In the present application, the cause of action is clearly to reinstate custodial and access rights to the applicant and thereafter deal with the rights of the minor children, together with other ancillary relief which the Magistrate's Court is not enjoined to deal with. If the application in the Domestic Violence Court does remain in force, the respondent will be seeking an order of protection. He will not and cannot be seeking an order relating to custody and access, as the Magistrate's Court is not competent to grant such relief. ..." [Paragraph 23]

"There is indeed another compelling consideration which makes the second point in limine untenable. It could never have been the intention of the Legislature in enacting the Domestic Violence Act ... to remove the common-law powers of this Court as the upper guardian of all minor children to adjudicate over what is in the best interests of such minor children. ..." [Paragraph 24]

"I conclude that, viewed cumulatively and objectively, the version of the respondent as to the relevant events in this matter is far from impressive and reliable. The applicant, a mere housewife, committed to the care of children, is more reliable. It will be in the best interests of the minor children for their custody to be awarded to her pendente lite. She has indeed made out a cogent case for most of the interim relief claimed in the notice of motion. It will also be prudent to set aside the interim protection orders in order to remove the dark cloud hanging over the future and well-being of the minor children." [Paragraph 30]

An order was granted to give custody to the applicant pending the outcome of the divorce action. The interim protection order was set aside. The respondent had to pay the costs.

COMMERCIAL LAW

DORBYL LTD V VORSTER [2011] JOL 27671 (GSJ)

Case heard 24 February – 4 March 2011, Judgment delivered 28 July 2011

Plaintiff, a listed company on the Johannesburg Stock Exchange, was a black economic empowered company operating nationally and internationally under the direction of the majority shareholder, a management consortium. The defendant was a duly appointed Director of the plaintiff, holding the position of Group Executive Director. The general conditions of employment of the defendant precluded the defendant from engaging himself in work for remuneration outside his scope of employment, without the written permission of the plaintiff. By the nature of his employment, the defendant owed the plaintiff a duty of good faith which included the duty to serve the plaintiff faithfully and honestly. It was alleged that the defendant, as a paid executive director of the plaintiff, received secret profits, without the knowledge of the plaintiff and in breach of his duty of trust. The court was also called upon to determine the consequences and implications of such fiduciary duty and whether the defendant in fact acquired the benefits in question with the approval of the plaintiff.

Moshidi J held:

"... In the context of the present matter, it is common cause that the defendant, as a paid Executive Director of the plaintiff, received the secret profits, in the form of joining fees, share allocation and proceeds of the resale of the shares, without the knowledge of the plaintiff in breach of his duty of trust. The plaintiff only came to know of the secret profits in September 2005. The profits must be returned to the plaintiff. It is common cause that the defendant was, at the time, in a fiduciary position." [Paragraph 25]

"On the pleadings, the version of the defendant ... evolved several times from acting as consultant to the entities, to encouragement ... for the defendant to engage himself in the management of the selling off businesses, to the defence as conveyed in the opening address. This latest defence is that the benefits are not and could never have been corporate opportunities for the plaintiff. The defence has no merit at all ... The plaintiff has argued, convincingly in my view, that the benefits received by the defendant as described in evidence, were secret profits or "bribe" in the classical sense. The contention that Ransom was prepared to pay millions of Rands by way of joining fees alone as a reward for some unspecified services which the defendant might render to him in regard to the entities where the defendant had had no direct involvement is highly improbable. The only real value the defendant could bring to IFS was during the negotiations where he was a member of the plaintiff's negotiating team who had done, at the very least, the initial groundwork and he had been a member of Dealco. It was also highly unusual that the defendant, as a full-time Board member of the plaintiff, participated in discussions leading up to the approval or otherwise of a proposed sale, whilst the other members of the Board did not know that the defendant in fact had a very real interest in the purchaser whose transaction was under discussion. It is also strange that whilst in the particulars of claim the plaintiff unambiguously alleged that the benefits received without its consent, in breach of the defendant's fiduciary duty, and constituted secret profits or commissions, the defendant chose not to testify and explain himself." [Paragraph 27]

"On the evidence and pleadings, and as argued by the plaintiff, at best for the defendant, his defence suggests that he received about R37 million whilst an Executive Director of the plaintiff, as well as a category 1 employee under the MPS from the purchaser as remuneration for what he termed consultancy services. On this basis, the defendant alleged that this was a benefit which could never have been a corporate opportunity for the plaintiff.... In the present matter, it was expressly admitted that the defendant stood in a fiduciary relationship to the plaintiff when the so-called opportunity became available to him. The defendant plainly breached his fiduciary duty to the plaintiff. He failed to inform the plaintiff of the offer to him or even its terms and he took it for himself without plaintiff's consent. On the credible evidence, the suggestion that the defendant in fact deliberately concealed the offer from the plaintiff, is not out of place. Not only was he paid his monthly remuneration at all material times, but he also benefited and stood to benefit further under the MPS." [Paragraph 28]

The Court ordered the defendant to pay the amounts claimed.

EX PARTE VAN DER MERWE 2008 (6) SA 451 (W)

Case heard 1 February 2008, Judgment delivered 8 February 2008

Applicant's estate had been sequestrated and a trustee appointed. The applicant sought to be revested with the immovable property which the trustee had abandoned in his estate. The scenario was not one of assets acquired by an insolvent during sequestration, or assets concealed to avoid liquidation. The trustee appeared to have bona fide abandoned the immovable property by excluding it from the final liquidation and distribution account. The question which arose was whether the applicant should be allowed to benefit from the trustee's abandonment of the immovable property.

Moshidi J held:

"... [T]he applicant did not enter into an offer of composition as envisaged in section 119 of the Act. However, the applicant was rehabilitated by this Court in terms of section 124(2) of the Act .... The Master, the trustee, the municipality and the only creditor that proved, that is Hartman, did not oppose the rehabilitation application which was brought to their attention. The first and final liquidation and distribution account in the sequestration, which was not opposed by the Master ... excluded the immovable property. In this regard, the applicant's explanation is that he was under the impression, though mistaken, that the trustee had liquidated the immovable property, until he received an enquiry about the immovable property from the estate agent ..." [Paragraph 8]

"Indeed, the central issue to be resolved in this matter, is whether the applicant should be revested with the immovable property based on the particular history and circumstances of the matter. I could find no explicit provision in the Act that deals specifically with a situation posed by the instant application, nor could counsel for the applicant point me to any. The applicant ... seeks that the immovable property be revested with him in terms of section 58(1) of the Deeds Registries Act 47 of 1937... " [Paragraph 10]

"In my view ... the issue to be decided in this application can safely and reasonably be resolved on the basis that the trustee abandoned the immovable property when he decided to exclude such property from the final liquidation and distribution account. This could account for the absence of any response or intervention from the Master." [Paragraph 12]

"The facts in Ex parte Allwright … are more relevant to the present application. At the time of his sequestration, the insolvent applicant was the registered owner of an undivided share in certain immovable property. The immovable property, which was clearly an asset in the applicant's insolvent estate, was not disclosed by the applicant to his trustee. The immovable property was subject to the life usufruct of a third party … The applicant's explanation for his failure to disclose the property was unsatisfactory. … The Master was equally of the view that the applicant's explanation in this regard was unconvincing. The applicant sought an order for his rehabilitation together with an order authorising and sanctioning that he be reinvested with his interest in the immovable property and other relief… In that case, although the court found that the immovable property was still registered in the name of the applicant (as in the present application), it was, however, still vested in his trustee. Further, that there had since the applicant's insolvency been no other transaction in connection with the property (once more as in the present application). However, in spite of all that, the court nevertheless declined to grant an order reinvesting the immovable property in the name of the applicant on the basis of the provisions of section 58(1) of the Deeds Registries Act … The court was, however, of the view that should a trustee refuse to transfer such property to the applicant, the latter might be entitled to an order compelling the trustee to pass such transfer. The court, however, granted an order rehabilitating the applicant. The facts in Ex parte Allwright … were however, clearly distinguishable from the present application in several respects. In the first place, in the present application, there is no application for rehabilitation, the applicant having been rehabilitated on 17 October 2006. Secondly, unlike the applicant in Ex parte Allwright, the present applicant made disclosure of the immovable property in question to his trustee. Furthermore, there is no opposition to the present application by the Master, or any other affected person." [Paragraph 17]

"…The facts in Ex parte Van Rensburg 1946 OPD 64 were to some extent similar to the facts in the present application. There the insolvent applied for the rehabilitation of his estate coupled with a declaratory order that certain immovable property, purchased by him during insolvency, to be his sole and absolute property. The applicant also asked for an order authorising and directing the Registrar of Deeds to deal with the immovable property on the mandate of the applicant without the interference or assistance of his trustee and directing him (the Registrar) to make such endorsements on the deed of transfer as may be necessary to give effect to the order of court. The trustee did not oppose the rehabilitation prayer, and the Master equally, did not object to the prayer sought by the applicant. In granting the rehabilitation prayer as well as the order relating to the immovable property, though in some modified form, the court held that the immovable property never vested in the trustee." [Paragraph 18]

"I now deal with the trustee's abandonment of the immovable property in the instant application. His reasons for such abandonment are that the outstanding rates and taxes owing in respect of the property to the municipality had to be set off in favour of the municipality as against any possible advantage to the creditor(s) in the estate. As a consequence, the immovable property was omitted from the first and final liquidation and distribution account subsequently approved by the Master. The immovable property remained registered in the name of the applicant, and this is currently still the position… In any event, the trustee in the instant application cannot now be of any assistance to the applicant in revesting the immovable property in the applicant. The role of the trustee terminated when the liquidation and distribution was confirmed by the Master …" [Paragraph 21]

"I conclude therefore that the present application presents with unique and unprecedented circumstances where the insolvent acquired the immovable property prior to his sequestration. He

disclosed the immovable property to his trustee. The trustee duly investigated the matter, but thereafter elected to abandon the asset and liquidation and distribution account. It is trite that where assets are acquired adverse to the trustee the court takes into consideration the potential prejudice the insolvent's creditors may suffer and seeks to prevent the mala fid applicant from secreting away his assets to the detriment of his creditors. In the instant matter, even though the property was acquired prior to the sequestration, the applicant has made no attempt to conceal the asset. The property in question was simply not possible to liquidate, and the only potential creditor that would have suffered because of it, the municipality, has since been paid in full. The applicant has at no time harboured the intent of depriving his creditors of any benefit due to them from his sequestrated estate, he has continuously taken the court into his confidence by revealing his standing with his creditors, both proved and unproved. He has disclosed the manner in which he learnt of the abandonment of the property and has subsequently sought the assistance of his legal advisors, in a matter where it appears no precedent exists, in approaching the court for a declaratory order entitling him to the property. There can obviously be no prejudice to any of the applicant's creditors as he has satisfied not only his estate's sole proven creditor, but has also taken steps to satisfy the municipality who failed to respond to the publication of his sequestrated estate." [Paragraph 22]

The application succeeded.

CRIMINAL JUSTICE

S V KHATHI [2008] JOL 21947 (W)

Case heard 9 June 2008, Judgment delivered 9 June 2008

This matter came to the High Court after the accused was convicted of murder, attempted robbery, and the unlawful possession of a firearm and ammunition. The accused had killed a traffic police officer whilst the latter was on duty, in an attempt to rob him and a colleague of their service firearms.

Moshidi J held:

"In the often difficult search for substantial and compelling circumstances, the court will take into account the factors traditionally considered in the sentencing process, with due regard to the principles of sentencing. The principles of sentencing are deterrence, rehabilitation, prevention and retribution, all of which are usually blended with a measure of mercy, depending on the circumstances of each case ... The traditional factors include the seriousness of the offence, the interest of society and the personal circumstances of the accused. The court is also enjoined to take into account any factor or factors closely connected with the commission of the crime, both mitigating and aggravating." [Paragraph 3]

"I consider the personal circumstances of the accused which are important in the determination of an appropriate sentence. His previous convictions have already been mentioned. From the evidence, his age is given as 27 years. He has been in custody since his arrest on 2 February 2007 in the present matter. This period is not, in the view of the court, as long as in the usual matters that come before the court. The accused did not testify in mitigation of sentence. However, his counsel informed the court that he was born on 21 December 1977, whilst his identity document, an exhibit in court, indicates that he was in fact born in 1980. He is not married but has a minor daughter of about 7 years whom he supports. Prior to his arrest, the accused was doing part-time gardening jobs and also selling loose cigarettes. He has a

level of education of Sub B only. It was argued that the low level of education; the time spent in custody awaiting trial in this matter; as well as his obligation to support his daughter, all constitute substantial and compelling circumstances. The court disagrees. Close examination shows that there is in fact nothing extraordinary in the personal circumstances of the accused. On the other hand, the court cannot ignore the evidence of the widow of the deceased … who testified today in aggravation of sentence. She was married to the deceased by customary union for approximately one year only at the time of the incident and they have one minor child, aged 2 years. The deceased was a traffic officer since July 2003. She is employed by the Gauteng Shared Services Centre and stayed together in Soweto with the deceased who was their main breadwinner. She testifies that her employment is insecure in that she is currently employed on contract basis and that since the death of her husband she has been responsible for the maintenance of the household. The deceased was also responsible to maintain his own extended family as a breadwinner. Mrs Jokazi was clearly emotional when she testified and appears to have been deeply affected by the death of her husband. She testifies that she attended counselling after the incident and was presently still attending counselling sessions, almost 1 year and 3 months after the incident. At the time of her evidence, Mrs Jokazi was 27 years old, and already rendered a widow by this incident. Her husband, the deceased, was also relatively young at age 32, when he was killed." [Paragraph 8]

"… [T]aking into account all the circumstances, aggravating and mitigating, the court is of the view that there are clearly no substantial and compelling circumstances present. The aggravating circumstances by far outweigh the meagre mitigating factors that may be present. There is plainly very little unusual in the personal circumstances of the accused. In cases such as these, the courts are expected to protect society at large, and in particular, law enforcement officers as well as their families and dependants. The facts of this case are of such a nature that a lengthy sentence of imprisonment is unlikely to be viewed by society as an appropriate deterrent to would-be perpetrators. It will also not serve the other purposes of sentence, such as retribution, prevention and rehabilitation. In the view of the court, the sentence of life imprisonment on the murder count is the only appropriate and just sentence in the particular circumstances of this case." [Paragraph 9]

The accused was sentenced to life imprisonment.

S V COLLARD 2007 (1) SACR 522 (W)

Case heard 10 March 2006, Judgment delivered 10 March 2006

Two cases involving the same accused were referred to the court on special review, with the request that the conditions attached to the sentences be reviewed. The accused was convicted of theft and fraud on the basis of his written statement, and sentenced to a fine or imprisonment which was wholly suspended for five years on certain conditions. The condition which was the subject of the review was that the accused repay to the complainant (his employer) in full the amount of R155 763,22 on or before the year 2010. The repayment conditions omitted any immediate obligation on the accused to commence the repayment. It was argued that the consequence of this condition was that the accused would wait until 2010 to effect any payment towards the full amount, in order to evade imprisonment. The complainant pointed this out to the magistrate, who then recommended that the repayment conditions of the suspended sentences imposed by him in the two cases be deleted and replaced by more rigorous repayment conditions.

Moshidi J (Jajbhay J concurring) held:

"The more pertinent question that needs resolution in this matter is whether this Court on review, may amend the conditions of the suspended sentences to ameliorate the situation of the complainant and in doing so, without any or further reference to the accused. Put differently, whether the accused will be prejudiced by such amendment. Most cases on review deal with the situation of an accused and not that of a complainant in a criminal trial..." [Paragraph 9]

"In the instant matter it is not the convictions or the sentences per se that the review is aimed at. The convictions are in fact in order. The sentences imposed in both cases were otherwise competent. The accused in terms of the sentences imposed, remains liable to the complainant for the full amount he was ordered to repay. What needs to be reviewed as recommended by the magistrate are the terms and conditions of such repayment. The motivation for the recommendation is that the sentences are impractical and detrimental to the complainant who would have to wait until 3 August 2010 for any repayment to occur by the accused. In my view, the accused can hardly be said to be prejudiced. His burden is not increased. He is merely called upon to make some immediate commitment towards reducing his original liability. The sentences essentially remain unchanged but seek to introduce some monthly repayments by the accused. He offered to repay the complainant although in smaller instalments. There is indeed no evidence on record that the accused has effected any repayments since the sentences were passed on him." [Paragraph 10]

"... [M]ost of the review cases concerned the position of an accused, for the better or worse. There should be no reason not to extend such review, where there was no actual prejudice to the accused, to a complainant in a criminal case..." [Paragraph 12]

"In addition, the complainant also has rights in terms of the Constitution ... In particular in terms of section 173 of the Constitution ... provides as follows: "The . . . High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."" [Paragraph 13]

"In the instant matter, although I am prepared to accept the magistrate's recommendations, it seems to me that it would be unfair to order that the accused effect any repayments retrospectively. There were indeed unavoidable delays since the recommendations were made and the finalisation of this matter. It will be just and equitable that the accused be ordered to make future payments only from the date of this judgment." [Paragraph 14]

The convictions and sentences in both cases were confirmed and the conditions were replaced accordingly.

CUSTOMARY LAW

MG V BM AND OTHERS 2012 (2) SA 253 (GSJ)

Case heard 2 August 2011, Judgment delivered 22 November 2011

Applicant sought orders condoning the late registration of a customary marriage between herself and the deceased, compelling the registration of the customary marriage, and directing that a marriage certificate be issued. The court was required to determine whether a valid customary marriage existed between the deceased and the applicant.

Moshidi J held:

"From the provisions of s 3(1) of the Customary Marriages Act … there is no doubt that the deceased and the applicant satisfied all the requirements prescribed when they entered into the customary marriage … The version of the applicant in regard to the existence of the customary marriage is not only corroborated by the deceased's uncle … and father of the applicant … but also by the first respondent, despite her current denials. I find that … the version of the applicant is more probable and she has succeeded in discharging the onus placed on her. The evidence shows overwhelmingly that, not only was the first respondent aware of the lobolo negotiations, the customary marriage, and the celebration thereof, but she also regarded the applicant as one of the wives of the deceased. … The sudden change of heart by the first respondent is most likely caused by the greed to exclude the applicant from the assets of the deceased." [Paragraph 12]

"Insofar as the requirements for registration of a customary marriage are concerned … both spouses have the duty to ensure that their marriage is registered. … [E]ither spouse has the option to apply to the registering officer in order to register their customary marriage after 8 June 2000. It is common cause that both the deceased and the applicant did not do so until much later, when their attempt to register failed … The applicant provides a plausible explanation for the delay when she states that she and the deceased were unaware that they had to register their customary marriage earlier. .. [T]he failure of the deceased and the applicant to register their customary marriage … is, in my view, not fatal to her application … [T]he Customary Marriages Act is a relatively new law … It came into operation … on 15 November 2000, some five months after the applicant and the deceased entered into their customary marriage. The Minister of Home Affairs has deemed it fit to extend, on several occasions, the prescribed period within which registration of customary marriages must be made. In my view, the reason for such extensions is simply to allow the huge population of the participants in customary marriages and customary law to fully become acquainted with the provisions of the legislation. …" [Paragraph 13]

"I conclude therefore that … the applicant has established convincingly the existence of such a marriage. I also find that the customary marriage between the applicant and the deceased is a customary marriage entered into validly on 8 June 2000, and as envisaged in s 4(3)(a) of the Customary Marriages Act. I am therefore satisfied that … I am enjoined, in the exercise of my discretion, to issue an order for the registration of the customary marriage between the deceased and the applicant …" [Paragraph 14]

"… I now turn to … the criticism levelled against the deceased for failing to timeously invoke the provisions of s 7(6) of the Customary Marriages Act when entering into a further customary marriage with the applicant" [Paragraph 15]

"… The evidence of the applicant is that in an endeavour to have their customary marriage properly registered, she and the deceased approached and instructed attorneys … What emerges from the … affidavits in support of the intended application to court … fortifies me in the finding … that there existed a valid customary marriage between the deceased and the applicant. The affidavits referred to establish … that not only did the first respondent know and consent to the deceased's customary marriage to the applicant, but she also actively and constructively took part in the negotiations and activities leading up to the customary marriage. … " [Paragraphs 16 - 17]

"The crisp and critical issue … remains the question whether the failure of the deceased to invoke the provisions of s 7(6) of the Customary Marriages Act, is fatal to the applicant's case. I think not. …" [Paragraph 18]

Moshidi J then considered the High Court decision by Bertelsmann J in *MM v MN*:

"There is another difficulty I have in following the decision in *MM v MN*. This is that, in interpreting the provisions of s 7(6) of the Customary Marriages Act, Bertelsmann J found that failure to comply with the mandatory provisions of s 7(6) of the Act 'cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect'. The immediate question that arises in the context of the present matter is, what are the significance and consequences of the finding that the second customary marriage between the applicant and the deceased is valid? Can it be ignored completely without any prejudice to the applicant? Was it in fact the intention of the legislature? I think not." [Paragraph 21]

"In my view, by concluding a valid customary marriage with the deceased, as I have found, the applicant acquired certain rights. … In my view, on a proper interpretation of the provisions of s 7(6) of the Customary Marriages Act … it could simply never have been the intention of the legislature to remove these rights from spouses such as the applicant … Furthermore, whilst the provisions of s 4 of the Customary Marriages Act places the duty to register a customary marriage on the spouses, section 7(6) makes it clear that it is the husband in a customary marriage who 'must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages'. This begs the question, why should the wife … be penalised or prejudiced for the failure of the deceased to comply with this requirement? In any event … Bertelsmann J in *MM v MN* supra came to the conclusion, and correctly so in my view, that the Act does not contain an express provision to invalidate a subsequent customary marriage for failure to comply with the provisions of s 7(6) of the Customary Marriages Act. … I conclude that the failure by the deceased and/or the applicant to apply to court timeously to approve a written contract which would regulate the future matrimonial property system of their customary marriage, does not invalidate their customary marriage …" [Paragraph 22]

"I feel duty-bound to note, during my research in preparation of this judgment … it became abundantly clear that much has been written on the provisions of s 7(6) of the Customary Marriages Act. There presently exists a great deal of uncertainty … caused largely by the absence of a penalty provision in the event of non-compliance with the section. … [I]t is clear, in my view, that the current confusion … is a matter that requires the immediate attention of the legislature. …" [Paragraph 24]

The application was granted.

ADMINISTRATION OF JUSTICE

THE PRESIDENT OF THE COURT OF APPEAL V THE PRIME MINISTER AND OTHERS, UNREPORTED JUDGEMENT, CONSTITUTIONAL CASE NO: 11/2013, HIGH COURT OF LESOTHO

Case heard 26 and 27 September 2013, Judgment delivered 22 November 2013

The applicant judge brought an urgent application to review and set aside the first respondent's representation to the King of Lesotho that the question of the applicant's removal from office as President of the Court of Appeal ought to be investigated by a tribunal in terms of s 15(5) of the Lesotho Constitution. Applicant also sought to interdict the first respondent from suspending him from office. An

earlier application, aimed at preserving applicant's position as President of the Court of Appeal, had previously been postponed.

Moshidi AJ (Potteril AJ concurring) dealt first with the question of urgency:

"… [O]n 22 August 2013 the first respondent addressed a letter … to the applicant. … [T]he applicant was informed about the appointment of the Tribunal … which is to enquire into the applicant's removal from office for misbehaviour and/or the inability to perform the functions of his office. The letter also detailed at least eight grounds of alleged misconduct on the part of the applicant. … On the same date, the first respondent addressed a further letter … to the applicant. … [T]he applicant was invited to make written representations … as to why he should not be suspended from office pending the outcome of the impeachment proceedings against him. … [T]he applicant neither responded … nor did he make representations on the issue of his proposed suspension. Instead, the applicant thereafter waited for some fifteen days … until he brought the present application on an urgent basis …" [Paragraphs 11 - 13]

"… [T]he history of the litigation … as well as the credible facts, clearly show that there is no urgency in the application. If there is any, it is self-evidently created by the applicant himself. …" [Paragraph 18]

"The blatant tardiness of the applicant … is not only highly questionable, but also plainly remains unexplained. … [I]t is the unexplained delay which shows self-created urgency resulting in circumstances for which the applicant alone must take responsibility … " [Paragraph 21]

"I also find that the applicant has not shown on the papers that he will not be afforded substantial relief in a hearing in due course … The appointed Tribunal has yet to commence its sittings. … The other contentions advanced on behalf of the applicant … are, in my view, all matters which are properly dealt with on the merits of the present application. … [T]he application is also capable of dismissal on another procedural aspect … the applicant has failed dismally to show that he will not have a fair hearing in due course should the present application not be considered on an urgent basis. … " [Paragraph 22]

"… I have come to the irresistible conclusion that the applicant has not made out a case for this matter to be adjudicated upon on [sic] urgent basis. … If however, I am incorrect in the above determination, … the application is also capable of dismissal on yet another procedural aspect. This is that, the record of the representation as well as that of the King's decision in appointing the Tribunal … and in suspending the applicant … were not placed before this Court. This … raises the questions as to how and on what basis this Court is expected to exercise its powers of review … in the absence of the record of the proceedings to be reviewed …" [Paragraphs 24 - 25]

"… The present application is … not such a matter in which the review is capable of success in the absence of the records, or in which condonation for non-compliance with the Rules ought to be granted … There is no record at all before us. In essence, the Court is called upon to speculate as to what exactly was contained in the representations made by the first respondent to the King as well as the King's basis for his decision. This is undoubtedly untenable, and an abuse of the court process on the part of the applicant. … Upon a careful balancing of the opposing interests … fairness dictates that the instant application should not succeed." [Paragraph 30]

Moshidi AJ then turned to consider the merits of the case, identifying the applicant's core argument as being that he was entitled to a hearing before the Tribunal was appointed [paragraphs 33 – 34]:

"... [T]he entitlement to audi although an important one ... is flexible. It is equally contextual and relative. ... [A]lthough it would have been ideal to have accorded the applicant audi prior to the appointment of the Tribunal, such omission has undoubtedly not vitiated the process thus far. ... [T]he applicant was accorded audi in regard to his suspension from office. He chose, without any explanation, not to exercise this right." [Paragraph 36]

"... [O]n there mere appointment of the Tribunal, none of the applicant's rights have been affected adversely. ... The appointment of the Tribunal is only a preliminary step. It is to ensure the observance of the applicant's right to a hearing. There is nothing preventing the applicant ... to place his side of the story in full before the appointed Tribunal. ... [H]e is therefore clearly not without alternative remedy. ..." [Paragraph 37]

"The contention that the applicant's rights to dignity, equality before the law, and other rights have been violated by the process adopted by the first respondent thus far is plainly without merit. ..." [Paragraph 38]

"There are more than compelling reasons, including public interest and that reputation of the entire judiciary in the Kingdom of Lesotho, to have the complaints against holders of public office, such as in the present matter, properly and transparently investigated by an independent tribunal. This is certainly required by sec 125(5) of the Constitution." [Paragraph 42]

The application was dismissed with costs. Musi AJ wrote a separate judgement, concurring in the order but disagreeing with the finding that the applicant was not entitled to be heard prior to the decision to appoint the Tribunal. An appeal to the Lesotho Court of Appeal was dismissed: President of the Court of Appeal v The Prime Minister and Others [2014] LSCA 1. The Court of Appeal disagreed with the finding that the appointment of the Tribunal did not have an adverse effect on the applicant's rights, but found that the failure to afford him a hearing, in the strict sense, before requiring the King to appoint a tribunal, was not unfair.

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. [See further the summary of the court a quo's decision at page 131]

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

CIVIL PROCEDURE

BOETIE DOUGLAS-HAW V PETER LIXOLILE KIKI, UNREPORTED JUDGEMENT, CASE NO.: 38/2012. (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

Case heard 27 June 2014, Judgment delivered 3 July 2014

This was an appeal against the dismissal of an application for the rescission of a default judgement granted by the magistrate's court. The Appellant (Defendant in Magistrate's Court) collided with a vehicle driven by the Respondent (Plaintiff in Magistrate's Court). The Defendant had not entered an appearance to defend the action, and the Plaintiff obtained default judgement.

Bloem AJ (Lowe J concurring) held:

"Rule 49 (1) of the Rules regulating the conduct of proceedings of the Magistrates' Courts provides that a party to proceedings in which default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit. Although our Courts have shied away from defining the concept of "good cause", they generally expect an applicant to show good cause by giving a reasonable explanation of his or her default, by showing that his or her application is made bona fide and by showing that he or she has a bona fide defence (with some prospects of success) to the plaintiff's claim." [Paragraph 4]

"The application for the rescission of the default judgment was served and filed on 11 August 2011. The application was accordingly timeously made within the 20 day period referred to in Rule 49 (1) after the Defendant obtained knowledge of the default judgment." [Paragraph 6]

"Rule 9 (5) authorises the service of process in the post box of a person who keeps his residence or place of business closed and as a result of such closure prevents the sheriff from serving the process. Rule 9 (5) requires an intentional act on the part of the person on whom process must be served to keep his or her residence or place of business closed with the aim of preventing the sheriff from serving the process." [Paragraph 7]

"In this case the return of service reflects that the Defendant's residence "is kept locked and secured", "no other service possible after a diligent search", the gates were locked and the sheriff was unable to gain entry onto the premises. It is apparent from that return of service that the gates at the Defendant's residence were locked. The return of service does not reflect or give an indication (nor is there evidence in the affidavits to suggest) that the gates were locked by the Defendant with the intention of preventing the sheriff from effecting service. Service of the summons by placing it in the post box at the Defendant's residence was not proper service in terms of Rule 9 (5) because, although the gates at the Defendant's residence were locked, there was no indication that they were locked by the Plaintiff with the intention of preventing the sheriff from effecting service. It is not clear how the sheriff could have conducted "a diligent search" if the gates were locked and the sheriff was unable to gain entry onto the premises. The

Magistrate's finding in this regard, that there was service at the Defendant's place as required by the Rules, is, in my view, accordingly unsustainable." [Paragraph 7]

"Since the service of the summons was not in compliance with Rule 9 (5) and since there is no other evidence to show that either the summons or the judgment came to the Defendant's knowledge prior to 18 July 2011, I must accept that, until that date, the Plaintiff was unaware of the summons and the judgment." [Paragraph 11]

"The Plaintiff did not deny the Defendant's version. In his affidavit he contends that, because the collision occurred on the Defendant's incorrect side of the road, the Defendant was therefore liable. That is obviously not the case. It is for the Plaintiff to prove that the Defendant wrongfully and negligently caused damage to the Plaintiffs motor vehicle." [Paragraph 12]

"By his version, the Defendant denies that his conduct was wrongful and negligent. He also denies that his conduct caused the damage to the Plaintiff's vehicle. The Magistrate dismissed the Defendant's defence because he did not place before her a "record of an unknown minibus taxi colliding with his vehicle and forcing it to go onto its incorrect side and to collide into the Plaintiff's vehicle, no mention of witnesses or that the Respondent observed such an incident as he was travelling on the same, outstretched main road, which this court would regard as showing the Applicant's bona fides". With respect, the Magistrate expected too much of the Defendant. All that the Defendant was required to do was to make out a prima facie defence in the sense of setting out averments, which if established at the trial, would entitle him to the relief sought. He did not need to deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour. In my view the Defendant made sufficient averments in his affidavit to make out a bona fide defence." [Paragraph 12]

"The Defendant made a bona fide application for the rescission of the default judgment. His attorney addressed a letter to the Plaintiffs attorney informing him that the Defendant denies liability and would defend any action instituted against him arising from the collision. Although the Plaintiff denies that he received the letter it does not follow that the Defendant's attorney did not send that letter and believed that it was received by the Plaintiff's attorney." [Paragraph 13]

"In all the circumstances, I am of the view that the Defendant has shown good cause for the rescission of the default judgment in that, the Defendant has fully explained his default, has a bona fide defence and the application for the rescission of the default judgment was not made with the intention of merely delaying the Plaintiffs claim. The appeal must therefore succeed. There is no reason why the costs of the appeal should not follow the result." [Paragraph 14]

SOUTHERN STAR ORGANISATION ENGINEERING (PTY) LTD V A & J DIESELDIENS CA267/2012 [2013] ZAFSHC 41 (14 MARCH 2013).

Case heard 11 March 2013, Judgment delivered 14 March 2013

This case was an appeal against an order of absolution from the instance granted by the Magistrate's Court. Southern Star had sued for the return of a truck and trailer, and in the alternative, for payment in lieu of the truck and trailer.

Bloem AJ (Rampai J concurring) held:

"The appellant's claim is based on the rei vindicatio alternatively the actio ad exhibendum. The rei vindicatio is available to an owner for the recovery of his movable or immovable thing from whomsoever is in possession or has detention of the thing, irrespective of whether the possession or detention is bona fide. … To succeed the appellant had to prove on a balance of probabilities that he was the owner of the goods … and that the goods were in the respondent's possession at the time of the institution of the proceedings." [Paragraph 6]

"The actio ad exhibendum is available to the owner of a thing upon proof that he was the owner thereof at the time the defendant disposed of the thing, … that the defendant had wrongfully disposed of the thing, that the defendant had knowledge of the owner's claim to the thing and that the owner suffered patrimonial loss as a result of the defendant's wrongful disposal of the thing." [Paragraph 7]

"Counsel for the appelant conceded that the appellant did not make out a case based on the rei vindicatio because no evidence was placed before the magistrate to prove that, as at 15 April 2010, the respondent was in possession of the goods. This concession … is … correct because, in order to succeed, the appellant was required to prove not only that it was the owner of the truck but also that, at the time when it instituted the action which gave rise to this appeal, the respondent had possession of the truck. … No evidence was led before the Magistrate to prove that the respondent was in possession of the truck when appellant instituted action." [Paragraph 9]

Due to this lack of evidence of possession, "the magistrate correctly found that the rei vindicatio was also not available to the appellant in respect of the trailer. Although it proved that it was the owner of the trailer, the appellant failed to prove that the respondent was in possession thereof when it instituted action against the respondent on 15 April 2010." [Paragraph 10]

"There was no evidence as to how the respondent came to be in possession of the goods, instead, when it was put to Mr Wright (the Managing Director of the Appellant) that the respondent effected some repairs to the goods and exercised its lien over the goods "until such time as the money is paid for the work that was done", Mr Wright had no knowledge thereof. That response serves to prove that Mr Wright was unable to place evidence before the magistrate to prove that the respondent was in possession of the goods, more particularly that it was in possession thereof when the respondent instituted the action against it on 15 April 2010." [Paragraph 11]

"The next enquiry is whether the appellant proved that the respondent disposed of the goods. If so, did the appellant prove that such disposal occurred before litis contestatio, that it was wrongful and when the respondent wrongfully disposed of the goods, it had knowledge of the appellant's claim thereto?" [Paragraph 12]

"… The evidence shows that on 4 September 2009 Wesbank informed the respondent that the truck was in the appellant's name and that it (Wesbank) was requested by the appellant to recover the truck." [Paragraph 13]

"Sight should not be lost of the fact that, as at 4 September 2009, Wesbank was the owner of the truck. At best for the appellant at that stage, it had an interest in the truck. Such interest is insufficient, because the actio ad exhibendum is only available to the owner of the res … As at 4 September 2009 the actio ad exhibendum was not available to the appellant in respect of the truck, simply because it was not the owner thereof." [Paragraph 14]

"If the appellant did not prove that the respondent disposed of the goods, it follows that it also failed to prove that the disposal was wrongful, that it occurred before litis contestatio and that, at the time of the

disposal the respondent had knowledge of the appellant's claim thereto. Regarding the last factor, on 4 September 2009 Wesbank informed the respondent that the truck was "in the name of" the appellant. That could not have meant and did not mean that the appellant was the owner of the truck. It indicated only that the appellant had an interest in the truck. … The appellant … failed to place any evidence before the magistrate to prove that the respondent disposed of the goods. " [Paragraph 15]

"Since the appellant failed to prove that the respondent disposed of the goods, its claim based on the actio ad exhibendum was also correctly dismissed by the magistrate." [Paragraph 16]

"… On the evidence at the close of the appellant's case, no reasonable person could give, or might have given, judgment against the respondent." [Paragraph 17]

The appeal was dismissed with costs.

KRAWA NO v ROAD ACCIDENT FUND 2010 (6) SA 550 (ECG)

Case heard 29 April 2010, Judgment delivered 20 May 2010.

This case dealt with the procedure relating to an amendment of a plea. Plaintiff instituted an action against the defendant for damages for loss of support - in both his personal capacity and in his natural guardian capacity as father of two children born of a marriage between the plaintiff and his deceased wife. The defendant served a notice on the plaintiff, in terms of rule 34 (1) of the Uniform Rules of Court in which they formally accepted the merits of the plaintiff's case. Subsequently the defendant wanted to amend two particulars in this notice, to deny that the plaintiff was the natural father of one of the children, and to deny that the plaintiff received support from his deceased wife prior to her death. At issue was whether these amendments to a rule 34 (1) notice could be made.

Bloem AJ held:

"*In Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) Corbett JA D (as he then was) stated at 839A - C that:*

'(I)n the case of an action for damages for loss of support, the basic ingredients of the plaintiff's cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) damnum, in the sense of a real deprivation of anticipated support. The facta probanda would relate to these matters and no cause of action would arise until they had all occurred.'" … [Paragraph 13]

"There can be no doubt that the first two elements of the cause of action for loss of support, namely a wrongful act by the defendant causing the death of the deceased, and negligence (or dolus) on the part of the defendant, have been covered by the defendant's concession. So far in the enquiry, the defendant conceded that, through his negligence, the insured driver committed a wrongful act which caused the death of the deceased." [Paragraph 15]

"Leaving the third element aside for the moment, there can be no doubt that the fourth element, the real deprivation of anticipated support, is an issue properly to be dealt with when the quantum of the plaintiff's damages is determined." [Paragraph 16]

"That leaves me with the third element, namely, whether the deceased, while alive, was under a duty to support the plaintiff. Does this element fall to be determined under the merits or quantum of the

plaintiff's claim? The question is whether, when the defendant conceded the merits of the plaintiff's claim, it also conceded the third element. In my view, paragraph 2 of the pre-trial minute disposes of this question. Therein the parties agreed that, after the concession, "only the aspect of quantum is to be determined" at the hearing which was scheduled to commence on 7 November 2007. By that agreement, read alone or against the background of the above concession, I understand the parties to have agreed that everything, but the quantum of the plaintiff's claim, was conceded. The parties intended the trial on 7 November 2007 to concern itself with only the quantum of the plaintiff's claim. Accordingly, the concession, as read with paragraph 2 of the minute of the pre-trial conference, means that the defendant conceded that, through the negligence of the insured driver, he committed a wrongful act which caused the death of the deceased who, while alive, had a legal duty to support the plaintiff, T and B." [Paragraph 17]

"To summarise, when the defendant conceded "the merits in favour of the plaintiff" it conceded all the aspects of the plaintiff's claim except for "the aspect of [the] quantum [of the plaintiff's claim]". The proposed amendments therefore clearly do not relate to the quantum of the plaintiff's claim. They relate to the merits of his claim." [Paragraph 18]

"The concession has all the essential elements of a compromise of the merits of the plaintiff's action. Since an agreement of compromise has been reached regarding the merits of the plaintiff's claim, the rights of the parties are regulated by that agreement." [Paragraph 20]

"The absence of an order of court reflecting that the defendant had conceded the merits of the plaintiff's claim is accordingly no different from a case where such order was indeed made. That being the case, the grant of the proposed amendments would result in me reopening the issues relevant to the merits of the plaintiff's claim. I do not have the power to do so. I accordingly do not have the power to grant the proposed amendments." [Paragraph 24]

The application for leave to amend was accordingly dismissed. On appeal, a full bench of the High Court overturned the decision, finding that issues of quantum of damages were not limited to mere calculation, but could include issues relevant to the existence of patrimonial loss or damage. Therefore when conceding the merits the RAF had not conceded that Krawa had suffered patrimonial loss, and thus the question of the deceased's duty of support remained in issue: **Road Accident Fund v Krawa 2012 (2) SA 346 (ECG).**

CRIMINAL JUSTICE

KOTSWANA V S (CA&R 306/2014) [2015] ZAECGHC 5

Case heard 4 February 2015, Judgment delivered 17 February 2015

This was an appeal against the convictions for kidnapping, assault and rape in the regional court. consent.

Bloem AJ (Dawood J concurring) held:

"Kidnapping is defined as the unlawful and intentional deprivation of liberty or of custody of a person. To secure a conviction on a charge of kidnapping the state must show beyond reasonable doubt that the accused person unlawfully (without consent or lawful justification) and intentionally deprived the complainant of his or her liberty or caused him or her to be placed in custody. Rape in terms of the common law was defined as the unlawful and intentional sexual intercourse with a woman without her

consent. Rape is now a statutory offence. It is committed when a person unlawfully and intentionally commits an act of sexual penetration with a complainant without the latter's consent." [Paragraph 11]

"Various tests over the years have been developed and applied to determine whether or not there is a duplication of convictions. In the "evidence test" the enquiry is whether the evidence necessary to establish the commission of one offence involves the commission of another offence. In terms of the "intention test", if a person commits sexual acts, each one of which could be a separate offence on its own, but they constituted a continuous transaction that is carried out with a single intent, the person's conduct would constitute only a single offence. In S v Whitehead and Others … it was held … that there is no infallible formula to determine whether or not, in a particular case, there has been a duplication of convictions. The above tests, it was held, are not rules of law, nor are they exhaustive. They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court. …" [Paragraph 12]

"In this case and on the acceptance of the evidence adduced by the prosecution … the appellant dragged or pulled the complainant to his house. It was against her consent. They walked some distance between the tavern and his house. He would not let her go. … She was obviously deprived of her liberty. Furthermore the appellant physically moved the complainant from the tavern to his house. In my view … the appellant unlawfully and intentionally deprived the complainant of her liberty. The offence of kidnapping was completed even before they entered the appellant's house. He could not have been convicted of rape at that stage because there was no penetration." [Paragraph 13]

"It was only after they had entered the house that the appellant committed the act of sexual penetration with the complainant without her consent. He accordingly committed rape in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. These are two separate offences committed at different times. … [I]f the appellant was interrupted with his plan to rape the complainant shortly before or after they had entered the house, he nevertheless would have been convicted of kidnapping because that offence had been completed. But, as the common cause facts show, he did not stop there. He committed an act of sexual penetration with her without consent, according to the complainant (and with consent, according to him). In my view common sense dictates that, on the above facts, the appellant committed two separate offences, first kidnapping and thereafter rape. In the circumstances, the submission that there was an improper duplication of charges cannot be upheld." [Paragraph 14]

"To deal with the … submission [that the State did not prove the appellant unlawfully deprived the complainant of her liberty because of a lack of evidence to show that she was dragged or pulled, and because she failed to shout for help outside the tavern when she had the opportunity, the only reasonable conclusion is that the complainant willingly accompanied the accused] it would be apposite to first deal with the probabilities of the two versions in respect of all the offences. It is common cause that the complainant's friend was sent to the tavern and the complainant accompanied her. The appellant testified that that is what the complainant had told him. He invited her to sit and have a drink with him. It is furthermore common cause that she declined the invitation because she told him that "we have been sent" and must obviously return to the person who sent them to the tavern. The complainant's evidence was that after she had declined the appellant's offer to her, she needed to use the bathroom. She went outside. The appellant must have followed her because both of them testified that they met outside the tavern. " [Paragraph 16]

"The appellant's version regarding the complainant's conduct outside the tavern is, in my view, so improbable that it must be rejected." [Paragraph 17]

"What happened inside that bedroom is, with respect, immaterial for present purposes save to point out that it is common cause that, after they had entered the house, the appellant locked the door behind him. The complainant's version that she jumped through the window to run away from the appellant in a naked state could not be disputed by him. ... I must therefore accept that the complainant, in the middle of the night, jumped through a window and presented herself to her elder sister in a naked state. The suggestion that the complainant felt guilty after the sexual intercourse and that she had cheated on her boyfriend and therefore cried wolf must be rejected. I find it highly improbable that a young lady would risk her own safety and humiliate herself by walking at that time of the evening in that state, simply because she felt guilty. If indeed she felt guilty because she had cheated on her boyfriend, one would have expected her to dress herself and leave the appellant's house hoping that no one would see her, or if she was terrified of the appellant, grab her clothes, jump through the window and get dressed when it was safe to do so. The complainant's above conduct is, in any view, consistent with a person who wanted to get away from a traumatic experience and a dangerous situation. How she presented herself to the public, particularly her sister, was the least of her concerns. She wanted to get away from the appellant who had sexual intercourse with her without her consent. In the circumstances, I find that the appellant was correctly convicted of rape." [Paragraph 19]

"The appellant was charged with two counts of rape. The complainant's evidence, that the appellant sexually penetrated her twice, was at no stage challenged. ... [T]he appellant's evidence was that he had sexual intercourse with the complainant once. Despite the rejection of the appellant's version as a fabrication and despite the fact that he accepted the complainant's version as to what happened inside the house, the magistrate found that he was "not convinced that there was a second rape because the complainant said after this rape the accused went out to his friend and she was then able to lock him out and jumped through the window". He was, with respect, wrong in that regard. The complainant's version, which the magistrate accepted, was that the appellant raped her. He then went outside while the complainant was checking whether or not the door was locked. The appellant returned. He assaulted her. He then raped her a second time. He once again went outside. That was the time when the complainant escaped. The appellant is fortunate that he was wrongly acquitted on the second count of rape. Unfortunately there is, as the law stands, nothing that the state can do to remedy the situation." [Paragraph 20]

"Regarding the charge of assault with intent to do grievous bodily harm, the appellant testified that when she was undressed inside the bedroom and before the first rape, the appellant stabbed her with an object that she did not see. It caused a scratch on her left thigh. Her version of a scratch on her thigh is corroborated by the medical report ... The appellant denied that he stabbed the complainant and suggested that she might have sustained that injury when she jumped over the fence to get to her sister, a suggestion which was denied by the complainant. Since the complainant's direct evidence as to how she sustained the injuries on her left thigh was met by a bare denial on the part of the appellant and since I have already found that the magistrate correctly rejected his version of what happened before they entered the house and what happened inside the house, I am of the view that the state proved that the appellant assaulted the complainant. He was accordingly correctly convicted of assault.

The Appeal was dismissed.

EDWARD H DOMONEY V STATE, UNREPORTED JUDGEMENT, CASE NO.: CC/98/03 / CA/16/201 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

Case heard 22 August 2011, Judgment delivered 29 August 2011

This case was an appeal against a sentence of life imprisonment imposed upon the appellant, who had been convicted of the premeditated rape the nine year old complainant in front of her younger brother. The appellant argued that the trial court had erred in three respects: 1) That there was a striking disparity between the sentence imposed and others imposed by courts in similar circumstances; 2) That the trial court had erred in not finding substantial and compelling circumstances for a lesser sentence; and 3) That the sentence imposed caused an injustice to the Appellant.

Bloem AJ (Nepgen and Mjali JJ concurring) held:

"I am required to test the justice and proportionality of the sentence of life imprisonment which was imposed by the trial Court by weighing and balancing all the factors relevant to the nature and seriousness of the offence of rape, the Appellant's personal and other relevant circumstances which could have a bearing on the seriousness of the offence of rape and the Appellant's culpability." [Paragraph 9]

"The complainant lived in such poor socio-economic circumstances that her mother had agreed that she and her younger brother be adopted by their late father's brother and his wife… ." [Paragraph 9]

The Appellant's three prior convictions "driving a motor vehicle while the alcohol content of his blood was more than 0.08 mg/100ml, theft, and possession of dagga, were neither of a sexual nature nor did they involve violence. For purposes of this appeal he will be treated as a first offender." [Paragraph 12]

"Prior to his arrest on the charge of rape the Appellant was employed and earned a salary with which it appears that he supported his children, parents and siblings. The above constitute the mitigating and aggravating factors which present themselves in this case." [Paragraph 13]

"The above circumstances convince me that the Appellant is deserving of a long period of imprisonment. However, compared to the case of S vs Mabuza … and the cases discussed therein and after employing the test referred to in S vs Mqikela … I am unable to state that this case is devoid of substantial and compelling circumstances justifying a lesser sentence than life imprisonment." [Paragraph 14]

"… Regard being had to the above cases, the complainant's rape does not fall within the worst category of rape. Life imprisonment is reserved for cases devoid of compelling and substantial factors. A departure from the prescribed sentence is justified on the basis that life imprisonment would be disproportionate to the rape, the Appellant and the legitimate interests of society. In my view these factors do not constitute flimsy reasons or speculative hypotheses favourable to the Appellant taken into account simply to depart from the prescribed minimum sentence." [Paragraph 14]

"In my view a sentence of 20 years' imprisonment will make the Appellant appreciate the wrongfulness and gravity of his conduct vis-a-vis the complainant, her brother and society. Although it is impossible to predict with any measure of certainty, the Appellant is unlikely to repeat the conduct that he exhibited towards the complainant when he is finally released from custody. To remove him from society for the remainder of his life would, in the circumstances, be grossly disproportionate to the circumstances under which the Appellant raped the complainant and the interests of society." [Paragraph 15]

The appeal was upheld.

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

BEAUTIFUL YOU HEALTH AND BEAUTY CLINIC (PTY) LTD V MOOLMAN AND ANOTHER (553/2015) [2015] ZAECPEHC 13 (10 MARCH 2015)

Case heard 19 February 2015, Judgment delivered 10 March 2015

This was an application for an interdict to enforce a restraint of trade agreement. Respondent was a former employee of the applicant, a beauty salon, and had signed a contract with the applicant which had included a restraint of trade clause (clause 25 of the contract). She subsequently resigned, and opened her own salon.

Malusi AJ held:

"The applicant averred at length regarding the nature of the relationship the respondent had established with customers. A picture was painted of particularly personal relationships the respondent had established with a number of customers due to her personality. The respondent did not dispute the relationships save for the intimacy content to describe the relationships as part of her duties she was expected to perform." [Paragraph 5]

"The applicant averred that the respondent had access to client information and pricing structures which was readily available to all employees. As such the respondent has had access to the applicant's entire client base. The respondent strenuously denied these averments. Though conceding knowledge of the client base as an employee she pointed out she did not keep an electronic or hard copy of what amounted to thousands of applicant's clients." [Paragraph 6]

"The main issue for decision is whether the relevant clause in the agreement discloses an interest worthy of protection. … It is my view that clause 25.2 identifies three interests to be protected, viz: (a) the employer; (b) the employer's tradename; and (c) the employer's goodwill. In the context of the agreement the protection of the employer can only mean protection from competition. It has been held a restraint of trade which its sole purpose is to prevent competition is unenforceable. To the extent the agreement seeking this purpose is unenforceable." [Paragraphs 13 - 14]

"… Both the trade name and goodwill relate to knowledge and esteem outsiders have of the applicant's business. They can be measured by how popular the business is to the public (business connections) or the esteem it is held by its peers (trade connections). These interests are worthy of protection. … The applicant has provided evidence that the respondent has contacted at least ten of its clients. The respondent admits the contacts but avers that they occurred whilst she was still in the employ of the applicant. I am of the view that this is an interest of the applicant worthy of protection. The applicant does not have to rely on an undertaking by the respondent not to contact its customers when it has a valid agreement. I am of the view that in the circumstances where the loyalty of the customers to the respondent and a relationship with customers is admitted, it is imperative that the respondent be restrained." [Paragraphs 15 - 16]

"I have further considered that on the evidence before me, the industry appears to have peculiar characteristics. Customers develop close relationships with the therapists which are easily transported in the event that the therapist practises her trade somewhere else. This is the type of relationship envisaged in Branco where the learned Judge reasoned that the employee should be restrained to protect the employer's trade connections. … I am satisfied it is the type of relationship where she could easily influence the customers. The positive comments ("likes") on her business facebook page is proof of that, if any was required." [Paragraph 17]

"The restraint of trade provides that the respondent be restricted for a period of 12 months within a radius of 50km from the applicant's premises. The notice of motion reduces the period to six months. … The reduced period appears to be sufficient time to allow another therapist in the employ of the applicant to establish a relationship with the customers that were serviced by the respondent. Both the period and the radius have been found in similar circumstances to be reasonable. The relatively young age of the respondent and her gender are a neutral factor on their own. They do not render the restraint unreasonable as there is no allegation of inequality of bargaining power at the time the agreement was concluded nor that the agreement is unduly oppressive." [Paragraphs 18 - 19]

"… The damages provided in the clause are not a satisfactory remedy. It is common cause that the respondent has established relationships with a number of customers. The evidence … indicates the industry is highly competitive. The purpose of the interdict is to prevent an exodus of customers to the respondent's salon due to her influence she acquired whilst still applicant's employee. A damages claim or even an award is more an apparent remedy than a real remedy in those circumstances." [Paragraph 20]

The application succeeded. First respondent was interdicted from being involved in a business in competition with the applicant, within a 50 kilometre radius for six months. First respondent was also ordered to surrender all confidential information in her possession relating to the applicant's business.

PATERSON OBO NZWANA V ROAD ACCIDENT FUND AND ANOTHER 2013 (2) SA 455 (ECP)

Case heard 19 April 2012, Judgment delivered 26 April 2012

Nzwana was injured in a motor vehicle collision on 27 June 2006. On 8 June 2010 the Court ordered (by agreement) that the merits of the case be heard separately. The same order provided that the first respondent conceded the merits and agreed to pay Nzwana 100% of his proven or agreed damages. On 4 August 2010 the Court ordered, per Revelas J, that the Defendant furnish First Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, for the costs of future accommodation of Nzwana in a hospital or nursing home, or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision after such costs had been incurred and upon proof thereof. The first respondent provided the applicant with an undertaking purportedly in terms of Section 17(4)(a) of the Act as ordered by this Court, the problem being the insertion of a proviso that differed from the order by

Revelas J. The issue for decision was whether the proviso amounted to an impermissible non-compliance with the order of Revelas J.

Malusi AJ held:

"The important fact to note is that it is the trial Court that is compelled to have regard to the compensation already paid and not the employee (applicant). It is thus not necessary for a certificate which is for the benefit of the patient (applicant) to include a reference to what the trial Court must consider." [Paragraph 12]

"The distinction that final judgment was still pending on the damages when the proviso was inserted is without merit. The trial Court would in due course have had regard to any payment made in terms of the certificate before deciding on the final award of damages. It is not for the patient to prove what compensation has been made by the Commissioner when he proves costs incurred as provided in Section 17(4) of the Act." [Paragraph 14]

"The fact that the order by Revelas J was by agreement is also an important consideration to bear in mind. The effect of the agreement being made a Court Order is that it is then binding on both parties. The first Respondent, cannot thereafter, unilaterally add any proviso to an undertaking directed by Court especially one that amounts to a qualification. The proviso further specifies an inception date of 22 October 2010. This date was not provided in the order of Revelas J and was certainly not with Applicant's consent" [Paragraph 15]

The applicant was ordered to provide an undertaking in compliance with the court order of 4 August 2010.

COMMERCIAL LAW

SOUTH AFRICAN NATIONAL TUBERCOLOSIS V PROVINCIAL GOVERNMENT OF THE EASTERN CAPE (581/12) [2014] ZAECBHC 3

Judgment delivered 11 March 2014

This was an application for payment of value added tax (VAT) and interest thereof on the purchase price of certain immovable properties. The applicant had entered into a sale agreement with the respondent in terms of which the former sold hospitals to the latter for a purchase price of R27 000 000,00. The parties could not agree whether the transaction was liable to VAT. The respondent contended that the transaction was exempt from the payment of VAT. The applicant held a contrary view. The sale agreement was drawn to accommodate the difference on this issue. The South African Revenue Services (SARS) later demanded VAT, penalties and interest payment from the applicant. After lengthy negotiations, the applicant settled the debt due to SARS with a portion of the penalties and interest being waived. The applicant in turn demanded payment of this amount with interest from the respondent. The respondent admitted liability for the VAT and made a part-payment thereof. The payment of the outstanding VAT was settled by the parties in a consent order

of the Court. The respondent denied liability for interest payment for the period before it was informed by applicant of SARS demand i.e. before 1 March 2012.

Malusi AJ held:

"Mora has been described as delay or fault. It arises when a party to a contract fails to perform his/her obligations on time. When the contract fixes the time for performance, faults arises from the contract itself (mora ex re) and no demand (intepelatio) is necessary to place the debtor in mora. The contrasting position is when the contract does not provide time of performance. In those circumstances the debtor will not be in mora until there is a demand by a person. This is the reason it is called mora ex persona as an act by a person is required to place the defaulting party in mora." [Paragraph 10]

"It is apparent … that … the sale agreement fixed the time for the payment of VAT as the registration of the property in the respondent's name, which occurred on the 27 November 2009. As the respondent failed to pay the VAT on that date, interest accrued from thereon" [Paragraph 11]

"The respondent has argued "the exemption" from SARS precluded it from being in mora ex re. The argument was developed to say because of the exemption certificate the applicant was required to inform the respondent of the demand from SARS before the respondent could be in mora. I do not agree. The transfer duty certificate did not exempt the parties from the payment of VAT but only transfer duty. The entry in the certificate that VAT was not applicable was made by the conveyancer and not SARS. It was neither SARS nor the applicant that caused the alleged uncertainty but the respondent's own insistence that VAT was not payable." [Paragraph 12]

Respondent was ordered to pay the interest accrued.

ADMINISTRATION OF JUSTICE

ABEGAIL NONTUTHUZELO SIPUNZI V THE SUPERINTENDANT GENERAL, DEPARTMENT OF EDUCATION, EASTERN CAPE AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 722/2013 (EASTERN CAPE LOCAL DIVISION, MTHATHA)

This was an application for a final interdict to compel the respondents to reinstate the applicant as principal of the Waterfall Park Primary School, and continue paying her salary. Applicant also alleged that the respondents were in contempt of earlier court orders. Applicant had been transferred from that position to the Mthatha district office after a dispute with the school governing body, educators and members of the community [paragraph 7]. The transfer was carried out pending an investigation by the respondents.

Malusi AJ held:

"The application is the latest in an unfortunate and tortuous series of applications to this Court by the applicant which started in April 2004. The applicant has since then approached this Court on at least six diverse occasions either to have her employment reinstated or to have the respondents declared to be in contempt of court orders." [Paragraph 6]

"The relationship between the applicant and her colleagues at the district office broke down … The series of applications … began. The last of those ordered the reinstatement of the applicant n her position at the district office until the finalization of disciplinary proceedings which were then pending against her … The 2nd respondent promptly withdrew the disciplinary proceedings and instructed the applicant to report at Waterfall Park Primary School. This culminated in the applicant launching the present application. …" [Paragraph 8]

"Both the applicant and the respondents have since filed financial documents … It appears … that there has been no payment of the March 2013 salary in compliance with paragraph 2.3 of the interim order. …" [Paragraph 9]

"… In the application for reconsideration of the interim order the 2nd respondent admitted that the effect of the order was that the respondents will continue to pay a salary to applicant when she is not rendering any service. Implicit in that is the acknowledgement that the respondents have an obligation to continue paying the applicant's salary in terms of the interim order. The respondents simply disobeyed the interim court order when the application for reconsideration was unsuccessful on this aspect. On the evidence before me it appears that the respondents were intent on pursuing all avenues not to have to give effect to the interim court order." [Paragraph 10]

"Section 1(c) of the Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. Section 165(1) – (5) vests the judicial authority of the State in the Courts and requires other organs of State to assist and protect the Courts. A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of that constitutional duty. … " [Paragraph 11]

"The upholding of the rule of law and effective administration of justice can be ensured by civil sanctions other than contempt proceedings. These are drastic sanctions to be used sparingly. … The Courts have recognised that a party who has disobeyed a court order may be barred from being heard until he or she has obeyed the court order. … " [Paragraphs 12 - 13]

"Our Courts cannot tolerate the disregard of its orders. The court order must be obeyed even if it may be wrong. Disobedience may lead to self-help and a breakdown of the administration of justice. Indeed, obeying court orders by all litigants is a matter of fundamental importance in our Constitutional democracy." [Paragraph 14]

"I am of the view that the respondents' defence may not be heard until they have purged their disregard for the interim court order by paying the applicant. … I must express my concern that the applicant appears not to have taken any steps to have her purported discharge reviewed and set aside by the Court. It is a principle of our law that until an unlawful decision is reviewed and set aside, it is treated as valid. I am alive to the authorities that a discharge is not an administrative decision but the point is that the applicant ought to have the discharge considered by the Court." [Paragraph 15]

"The most disconcerting aspect of this matter is the brazen attitude of the respondents in disobeying the court order. … This attitudeharboured [sic] by senior State officials is inimical to the values, spirit and purport of the Constitution. The respondents were previously found … to be motivated by malicious intent against the applicant. … This has now been exacerbated by a disregard for the

devastation visited upon the applicant. I find the conduct of the respondents unacceptable and reprehensible. A punitive costs order is warranted in the circumstances. This is the fifth such costs order against the respondents. They may consider themselves forewarned that if their donduct against the applicant persists, the punitive costs order may be payable *de bonispropris* in the future." [Paragraph 16]

The rule nisi was confirmed, and the contempt proceedings postponed for a separate hearing.

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

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.

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

SELECTED JUDGMENTS

PRIVATE LAW

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

Case heard 16 May 2014.

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

Msizi AJ held:

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

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

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

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

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

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

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

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

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

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

COMMERCIAL LAW

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

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

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

Msizi AJ held:

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

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

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

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

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

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

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

ADMINISTRATIVE JUSTICE

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

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

Msizi AJ held:

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

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

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

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

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

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

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

The application was successful, and the interdict was granted.

CRIMINAL JUSTICE

BOOI V S [2014] JOL 32183 (ECG)

Case heard 6 August 2014, Judgment delivered 12 August 2014

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

Msizi AJ (Goosen J concurring) held:

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

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

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

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

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

The Appeal was dismissed.

SELECTED JUDGMENTS

LABOUR LAW

NOVO NORSDISK (PTY) LTD v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2011) 32 ILJ 2663 (LAC)

Case heard 7 September 2010, Judgment delivered 6 June 2011

The employee was dismissed and lodged a dispute with the CCMA alleging unfair dismissal. The CCMA commissioner issued an award in the employee's favour, finding the dismissal substantively unfair and ordering his reinstatement. The employer took the award on review, and the award was set aside by the Labour Court. The employee appealed the decision and although the Labour Appeal Court struck the appeal off the roll it nevertheless set aside the decision of the Labour Court to review the award and issued an order requiring the parties to reconstruct the record, together with the commissioner and to set the matter down for rehearing. The employer was directed to take the necessary steps to initiate the process and a deadline was given for the record to be filed. The employer failed to comply with the time-limit and applied for an extension, which was granted by the Labour Court. The Labour Court later issued a directive indicating that the employer needed to apply for condonation and for a further extension to file the reconstructed record. The employer filed an application seeking condonation of the late filing of the reconstructed record. The employee opposed the application and brought a counter-application to make the arbitration award an order of court. The Labour Court refused the employer's application for condonation and made the arbitration award an order of court.

Jappie JA (Hendricks AJA and Van Zyl AJA concurring) held:

"Condonation of the non-compliance or non-observance of the rules or directives of a court is by no means a mere formality. In Foster v Stewart Scott Inc (1997) … (LAC) … the court stated the following: 'It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include a degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other.'" [Paragraph 13]

"Before us, the appellant has argued that the Labour Court had erred in deciding the application for condonation according to the ordinary principles relating to condonation as these principles do not apply in a case where an applicant applies for condonation for the late delivery of a record. The Labour Court had committed a misdirection in deciding the appellant's application according to the established principles for condonation. The appellant sought the setting aside of the Labour Court's judgment." [Paragraph 25]

"The granting or the refusal of condonation for the non-compliance with the rules or directives of a court is to be decided by applying what are now well established principles and these principles are of general application." [Paragraph 26]

"In Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) the court in considering when there ought to be a rescission of a judgment stated the following two requirements: (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (ii) that on the merits such a party has a bona fide defence, which, prima facie, carries some prospect of success." [Paragraph 27]

"It seems to me that the aforesaid requirements are equally applicable when a party seeks condonation. The party seeking condonation must satisfy the court that it has a reasonable explanation for its delay in failing to comply with the time-limits applicable to that party. Its failure to put before the court such a reasonable and acceptable explanation entitles a court to refuse condonation. Further, if a court takes the view that there is little prospect of success then, in my view, a court can justifiably refuse the indulgence being sought." [Paragraph 28]

"In the present case it seems to me that the appellant failed to provide an acceptable and adequate explanation for its failure to reconstruct the record of the arbitration proceedings timeously as directed by the Labour Court on several occasions and its reliance on the conduct of the employee and/or its legal representative does not justify the appellant's obvious non-compliance. Moreover, I am unpersuaded that the Labour Court erred in concluding that the appellant's prospects of having the award reviewed and set aside are slim. In my view, the appellant has failed to show that the court a quo had erred in dismissing its application for condonation." [Paragraph 29]

The appeal was dismissed with costs.

BRACKS NO & ANOTHER V RAND WATER & ANOTHER (2010) 31 ILJ 897 (LAC)

Judgment delivered 11 March 2010

In arbitration proceedings the first appellant, a commissioner of the CCMA, found that an employee had been unfairly retrenched because her employer had failed to comply with the procedural requirements of s 189 of the Labour Relations Act (LRA), and ordered her reinstatement. On review the Labour Court held that, having regard to the wording of s 191(12) of the LRA, it was only in matters where only the substantive fairness of a dismissal for operational requirements involving a single employee was to be determined that the CCMA had jurisdiction to hear the matter. The court found that as soon as the procedural fairness of the dismissal was put in issue the matter had to be referred to the Labour Court. The arbitrating commissioner and the CCMA appealed to the Labour Appeal Court to determine whether the CCMA has jurisdiction to hear disputes about the procedural fairness of dismissals for operational requirements involving a single employee.

Jappie JA (Davis JA and Leeuw JA concurring) held:

"In Scheme Data Services (Pty) Ltd v Myhill NO & others (2009) 30 ILJ 399 (LC) … Ngalwana AJ expressed the view that the judgment of the court a quo in this appeal is clearly wrong in law. After a careful analysis of the judgment of the court a quo, Ngalwana AJ concluded that s 191(12) did not exclude the jurisdiction of the CCMA to arbitrate an unfair dismissal dispute in circumstances where a single employee contends that the dismissal for operational requirements is unfair because the employer did not comply with the procedural requirements as set out in s 189." [Paragraph 6]

"In my view, Ngalwana AJ's interpretation of s 191(12) in Scheme Data Services is to be preferred." [Paragraph 7]

"Section 191(12) does not expressly pronounce upon the jurisdiction of the CCMA. What the section provides is that when a single employee disputes the fairness of his/her dismissal for operational reasons, and where such a dispute remains unresolved after conciliation, the single employee has a choice either to refer the dispute to the CCMA for arbitration or to the Labour Court for adjudication." [Paragraph 9]

"Section 191(12) was introduced by way of an amendment by s 46(i) of Act 12 of 2002. The explanatory memorandum to the amending Act states … that s 191 is to be amended 'to provide that if only one employee is dismissed for operational requirements the employee is able to refer the dispute after conciliation to the Labour Court or to arbitration'. There is no indication that it was the intention of the legislature to limit a single employee's election to refer a dispute to arbitration to cases where only the substantive fairness is placed in issue. My view is that the legislature intended to give a single retrenched employee, who may not be able to afford the legal costs of Labour Court litigation, the opportunity to have his/her unfair dismissal dispute resolved by arbitration. That appears to be the plain purpose of s 191(12). The court a quo therefore erred in placing upon s 191(12) a construction which limited a single employee's election to either approach the CCMA or the Labour Court where both the substantive and procedural fairness of his/her dismissal for operational reasons are placed in issue." [Paragraph 12]

"The legal question raised in the appeal is answered with the finding that the CCMA does have jurisdiction in terms of s 191(12) to hear disputes about the procedural fairness of a dismissal for operational requirements involving a single employee." [Paragraph 13]

The appeal was upheld.

MAEPE V CCMA & ANOTHER [2008] JOL 21837 (LAC)

Judgment delivered 18 April 2008

The appellant had lied under oath giving evidence at arbitration proceedings in which he faced dismissal by the CCMA for sexual harassment. The Labour Court decided that, although sexual harassment had not been proved, his dishonesty under oath warranted his dismissal, and set aside the arbitrator's ruling that the dismissal was unfair. The effect of this finding was that, if the commissioner had applied his mind to the fact that the appellant had given false evidence, the commissioner would not have granted the appellant any relief whatsoever or he would have granted him compensation rather than reinstatement.

Jappie JA (Zondo JP and Patel JA concurring; Zondo JP writing a separate concurring judgement) held:

"Once the Labour Court or an arbitrator has come to the conclusion that a dismissal is unfair, the Labour Court or the arbitrator must now determine what relief or remedy, if any, should be granted to the employee. The determination of what relief ought to be awarded to an employee is governed by the provisions of section 193 of the LRA. Once an award has been made, the award may be reviewed under limited grounds as set out in section 145 of the LRA." [Paragraph 39]

"In addition to what is stated above, in Sidumo & another v Rustenburg Platinum Mines Limited & others … the Constitutional Court concluded that a commissioner conducting CCMA arbitration is performing an administrative function. This notwithstanding, the Constitutional Court has rejected the justifiability of an arbitration award in relation to reasons given for it as a ground of review of CCMA awards. It held that CCMA awards can be reviewed on the ground of unreasonableness. It held that the test is whether the decision reached by the commissioner is one that a reasonable decision maker could not have reached. If it is one that a reasonable decision maker could have reached, such decision is reasonable. If it is not a decision that a reasonable decision maker could have reached, it is unreasonable and can be set aside on review on that ground. The Constitutional Court concluded that applying this standard would give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair." [Paragraph 40]

"The appellant was employed in a position of trust. He was a convening senior commissioner for the Eastern Cape. He was required to act with honesty and integrity in order to maintain and preserve the trust and confidence the public must have in the CCMA as an institution. He was entrusted by virtue of his position to administer the oath to parties appearing before him and he would legitimately expect those parties to abide by the oath. He cannot demand this of others if he himself has been shown not to have any respect for the oath. That is to say that a person who holds the position of a commissioner, not to speak of a convening senior commissioner, must be a person of integrity in order to be considered a fit and proper person to hold such a position. When circumstances are present which cast serious doubt on the integrity of a person holding a position such as that previously held by the appellant, then, in my view, such a person is not a fit and proper person to be entrusted with such a position." [Paragraph 47]

"The commissioner had concluded that the appellant had given false evidence. The commissioner was aware of the position the appellant held with the first respondent. Accordingly, the commissioner ought to have appreciated the importance of the appellant being a fit and proper person to occupy the position of a convening senior commissioner if he was to be reinstated in his position. The court a quo was, therefore, correct in concluding that, had the commissioner applied his mind to the effect on his job of the appellant's conduct in giving false evidence, he would not have ordered reinstatement. This appears to be supported by what the commissioner said in reinstating the appellant, namely: 'Let me say at the outset, that although the Applicant comes away from this arbitration with his job intact, he can count himself extremely fortunate that I am not confirming his dismissal.' This suggests to me that, if the commissioner had taken into account the fact that the appellant had given false evidence under oath, he would not have ordered the appellant's reinstatement." [Paragraph 49]

"Despite his dishonesty, the appellant's dismissal for sexual harassment remains unfair. Although the appellant's conduct was unacceptable, it seems to me that it is unfair that he should be denied not only reinstatement but all relief. His reinstatement as a convening senior commissioner is impracticable … In my view, it is just and equitable that he be granted some relief. I consider it to be just and equitable that the appellant be awarded compensation equivalent to 12 months' remuneration calculated at the appellant's rate of remuneration at the date of his dismissal." [Paragraph 51]

SHOPRITE CHECKERS (PTY) LTD V CCMA & OTHERS [2007] JOL 20248 (LAC)

Judgment delivered June 26, 2007

There were a series of thefts at the appellant's store, and the third respondent was implicated and dismissed following a disciplinary hearing. The third respondent referred the dispute (of his dismissal) to the CCMA. At conciliation the matter remained unresolved and it was then referred to arbitration. The arbitration was set down and was to be held at the offices of the department of labour in Grahamstown. The second respondent was assigned to conduct the arbitration. Notices of set down were served on both the third respondent and the appellant. At the hearing on the 5 May 2004 the third respondent was in attendance. No-one appeared for or on behalf of the appellant. The second respondent, having satisfied himself that the appellant had been properly notified of the date, time and venue of the proceedings and in the absence of any explanation from the appellant for its failure to attend, proceeded with the arbitration and handed down his award. The appellant was ordered to re-instate the third respondent. The appellant then instructed its attorneys make an application to have the award rescinded. The application for the rescission of the arbitration award came before the second respondent who dismissed the application for rescission. The appellant, thereafter, brought a review application in the Labour Court and sought to have the second respondent's ruling reviewed and set aside. The Labour Court upheld the ruling by the second respondent.

Jappie AJA (Zondo JP and Khampepe AJ concurring) held:

"Before this Court, counsel for the appellant, submitted that the main question raised in the appeal is whether section 144 of the Act permits the rescission of a CCMA arbitration award on the ground of good cause. He submitted that a finding in favour of the appellant on this issue would result in the appeal being upheld as it would follow that the court a quo had erred in law in concluding that good cause was an insufficient basis for the rescission of an arbitration award. Moreover, he submitted that there can be no dispute that the appellant had in fact demonstrated good cause for its non-attendance at the CCMA on the date when the arbitration proceedings were held." [Paragraph 16]

"It is apparent from the judgment of the court a quo that it applied section 144 as if it was applying the provisions of rule 42 of the uniform rules of court. This approach, it was argued, effectively amounted to a reliance on the principle of statutory interpretation referred to as "in pari materia". The effect of this principle is that, where the meaning of a statute is unclear, then that statute should be afforded the same meaning given to an earlier statute if couched in the same language. It was submitted that this principle is inapplicable because it only applies to corresponding statutory provisions and not to provisions in statutes and corresponding rules of court. It was argued that, that interpretation of rule 42 arises in circumstances which are entirely different to the circumstances under consideration in relation to section 144 of the Act. In the High Court, a party bringing an application for rescission has available to him, in addition to the provisions of rule 42, other remedies. He may obtain rescission under the common law or under the provisions of rule 31(2) of the uniform rules which permits rescission on good cause shown. There is no similar rule which is applicable to arbitration proceedings before the CCMA." [Paragraph 18]

"It is so that section 144 of the Act makes no mention of good cause shown. Moreover section 144 of the Act mirrors the text of rule 42 of the uniform rules of court..." [Paragraph 26]

"In the civil courts, rule 42 is confined by its wording and context to limited application. However it is clear that the rule do not deprive the court of its discretion which must be exercised judicially." [Paragraph 28]

“It seems to me that in applying section 144 of the Act a commissioner is in the same position as a judicial officer in the civil courts when considering an application for rescission.” [Paragraph 29]

“As there are circumstances which can be envisaged, such as in the present case, and which fall outside the circumstances referred to section 144 of the Act in such cases both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief. It follows, that if one was to hold that section 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances allowed by the wording of the section it could lead to unfairness and injustice. In my view this would be inconsistent with the spirit and the primary object of the Act referred to above. Furthermore, I am of the view that to interpret section 144 of the Act so as to include "good cause" as a ground for rescission is to give the Act an interpretation that is in line with the right provided for in section 34 of the Constitution because, if section 144 is not interpreted in that way, a party who can show good cause for his default would be denied an opportunity to exercise his right provided for in section 34 of the Constitution despite the fact that he may not have been at fault for his default. That could be a grave injustice.” [Paragraph 33]

“In considering good cause, the second respondent took into account only one aspect of the test. That is to say he only considered the fact that Booysen had mis-diarised the date of the arbitration hearing. He clearly did not consider the appellant's defence to the third respondent's claim as he made no mention of it in his decision. In my view, the second respondent, failed to weigh together all the relevant factors in determining whether it was just and fair and therefore, whether good cause had been shown for the rescission of the arbitration award. It follows that the second respondent did not apply his mind to all the issues before him and if he did, he ought to, in the circumstances of this case, to have rescinded his earlier default award.” [Paragraph 37]

“When the matter came before the Labour Court, Pillay J adopted the approach that good cause is not a requirement in an application for the rescission of a decision of the CCMA and a commissioner was obliged not to take it into account. … I take a different view. Section 144 must be interpreted so as to also include good cause as a ground for the rescission of a default arbitration award. Accordingly, a commissioner may rescind an arbitration award under section 144 where a party shows good cause for its default…” [Paragraph 38]

“… [T]he court a quo should have set aside the ruling of the CCMA. The next question that arises is whether the court a quo would then have had to remit the matter to the CCMA to be dealt with afresh or whether it could itself have effectively made the decision that the CCMA ought to have made in the rescission application. One of the primary objects of the Act is the effective resolution of disputes. This includes an expeditious resolution of disputes. In this case the dismissal occurred in December 2003. Accordingly, there has already been a delay of over three years. Furthermore, the employer had missed the arbitration hearing date by one day. The non-attendance by the employer's representative was due to an understandable mistake. On the merits the employer's case is one which deserves an opportunity to be heard at the arbitration. I am of the view that, if I were to remit the matter back to the CCMA for it to decide the rescission application afresh, the granting of the rescission in this matter would be a foregone conclusion in the light of all the circumstances of the case. I am of the view that the Labour Court, and, therefore, this Court as well, has power in cases such as this to make the decision which the tribunal whose decision is on review should have made (see Traub v Administrator of the Transvaal and others …” [Paragraph 39]

"In all of those circumstances the arbitration award given earlier should be rescinded and the employer be given an opportunity to defend its decision to dismiss the employee." [Paragraph 40]

The appeal was upheld, each party to pay its own costs.

ADMINISTRATION OF JUSTICE

NTULI V ZULU AND OTHERS 2005 (3) SA 49 (N)

Case heard 18 February 2004, Judgement delivered 30 July 2004

The High Court set aside an order granted by the second respondent, the presiding officer of the North Eastern Divorce Court, and called on the second respondent to show cause why she should not be directed to pay the costs occasioned by the proceedings in the High Court.

Jappie J held:

"Although this application [brought in the North Eastern Divorce Court by Mr Zulu against his former wife for the return of their children] was addressed to the applicant, as respondent, and the relief sought was in the form of a rule *nisi*, the second respondent … granted what in effect was a final order directing the Sheriff … to take the aforesaid children and their personal effects and hand them over to the first respondent. … The order as well as the application papers were then served on the applicant … Although the order contained no return date, the applicant nevertheless instructed her attorneys to anticipate the return date and to seek an order setting aside the order … Simultaneously, the applicant brought a counter-application for a rule *nisi* for the custody *pendente lite* of the minor children together with certain other ancillary relief. The matter was then placed before the second respondent on 14 August 2003. It is the conduct of the second respondent on this occasion which caused the applicant to seek an order for costs against the second respondent either in her official capacity; alternatively *de bonis propriis*." [Page 50]

"What occurred is set out in the affidavit by counsel (MS I Stretch) who appeared on that occasion for the applicant. … At 12:00 counsel returned to the chambers of the second respondent and was then informed by the second respondent that she did not know what to do with the papers as there was no typist available. Upon enquiring what was meant by this, the second respondent advised counsel that she had refused the application. Counsel then enquired as to how this could be possible as the application had not as yet been moved. Counsel further informed the second respondent that a substantive application had been prepared and that she (counsel) now wished to move that application. The second respondent refused to hear counsel. The second respondent stated that she had already made her order and could not change it. In spite of the protestations of counsel and an explanation as to what the applicant was now seeking, the second respondent replied that she was not at liberty to hear counsel and reiterated that she had already granted an order and that the applicant's application was refused. It was made clear that both the opposition to the *ex parte* application, brought by the first respondent, as well as the applicant's counter-application were refused. The second respondent was requested to record this refusal in open court and to furnish her reasons therefor. The second respondent refused to go on record. She simply stated that the applicant could apply for reasons in writing. …" [Page 51]

"... Julyan AJ came to the conclusion that the proceedings on 14 August 2003 amounted to a gross irregularity. In the judgment she sets out her reasons for this conclusion. She concluded that the second respondent had denied the applicant her right to be heard and this constituted a gross irregularity. The second respondent, in her affidavit, has not challenged this conclusion; neither has counsel, acting on her behalf, submitted that the court issuing the rule *nisi* erred in this respect." [Page 52]

"The argument advanced on behalf of the second respondent is as follows: It is not competent to award costs against a judicial officer in his/her official capacity, as such an award is in effect an award against the State or the relevant government department which employs the judicial officer concerned. The State and/or the department concerned is not a party to the review proceedings and has, therefore, no interest whatsoever in the outcome of these proceedings. Moreover the State and/or the relevant department has not made itself a party to the proceedings by opposing the proceedings for review. It was further submitted that, unlike the position of officials performing administrative functions, the State has no power of control or supervision over a judicial officer in the conduct of judicial proceedings. The judicial officer exercises a purely personal discretion and is not a servant of the State. ... If this *dictum* [from the 1976 Appellate Division case *Regional Magistrate Du Preez v Walker*] is to be applied in the manner submitted ... then a judicial officer in his/her official capacity would enjoy absolute immunity against an award for costs. The *ratio* in *Walker's* case is ...: 'It is a well-recognised general rule that the Courts do not grant costs against a judicial officer in relation to the performance I by him of such functions solely on the grounds that he had acted incorrectly. To do otherwise would unduly hamper him in the proper exercise of his judicial functions.'..." [Page 52]

"In my view, *Walker's* case has no bearing on the present matter. In this matter the contention is that the judicial officer (the second respondent) refused to perform her judicial function. That is to say that she refused to hear counsel and to give reasons for her order.

Costs may be awarded against a judicial officer, acting in a judicial capacity, where his/her conduct can be described as *mala fide*, he/she has taken sides, where he/she has conducted himself/herself maliciously or where there has been a gross illegality in the case. ... In this matter, Julyan AJ came to the conclusion that it was the gross irregularities in the proceedings before the second respondent that have given rise to the present application. She concluded that, had the second respondent been mindful of her obligation to apply the maxim *audi alteram partem*, these proceedings would not have been necessary. She described the conduct of the second respondent ... as to 'defy belief'. The second respondent's contention that she firmly believed that she was '*functus officio*' is no explanation at all. If indeed the second respondent believed that she was *functus officio* after having made the initial order ... and she was therefore precluded from entertaining any further applications on the issue, ... Why then did she not simply refer the application on 14 August 2003 to another judicial officer? By refusing to hear counsel and then simply dismissing the applicant's applications ... is, in my view, conduct which can only be described as grossly irregular. It must be borne in mind that s 34 of the Constitution of the Republic of South Africa Act 108 of 1996 provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'" [Page 53]

"...[T]he applicant was denied 'a fair public hearing' before a court. In my view, the second respondent's explanation for the situation does not show cause why she should not be ordered to pay the costs of these proceedings. I had considered awarding costs against the second respondent *de bonis propriis*. However, such an order is only called for if it can be said that the second respondent had acted *mala fide*

or with manifest bias. I cannot make that finding on the facts as they appear before me. Nevertheless, it would be unjust for the applicant to be mulcted in costs in circumstances where she was simply exercising her rights as a litigant and having been prevented from so doing by the unreasonable conduct of the second respondent." [Page 53]

Second respondent was ordered, in her official capacity, to pay the applicant's costs in the High Court proceedings.

SELECTED JUDGMENTS

PRIVATE LAW

WILLIAMS V ISAACS (24968/2014) [2014] ZAGPPHC 230 (9 APRIL 2014)

The case was about the restoration of water and electricity supply to a tenant after the respondent unlawfully cut the supply to the applicant.

Matojane J held:

"Counsel for the Respondent submitted, wrongly in my view, that it is impossible for the Respondent to restore Plaintiff's right to water as it is the municipality that can reconnect the water supply. It is not in dispute that Applicant was in peaceful and undisturbed possession of access to water on the property." [Paragraph 7]

"It is also not in dispute that Respondent caused a pre-paid meter to be loaded with the amount of R3 000.00 that he owes to the municipality and as a result of Respondent's failure to pay water charges; the municipality disconnected the water supply." [Paragraph 7]

"The Respondent's claim in the circumstances can therefore be properly considered as a claim for a mandament van spolie as Applicant seeks restitution ante omnia which can only be achieved by the Respondent paying his debt to the municipality." [Paragraph 7]

"In my view, the Respondent deliberately deprived Applicant of her right of to access water supply in premises." [Paragraph 7]

Respondent was ordered to restore the status quo ante by restoring Applicant's access to water.

SOCIO-ECONOMIC RIGHTS

BAKGATLA-BA-KGAFELA COMMUNAL PROPERTY ASSOCIATION V MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS (LCC 80/2012) [2013] ZALCC 16

Case heard 6 March 2013, Judgment delivered 14 June 2013

Applicant approached the court to be declared a registered Communal Property Association in terms of section 8 of the Communal Property Association Act 28 of 1996. The respondents challenged the application on various grounds, including lack of locus standi of the applicant and lack of jurisdiction by the Land Claims Court to hear the matter.

Matojane J began by considering the jurisdiction of the Land Claims Court:

"In my view, jurisdiction can be found in the provisions of section 22{2)(c) of the Restitution Act which reads as follows: - "Subject to chapter 8 of the Constitution, the court shall have jurisdiction throughout the Republic and shall have-the power to decide any issue in terms of this Act or in terms of any other

law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, If the Court considers it to be in the interest of justice to do so." [Paragraph 15]

"What Is required to confer jurisdiction on this Court in terms of the above section is, firstly, that the issue to be decided is incidental to an issue within the jurisdiction of the Court and, secondly, that the Court considers it to be in the interests of justice to do so." [Paragraph 16]

"It is therefore in the interest of justice that the issue before me, been incidental to a land claim, be determined by this court." [Paragraph 18]

"Sebapi in referring the application to himself (in his other capacity) as a Registration Officer for registration is null and void for absurdity. Consequently, the application that qualified for registration was, in my view, never registered." [Paragraph 33]

"In my view, the action of Mr. Sebabi is invalid on another ground, as the Act does not give a Registration Officer the discretion to decide whether to register or not to register an association; once the registration of an association is approved by the Director General, the Registration Officer must register it as such." [Paragraph 34]

"I disagree with the submission by counsel for the eleventh and twelfth Respondents that the parties could validly reach an agreement with the Minister, to override the recommendations by the Director-General and convert an approved application for permanent registration to a provisional one and instruct the Registration Officer accordingly. The Minister has no role to play in the registration process." [Paragraph 34]

"In my view, the registration of the provisional association was not authorised by law. All the requirements for the registration of a permanent association have been met and the Registration Officer failed to carry out a recommendation by the Director-General to register the Association in terms of section 8(3) of the Act. The association can accordingly be registered." [Paragraph 40]

The applicant was declared an Association and the relevant authorities were ordered to register it. The judgement was overturned on appeal by the SCA in Bakgatla-Ba-Kgafela Tribal Authority v Bakgatla-Ba-KgafelaTribal Communal Property Association (939/13) [2014]ZASCA 203 (28 November 2014).

NKWALI BROTHERS FARMING CC V THELA AND OTHERS (49374/2007) [2010] ZAGPPHC 613

Judgement delivered: 18 May 2010.

Applicant sought to have a number of people evicted from their farm. The respondents argued that they had rights of an 'occupier' as defined in terms of section 1 of the Extension of Security of Tenure Act, No 62 of 1997 ('ESTA')

Matojane J considered the jurisdiction of the High Court to hear the matter, and held:

"... I am not called upon to regulate tenure rights and the conditions under which the right of persons to reside on land may be terminated, this is the exclusive jurisdiction of the Land Claims Court in terms of section 20(2)." [Paragraph 4]

"Accordingly, this court, in my view, has the ordinary power to interpret the provisions of ESTA in order to determine which of the two Acts apply in the dispute before me." [Paragraph 4]

"In my view, the consent of the previous owner to the occupation of farm by the respondents was never lawfully withdrawn before the farm was sold. The respondents continued to reside in the farm despite the fact that the new owners had never consented to their occupation." [Paragraph 6]

"Section 25(3) provides that if an occupier vacates the land concerned freely and willingly, while being aware of his or her rights in terms of this Act, he or she shall not be entitled to institute proceedings for restoration in terms of section 14. It is clear that the said respondents were not aware of their rights in terms of ESTA at the time they left, they therefore have a right to claim restoration in terms of section 14 of the Act." [Paragraph 8]

"Though they are unlawful occupiers in terms of PIE, they still have the opportunity to apply to regularize their occupation and the order of eviction will defeat the purpose of the Act, which is to facilitate legally secure tenure for vulnerable people living on land that belongs to someone else." [Paragraph 8]

The application was dismissed.

ADMINISTRATIVE JUSTICE

ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD AND OTHERS V CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY AND OTHERS (7447/2012) [2012] ZAGPPHC 185

Judgement delivered: 28 August 2012.

This was an application to prevent SASSA from implementing a tender it had awarded to Cash Payment Services ("CPS") for the distribution of social grants involving about R500 billion. Applicants alleged that the tender process was fundamentally flawed at almost every level, from the terms of reference, to the procedure, to the ultimate evaluation and adjudication of the bids.

Matojane J held:

"Applicants contend that failure to answer certain questions were prejudicial to their bid yet they were contend to submit their bid and participate in an unfair tender process without raising an objection nor interdicting it… The conclusion is inescapable that applicants raise the issue of procedural unfairness at this stage because they were unsuccessful" [Paragraph 38]

"It is significant that applicants raise the issue of the alleged procedural irregularity in the tender process only because they were unsuccessful. It was open to the applicants to either interdict the continuance of the tender process or to apply for a further extension to amend their tender submission if they were of the view that the Bidders Notice introduced a new requirement … In my view, this ground of review must fail." [Paragraph 51]

"The duty to act fairly requires in the circumstances of a particular case that an administrator bring to a person's attention the critical issue on which the decision is likely to turn so that the person may have an opportunity to deal with it" [Paragraph 57]

"In my view, the process followed by SASSA in reducing the applicants score was irrational, unfair and inconsistent with the requirements of section 217 of the Constitution, PFMA and PAJA" [Paragraph 58]

"It follows in my view, that the essential question in determining whether there is a reasonable apprehension of bias is whether there is a possibility (real and not remote) and not a probability that an administrator might not bring an impartial mind to the question to be determined." [Paragraph 62]

Matojane J found that no conflict of interest had been shown [paragraph 63], but that the failure to assess the capacity of CPS's BEE partners to perform the percentage of work undertaken, before the tender was awarded, was unlawful, having been taken for an ulterior purpose [paragraph 65]. Matojane Jthen considered the appropriate remedy:

"It is not clear how long it will take for a new tender to be commenced with as applicants argues that the present tender is fundamentally flawed at every level and new bid specifications and terms of references will have to be formulated. No evidence has been placed before court as to the practicality and mechanics of there [sic] proposals. … Applicants rely on SASSA's version that the process of migration from Allpay to CPS can be reversed provided that it has a minimum of 60 days, this does not take into account that CPS, prior to implementation of the award, paid approximately 50 percent of the social grant beneficiaries in the country and it was therefore geared towards a takeover of all beneficiaries nationally in a relatively short period of time. It is not clear whether applicants nor Empilweni has the infrastructure to do so. " [Paragraphs 76 – 77]

"The remedy proposed by applicants is not just and equitable in the circumstances as it does not ensure that there will be no interruption in the payments of grants. Practicality and certainty in my view, does not require the setting aside of the agreement that SASSA has entered into with CPS." [Paragraph 78]

The tender process was thus declared illegal and invalid, but the award of the tender was not set aside. The SCA dismissed an appeal by AllPay against the refusal of the High Court to set aside the tender award, but upheld a cross-appeal by CPS against the declaratory order of illegality and invalidity (AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2013 (4) SA 557 (SCA)). The Constitutional Court set aside the decision of the SCA, declaring the award of the tender to be constitutionally invalid, and suspending the order pending a determination of the appropriate remedy (AllPay Consolidated Investment Holding (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC)). Subsequently, the Constitutional Court ordered that SASSA initiate a new process for the payment of social grants, and that the declaration of invalidity be suspended until the decision on the awarding of the new tender was made (AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12.

ESOFRANKI PIPELINES (PTY) LTD AND ANOTHER V MOPANI DISTRICT MUNICIPALITY AND OTHERS (13480/2011,17852/2011) [2012] ZAGPPHC 194

Judgement delivered: 29 August 2012

The case was an application for the review and setting aside of a decision by the respondent municipality to award a tender to a joint venture between Tango Consultancy and Tlong Rea Trading (the second and third respondents). The applicants argued that the Municipality was biased and acted in favour of the

joint venture. The court had to decide two issues: first, an application to ensure that an interim interdict against the respondent remain in force pending an appeal by the respondent, and the costs thereof. Second, the main review applications.

Matojane J held:

"In my view, all steps taken by the Municipality were in accordance with the Uniform Rules of Court and Rules of the Supreme Court of Appeal. I do not agree that the attempts by the Municipality to overturn what it thought was a violation of its constitutional right to be heard in court was frivolous and vexatious or that it was dishonest and part of a stratagem to subvert the course of justice" [Paragraph 23]

"In our law, all administrative acts are presumed to have been done rightly until such time that the decision is set aside by a court of law. The Municipality was accordingly entitled to proceed on the basis that the award of the tender was valid and lawful until set aside by the court" [Paragraph 29]

"In a judicial review, the focus is on the process, and on the way in which the decision-maker came to the challenged conclusion, all the facts which allegedly occurred after the award of the tender, are irrelevant and are not taken into account." [Paragraph 31]

"This case cannot be properly decided without first having regard to the manner in which Esofranki, a civil engineering group with a turn over of 1.9 billion conducts this litigation. Esofranki and Cycad [the second respondent], despite their protestations to the contrary are not independent." [Paragraph 47]

"The Esofranki-Cycad joint venture was awarded a tender by the Ethekwini Municipality … The KwaZulu Natal High Court in the matter of Sanyathi Civil Engineering and Consultants v Ethekwini Municipality reviewed and set aside the award of the tender to the Esofranki-Cycad joint venture as the court found that corruption could not be ruled out in the tender process." [Paragraph 47]

"The conclusion is inescapable that the applicants have embarked on a deliberate strategy to attack the flanks of the Municipality simultaneously in a pinching motion until it capitulates and award the contract to Esofranki." [Paragraph 51]

"Esofranki is prepared to ignore the crime that it contents the Municipality and its legal representatives have committed if only it can get the contract. This is all the more so in circumstances where Mahowa has alleged in his duplicating affidavit that the relief sought against him de bonis propriis was brought for the ulterior motive of pressurising him to advise his client, the Municipality, to settle with Esofranki and Cycad." [Paragraph 58]

"The letter further demonstrates that attorney Thompson/ Esofranki is prepared to hamper the proper administration of justice through extortion or bribery in exchange for the contract." [Paragraph 62]

"In a sanctimonious and disingenuous manner, Esofranki seeks costs de bonis propriss against Mahowa with dirty hands and with an ulterior motive. " [Paragraph 62]

Matojane J then considered the main review application:

"The joint venture bid cannot be regarded as "acceptable" in that it does not comply with the specification and conditions of the municipalities' own bid document and was accordingly irrational, arbitrary and unreasonable." [Paragraph 71]

““Tlong was only created after the invitation to tender was extended and a week before the tender was actually submitted. It has no employees, assets or income.” [Paragraph 75]

““The Constitutional Court had found that where there is a procedurally unfair administrative action, this is a violation of the Constitution, and the court must in terms of section 172(I)(a), declare such action to be invalid.” [Paragraph 80]

“I … am of the view that each party should pay its own costs because of the unreasonable and unconscionable manner in which Esofranki and its attorney including Cycad conducted this litigation. I am also of the view that Esofranki and its attorney should be ordered to pay the ninth respondent's (Mr Mahowa's) costs on a punitive scale as a result of the vexatious and unjustified attack on Mr Mahowa.” [Paragraph 86]

The tender process was declared illegal and invalid and it was set aside. The decision was overturned on appeal in Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others (40/13) [2014] ZASCA 21 [see summary on page 74]

CIVIL PROCEDURE

FIRSTRAND BANK LIMITED V BALOYI N.O. (69717/2013) [2014] ZAGPPHC 881 (13 NOVEMBER 2014)

This was an application for condonation for the late delivery of an application for summary judgement. Applicants argued that they attempted to serve the application by hand at the offices of the defendant's attorneys on the 18 December 2013, but the latter's offices were already closed for the festive season.

Matojane J held:

“I cannot accept the applicant's explanation why it had not complied with the Rules. It is not unusual for attorneys offices to be closed on the 18th of December 2013 and that applicant should have taken the festive season into account when it decided to wait until the last moment to make an attempt at serving the application.” [Paragraph 16]

“In this matter the application was postponed on 19 February 2014 to enable the applicant to deliver an application for condonation for the late delivery of its application for summary judgment, In my view, the merits of the summary judgment application can only be dealt with once the condonation has been granted” [Paragraph 16]

“I am not convinced that this is a matter where I should exercise my discretion to grant summary judgment. By doing so, I would effectively close the doors of the Court to the respondent. In the light of this I believe that I should strike the matter from the roll.” [Paragraph 19]

CUSTOMARY LAW

MXIKI V MBATA, IN RE: MBATA V DEPARTMENT OF HOME AFFAIRS AND OTHERS (A844/2012) [2014] ZAGPPHC 825

Judgement delivered: 23 October 2014

In this appeal, the appellant argued that she had been validly married under customary law to the deceased, though the marriage was never registered with the Department of Home Affairs. She argued that part of the lobola was paid and negotiations were done. Central to issue was the question of which requirements are fundamental for a customary marriage to be valid.

Matojane J (Molop-Sethosa and Rabie JJ concurring) held:

"The payment of lobola is not as a requirement for the validity of a customary marriage yet it is intrinsically linked with its existence. In customary law man or a woman is not regarded as married until lobolo is paid." [Paragraph 8]

"In the present matter it is common cause that part of the negotiated lobolo was paid over to appellant's family but the parties never agreed on the formalities and the date on which the appellant will be symbolically handed over to her in-laws." [Paragraph 10]

"As a customary marriage is a union of two family groups a bride cannot hand herself over to her in-laws. Her family has to hand the bride over to her husband's family at his family's residence where the elders will counsel the bride and the bridegroom in the presence of their respective families" [Paragraph 10]

"Accordingly, in my view, it is the handing over of the bride, even if the lobolo has not been paid in full, that constitute a valid customary marriage not the payment of lobolo as the court a quo found." [Paragraph 10]

"In my view, the most essential requirement of a customary marriage, the handing over of appellant to her husband's family was never done. Accordingly a customary marriage though negotiated was never entered into or celebrated in accordance with customary law as required by the Act" [Paragraph 11]

"In the result, I would allow the appeal and set aside the order of the court below and replace it with: The application is dismissed with costs." [Paragraph 12]

ADMINISTRATION OF JUSTICE

NETCARE HOSPITALS (PTY) LTD V KPMG SERVICES (PTY) LTD AND ANOTHER [2014] 4 ALL SA 241 (GJ)

Judgment delivered 22 August 2014

Applicant sought to interdict the appointment of KPMG as a service provider to the Competition Commission for an inquiry into the health care market. Netcare argued that the relationship between Netcare and KPMG placed KPMG in a conflict of interest position due to having access to information confidential to Netcare. An order had previously been made, by consent, interdicting KPMG from providing information which came from its relationship with Netcare to the Commission. Netcare then

contended that KPMG had failed to comply with the order, and sought amended relief declaring that KPMG had breached the consent order.

Matojane J held:

"In my respectful view, the belated points taken by Netcare against the Commission and KPMG falls to be dismissed for the following reasons: Firstly, at no stage were the respondents called upon to meet a challenge on noncompliance with section 165 and 195 of the Constitution. There is no constitutional cause pleaded which itself is a bar to raising it now. There is further no relief sought by Netcare against the Commission in these proceedings" [Paragraph 68]

"Netcare makes the following submission based on the English decision of Prince Jefri Bolkiah v KPMG ("Bolkiah") which in my respectful view; incorrectly state our law regarding interdicts: "In the circumstances, our law makes clear that the Court must intervene and interdict KPMG from acting for the Commission unless it is satisfied that there is no risk (even if not substantial) of disclosure" [Paragraph 72]

"This court is loath to come to Netcare's assistance in this regard as Netcare is obliged by law to disclose any information that is relevant to the market inquiry voluntarily and in a candid manner" [Paragraph 110]

"I respectfully agree … that Netcare contend for an unsustainable interpretation of the Order, which was not within the contemplation of the parties at the time the Order was taken. A court order can never compel an individual to lie on oath and neither can it compel their employer to procure untruthful affidavits from them." [Paragraph 137]

The application was dismissed with costs

LETHLAKA V LAW SOCIETY OF THE NORTHERN PROVINCES (54065/2012) [2014] ZAGPPHC 902

Judgement delivered: 11 November 2014

The applicant sought readmission and enrolment as an attorney after the Law Society had successfully applied for his removal from the roll of attorneys in 2010. The court had to consider whether the applicant had reformed from his previous behaviour.

Matojane J held:

"If anything, the manner in which the applicant approached those issues as well as the nature of the unrestrained language used in describing the conduct of an attorney's firm and that of the Law Society, shows that the applicant lacks some of the important qualities expected of a practising attorney." [Paragraph 20]

"One of the main features of the present application is that the applicant has shown an inability to appreciate the seriousness and unacceptability of his conduct and thus the reasons why he was struck off the roll to begin with." [Paragraph 20]

"In my view, it is clear that the applicant has not discharged the onus to convince the Court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the

defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is re-admitted he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned." [Paragraph 30]

"In fact, quite the opposite appears to be the case. The applicant failed to make a full and frank disclosure of all the relevant facts; certain statements were factually incorrect; he dealt with only some of the allegations against him and ignored others; and he failed to show any remorse for what he had done wrong." [Paragraph 31]

"Instead, the applicant tried to defend his view that remorse was not called for and even went further by repeating his accusations, in unrestrained and defamatory terms, that not only two firms of attorneys but also the Law Society are guilty of unlawful conduct of a most serious kind, without presenting a proper factual base for such accusations." [Paragraph 31]

"The applicant's laconic remark that he would pay the Law Society's costs once he is readmitted as an attorney, falls far short of what is expected of an attorney" [Paragraph 34]

The application was dismissed with costs.

SELECTED JUDGMENTS

SOCIO-ECONOMIC RIGHTS

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

Judgement delivered: 30 July 2013

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

Meer AJP held:

"With palpable emotion, the plaintiff spoke of the trauma he endured in having to leave his farms, his home and the family partnership which had to come to an end as a result of the acquisition of the subject properties by the Trust. … [T]he plaintiff was adamant that the fact that he did not protest … against the acquisition of the subject properties or reject the price offered, did not indicate he was a willing seller. He said … he was not happy but accepted there was nothing he could do. …" [Paragraph 12]

"It is undoubtedly so that Black African people bore the brunt of injustice under repressive apartheid legislation … It is also the case that their human rights and dignity were violated incomparably with any other group by the apartheid legal machinery …" [Paragraph 25]

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

"The interpretation called for [by counsel for the defendants] would require me to traverse into the realm of the Legislature and legislate the exclusion of White persons and indeed other categories of persons who were not victims of the 1913 Land Act, under the guise of purposive legal interpretation. This I cannot do for it would offend against the doctrine of separation of powers, a hallmark of our democracy. …" [Paragraph 29]

"These cases [a series of judgements by the Land Claims Court] make clear that a deprivation of ownership which is prompted by a racial law or which has as its root cause a racial law is a forced sale and consequently a dispossession." [Paragraph 33]

"… The deprivation of ownership was prompted by a racial law, the root cause of the forced sale. In the circumstances the plaintiff was disposed of a right in land as contemplated in the Restitution Act." [Paragraph 36]

Meer AJP then dealt with the question of costs:

"... I was presented with the astonishing explanation [for differing approaches by the defendant to similar cases] that the different approach adopted in this case was on the instruction of the Eastern Cape Regional Land Claims Commissioner, whilst the approach in Hoogenboezem, was on the instruction of the Commissioner for Limpopo. ... I express my concern that there exist such regional divergences which can advantage one claimant in one province and disadvantage a similar claimant with almost identical claim in another province, with regard to legal precedent. Such an approach flies in the face of the guarantee at Section 9(1) of the Constitution to equality before the law and to equal protection and benefit thereof. ..." [Paragraph 39]

"The defendants' continued opposition on the issue of dispossession was in the circumstances, unworthy. Their stance in persisting with the argument that the Restitution Act was not intended to give relief to White persons in total disregard of precedent to the contrary, of which they were apprised, ran the risk of a punitive costs order. This was exacerbated by the late stage at which this point was raised for the first time ... The defendants were given notice that the plaintiff would seek attorney client costs and ... I am of the view that given their unworthy conduct, such costs are justified at the completion of the preliminary hearing on dispossession ..." [Paragraph 40]

Meer AJP found that the plaintiff had been disposed of rights in land under the Restitution of Land Rights Act, and ordered the first and second defendants to pay the plaintiff's costs in respect of the hearing on dispossession on the attorney and client scale.

QUINELLA TRADING (PTY) LTD AND OTHERS V MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2010 (4) SA 308 (LCC)

Case heard 1 April 2010, Judgment delivered 18 May 2010

Applicants sought an order declaring certain offers made by the second respondent dated 05 September 2007 for the purchase of their immovable property and the acceptance to be valid and binding in compliance with the provisions of sec 2 (1) of the Alienation of land Act No 68 of 1981. The respondents opposed the application on the grounds that - (a) no contract of purchase and sale was concluded since no written deed of alienation was signed by the parties, (b) impossibility of performance due to lack of funds, and (c) that no funds were appropriated for the purchase of the properties and the orders sought would be in contrary to sections 38 and 86 of the Public Finance Management Act No 1 of 1999.

Meer J held:

"Although the draft deeds of sale were discussed at a meeting on 10 February 2009, there was no agreement that the terms thereof would be included as material terms to the September 2007 agreements, nor do Respondents contend as much. Respondents have elevated the terms of the deeds of sale drafted by Applicants' attorney to a status which such documents simply did not enjoy. ... I take note that ex facie the offers to purchase it is not indicated that Second Respondent offers to purchase under powers delegated by First Respondent" [Paragraph 11]

"It must be noted that statutory delegation is distinguishable from contractual agency ... The peremptory provisions of Section 2 (1) of the Alienation of Land Act is therefore not contravened in the instant case in that the Second Respondent in signing the agreements did not act as the First Respondent's agent, but as a functionary of the State who had statutory authority conferred upon her through delegation by the Minister to bind the State in her own name." [Paragraph 16]

Meer J found that the offers and acceptances of September 2007 were valid and binding agreements in compliance with s 2(1) of the Alienation of Land Act.

"I pause here to emphasise, especially in view of the number of agreements to purchase land by Regional Land Claims Commissioners which this Court has of late been required to adjudicate upon, that in the absence of delegated authority to purchase under Section 42 D (3) of the Act, or approval of agreements by the Minister under Section 42 D (1) thereof, such agreements by Regional Land Claims Commissioners are not in accordance with Section 42 D, and do not lend themselves to settlement of land claims under Section 42. The powers of the Commission as set out at Section 6 of the Act do not include the power to enter into agreements for the purchase of land. This power, in terms of Section 42 of the Act is the preserve of the Minister alone. As it is the state which effects restitution, so too it is the state through the Minister which purchases land for this purpose. The Commission being an organ of state does not have this authority. Any agreement of sale negotiated by the offices of the Commission or a Regional Land Claims Commissioner in settlement of a land claim is therefore not binding unless done so under delegated powers as in this case, or is entered into by the Minister under Section 42D of the Act." [Paragraph 18]

"During the preparation of this judgment I invited Counsel to make written submissions also on the question whether Applicants had a legitimate expectation that Respondents would abide by the 2007 agreements, an aspect which was not raised before me at the hearing." [Paragraph 19]

"... A public official such as the second respondent and a minister of State, as is the first respondent, have a duty to act fairly, and such duty creates a legitimate expectation on the part of citizens with whom they contract that they will honour their obligations. The first and second respondents fell foul of their duty, did not fulfil the legitimate expectation, and are bound to fulfil their obligations under the 2007 agreement unless their defence of impossibility of performance succeeds." [Paragraph 24]

"Applicants seek costs against respondents on an attorney and own client scale. The conduct of respondents, they contend, was reckless, slack and lackadaisical. ... Respondents have in my view conducted this case in a manner deserving of censure, by means of a special order for costs to be taxed as between attorney and client. Respondents' disregard for their financial obligations under the contracts, their attempts to escape same by disputing the validity of the agreements, and their resort to spurious and unsubstantiated allegations of lack of funds, can be characterised as vexatious, reckless and reprehensible, and deserving of censure. The high-ranking statutory approval of the agreements in terms of s 42D of the Act, as aforementioned, created expectations which were thwarted by unacceptable dilatoriness on the part of respondents. Conduct of this ilk on the part of State officials flies in the face of fair contractual practice and furthers the aims neither of land restitution, nor the right thereto, as embodied, respectively, in the Act and the Constitution." [Paragraphs 33 - 34]

The offers and acceptances were held to be valid and binding agreements.

GLEN ELGIN TRUST V TITUS AND ANOTHER [2001] 2 ALL SA 86 (LCC)

The respondents were evicted from their dwelling as a result of a lawful termination of employment. In terms of Section 9(3) of the Extension of Security of Tenure Act 62 of 1997, an eviction order is fully complied with if a report detailing the availability of alternative accommodation, the constitutional rights of those affected and the undue hardship to the occupier occasioned by an eviction and any other matter

is submitted to a magistrate within a reasonable amount of time. The adequacy of the report in this case was in issue.

Meer J held:

"The report in my view does not pass muster. It has clearly failed to consider fully the question of alternative accommodation as is required by section 9(3)(a), which it ought to have" [Paragraph 5]

"Another difficulty I have with the report is that pertinently, it fails to address the constitutional rights of any person affected by the eviction. Section 9(3)(b) requires a report to be submitted "indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education."

"Whilst the report touches on the rights of the occupiers and their children, it is completely silent on the constitutional rights of the landowner, which invariably must feature in any eviction."

"The constitutional rights of any occupier affected by an eviction must include the right to housing, the right of the minor children of the occupier to education and shelter, and arguably even the right to life, whilst that of the affected landowner must be the right to property." [Paragraph 6]

"Whilst the Act requires these respective rights to be considered, and imposes complex procedural and substantive obstacles for landowners to overcome before they can evict occupiers, it should, of course, not be construed to suggest that the constitutional rights of the occupier stand to be enforced against the landowner. For clearly they cannot and indeed ought not to be so enforced lest the ludicrous situation arises whereby landowners are expected to take over the State's responsibility to provide housing to occupiers and education to their children." [Paragraph 8]

"Reports must emanate from full investigations with all relevant parties. They ought to clearly set out the constitutional rights of both owner and occupier and avoid the perception of being one-sided. The questions of alternative accommodation and hardships should similarly be considered with regard to the respective positions of owners and occupiers alike. It must be borne in mind that the Act seeks not only to regulate the eviction of vulnerable occupiers in a fair manner, but also recognises the right of landowners to apply to court for an eviction order under appropriate circumstances." [Paragraph 13]

The eviction order was set aside in its entirety, and magistrate directed to request a more comprehensive report.

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

Case heard 27 September 1997, Judgment delivered 27 September 1997

This case was an appeal to the Land Claims Court against a summary judgment granted by a magistrate's court for the eviction of the appellants (defendants) from the respondent's (plaintiff) farm. The respondents disputed the jurisdiction of the LCC on two grounds: (a) Section 13 of the Land Reform (Labour Tenants) Act 3 of 1996 only granted appellate jurisdiction to the Land Claims Court in respect of proceedings that were pending at the commencement of the Act on 22 March 1996, thereby excluding the present case, which commenced on 29 May 1996; and (b) it had not been found that the defendants were labour tenants.

Meer J held:

“As a threshold issue, I must first determine whether the Act gives the Land Claims Court jurisdiction over this matter.” [Paragraph 7]

“It is clear from the wording of the section that the Legislature granted appellate powers to the Land Claims Court expressly. The maxim expressio unius est exclusio alterius suggests that the framers of s 13 intended to give this Court appellate jurisdiction only in respect of eviction cases which were pending when the Act came into effect (by expressly providing therefor at s 13), and intended to exclude appellate jurisdiction over all eviction cases, pending or not, in references to jurisdiction elsewhere in the Act.” [Paragraph 7]

“Of significance also is that the summons sought to evict not labour tenants, but ordinary persons unlawfully occupying the farm, and the magistrate did not make a finding that they were labour tenants. The requirements of s 13 not having been met, I am of the view that this section does not confer jurisdiction on the Land Claims Court to hear the present appeal.” [Paragraph 8]

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

“Likewise, neither the jurisdiction conferred at s 29 of the Land Reform (Labour Tenants) Act and the ancillary powers referred to therein, nor the jurisdiction referred to at s 28N of the Restitution of Land Rights Act which sets out the Court's powers at the hearing of appeals, (both of which were referred to by appellants' counsel) takes their case any further, appellate jurisdiction not being granted in either section.” [Paragraph 11]

“The appellants have identified no clear function to which appellate jurisdiction could be incidental. It is my view that appellate jurisdiction is primary in nature and cannot be considered incidental.” [Paragraph 12]

“It is indeed an anomalous situation that the Land Claims Court does not have appellate jurisdiction in this particular matter, inter alia because the proceedings were not pending when the Act commenced, given that the Land Claims Court is the obvious forum to decide whether defendants are labour tenants or not. One can only suppose that the Legislature in enacting s 13 optimistically envisaged that after the Act came into force subsequent evictions of labour tenants would be brought directly to the Land Claims Court as required by s 5.”

“... Even where persons facing evictions may well be labour tenants, plaintiff landowners are unlikely to concede that the persons they seek to evict are labour tenants, since this would trigger the significant protections afforded to labour tenants under the Act”

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

so as to give the Land Claims Court power consistent with its purposes. Without such amendment, s 13 does not grant the Court power to hear an appeal like the present one." [Paragraph 14]

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

DULABH AND ANOTHER v DEPARTMENT OF LAND AFFAIRS 1997 (4) SA 1108 (LCC)
Case heard 3 February 1997, Judgment delivered 16 April 1997

Applicants claimed financial loss suffered as a result of their grandmother's dispossession, and being unable to inherit family property due to being legally compelled to sell the property to a white person in terms of the Group Areas Act 36 of 1966. Of particular importance was the interpretation of "dispossession" in section 121(2) of the Interim Constitution.

Meer J (Gildenhuys J concurring) held:

"The claim is an interesting and indeed unusual one in that the claimants and their family did not physically move off the property after it was declared to be a white group area." [Paragraph 8]

"... [I]t must be considered whether, given the circumstances, a dispossession of a right in land as contemplated under s 121(2)(a) of the interim Constitution had occurred. Neither the Act nor the interim Constitution defines the concept of dispossession. I was not able to find a definition of dispossession in any South African legal dictionary. The word is defined in some English and American dictionaries as follows: According to Jowitt's Dictionary of English Law, dispossession means 'ouster'. ..." [Paragraph 28]

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

"This issue is concerned with the concepts, 'restoration', 'restitution' and 'compensation'. It poses the related questions, can a claim for restitution of a right in land by way of compensation be permitted where physical restoration of the land has already been acquired by the claimants through their own means?" [Paragraph 32]

"To fully determine the ambit of restitution, one should reach beyond the immediate linguistic context of the word "restitution", its ordinary and grammatical meaning, as contained in the Interim Constitution ... to its wider legal and jurisprudential context so as to give effect not only to the purpose of the legislation, but also to the sense, spirit, ethos, morality and fundamental principles of the Interim Constitution and the Act." [Paragraph 46]

"A narrow meaning of restitution to exclude a claim purely for compensation in a case like the present, would be prejudicial precisely to those people whom the Interim Constitution and the Act seek to protect from the past injustices of discriminatory legislation. It would exclude the Claimants in this case, just because they have, through their own initiative, bought back property from which they were unfairly dispossessed, and it would take no cognisance of the hardship and unfair discrimination foisted upon them by law." [Paragraph 46].

“To deny their claim for compensation simply because they themselves effected restitution of their right of ownership would be absurd, and tantamount to punishing them twice. It would make a mockery of the spirit of the interim Constitution and the Land Restitution Ac.t” [Paragraph 60]

Meer J concluded that given the meaning of restitution, nothing precluded the applicants from claiming compensation.

SELECTED ARTICLES

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

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

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

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

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

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

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

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

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

SELECTED JUDGMENTS

PRIVATE LAW

VAN DER WESTHUIZEN V MINISTER OF SAFETY AND SECURITY (14013/2010) [2012] ZAGPJHC 207

Case heard 14 September 2012, Judgment delivered 10 September 2012

The plaintiff instituted an action against the Minister, alleging that he was wrongfully and unlawfully arrested and defamed in the presence of his family, despite showing proof that he was not the person being sought in connection with fraud related charges. The judge criticised the conduct of police officers.

On arrest without a warrant, Kgomo J held:

"Our Constitution and other enabling legislation do not countenance an arrest without a warrant for flimsy or negligible or obscure reasons. The law should be interpreted in such a way that the liberty of an individual is always paramount." [Paragraph 90]

On the test for a justifiable arrest without a warrant, Kgomo J held:

"... [T]he question to be determined in relation to the immunity given to the police under the applicable laws is whether any ordinary, prudent and cautious person authorised and bound to execute a warrant of arrest or effect an arrest, would have believed that the person being arrested was the wanted person or the person named in the warrant of arrest, if any." [Paragraph 93]

On the arrest of the plaintiff in the face of evidence proving his identity, Kgomo J held:

"The above conduct, in my view, and finding strengthens the plaintiff's contention that the second defendant acted with a tinge of malice that can even be characterised as racism" [Paragraph 104]

"It is thus my considered view and finding that the plaintiff was arrested in a dehumanising and inhumane manner in front of his small children and that the arrest has humiliated and traumatised him and his family" [Paragraph 114]

"Unlawful arrest and misuse of powers by members of the defendant is frowned upon and its escalation should be curbed as by yesterday, i.e. "pronto"." [Paragraph 131]

On the motive for the arrest, Kgomo J held:

"How he [the second defendant, the arresting officer] would not have known of the plaintiff is not only at variance with recognised concepts of truthfulness but also smacks of blatant lies being told. The plaintiff suggested and charged that this particular "docket" never existed at the time the plaintiff was released from custody but is a recent fabrication by the second defendant in a sorry attempt to cover up for his indiscretion and misdemeanour" [Paragraph 146]

"His creation of "Docket 1336/11/2009 (Vanderbijlpark)" was a failed or transparent attempt and/or ruse to try to cover up his illegal and unlawful act." [Paragraph 147]

On the refusal by the second defendant to testify, Kgomo J held:

"His failure or refusal to come and testify as enunciated in court by their counsel definitely left both the first defendant and its counsel with "*egg on their face*s." [Paragraph 148]

Addressing the recklessness of the arrest, Kgomo J held:

"Attempts were made to press him like a sack of mielie meal inside a Ford Ikon micro sedan until the second defendant and his colleagues realised that he cannot fit therein." [Paragraph 157]

"All of this solely because some police official's ego was sore or needed a boost. The malice inherent therein is palpable." [Paragraph 158]

Judgement was given in favour of the Plaintiff, who was awarded damages of R480 000.00

CIVIL AND POLITICAL RIGHTS

MPHAHLELE AND ANOTHER V MOLOTO AND ANOTHER (13/19023) [2013] ZAGPJHC 140

Case heard 6 June 2013, Judgment delivered 14 June 2013

This was an application by Mphahlele Letlapa and the Pan African Congress of Azania, seeking an order to declare that a meeting and the resolutions convened by the first respondent (Moloto Narius) were invalid.

In dealing with the time frames for the hearings, Kgomo J held:

"It is consequently my considered view and finding that the respondents' counsel's contention that there are no time frames set when a notice should be issued and whereafter after how long the disciplinary hearing should be held cannot be correct." [Paragraph 70]

"A member to be charged must be given an opportunity to make representations why the charges should not be proceeded with." [Paragraph 71]

"… [T]he total membership of those present who were allowed to take decisions at an NEC meeting of the PAC did not constitute a quorum to pass any valid and constitutionally permissible resolutions at the meeting of 11 May 2013 … Consequently, all deliberations at this meeting as well as all and any resolutions adopted or taken thereat are *null and void*, *ab initio* and thus invalid." [Paragraph 88]

"The time frames given to the first applicant, even if for argument sake the NEC at the meeting of 11 May 2013 had quorated, were woe-fully inadequate and are tantamount to denying the first applicant a right to a fair hearing. The application could still fail under those circumstances." Paragraph 96

On the suspension of the applicant, Kgomo J held:

"It comes down to the simple fact that the suspension by the committee elected at that meeting of 11 May 2013 of the first applicant cannot stand or be lawful, constitutional and valid."

"His suspension and subsequent dismissal thus also stands to be set aside as it is legally and factually a non-event when the Constitution of the second respondent is anything to go by." [Paragraph 90]

"For the sake of completeness as well as for future directives it is my view and finding that I should say something about the lead-up to the so-called disciplinary hearing that led to this application…" [Paragraph 91]

On the missing documents and subsequent response by counsel for the respondents, namely that it had been incumbent on the applicant to establish what further documents accompanied the charge, Kgomo J held:

"I find the last-mentioned attitude not only unreasonable but also an above average display of ignorance and arrogance." [Paragraph 95]

The suspension of the applicant and the subsequent resolutions by the respondents were declared null and void.

DE LANGE AND ANOTHER V ESKOM HOLDINGS LTD AND OTHERS 2012 (1) SA 280 (GSJ)

Case heard 11 April 2011, Judgment delivered 29 July 2011

This case concerned the disclosure of information under the Promotion of Access to Information Act (PAIA). The applicants were seeking an order directing Eskom to release information regarding its electricity pricing to some of its biggest customers. The respondents invoked sections 36 and 37 of PAIA, which provided for the mandatory protection of commercial or confidential information of a third party, while the applicants relied on section 46, which contained a public-interest override where a disclosure prohibited under s 36 or 37 would reveal an imminent threat to public safety or the environment.

Kgomo J held:

"Section 32 of the Constitution makes a decisive break with the past, entitling everyone to information held by the State. Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the State to a new regimen of openness and fair dealing with the public." [Paragraph 20]

"… [T]he importance of access to information held by the State or public or State entity as a means to secure accountability and transparency justifies the approach adopted in s 32(1)*(a)* of the Bill of Rights and in PAIA, namely that, unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the State or public entity as a matter of right." [Paragraph 34]

In dealing with public interest in the disclosure of information, Kgomo J held:

"The term 'public interest' may in my view mean more than the meagre aspect specifically identified in the section. It may include the public interest in upholding the law as well as the public's awareness of public safety or environmental risks. There may also be the public interest in furthering the general goals of the Act." [Paragraph 139]

"In their heads of argument and arguments in court both sides engaged in academic pontification and splitting of hairs about what is meant by 'substantial contraventions of or failure to comply with the law' and 'an imminent and serious public safety or environmental risk'." [Paragraph 140]

"My view is that if given their ordinary grammatical meanings the above expressions do not need any 'arm twisting' to understand what they imply or how they should be interpreted." [Paragraph 141]

In dealing with the impact of load shedding on the general South African public, Kgomo J held:

"... Billiton smelters consume 5,68% of Eskom's total base load capacity and that Eskom's base load deficiency is almost the same percentage, the conclusions by the applicants and the general public that the extent of the rolling electricity blackouts experienced in South Africa since 2008 would have been substantially reduced or completely eliminated make sense." [Paragraph 148]

"If electricity supply is unavailable to ordinary households, unhealthy power supplies like coal-fired stoves or braziers may be utilised. The environmental and health dangers associated with these alternative power supplies are obvious. People die from smoke or gas/fume inhalations."

"Lung diseases increase, resulting in unbearable pressure on healthcare facilities. Fatal consequences most times follow. These aspects are linked to substances released into the environment" [Paragraph 149]

"This situation brings into reckoning the issue of public interest — whether the harm contemplated in the refusal to disclose is outweighed by the public interest." [Paragraph 151]

"... [O]n the basis of the public interest override in terms of s 46 of PAIA, it is in the public interest that the first respondent disclose to the applicants the information or data as well as the documents sought in this application." [Paragraph 164]

The first respondent's decision to refuse to grant the applicants' request for access to information was thus set aside, and the first respondent was ordered to provide specified records and information to the applicants. The decision was upheld by a majority of the Supreme Court of Appeal in BHP Billiton Plc Inc and Another v De Lange and Others 2013 (3) SA 571 (SCA).

CIVIL PROCEDURE

COAL OF AFRICA LIMITED AND ANOTHER V AKKERLAND BOERDERY (PTY) LTD (38528/2012) [2014] ZAGPPHC 195

Case heard 23 July 2013, Judgment delivered 05 March 2014

Applicant, a coal mining company, sought to have the respondents (the owner of the Lukin farm property) interdicted to stop respondents denying them access to the farm in order for them to carry on prospecting operations. The respondents argued that that the applicant did not have a clear right, and that the requirements of the Mineral and Petroleum Development Act (MPRDA) were not met when the prospecting rights over the Lukin property were conferred.

On the justification of invasion of ownership rights and accompanying harm to the environment by prospecting and mining, Kgomo J held:

"... [P]rospecting and mining is, in principle, justified by the need to promote development and to contribute towards the redress of poverty and lack of access to the resources and the riches of our

country by as many of the inhabitants of our country in iine with the previous, preconstitutional dispensation" [Paragraph 39]

"The views and interests of the landowner, who may be unwilling to allow his/her property to be "invaded' this way, and those of the broader community, must be taken into account in the decision-making process." [Paragraph 39]

"... [T]he nature of the rights created under mining and environmental legislation (which include prospecting) is such that a number of different and potentially competing rights and interests must be considered and. if possibie, accommodated." [Paragraph 44]

On the allegations of the invalid administrative acts, Kgomo J held:

"It is common cause that generally, an unlawful administrative act remains vaiid and/or enforceable in law and has legal consequences which prevail until the so-said unlawful administrative act or decision is reviewed and set aside, in this sense, such acts are said to be or described as voidable." [Paragraph 58]

On the issue of whether the applicants consulted with the respondents, Kgomo J held:

"The respondents in their submissions attempted to pour cold water on this letter and its import. After analysing the arguments on this aspect i am satisfied that the respondent was approached for purposes of consultations but the respondent refused to consult or frustrated the applicant's attempts to have such consultations going" [Paragraph 83]

"After taking into account the viewpoints of both sides, checking on the applicable laws and factoring facts as dictated by probabilities and the circumstances, it is my view and finding that the applicants have made out a case for the grant of the prayers they sought. The respondent's points of dispute and defence did not withstand scrutiny." [Paragraph 127]

The respondent was interdicted and restrained from refusing the applicant access to property.

CRIMINAL JUSTICE

S V AGLIOTTI 2012 (1) SACR 559 (GSJ)

Case heard 12 August 2010, Judgment delivered 16 August 2010

This was an application by the State for the admission of the accused's record and contents of bail proceedings at his trial. Central to the case was the fact that the accused was not warned of his rights under Section 60(11B)(c) of Criminal Procedure Act. The case deals with the importance of the section in guaranteeing the right to a fair trial.

On the conduct of the State advocate during trial, in failing to provde a witness statement prior to the witness being called, Kgomo J held:

"I made it clear to the state counsel that that state of affairs was highly undesirable, as it may likely be classified as something akin to 'ambush litigation' ...." [Paragraph 4]

Referring to the principle in *S v Pienaar* that that an affidavit ranked as evidence, but not as high as viva voce evidence, Kgomo J held:

"The court talked therein of higher- caste evidence and lower-caste evidence. In my view that is a recipe for ambiguity and lack of legal certainty. Evidence should be evidence, finish and klaar." [Paragraph 31]

In dealing with the importance of Section 60(11B)(c) of Criminal Procedure Act, Kgomo J held:

"The warning in terms of s 60(11B)(c) is an important constitutional safeguard that impacts directly on whether an accused person receives a fair trial." [Paragraph 35]

"The interests of justice require that the accused's constitutional rights and guarantees be respected" [Paragraph 37]

"It is my considered view that, even where an accused or applicant, in a bail hearing concerning schedule 6 offences, intends to use an affidavit, it is a peremptory duty of the court, right at the beginning of the proceedings, to warn him fully and comprehensively of the provisions of s 60(11B)(c)." [Paragraph 39]

"As I stated before, both oral evidence and affidavit are evidence that may be used in the subsequent trial. As such, the requisite warning should be issued by the court to the accused before he elects to testify orally or to use an affidavit." [Paragraph 39]

"Whether he was represented by a good, able or competent, or experienced, counsel is not a consideration that would affect what ought to be done. It should be done by the court, not by counsel or attorney representing the applicant in the bail proceedings." [Paragraph 41]

The application was dismissed.

S V AGLIOTTI 2011 (2) SACR 437 (GSJ)

Case heard 26 July 2010, Judgment delivered 25 November 2010

The accused was charged with conspiracy to murder under the Riotous Assemblies Act, and with attempted murder. Alleged co-conspirators admitted to various degrees of involvement in a conspiracy to commit murders, and testified as witness subject to potential immunity under section 204 of the Criminal Procedure Act. The co-conspirator who could implicate the accused did so in a supplementary affidavit and was discredited during cross examination, leaving the State without a prima facie case against the accused at the close of its case. At the conclusion of the state's case, the accused applied for a discharge under section 174 of the Criminal Procedure Act, arguing that he had not received a fair trial and that the state had not made out a prima facie case. The case dealt with the position under South African law with regard to assisted suicide, euthanasia, and the general expected conduct of prosecutors.

On euthanasia and assisted suicide in South Africa, Kgomo J held:

"In South Africa the situation is still fluid and confusing. Different functionaries have differing views on euthanasia (especially) and assisted suicide. Civil society at times holds views opposed by adherents of religion who, in turn, are wont to differ *inter se*." [Paragraph 19]

“Our courts have also in the past sent out inconsistent views in contradictory judgments on assisted suicide and euthanasia. When one traces the development of this phenomenon the confusion increases. The initial view was that a person who knowingly supplied any drugs to a patient for use in a suicide or who hands another a weapon to kill himself/herself was guilty of an offence.” [Paragraph 20]

“The conclusion one arrives at, at the end of it all, is that in South Africa a person assisting any other person to commit suicide — let alone actually killing the suicide requestor — will be guilty of an offence. Consequently, anyone who conspires with, aids and/or abets another to commit suicide, albeit called assisted suicide, will be guilty of an offence.” [Paragraph 21]

“This case is about hidden and/or sinister agendas perpetrated by shady characters, as well as ostensibly crooked and/or greedy businesspersons. It is about corrupt civil servants, as well as prominent politicians or politically connected people, wining and dining with devils incarnate under cover of darkness.” [Paragraph 24]

Regarding the section 204 witnesses, Kgomo J held:

“This points to some kind of 'muvhango' (conflict or dissensus) somewhere in the innards of the DSO and DPP, which is, fortunately, no concern of ours here. Suffice to say that insofar as statements, affidavits, dockets, evidential material and anything that impacted on this trial were held back by the past or present investigation teams, both the State and the defence were hampered and the course of justice was somewhat hindered if not obstructed.” [Paragraph 43]

“… Their rendition was like a scene from a mafia film — tragic, emotionless and comical — only it was real and serious.” [Paragraph 46]

The accused was discharged in terms of section 174.

SELECTED JUDGMENTS

PRIVATE LAW

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

Case heard 1 April 2011, Judgment delivered 12 April 2011

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

Legodi J held:

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

"On 19 March 2011 the applicant attempted to gain access to the scheme by using his access disk at the security gate. It did not activate the security boom and as a result he was unable to gain access to the village complex." [Paragraph 10]

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

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

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

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

"... The statement suggests the existence of a 'rule of conduct' in terms of the respondent's rules, which entitles the respondent to suspend the access tags of those owners who fail to make payment of the monthly levies. Of course, the two clauses referred to above make no reference to such a 'rule of conduct' for such entitlement, nor is such reference made anywhere else in the agreement. Even if there were, in my view, the respondent would not have been entitled to spoliation without due process of the law. In other words, it could not have taken the law into its own hands, as it did." [Paragraph 19]

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

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

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

The spoliation order was granted.

COMMERCIAL LAW

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

Case heard 9 September 2009, Judgment delivered 11 September 2009

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

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

"Clear [sic] from what has been quoted above that, a credit provider will not be entitled in terms of paragraph (b)(i) of section 129(1) to commence any legal proceedings to enforce the agreement before

first providing notice to the consumer, as contemplated in paragraph (a) of section 129(1) and meeting any further requirements set out in section 130." [Page 2]

"The issue that worried me was whether the letter ... addressed to the consumer, that is, the defendant, complied with the provisions of section 129(1)(a). ... The notice in terms of section 129 as I see it is intended to ... draw the default to the attention of the consumer, ... to propose to the consumer to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, [and] to draw the consumer's attention that such a referral is with the intention that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date. ... In two respects, I am not satisfied that there has been full compliance with the requirements of the notice. ... Firstly, the portion of the letter of the notice quoted earlier in this judgment, makes no reference to alternative dispute resolution agent as an option to which the credit agreement might be referred. I do not see this omission as a minor omission. It could be that a consumer may never have heard of debt counsellor, consumer court or ombudsman, but it could be that an alternative dispute resolution agent is well known to a consumer ... Secondly, the whole idea of referral should clearly be spelled out to a consumer. You do not make a referral without a purpose. It is not each and every consumer that is told to go to a debt counsellor, consumer court or ombudsman that will know the purpose thereof. ... Having not been satisfied that there has been a compliance with the provisions of section 129, the application for a summary judgment is destined to be dismissed." [Pages 3 - 4]

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

ADMINISTRATIVE JUSTICE

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

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

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

Legodi J held:

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

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

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

The decision was overturned on appeal: **2007 (5) SA 236 (SCA)**

ENVIRONMENTAL LAW

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

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

Legodi J held:

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

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

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

CRIMINAL JUSTICE

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

Case heard 12 October 2009, Judgment delivered 12 October 2009

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

Legodi J (Phatudi J concurring) held:

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

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

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

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

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

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

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

"The accused pleaded guilty to the charge and he was convicted on his plea. By this he indicated a sign of remorse, which … required an element of mercy to be considered. Remember, mercy in a criminal court means that justice must be done, but it must be done with compassion and humanity, not by rule of

thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation. …" [Paragraph 17]

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

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

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

Legodi J finally considered the question of judicial notice:

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

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

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

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

Judgement delivered 2 March 2005

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

Max prison. Plaintiff also claimed damages for inhumane treatment in the C-Max prison, including actions which harmed his privacy and sense of dignity.

Legodi J held:

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

"I need to pose and emphasise that whilst the Commissioner of Correctional Services is entitled to determine the security measures applicable at different prisons … the plaintiff as a prisoner was entitled to all his personal rights and personal dignity not temporarily taken away by law…The keeping of the plaintiff in solitary confinement for 23 hours per day, in my view, did not accord with the principle of decency and may have infringed the plaintiff's fundamental rights to be treated like any other citizen except those rights taken by law expressly or by implication or those necessarily inconsistent with the circumstances in which the plaintiff as a prisoner was held." [Paragraphs 36–37]

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

S V SILUBANE [2005] JOL 15264 (T)

The accused had escaped from police custody. Accused was caught and once rearrested, was taken to 'a place in the veld' where he pointed out certain firearms and ammunition. Police had then shot him on the grounds that he had taken a threatening stance towards him. The accused denied there had been a pointing out, but that police had threatened to take him to the 'veld' in order to kill him.

Legodi J held:

"In the present case the accused was undefended, it is not clear how his constitutional rights, particularly The right to remain silent and not compelled to make the pointing out were explained, the accused clearly suggested that he was threatened and without his permission taken to a bush where he was shot without any reason." (Page 5)

"An accused person is entitled to insulate the inquiry relating to voluntariness in a compartment separate from the issue of guilt, a trial-within-a-trial is intended to prevent a collision or attenuation of two important rights of a criminal accused i.e. the right to prevent inadmissible statements being led in evidence against him and the right not to give evidence at the close of the State's case." (Page 6)

Legodi J (Van der Merwe J concurring) held that failure to hold trial within a trial was a serious irregularity that rendered the trial unfair. The charge of unlawful possession of ammunition and an unlicensed firearm were accordingly dropped.

S V TAWANA [2005] JOL 16013 (T)

The accused had been sentenced to two years imprisonment for assault (with intent to do grievous bodily harm) of his lover. The accused, who was a first offender, had attacked his lover with an iron bar 'in a fit of jealousy.'

Legodi J (Bosielo J concurring) held:

"In my view, 2 years' direct imprisonment is harsh particularly taking into account the fact that the accused is a first offender. Furthermore his actions appear to have been driven by jealousy. On the other hand, the assault on the complainant appears to have been serious although the assault did not result in any permanent disability."

"In our new constitutional democracy no man should feel superior over women, particularly as women have for so long suffered domination by men. Needless to state that women are not chattels to be owned by men. Obviously this is a serious challenge to the majority of men who have been brought up in a patriarchal society."

Legodi J held that due to accused being a first offender, the sentence of two years was too harsh. It was reduced to 18 months imprisonment of which 6 months' imprisonment was suspended for a period of 3 years, on condition that the accused was not convicted of assault with intent to do grievous harm, or any offence where violence was the element of the offence, during the period of suspension.

SELECTED JUDGMENTS

PRIVATE LAW

NETWEEN V NEMBAMBULA (598/2009) [2014] ZALMPHC 3

Case heard 12 September 2014, Judgment delivered 12 October 2014

This was a claim for damages suffered by the plaintiff as a result of a road accident involving him and another motor vehicle.

Makhafola J held:

“Mbulungeni Robert Maposa commonly referred to as "Pastor" was the most evasive witness for the plaintiff. When asked if he needed to be taken to the scene of the collision to be able to say a motor vehicle made a U-turn, his answer was: "I was not taken to the scene.” [Paragraph 48]

“Pastor" was a disaster during his testimony in cross-examination. He denied that he testified that the taxi had zigzagged. Here, he clearly contradicted his evidence- in-chief.” [Paragraph 51]

“Pastor" failed to read his police statement where he had mentioned that the Bantam had made a U-turn... The U-turn version is a fabrication by "Pastor"” [Paragraph 53]

“But "Pastor" cannot be allowed to change his statement at this stage. He was expected to have read his statement during consultation with the plaintiffs legal team.” [Paragraph 57]

“Conversely, the defendant was a good witness who stuck to his version of events without evading the cross-examiner's questions. He was also not argumentative. He did not find it convenient to change his version when it did not suit him” [Paragraph 64]

“The plaintiffs onus has not shifted and he has been bound throughout the trial to prove negligence on the part of the defendant. The plaintiffs driver was at pains to present evidence as to why if he had not been driving at a high speed, his taxi had to come to a standstill at a distance of more than 140 metres from the alleged point of impact.” [Paragraph 78]

“... [T]hat ultimately the plaintiffs case has dazzled dismally from its first witness to its third witness; and finally bowed out to the defendant's case leaving the court with one option of finding in favour of the defendant.” [Paragraph 79]

The plaintiff’s case was dismissed.

SOCIO-ECONOMIC RIGHTS

CHIEFTAIN REAL ESTATE INCORPORATED IN IRELAND v TSHWANE METROPOLITAN MUNICIPALITY AND OTHERS 2008 (5) SA 387 (T)

Case heard 4 April 2008, Judgment delivered 4 April 2008

This was an application for an order joining the Government of the Republic of South Africa and the MEC for Housing in Gauteng Province to the main application, wherein the applicant sought to compel the Tshwane Metropolitan Municipality to remove all illegal settlers from the applicant's properties. The respondents opposed the application for joinder, arguing that there was no question arising between government and the applicant that depended upon the determination of substantially the same questions of law or fact to found a joinder.

Makhafola AJ held:

"In casu there are 20 000 occupiers … and the applicant has not as yet applied for eviction because the municipality had made an undertaking it would do that." [Paragraph 28]

"The occupiers are violent and aggressive and they are not prepared to move. The municipality has left this colossal problem of eviction in the hands of the applicant." [Paragraph 28]

"Taking its cue from the Modderklip case that illegal occupiers of a big number are hard, if not impossible, to evict, why should the applicant first obtain an eviction order as the owner of the property?" [Paragraph 29]

"Will it serve any purpose when the attitude of the occupiers is clear? The municipality lacks the capacity to evict." [Paragraph 29]

"The municipality is part of the hierarchy of the national organs of State. If it fails to protect the applicant the same duties of protection vested in the provincial and national organs of State should be invoked." [Paragraph 30]

"And in a case of this nature where the applicant and the illegal occupiers' rights have to be protected, the municipality having expressed lack of sufficient funds, the second and third respondents as higher echelons of the organs of State have a direct and substantial interest in the final outcome of the main case." [Paragraph 31]

The application was granted.

CIVIL PROCEDURE

NEDBANK LIMITED V GELDENHUYS AND ANOTHER (13509/2005) [2005] ZAGPHC 286)

Case heard, Judgment delivered 27 July 2005

The applicant applied for summary judgment for the payment of money owed by the respondents. The applicant further prayed for an order declaring the mortgaged property of the respondents' executable. The respondents raised a number of defences including that the summons did not disclose a cause of action, that they were not in default and that the applicants wrongly calculated the amount of money due.

Makhafola AJ held:

"At best the defendants ought to have stated the sum which is not the result of any miscalculation which according to them is the correct calculation of the amount which is due, owing and payable to the plaintiff in future, and at the time of the issue of summons." [Paragraph 6]

"This would create a dispute to the sum claimed and display doubt that the plaintiff's case is unanswerable and unimpeachable." [Paragraph 6]

"To my mind, this would enable the court to assess the bona fide defence in favour of the defendants and this would meet the test of "full disclosure of the nature and grounds of the defence raised and the material facts upon which this is founded ....."" [Paragraph 6]

"In the circumstances, the defendants' case on the merits and the points in limine is untenable and, therefore, decided against the defendants." [Paragraph 6]

Summary judgment was granted against the respondents.

CRIMINAL JUSTICE

GADE V S [2007] 3 ALL SA 43 (NC)

Case heard 07 March 2007, Judgment delivered 09 March 2007

This was an appeal against a refusal to grant bail by the Magistrates' Court.

Dealing with delays in the bail application, Makhafola AJ held**:**

"There is a disturbing aspect in the record depicting a delay in the hearing of the appellant's bail application." [Paragraph 13]

"This bungle-up is unacceptable as it delayed justice and in the process prejudiced the appellant… Perhaps in particular to Upington the administrative arm needs to be brought to the

attention of the relevant authorities so that the workings there should be "BATHO PELE" – "PEOPLE FIRST" conscious as other places in the country." [Paragraph 14]

Dealing with questioning by the presiding officer during proceedings, Makhafola AJ held:

"The general principle about questioning a witness by the court is noble and sound. The court has the right to question any witness at any stage of the proceedings the main purpose being to clarify and clear up points which are still obscure." [Paragraph 15]

"… There is nothing obscure about where the appellant's wife works and in what capacity she works. The manner of asking the questions depicted [in]the record clearly reflects cross-examination by the court." [Paragraph 16]

"… This manner of conducting the proceedings is irregular because it compromises the impartiality of the presiding officer. Whereas regard to withdrawn charges, in my view, exaggerates and magnifies unnecessarily the pending trial the appellant is facing and it has impacted negatively to the granting of bail." [Paragraph 22]

"From the totality of the evidence there exist no prima facie indications that the proper administration of justice and the safe-guarding thereof will be defeated or frustrated if the appellant is admitted to bail." [Paragraph 28]

"… [T]hat the prosecution in its opposition to bail relied on the charge of robbery with aggravating circumstances which is lacking in persuation that the court hearing bail application could not even prima facie express a view of the strength or weakness of the case against the appellant" [Paragraph 30]

The appeal succeeded and bail was granted.

MAZIBUKO V MINISTER OF CORRECTIONAL SERVICES & OTHERS [2007] JOL 18957 (T)

Case heard 07 December 2005, Judgment delivered 07 December 2005

The applicant sought to review the Minister's decision not to grant him medical parole. He had been convicted of serious crimes and sentenced to life imprisonment. The case addresses the issue of whether a Minister can deny the release of a convicted person who has complied with the requirements of the Act.

Makhafola AJ held:

"In my view, there is nothing in the Act, which requires the first respondent, to base his decision on a second opinion, of any medical officer. For the purposes of the relevant section of the Act, the applicant is entitled to release on medical grounds." [Page 6]

"In the circumstances, one is at pains to ask the following: is the continued incarceration of the applicant serving any purpose in terms of imprisonment; if the applicant is released in terms of the Act, is he going to enjoy life at his home when in his own words, he is a spent-force? The answer is no."

"It is clear and lucid that the applicant has been convicted of very serious crimes, and that by law, he is required to serve his sentences lest a wrong message be sent out to the community, that when you are sick, you will be released to go home and continue to enjoy life, as if nothing had happened."

"But this is not the case with the applicant. There is no good life for him outside prison when his health is deteriorating daily… The sooner he leaves prison, in terms of the act, will serve him, his relatives and the community well."

"To deny him a release under medical parole, is to deny him his dignity and respect, which he requires to enforce by being allowed to go home and complete his life there" [Page 7]

"It is my view, that refusing to release the applicant, who has complied with the requirements of the Act, amounts to an infringement of section 33(1) of the constitution." [Page 10]

"Mercy is a hallmark of a civilised and democratic country. The applicant in the circumstances that he finds himself in, requires to be treated with mercy, within the precincts of the law." [Page 10]

"In conclusion, therefore, I find that the refusal to release the applicant on medical parole, is unjust, unlawful, unreasonable, and procedurally unfair." [Page 11].

S V PHIRI 2008 (2) SACR 21 (T)

Case heard 04 December 2007, Judgment delivered 04 December 2007

This case was referred to the High Court for sentencing. The main issue the court had to decide was whether the proceedings in the magistrates' court had been conducted in accordance with justice, particularly in regard to the way the magistrate criticised the prosecution, defence and witnesses.

On questioning of witnesses by the Court, Makhafola AJ held:

"Taking over any examination or cross-examination of a witness by the court is not to conform to the generally accepted norms. …" [Page 24]

"The decided cases quoted above address the six point query which I sent to the magistrate for her clarification and reply. After reading the reply from the trial court I observed disturbing comments about the defence attorney at the court a quo and about this court. When asked to clarify why the court had stopped the complainant from answering a question by the defence …

the learned magistrate says the complainant knows nothing about accused 2. To ask that question, 'the attorney obviously did not think'. When asked to clarify who does the investigation about DNA tests, as it was not clear from the record, the learned magistrate in answer elects to take a swipe at this court. …The query is part of the record and can be accessed. It does not in the slightest iota depict any suggestion about the magistrate. The use of the word 'nonsense' in reference to this court is a discourtesy of a high order which the utterer must reconsider."

"The trial is fraught with serious irregularities impacting the core of the proper administration of justice. The said irregularities are manifested by the manner of criticising the police, the prosecution, the defence and this court." [Page 25]

"Ms Mdlolo has been called stupid, the public prosecutor is directed to watch TV and DSTV on channel 69, and she was also given lessons on how to conduct the prosecution during court proceedings."

"From the record nearly every arm of the court is labelled incompetent." [Page 25]

"I must remark, as I hereby do, that such a conduct is unbecoming and should be discouraged at all costs. Discourtesy to witnesses cannot be condoned as well as insults hurled with impunity in facie curiae."

"Apart from other irregularities that I have pointed out above and so many others apparent from the record, coupled with the fact that the trial court was incentivised by the prospect to finalise, on average, at least 18 trials per month as stated in the reply to my query, I have to look at the cumulative effect that this has had on justness and fairness of the trial."

"The cumulative effect of the irregularities considered together with the shortcomings of the DNA procedures is decisive and has destroyed the legal validity of the accused's trial. The trial was not in accordance with justice." [Page 26]

The conviction was not confirmed, and the accused was acquitted and discharged.

SELECTED JUDGMENTS

PRIVATE LAW

HOLM v SONLAND ONTWIKKELING (MPUMALANGA) (EDMS) BPK 2010 (6) SA 342 (GNP)

Case heard 8 June 2010; 9 June 2010; 10 June 2010, Judgment delivered 9 July 2010

This case raised issue as to what extent the owner of land, who invites others to use that land, owes a duty to protect those users against the consequences of their own negligent actions. The plaintiff sued the defendant for damages arising out of the injury sustained by him pursuant to his having dived into a dam situated on property owned by the defendant. The defendant pleaded that the incident was caused solely as a result of plaintiff's own negligence and, alternatively, that the defendant's liability is excluded by virtue of an exclusion clause in an agreement entered into between the parties.

Makgoba J held:

"... On the evidence before me it is common cause that the plaintiff entered the premises through the sliding gate. It is further common cause that there was no notice board disclaiming liability at the sliding gate. It goes without saying that the alleged exclusion clause never came to the attention or knowledge of the plaintiff. There can therefore be no agreement between the parties as alleged by the defendant. The defendant has failed to discharge the onus of proving that the alleged agreement came to the notice of the plaintiff." [Paragraph 18]

"The next issue ... is for the plaintiff to establish the wrongfulness of the defendant's act of omission; whether there was a duty of care on the part of the defendant and that, through its negligence, the defendant has breached the duty of care. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm." [Paragraph 19]

"The court determines this issue by making a value judgment based on 'the legal convictions of the community', and on considerations of policy. The approach of the courts to this issue has always been an open-ended and flexible one ..." [Paragraph 20]

"A defendant acts wrongfully when he creates a source of danger by means of positive conduct (commissio) and subsequently fails to eliminate that danger (omissio), with the result that harm is caused to a plaintiff. ... Likewise, a defendant who is in control of property upon which a hazard exists is under a duty to warn a plaintiff of the nature of the hazard and the risk involved, by appropriate warning of the hazard. Failure to do so involves a wrongful omission. ..." [Paragraph 23]

"... [W]hen regard is had to all the circumstances outlined in the evidence, I am of the view that the legal convictions of the community require the defendant either to ensure that the dam is not hazardous, or to take appropriate steps to remove the volleyball court from the edge of the dam, or to warn the public about it, or to erect a barrier or railings preventing members of the public from proceeding into the dam. Public policy, in relation to a public shopping complex such as the defendant, requires that" [Paragraph 26]

"It has been conceded on behalf of the plaintiff that the plaintiff was to a degree negligent in diving into the dam without first satisfying himself that it was safe to do so. Apparently on the basis of this concession … counsel for the defendant, argued and submitted that a reasonable person, in the position of the defendant, does not have to guard against reckless or grossly negligent conduct on the part of a plaintiff. …" [Paragraph 29]

"I have considered the authorities referred to by counsel and in my view same cannot be helpful to the defendant in casu. The above cases deal with negligence in relation to the driving of motor vehicles. Without suggesting that negligence on the highway falls into a discrete category, it is nevertheless appropriate to point out that particular factual circumstances, which may vary considerably from case to case, attend upon driving of motor vehicles. Even in the context of negligent driving, there are circumstances when a reasonable driver will foresee and take precautionary measures against the negligent conduct of other drivers." [Paragraph 30]

"Although the plaintiff had himself been negligent, the defendant should have reasonably foreseen that members of the public might walk along the water's edge and even dive into the dam, albeit that it was negligent to do so, and should have taken the easy and inexpensive precautions available to it to avert the potential danger, and that it could not, in the circumstances of the case, rely on the principle that one is entitled to assume that others will not act negligently." [Paragraph 31]

"The reasonable person in the position of the defendant would have taken reasonable steps to guard against someone diving into the dam to retrieve a volleyball. Steps could have been taken by the defendant, at negligible cost and with minimum effort, by simply displaying a warning sign at the volleyball court, of the danger of diving into the dam due to the shallow water level, alternatively, erecting a railing adjacent to the volleyball court at the water's edge. The defendant failed to take any steps, as it ought to have done, to prevent harm to a visitor to the shopping complex diving into the dam." [Paragraph 32]

"The degree of plaintiff's negligence must be assessed in order to determine the defendant's contributory negligence. In my view the plaintiff's conduct was momentary in nature, or, at most, of only very short duration. It consisted of a manifestation of poor judgment on the spur of the moment, rather than of recklessness or foolhardiness on the plaintiff's part." [Paragraph 34]

"In conclusion I make a finding that the wrongful and negligent omission on the part of the defendant, in failing to erect any warning sign of the danger posed by diving into the dam, alternatively, to erect railings at the water's edge adjacent to the volleyball court to prevent one from doing so, was directly causally related to the plaintiff's injury." [Paragraph 35]

The defendant was ordered to pay 50% of the plaintiff's damages, to be proved or agreed, as well as the plaintiff's costs of the trial on the merits.

MULLER V MINISTER OF SAFETY AND SECURITY (39728/2008) [2010] ZAGPPHC 633

Case heard 4 June 2010, Judgment delivered 17 June 2010

The plaintiff instituted a claim for damages arising out of his alleged unlawful arrest and detention by members of the South African Police Service. The plaintiff was arrested without a warrant on 27 August

2005 and released on 29 August 2005, without any charge being preferred against him or any appearance in court.

Makgoba J held:

"The plaintiff states that when he was locked up he was never informed of the crime he was being arrested for, that no constitutional rights were explained to him that he was under arrest and that form SAP 22 [a document containing a detainee's rights] was never completed, read out and given to him to keep. ... According to the plaintiff Van den Berg [the complainant] begged the police not to detain the plaintiff but they could not listen to him." [Paragraph 8]

"On the issue as to who arrested the plaintiff there are two irreconcilable versions. ..." [Paragraph 14]

"There are stark differences in the evidence between the plaintiff and the defendant's witness, Inspector Mhlongo. In assessing the evidence I take into account the honest and open way in which the plaintiff testified in court. He was, although subjected to an intense cross-examination, not shaken in any way. He did not deviate from his evidence in chief. His evidence has, in my view, the ring of truth." [Paragraph 15]

"On the other hand the evidence of Mhlongo was of such a poor quality that the court cannot accept any of his evidence where it differs with the evidence of the plaintiff. He contradicted himself on material aspects and was admonished by the court on several occasions to speak up. He was not sure of himself when giving evidence in chief and when answering questions under cross-examination. To sum up, he was a pathetic figure in the witness box." [Paragraph 16]

"The probabilities show that Mhlongo did not effect the arrest of the plaintiff on 27 August 2005 but that another police officer did that as testified by the plaintiff. The case docket itself shows that he only received the docket for further investigation on 29 August 2005 when it was booked out to him by his superior ... I therefore reject Mhlongo's evidence that he questioned the plaintiff on 27 August 2005, formed a suspicion that the plaintiff had committed an offence and then arrested him." [Paragraph 17]

"... I accordingly find that there is no evidence to show that any police officer reasonably suspected the plaintiff of having committed an offence. The defendant's defence as pleaded can therefore not stand. I conclude therefore, that the arrest and detention of the plaintiff was unlawful. ..." [Paragraph 18]

"In this case I take into consideration that the plaintiff spent two nights in detention and was ultimately released without being charged. ... The conduct of the police in this regard can be said to have been heartless if not malicious." [Paragraph 20]

"The plaintiff has undergone a harrowing experience of being locked up in police cells with seasoned criminals who harassed him for almost the two days he spent in detention. He could hardly eat and have a peaceful sleep. To date hereof he is still bitter and regards the incident unforgettable." [Paragraph 21]

" ...I am satisfied that an amount of R120 000.00 is reasonable in the circumstances." [Paragraph 23]

The claim thus succeeded, with costs.

CIVIL PROCEDURE

PRETORIUS AND ANOTHER V TRANSNET SECOND DEFINED BENEFIT FUND AND OTHERS (25095/2013) [2014] ZAGPPHC 526; 2014 (6) SA 77 (GP)

Case heard 21 July 2014, Judgment delivered 22 July 2014

Pretorius and Kruger, two Transnet pensioners, brought an application for leave to institute a class action in terms of s 38(c) of the Constitution as representatives of members of the Transnet Second Defined Benefit Fund (first respondent) and Transport Pension Fund (second respondent). They sought to compel Transnet (fourth respondent) and the state (fifth and sixth respondents) to pay a 'legacy debt' of R80 billion dating from the establishment of Transnet, to the funds in accordance with their obligations. The essence of the relief sought was to enforce legislative provisions which they interpreted as creating an obligation on Transnet, guaranteed by the state, to pay a pension deficit which existed in 1990 and which was allegeded to be due and payable.

Makgoba J held:

"With regard to 'raising a triable issue' the Supreme Court of Appeal authoritatively decided that the applicant must show a cause of action with a basis in law and the evidence. That is, the claim must be legally tenable and there needs to be evidence of a prima facie case. …" [Paragraph 19]

"In the earlier decision in Permanent Secretary Department of Welfare, Eastern Cape and Another v Ngxuza and Others … the Supreme Court of Appeal laid down an approach to be adopted when considering a class action. It was held that the matter involving a class action was no ordinary litigation, that a class action is expressly mandated by the Constitution. The courts are enjoined by s 39(1)(a) of the Constitution to interpret the Bill of Rights, including its standing provisions, so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. The courts are also enjoined by ss (2) to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights." [Paragraph 24]

"The situation in the present case seems pattern-made for class proceedings. This is so in that the class the applicants represent in this case is drawn from the very poorest within our society (old pensioners), those in need of statutory social assistance. They also have the least chance of vindicating their rights through the ordinary legal process. As individuals they are unable to finance a legal action, given their meagre income in the form of pension moneys. What they have in common is that they are victims of official excess, bureaucratic misdirection and what they perceive as unlawful administrative methods." [Paragraph 26]

"The defence raised by the funds regarding the concept 'reasonable pension benefit expectation' would better be argued or deliberated upon more fully at the trial of the action contemplated by the applicants. It should not be a bar to an order for certification of the action when the interests of justice call for the granting of an order for certification." [Paragraph 35]

"Consequently I make a finding that there is a triable issue between the applicants and the first and second respondents (the funds)." [Paragraph 36]

Makgoba J then went on to deal with the claim against Transnet:

"…In approaching the issue of locus standi the court should bear in mind the provisions of s 38 of the Constitution. This section is new and introduces far-reaching changes to our common law of standing." [Paragraph 40]

"In my view the provisions of s 38 are wide enough to accord locus standi to the applicants in the present case. In the case of TEK Corporation Provident Fund and Others v Lorentz supra a member of that fund instituted proceedings in his own name in a very similar case to the one that the applicants in this case intend to institute against the present respondents. No question of locus standi was raised in that case. In subsequent cases members of funds also instituted proceedings against the funds and other relevant parties without any issues raised on their locus standi. …" [Paragraph 42]

"… In my view the papers filed of record identified a triable issue between the parties. Should it happen to the defendant that the summons and particulars of claim in the proposed action do not disclose a cause of action, the defendant is at liberty to file an exception at the appropriate time." [Paragraph 45]

"In the circumstances the application for certification is appropriate and the interests of justice dictate that leave should be granted to the applicants to pursue a class action against Transnet." [Paragraph 46]

As for the claim against the state parties (fifth and sixth respondents), Makgoba J held:

"While the founding affidavit foreshadows the abovementioned claims against the state parties, the draft particulars of claim do not disclose any claim against the state parties. … It does not appear anywhere in the draft particulars of claim that the applicants intend to institute any claim against the state parties." [Paragraph 48]

"It is trite that in an application for certification of a class action the applicant must annex draft particulars of claim setting out the cause of action. This the applicants failed to do as against the state parties. There is accordingly no triable issue identified by the applicants against the fifth and sixth respondents." [Paragraph 49]

The application for certification thus succeeded against the first, second and fourth respondents.

CUSTOMARY LAW

BAPEDI MAROTE MAMONE V COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS AND OTHERS (40404/2008) [2012] ZAGPPHC 209; [2012] 4 ALL SA 544 (GNP)

Case heard 12 September 2012, Judgment delivered 21 September 2012

The Commission conducted an investigation to determine whether the paramouncy of Bapedi was established in accordance with customary law and custom. The Commission made a finding that the institution of kingship of Bapedi resorts under the lineage of the Sekhukhune Royal House and not the Mampuru/Mamone Royal House. Applicant sought to review and set aside this finding, and to have the court declare that the kingdom of Bapedi resort to the lineage of Bapedi Marota Mamone Royal House.

Makgoba J held:

“The application is brought in terms of the provisions of section 6 of the Promotion of Administrative Justice Act ... The declaratory order ... is sought in terms of section 8(1)(c) of the Act. The Commission is an organ of State as defined in section 239 of the Constitution in that in conducting its investigation and taking decisions, it is exercising a public power and performing a public function in terms of the Framework Act. Its decisions are therefore reviewable and this Court has jurisdiction to do so.” [Paragraph 9]

“The factual issue to be determined is whether by virtue of forcefully driving Mampuru II away Sekhukhune I legitimately usurped kingship. Furthermore, whether by killing Sekhukhune I Mampuru II did in fact assume kingship, and if so, did he do that legitimately.” [Paragraph 33]

“The legal issue to be determined by the Court is whether the decision of the Commission in determining that the kingship of Bapedi resorts in the lineage of Sekhukhune, was rationally connected to the information before it or the reasons given by it; and whether it ignored relevant facts and evidence placed before it, to which it had access.” [Paragraph 34]

“The version of the Mampuru royal family that maternity and not paternity is the overriding consideration in determining succession to bogosi is correct, as this is the case in many African communities including the Bapedi. Therefore the contention by the Sekhukhune royal family that Mampuru II could not be king because he was not fathered by Sekhukhune I cannot hold water.” [Paragraph 35]

“However in the present case the determination of the lineage of kingship was not necessarily based on birth but on the fact that it was not unusual for the kingship to be obtained through might and bloodshed, hence it was found that Sekhukhune I legitimately usurped kingship by forcefully driving Mampuru II away. Mampuru II fled with his followers, without kingship. Even after returning to kill Sekhukhune I, Mampuru II did not ascend the throne. Malekutu III succeeded Mampuru II as leader of the followers of Mampuru II and not as king of Bapedi.” [Paragraph 36]

“There are no merits in the aforesaid contention made by the applicant for the following reasons: 38.1 The coronation of Mampuru II by the British after the incarceration of Sekhukhune I cannot be said to be consistent with the customary law of the Bapedi. There is no evidence that the Bakgoma, Bakgomana and Dikgadi sanctioned or were part of the alleged coronation. The deposition of Sekhukhune I and the subsequent coronation of Mampuru II by the British Government can simply be seen as a unilateral act of a colonial master who disregarded the laws and practices of the indigenous Bapedi nation. 38.2 The killing of Sekhukhune I by Mampuru II cannot be said to constitute conquest by might and bloodshed as was the common practice in customary law. The evidence shows that when Mampuru II surfaced from where he had fled he was in the company of Nyabela who had given him sanctuary. With the assistance of Nyabela he killed Sekhukhune I, fled again to Nyabela's place where he was eventually captured, convicted by a court of law and eventually executed. The conduct of Mampuru II in killing Sekhukhune I and fleeing to Nyabela is not consistent with the conduct of a person who had come to conquer and take over kingship. With respect, this is the conduct of a common criminal. It is a fact that he paid the ultimate price for the crime he committed.” [Paragraph 38]

“... I make a finding that there is a rational connection between the determination or decision of the first respondent and the material facts presented before it. ... The decision of the first respondent in this regard cannot be faulted.” [Paragraph 40]

"Judging by the methodology employed by the first respondent in the present case it cannot be found that its functions were not carried out in a manner that is fair, objective and impartial as required by section 22(2) of the Framework Act. In its determination, the issues to be determined by the first respondent were outlined and thereafter analysed, whereafter the evidence was analysed to arrive at its conclusion that in terms of customary law and customs of the Bapedi and the Framework Act, the lineage of the Bapedi kingship resorts to Sekhukhune Royal House." [Paragraph 42]

"There is no merit in the applicant's contention that the first respondent failed to consider all the evidence put before it by the parties to the dispute. In any event the applicant failed to produce any evidence to that effect save for the bear allegations." [Paragraph 42]

"It can safely be stated that the methodology applied by the first respondent in arriving at its conclusion was lawful, reasonable and procedurally fair and in accordance with section 33(1) of the Constitution of the Republic of South Africa Act, 1996 as well as section 3(1) of PAJA. In the end the first respondent provided comprehensive written reasons for its conclusion, thereby complying with the dictates of section 33(2) of the Constitution." [Paragraph 47]

"It is clear from an overview of the whole record of proceedings of the first respondent's investigation into the Bapedi kingship dispute that the first respondent in its determination did not fail to take all relevant evidence into account as argued by the applicant. Still less can it be said that its decision was irrational. It thoroughly dealt with all the evidence and submissions ..." [Paragraph 48]

"The first respondent acted in accordance with its mandate, within the parameters of the Framework Act and did not contravene any provision of PAJA. In the circumstances the applicant's application falls to be dismissed." [Paragraph 49]

This decision was upheld by the Supreme Court of Appeal (Mamone v Commission of Traditional Leadership Dispute and Claims and Others (260/13) [2014] ZASCA 30) and by the Constitutional Court (Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others (CCT 67/14) [2014] ZACC 36).

SELECTED JUDGMENTS

PRIVATE LAW

DERCKSEN V WEBB AND OTHERS [2008] 2 ALL SA 68 (W)
Judgment delivered: 19 October 2007

The appellant had been dismissed from his employment by the third respondent, after being accused of theft. The first two respondents were involved in the investigation of the incident. After his dismissal, the appellant sued the respondents for damages based on *iniuria* and defamation relating to utterances made against him by the respondents. The words to which the appellant had taken offence were those used to inform him that he was a suspect in the theft incident. The parties were in dispute as to the exact words used. The action was dismissed. On appeal, the issues for determination were whether the utterances complained of were made; whether they amounted to an *iniuria*; and whether they were defamatory.

Masipa J (Levenber AJ concurring) held:

"Once it is determined that the words are subjectively and objectively insulting in nature, wrongfulness is *prima facie* proved. However, that is not the end of the inquiry. In determining unlawfulness, it is also necessary to consider the defence of justification, if it has been raised by the defendant. …" [Paragraph 51]

"*In casu* it may be that the appellant felt "humiliated, hurt, angered and degraded" when he was told that his name was on top of the suspect list. Subjectively the appellant's dignity may have been impaired. That, however, does not necessarily mean that the conduct of the respondents is actionable. It could be that the appellant is a "hypersensitive" person by nature. The character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby … An objective test of reasonableness is also applied." [Paragraph 54]

"We are here dealing with an employer and employee relationship. As a matter of policy an employer must be able to call in an employee and question him/her about "missing" or "stolen" items if the employee can reasonably shed light onto the matter." [Paragraph 56]

Upholding the appeal in respect of the second respondent, Masipa J held:

"The defamation in this case is serious, it having been made in the presence of fellow workers. Although only one co-employee gave evidence it was established that the offending words were said in the presence of more than one person. Mostert testified that at first he did not want to believe the accusations but, following the appellant's dismissal, he thought the accusations that the appellant was a thief must be true. It has, therefore, been established that the defamation had an effect of lowering the image of the appellant in the eyes of his fellow workers. What also has to be borne in mind is that, although the appellant had not worked for the third respondent for long enough to build a reputation, he occupied a fairly senior position as a supervisor, which position necessarily commanded some degree of respect." [Paragraph 93]

Masipa J found that the third respondent could not be held vicariously liable. The appeal was partially upheld.

COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LTD V PANAYIOTTS 2009 (3) SA 363 (W)

Case Heard 27 October 2008, Judgement Delivered 6 February 2009

Applicant sought summary judgement against a debtor for being in arrears on a mortgage bond. The applicant further sought an order declaring the immovable property over which it held the bond as executable. The respondent used his over-indebtedness as a defence, in terms of s 79(1) of the National Credit Act.

Masipa J held:

"A party (the consumer) who raises a defence of over-indebtedness must plead and prove the defence, which includes proving that he is over-indebted as envisaged in s 79 of the NCA." [Paragraph 8]

"In exercising its discretion the court ought to bear in mind that, although the relief sought in terms of the NCA is sui generis, in a summary judgment application one cannot ignore the requirements of rule 32 of the Uniform Rules of Court completely. [Paragraph 53]

"The test of bona fide means that the defendant's allegations ought not to be inherently and seriously unconvincing. ..." [Paragraph 40]

"The application in terms of s 85 must still be bona fide and not raised solely as a delaying tactic. The debtor must provide sufficient information to support his allegation of over-indebtedness. This means a consumer who raises a defence of over-indebtedness must plead and prove, on a balance of probabilities, that he is over-indebted as envisaged in s 79 of the NCA." [Paragraph 55]

"In casu the defendant's allegations regarding his over-indebtedness are inherently and seriously unconvincing. I say this for the following reasons: the defendant has set out insufficient facts to show that he is over-indebted as envisaged in s 79. In addition such facts are so vague and bald that they do not amount to a bona fide defence." [Paragraph 56]

"In any event, my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness." [Paragraph 77]

"There is another consideration with regard to the property, and it is this: The property is not used by the defendant as his residence, so it cannot be said that the defendant will be greatly prejudiced if the property is sold. I am also mindful of the fact that, even on the defendant's own version, the property is neglected, as it is clear that the defendant only knew of the damage to the property months after the event. The plaintiff certainly cannot be expected so sit back and allow its interests to be eroded while the defendant tries his hand at investment. It seems to me that the longer the property remains in the hands of the defendant, the more likely the plaintiff will suffer prejudice." [Paragraph 78]

"Considerations of fairness require that the circumstances of both the defendant and the plaintiff be given equal consideration. Where it is clear that the credit provider is likely to be greatly prejudiced if the protection measures provided by the provisions of the NCA are implemented, courts should be reluctant to assist the defendant." [Paragraph 79]

"The purpose of the NCA is, inter alia, to provide for the debt re-organisation of a consumer who is over-indebted, thereby affording such consumer the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position (see Firstrand Bank (supra)). In casu, the defendant has failed to show any financial distress on his part." [Paragraph 81]

"In my view, the defendant has failed to make out a case for the relief that he seeks." [Paragraph 83]

The Application succeeded. Summary judgement was granted against the respondent, and Masipa J declared the respondent's house executable under the mortgage bond agreement.

SOCIO-ECONOMIC RIGHTS

BLUE MOONLIGHT PROPERTIES 39 (PTY) LIMITED V OCCUPIERS OF SARATOGA AVENUE AND ANOTHER (2006/11442) [2008] ZAGPHC 275 (12 SEPTEMBER 2008); 2009 (1) SA 470 (W)

The applicant, the registered owner of property situated at Saratoga Avenue, Johannesburg. It launched eviction proceedings against alleged unlawful occupiers of the property, the first respondents. The issue was whether the city was obliged to provide temporary or permanent accommodation to unlawful occupiers who are being evicted, and whether the City was obliged to provide a report about the housing needs of unlawful occupiers in its area of jurisdiction, and the scope of such a report. In October 2007' Mophosho AJ had granted an order directing that the City of Johannesburg Metropolitan Municipality be joined in the proceedings by virtue of its interest in the relief sought. The preliminary issue raised was that joinder of the City in this matter was irregular. The City argued that it was not appropriate to join the City as a co-respondent in eviction cases that fall under section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

Masipa J held:

"In summary a State housing programme must, *inter alia*, be comprehensive, coherent and effective; have a sufficient regard for the social economic and historical context of widespread deprivation; have sufficient regard for the availability of the State's resources; make short, medium and long term provision for housing needs; give special attention to the needs of the poorest and most vulnerable; be aimed at lowering administrative, operational and financial barriers over time; allocate responsibilities and tasks clearly to all three spheres of government; be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations; respond with care and concern to the needs of the most desperate; achieve more than a mere statistical advance in the number of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for, and a program that excludes a significant segment of society cannot said to be reasonable." [Paragraph 28]

"Each eviction case is different. Hence the necessity to treat each differently. Circumstances of unlawful occupiers either as individuals or as a group are also unique. In the City's answering affidavit the deponent states "any obligation that may rest with the State with regard to the first respondents will depend on a number of factors including personal circumstances of the individuals concerned". However, there is no indication either in the affidavit or in the report that the circumstances of the first respondents were given consideration. We are here dealing with unlawful occupiers who are desperately

poor and some of whom have been rendered homeless before. Such cases require extra vigilance and compassion on the part of the courts. Hence the need to get specific information from the City regarding a specific case. A one-fits-all solution in eviction cases is, therefore, not only unworkable but also unacceptable." [Paragraph 64]

"The court is enjoined to consider "all the relevant circumstances". The circumstances expressly include whether alternative land or occupation is available for the relocation of "the unlawful occupiers". It is evident that in eviction cases a municipality is obliged and expected to give the court a full picture of, inter alia, whether land has been made available or can reasonably be made available, for the relocation of a specific group of unlawful occupiers not unlawful occupiers in general" [Paragraph 66]

"PIE and the Constitution require local authorities to respond in a proper and meaningful way to every eviction application that has the potential to result in homelessness. Counsel for the first respondents correctly submitted that the City's failure to furnish a proper report is conduct at odds with the spirit and purpose of the Bills of Rights. …" [Paragraph 67]

"In the present case the report has not attempted to even remotely deal with the present eviction application and its implication, as well as how or when it would be in a position to assist. A statement such as 'the City *cannot for the time being* make any of its emergency shelters available for any persons evicted from property by way of PIE' is vague in the extreme and not helpful at all. It is clear that the City is trying to distance itself from the problems of the unlawful occupiers in this matter. This indeed is at odds with the Constitution and is tantamount to failure by the City to comply with its constitutional obligations." [Paragraph 69]

"That courts can grant structural interdicts where appropriate is clear. … The facts … surrounding the violation of rights will determine what form of relief is appropriate. … *In casu* an eviction application is pending. Before a court hearing the application can reach a just and equitable decision it has to have the full assistance and cooperation of the municipality. The City has furnished a report but it falls far short of the requirements implicit in s 4(7) of PIE. Without a full and meaningful report the court hearing the application will be ill-equipped to deal with the eviction application properly." [Paragraphs 74 – 75]

Masipa J ordered that the City report to the court within four weeks regarding the steps it had taken, and in future can take, to provide emergency shelter or other housing for the first respondents in the event of their eviction.

CIVIL PROCEDURE

AFRIFORUM NPC AND ANOTHER V CITY OF MATLOSANA LOCAL MUNICIPALITY AND OTHERS (15572/2013) [2013] ZAGPPHC 407 (4 DECEMBER 2013)
Case Heard: 4 December 2013, Judgment Delivered: 4 December 2013

The third respondent, Eskom, published notices indicating that the first respondent municipality had failed to settle its electricity account pertaining to Klerksdorp and Jouberton and that therefore Eskom was going to disconnect electricity supply to those towns. The applicants launched an urgent application and were granted an interim order restraining Eskom from disconnecting the electricity supply. When the matter was set down for hearing the question was whether the applicants had locus standi to bring the application for an interdict, and on the issue of who should pay costs. Counsel for the respondents

submitted that the applicants had no locus standi to launch the application. The basis of this submission was that there was no nexus between the applicants and the residents of either Klerksdorp or Jouberton. Neither was there any nexus between the first applicant and the second applicant.

Masipa J held:

“To properly deal with this issue it is necessary to look at the manner in which the applicants describe themselves. In the founding affidavit the first applicant is described as a non profit company duly registered in terms of the Companies Act, 2008. The principal business of the applicant is described as "the advancement of advocacy and democracy by stimulating civil society in participation in constitutional rights in South Africa."” [Paragraph 6]

“Section 38 of the Constitution deals with enforcement of rights and provides that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- "(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members acting in the public interest."” [Paragraph 9]

“Anyone listed above is entitled to approach a competent court, alleging that a right in the Bill of Rights, has been infringed or threatened.” [Paragraph 10]

“It is clear that Section 38 is not of application in the present case as the right to electricity is not a right protected in the Bill of Rights. Counsel for the applicants submitted that the applicants relied on the Municipal Systems Act … which was clearly set out in the papers and that was adequate for purposes of locus standi.” [Para 12]

“A court cannot rely on the mere say so of the applicant that it has locus standi. An applicant who seeks to persuade the court that it has locus standi must not only set out the interest it has but must also clearly state the nature of that interest. In the present case nowhere in the applicants' papers is there an indication that the first applicant or its members would be affected by the threat that is the subject of the dispute before court or that a finding in its favour would benefit it or its members. In short it has not been established that the first applicant has any interest in the matter and if it has what the nature of that interest is.” [Paragraph 19]

Masipa J held that the first applicant lacked locus standi, but that the second applicant, a business owner based in Klerksdorp, had locus standi.

CRIMINAL JUSTICE

S V THATHANA 2008 (1) SACR 494 (W)

Case heard 8 December 2006, Judgment delivered 8 December 2006

This was a decision on sentence, the accused having been convicted of killing his wife and daughter.

Masipa J held:

"The court is … left in the dark as to why the accused shot the two deceased, as he chose not to take this court into his confidence. What is clear is that when the two deceased were shot they had thought they were safe, as they had a protection order against the accused. In the absence of an acceptable explanation from the accused, the only reasonable inference is that the murders were a continuation of the perpetration of abuse and violence against the deceased, and the children." [Pages 495 - 496]

"Ms Nozuko Nkewuse, legal advisor of People Opposing Women Abuse, POWA, told the court about the shocking statistics of women who are killed daily by either their lovers or husbands. According to Ms Nkewuse the latest statistics … is that every four hours a woman is killed by her partner, while one woman in every four is in an abusive relationship. That indeed is frightening, to say the least. What is equally frightening and saddening at the same time is that more than ten years after our country embraced democracy we still have people who see killing their partners as a solution to family problems." [Page 496]

"The interests of society should be jealously guarded by our courts. Women, who are some of the most vulnerable people, are part of that society. Rosina's sudden death at the hands of her husband must have been shocking not only to her immediate family, but also to members of the community in which she lived. Ivy's life was cut off when she was only 20 years of age and looking forward to a great future. The children of Rosina in particular must be suffering a great loss, having lost both their mother and sister, as well as having the terrible knowledge that the deceased were killed by their father. The most shocking and disturbing feature of this case is that at the time Rosina and Ivy were killed they had obtained protection orders against the accused. This fact alone must have been devastating in particular to members of POWA who assisted the deceased with shelter and the protection orders. One can only hope that POWA and similar organisations which are doing wonderful work of protecting abused women are not discouraged by what happened in this case." [Page 496]

"She was equally shocked, as was this court, that a most senior member of the South African Police Service, Captain Mandiwani, had given permission for the release of the accused's firearm without confirming the veracity of what the accused was telling him. If a captain of the Police Service can take his duties so lightly one shudders to think how junior members conduct themselves in carrying out their duties. I think Captain Mandiwani let down the South African Police Service, as well as the whole community, and that this conduct ought to be investigated. For that reason I direct that a copy of my judgment and sentence be made available to the Commissioner of Police with a view to investigate the conduct of Captain Mandiwani …" [Page 496]

"… [I]n the absence of a reasonable version from the accused, the inference is inescapable that the deceased were shot in cold blood, considering that neither of them was armed. In addition, Ivy was in the

process of fleeing from the scene when the accused shot her, not once, but four times. I find this very aggravating." [Page 499]

"A disturbing feature … is that the three remaining children have not received any counselling since the murder … This is especially worrisome since Mr Maree recommended that reconciliation between the accused and the children should take place as soon as possible. In my view, although reconciliation would be good for all the concerned individuals, meaningful and effective reconciliation can only take place once the children, and the accused, have received counselling. For this reason I have consulted with the Family Advocate who is an officer of this court on the issue of counselling. …" [Page 500]

"It is hard not to sympathise with the accused or other men who find themselves in a similar position. Evidence was that the accused believes in traditional ways of doing things. That is why when he experienced problems he spoke to members of his family and the wife's family instead of seeking professional help, as he was advised by members of POWA. The above might also explain why the accused thought he was entitled to 'discipline' his wife and his children by violent means. Sadly the accused is just one of the many men who think this way, as is borne out by the shocking statistics provided to this court. Although Ms Killian argued that there were substantial and compelling circumstances in the following, inter alia, that the accused was in emotional turmoil at the time the offences were committed, that he has suffered, as he has lost his wife, daughter and the three surviving children, that the accused has also lost his house, business and job, and that he did not flee and try to hide from the police after the shooting incident, in the circumstances I am not persuaded that there are any." [Page 500]

The accused was sentenced to 18 years' imprisonment for each murder, the sentences to run concurrently.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

SOUTH AFRICAN PORK PRODUCERS ORGANISATION V NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY OF ANIMALS (26060/2014) [2014] ZAGPPHC 877

Case heard 15 September 2014, Judgment delivered 5 November 2014

The applicant, a non-profit organisation representing the pork industry in South Africa, sought access to certain documentation allegedly held by the respondent, in terms of the Promotion of Access to Information Act.

Before dealing with the substance of the application Phatudi J remarked:

"At the commencement of the hearing, I expressed my disapproval on the part of legal practitioner's tendency of requesting or directing that their matters be heard by certain judges. The applicant's attorney requested "that the matter be allocated to a senior judge adequately experienced to consider relevant issues" is, in my view, regrettably discouraged. I know not of such title, "senior judge". An acting judge is a judge. All judges are deemed to be adequately experienced to adjudicate and consider any legal issue before him/her." [Paragraph 2]

Phatudi J then proceeded:

"… SPCA is a creature of the Societies for the Prevention of Cruelty to Animals Act … (SPCA Act). The respondent is thus a public body as defined in PAIA." [Paragraph 3]

"In refusing to provide access to the complaint, the respondent relies on section 37(1) (b)13 and 44(2) (a)14 of PAIA respectively. The respondent deems such refusal a reasonable protection of privacy in respect of the third party who provided information that was supplied in confidence when lodging the complaint with them. The respondent further contend that the disclosure of the record could reasonably be expected to jeopardise the effectiveness of their method used to the protection of information provided by the members of the public who lodges complaints against animal abuse …" [Paragraph 12]

"I further enquired if redaction of the name(s) of the complaint lodger would cause any prejudice. Counsel submits that reasonable expectations of harm may occur and members of the public may be ward off to expose animal abuse. … The applicant submits that they are only interested in the contents of the complaint and not who reported. They submit they would welcome redaction." [Paragraph 16]

"The applicant submitted that they need the information provided to the respondents to enable them to take disciplinary measures against the Piggery, their member. …" [Paragraph 22]

"Considering the mandatory protection of certain confidential information, the respondent is given the discretionary power to refuse a request for access to a record which consists of information that was supplied in confidence. …" [Paragraph 23]

"The applicant's submissions that they seek the information to enable them to take disciplinary action against its member have not been supported by supporting affidavit from its Limpopo branch. In my view, there is no merit in the applicant's contention in that, the applicant may still put the disciplinary

action in motion against the Piggery on the reports filed by the respondent and the Veterenian. …" [Paragraph 25]

"The respondent submitted that they abandoned their intent to press criminal charges against the Piggery. If the respondent had persisted with its intent of pursuing the criminal charges, then the confidentiality and or protection of privacy would have been removed. …" [Paragraph 26]

"… I am of the view that the protection of privacy of the complainant and protection of confidentiality of the information given by the complainant is reasonable justifying the limitation in the constitutional right of access to information." [Paragraph 29]

CONSTITUTIONAL INTERPRETATION

MANSINGH V PRESIDENT OF REPUBLIC OF SOUTH AFRICA AND OTHERS (20879/2011) [2012] ZAGPPHC 3

Case heard 28-29 November 2011, Judgment delivered 09 February 2012

The applicant, a practising advocate, sought an order declaring that the President lacked the power to confer the status of senior counsel on practising advocates.

Phatudi J held:

"The institution of awarding silk in South Africa has been "adopted" pre 1961 by way of the Queen's prerogatives. When South Africa became a Republic in 1961, the QC kept their patents. New appointments were made by the State President and named Senior Counsel (SC). This was a prerogative power bestowed on State President …" [Paragraph 9]

"It is common cause that: 14.1 the South African system has changed from pre 1961 monarchy to parliamentary sovereignty in 1961 and finally to constitutional democracy (1993 and 1996) 14.2 in the 1961 and 1983 Acts respectively, the State President, as Head of State, retained "such powers and functions as were possessed by the Queen prior to 1961 Act by way of prerogatives". 14.3 the 1993 and 1996 Constitutions did not retain the said powers and functions the Queen/State President possessed by way of prerogatives. 14.4 the President has only such powers as are bestowed on him by the Constitution or by legislation consistent with the Constitution." [Paragraph 14]

"… [T]he 1961 Constitution and 1983 Constitution empowered the State President in addition to the powers the President had as the Head of State, to have such powers and functions as were possessed by the Queen and State President by way of prerogatives prior to commencement of 1961 and 1983 Constitutions respectively (the prerogative clause)." [Paragraph 17]

"… [T]he final constitution makes a clean break with the past. I am of the view that it was not an oversight on the part of the drafters on behalf of South Africans by not including the said prerogatives in adopting the Constitution. I do not agree … that the prerogatives the Monarchs and the State President's respectively are codified in the Constitution. The drafter's thought of having a break with the past is, in my view, an avoidance of adopting concepts into the Constitution which are not based on the will of the people of South Africa. …" [Paragraph 23]

“The interpretation of phrases in the Constitution must be done in a manner that is compatible with the fundamental values embodied in it. ...” [Paragraph 31]

“The applicant submits that an "honour" for purpose of section 84(2) (k) is a recognition from the head of state for distinguished service to the country. ... The applicant further submits that the conferral of the status of senior counsel is not mentioned on the Presidency's website as part of the system of national orders. She submits that "silk" is not an 'honour' as contemplated in section 84(2)(k) and is not viewed as such by the President ” [Paragraphs 32 - 33]

“...I am of the view that the argument ... that non inclusion of conferment of senior counsel status on the presidency website is not one such "honour" as envisaged in terms of section 84(2)(k), is correct. ... The Order of the Baobab, for instance, is awarded to South African citizens for services distinguished beyond the ordinary call of duty. It is an "honour" awarded for exceptional and distinguished contribution in community service. I am reluctant to accept that the framers of our autochthonous Constitution were comfortable that the President is empowered in terms of section 84(2) (k) to confer the status of senior counsel on practising advocates.” [Paragraph 37]

“Are the services and contributions made by practising advocates exceptional or beyond the ordinary call of duty that warrant an award of the status of senior counsel? Can an award of the status of senior counsel be equated with, for instance, Order of Luthuli or Order of the Baobab, ...?” [Paragraph 38]

“...It is on that basis I am of the view that an honour is earned while serving the country exceptionally beyond the ordinary call of duty. ...” [Paragraph 44]

“There is no legislation ... that empowers the President to institute, constitute and award the status of senior counsel to practising advocates or any legal practitioner who has displayed "good quality work" to the legal profession. The term "Senior Counsel" is not even defined in the Advocates Act. ... In South Africa there is no legislation in place that covers the conferment of honours on practising advocates.” [Paragraph 45]

“... [T]he powers of the President which are contained in section 82(1) of the interim constitution have their origin in the prerogative powers exercised under former constitutions by South African heads of State. ... [T]here are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in section 82(1)/58 Section 82(1) of the interim Constitution is almost a replica of section 84(2) of the final Constitution. Section 82(1) (e) of the interim constitution is a replica of section 84(2) (k) of the Constitution. The words of Goldstone J [in President of the Republic of South Africa & Another v Hugo] that "there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in the constitution" requires no qualification. ...” [Paragraph 46]

“I do not think that section 84(2) (k) proposes a system of awarding any professional who attained an advanced skill in forensic work in his or her profession a status of seniority. If conferring honours envisaged in terms of section 84(2)(k) does include awarding the seniority status to the legal profession, I am afraid, the President will be responsible for conferring honours of seniority to accountants, doctors, auditors, to mention but a few, of 12 years experience with trace records of "good quality work”. [Paragraph 47]

"In my final analysis, the appointment of practising advocates as senior counsel does not amount to the conferring of an honour within the meaning of section 84(2)(k) of the Constitution of the Republic of South Africa." [Paragraph 49]

The President was thus found not to have the powers to confer senior counsel status. The decision was reversed by the Supreme Court of Appeal (2013 (3) SA 294 (SCA)) and the Constitutional Court (2014 (2) SA 26 (CC)).

CIVIL PROCEDURE

MALINGA v ROAD ACCIDENT FUND 2012 (5) SA 120 (GNP)

Case heard 5 October 2011, Judgment delivered 6 October 2011

The plaintiff, a passenger in a motor vehicle, claiming damages that he sustained as a result of the motor vehicle collision. Plaintiff subsequently amended the particulars of claim, whereupon the defendant filed a special plea, arguing that the plaintiffs claim as set out in the amended particulars of claim had prescribed.

Phatudi J held:

"…[T]he plaintiff's argument is that the amended particulars of claim has not prescribed because the plaintiff seeks to enforce the same "debt" as claimed in the summons prior to the amendment." [Paragraph 10]

"In my evaluation of the evidence, it is not in dispute that summons were issues on the 24th of May 2001 and served on the defendant on 15 June 2001." [Paragraph 15]

"It is apparent that plaintiff pursued the claim in terms of section 17(1) (a) of the Act. The cause of action set out in … the initial particulars of claim support the claim envisaged in terms of section 17(1)(a). The plaintiff's cause of action is based on the identified driver or identified owner of the motor vehicle. The plaintiff's alternatives thereto are also on the premise of provision of section 17(1) (a)." [Paragraph 16]

"In the amended particulars of claim the plaintiff still allege that the defendant is in terms of section 17(1)(a) obliged to compensate him for damages sustained as a result of the collision that occurred on 6 September 1997." [Paragraph 17]

"Paragraph 5 of the amended particulars of claim sets out a different cause of action with an element of unidentified motor vehicle as the cause of the accident. The defendant allege that the new cause of action is tantamount to service of new summons which, as Mr Ferreira submits, has prescribed in that 5 years has expired from the date upon which the cause of action arose." [Paragraph 18]

"It is clear from the unamended summons that the plaintiff did not sue the defendant on the basis of unidentified motor vehicle. It is further clear that the plaintiff set out his cause of action in the particulars of claim relying on the provisions of section 17(1) (a)." [Paragraph 25]

"In my view, the amended particulars of claim introducing the new cause of action on unidentified motor vehicle is indeed tantamount to issuing of "new summons" for purposes of compliance with section 17(1)(b) read with regulation 2(1)(a) and (c" [Paragraph 26]

"It is further my view that the plaintiff failed to comply with the said provisions in that he failed to cause issue of summons in accordance with the provisions of regulation 2(1)(c)." [Paragraph 27]

"Based on the above, I find the plaintiff's claim to have prescribed." [Paragraph 29]

CRIMINAL JUSTICE

MOGAGA V S (A622/2013) [2014] ZAGPPHC 199

Case heard 24 February 2014, Judgment delivered 26 March 2014

This was an appeal against sentence. The appellant had been sentenced to an effective term of life imprisonment plus a further 27 years imprisonment. It was further recommended that the Department of Correctional Services should only release the appellant on parole after he would have served at least 30 years of his sentence.

Phatudi J (Rabie and Msimeki JJ concurring) held:

"In S v Mhlakaza and Another, the Supreme Court of Appeal set out the principle that '[t]he function of a sentencing court is to determine the term of imprisonment a convicted person may serve.' It is further principled that 'the court has no control over the maximum or actual period served or to be served.' …" [Paragraph 10]

"The court in S v Mahlatsi followed Mhlakaza decision and said that 'the sentencing court shall not consider the possibility of release on parole when determining an appropriate sentence, but that the sentence imposed must be one which the court intends as the ultimate punishment that should be served and that release on parole is a function of the executive arm of government that courts should not likely interfere with.'" [Paragraph 11]

"Considering the sentence of life imprisonment plus a further period of 27 years imprisonment vis-a-vis the provisions of section 32(2) of the then Correctional Services Act … (which was operational at the time of imposition of the sentence), it is clear that there is a misdirection on the part of the trial court in imposing the said sentence." [Paragraph 12]

"It is further clear that the trial court ought to have ordered the sentence of 27 years' imprisonment in respect of counts 2, 3 and 4 to run concurrently with the sentence of life imprisonment in respect of count 1." [Paragraph 13]

"On the reading of the section, it is clear that the court has the discretion to fix a period during which a convict shall not be placed on parole. However, such a "fixed non-parole period" must not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter. …" [Paragraph 17]

"It is further clear .. that if a convict is convicted of two or more offences which are ordered to run concurrently, the court shall fix the non-parole period, subject to the provisions of subsection (1) (b), in respect of the effective period of imprisonment." [Paragraph 18]

"It must, however, be borne in mind that at the time of the trial court imposing the sentences, the amendment to the Criminal Procedure Act was not as yet effected. …" [Paragraph 20]

"… I am unable to fault the trial court in fixing the non-parole period in his sentence but for the number of years so fixed. As demonstrated, the provisions in section 32(2) of Correctional Services Act … did not provide for the maximum number of years that could be fixed as a non-parole period in a sentence. …" [Paragraph 21]

"Fixing a non-parole period in sentencing an offender should, in my view, be made in exceptional circumstances, such as facts before the trial court that would continue, after sentence, which may result in a negative outcome for any future decision about parole. Such circumstances should be relevant to parole and not only be aggravating factors of the crime committed. …" [Paragraph 22]

"The position with regard to the fixing of a non-parole period changed as a result of the insertion of section 276B of Criminal Procedure Act … Had the fixing of a non-parole period of 30 years been done after the promulgation of section 276B of the Criminal Procedure Act, I would not have hesitated to find further misdirection on the part of the trial court." [Paragraph 23]

Phatudi J went on to determine the appropriate sentence:

"The appellant's personal circumstances were, as placed before the trial court, that he was a first offender of 30 years of age at the time of the commission of the offence with 3 children to feed even though unmarried. Added thereto, I find the appellant's self-incrimination at the time of his plea explanation, during cross- examination of the key witness, Mrs Engelbrecht and during his testimony when he endeavoured to reduce his moral blameworthiness. He explained how he and his co-accused went to the house. He painted a picture of an innocent follower of his co-accused, unaware that robbery was committed. He has been helpful in revealing that which the state could not have revealed in evidence." [Paragraph 29]

"I am mindful that the commission of the offence was planned and executed by the appellant and a gang of perpetrators. Murder was committed during the robbery and in the presence of the deceased's wife and their two minor children. The goods robbed were of a substantial value and were never recovered. …" [Paragraph 32]

The appeal against sentence succeeded, and the accused was sentenced to an effective 25 years' imprisonment.

S v SHAI 2014 (1) SACR 204 (GNP)

Case heard 1 October 2012, Judgment delivered 8 October 2012

The appellant had been convicted in the regional court of the rape of a 13-year-old girl, and sentenced in the high court to life imprisonment. He appealed against the sentence.

Phatudi J (Hassim AJ and Molefe AJ concurring) held:

"In my view, it is clear from the record that the regional magistrate did her best to inform and warn the appellant of the applicability of s 51 of CLAA [Criminal Law Amendment Act]. She even explained to the

appellant that 'if the complainant is below the prescribed age of 16 years, then the sentence will be meted out by the High Court'. She went further, to enquire if the appellant understood the charge put to him, 'that of rape'. I find no leg to stand on to fault the regional magistrate. ...” [Paragraph 15]

“The question to be determined is whether the high court misdirected itself in imposing the sentence it did or whether the sentence imposes a sense of shock or is disproportionate to the offence committed.” [Paragraph 16]

“In my perusal of the record of proceedings in the high court and having heard both counsel, I find no misdirection on the part of the judge in imposing the sentence.” [Paragraph 19]

“The judge first stated that 'the court takes into account that this is not the so-called most serious rape incident'. The judge stated that: 'The court is prepared to accept that the following are substantial and compelling circumstances. • The accused is a first offender. • He did not injure the complainant. • The state proves no psychological effects on the complainant. • [The appellant] has apologised to the family. • The mother of the complainant has testified [that the family] accepts the appellant's apology.'” [Paragraph 20]

“Considering the substantial and compelling circumstances recorded, I am of the view that the sentence imposed is disproportionate to the offence committed.” [Paragraph 23]

“I accept the recorded circumstances that warrant imposition of a lesser sentence than the one prescribed by CLAA. I am of the view that the appellant's youthfulness and the period spent in custody while awaiting trial should have been added (which I now do) to the list of substantial circumstances compelling deviation from the prescribed sentence. Considering the testimony on the appellant's forgiveness by the members of his and the complainant's family, the reports filed and the recommendations, I am further of the view that the sentence imposed is disproportionate to the offence the appellant committed. The appeal against sentence stands to succeed. ...” [Paragraph 24]

The life sentence was replaced by a sentence of 12 (twelve) years' imprisonment, which was antedated, and the prison authorities were ordered to deduct a period of two years from the sentence imposed, when calculating the date upon which the sentences imposed were to expire.

RABUPAPE V S (A907/2014) [2014] ZAGPPHC 948

Judgment delivered 2 December 2014

A 16 year old child who was driving without a licence collided head on with another vehicle while overtaking illegally, resulting in a death. The presiding magistrate referred the child for diversion. The matter was then referred to the High Court as a special review, on the grounds that the presiding magistrate ought not to have referred the child for diversion as envisaged in terms of Child Justice Act.

Phatudi J (Msimeki J concurring) held:

“[The] Child Justice Act ... was enacted and promulgated....with a view to (among others) establish a criminal justice system for children who are in conflict with the law. The Act further aims to provide for

the holding of a preliminary inquiry and to incorporate the possibility of diverting matters away from the formal criminal justice system." [Paragraph 5]

"The presiding judicial officer may, after consideration of all relevant information presented at a preliminary inquiry, consider diversion if the child acknowledges responsibility for the offence and the prosecutor indicates that the matter may be diverted in accordance with subsection (2)." [Paragraph 7]

"It is clear from the record that the application for diversion was instituted by the defence. It appears that the presiding officer was persuaded by the defence's submission that the child acknowledged responsibility for the offence. Notwithstanding the public prosecutor's opposition thereto, the presiding officer ordered for diversion without considering the provisions of the Act. In my view, the presiding officer misdirected himself by accepting the child's acknowledgement of responsibility for the offence without considering the provisions of section 52(1) (e). … [T]he presiding officer erred and acted irregularly." [Paragraph 8]

"Further thereto, the prosecutor may, in the case of an offence referred to in Schedule 2, after he/she has considered the views of the victim or any person who has a direct interest in the affairs of the victim, may indicate whether or not the matter should be diverted. There is no evidence of either the deceased's family or any person with direct interest in the affairs of the deceased or of the police official responsible for the investigation of the matter demonstrating that they were consulted before diverting the matter. The evidence on record is just that of the prosecutor opposing diversion. The diversion ordered by the presiding officer is, on this leg as well, irregular." [Paragraph 9]

"The presiding officer, as the record demonstrates, … realised the irregularities that the court had committed. He, in his statement stated that he 'truly agrees with the submissions made by the Control Public Prosecutor that the accused minor child should face the full might of the law'. The presiding officer, being functus officio, cannot retract or rescind his own judgment and order. The matter, in my view and in the interest of justice, is reviewable." [Paragraph 14]

"Based on the irregularities committed by the presiding officer which are mentioned herein, the order for diversion made stands to be set aside. Indeed the matter stands to be referred to the Child Justice Court for the minor child to face the full might of the law. …" [Paragraph 15]

The order made by the court a *quo* was set aside and the case referred to Child Justice Court for trial.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

M & G MEDIA LIMITED V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS [2013] 2 ALL SA 316 (GNP)
Case heard: 12 February 2013, Judgment delivered: 14 February 2013

Applicant's sought access to a report to the then President Thabo Mbeki by two senior judges, regarding constitutional and legal issues related to the 2002 Presidential elections in Zimbabwe. The case was remitted to the Court in terms of a Constitutional Court order, requiring the High Court to examine the record in terms of the provisions of section 80 of the Promotion of Access to information Act (a so-called "judicial peek"), and to determine the application under section 82 of the Act. When this matter was called, the court ordered the respondents to produce the report to the court. Once the report was handed to the court in confidence, the court took a short adjournment and took a judicial peek at the record. When the court resumed, parties were afforded an opportunity to address the court on the procedure to be followed pursuant to the judicial peek. The applicant then brought an application for the court to determine whether, based on the requested record which the Court had examined, the respondents had discharged the statutory burden imposed upon them by section 81(3) of the Act to establish that their refusal of the request for access complied with the provisions of the Act.

The case centered on two exemptions claimed by the respondents under sections 41(1)(b)(i) and 44(1)(a) of PAIA. Raulinga J found that on a balance of probabilities the State had failed to discharge the burden placed on it under section 81(3) of the Act, holding that the contents of the report did not support the first ground of exemption, that the disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation [paragraph 59]. The applicant had complied with all procedural requirements pertaining to the request for information in possession of the State. Raulinga J held that the law made disclosure of information the rule, and exemption from disclosure was the exception. The default position in respect of access to information held by the State was that of disclosure.

"The evidence of the Deputy Information Officer and the Minister in the Presidency can be discounted on the basis that they were not personally involved in the events preceding the mission of the two justices to Zimbabwe. The testimony of the Director General can be excluded on the ground that he did not provide details in his affidavit as to how his position in the Presidency afforded him the opportunity to have acquired personal knowledge of the judges' mandate. Rev Chikane, as Director General must have had personal knowledge of such events as the Director General in the Presidency. However, this is mired by the submission on behalf of the respondents that the two justices had to report personally to the former President Mbeki who was of the view that a report made directly to him would assist him and the national executive to take policy decisions on how best to support and strengthen the quest for political and economic stability in Zimbabwe and in the region. This, therefore, removes Rev Chikane from the picture as the person who bears personal knowledge to the Zimbabwean mission. Even if one were to assume that he bears personal knowledge to the facts, in the absence of the evidence of former President Mbeki the respondents' case remains mystified. Once Sapire J, decided that there was insufficient evidence to support the withholding of the record by the respondents, the writing was on the wall for more evidence to be presented to justify the exemptions claimed. The affidavits of former

President Mbeki and the current President ought to have been fifed [sic] on appeal in the Supreme Court of Appeal and later to the Constitutional Court. I say this against the backdrop that the respondents' hands are tied by sections 25(3)(b) and 77(5)(b). Despite these constraints based on the contents of the report, I do not see how section 80 can support the cause of the respondents for nondisclosure." [Paragraph 51]

"In my view, and it is supported by the contents of the report /there are three people who have direct knowledge of the mandate that was given to the judges – Former President Mbeki and the two Justices. Questions have been raised why the two justices did not depose to affidavits. I do not wish to act as pontiff for Justices Khampepe and Moseneke, I think they accepted to act as envoys of the former President in good faith as a call to national duty. Their acceptance to act as envoys must not be seen as succumbing to an agreement to a traduction of the division of powers. This must be assessed against the background that the then late Chief Justice Arthur Chaskalson, himself a proponent of the separation of powers, had sanctioned the appointment of the two Justices as envoys on a mission in Zimbabwe. To date we do not know why their affidavits were not filed, which omission cannot be blamed on them." [Para 52]

"It is common cause that the applicant complied with all procedural requirements pertaining to the request for information in possession of the State. This includes up to the appeal stage within the Presidency. Under our laws, the disclosure of information is the rule and exemption from disclosure is the exception. The default position in respect of access to information held by the State is that of disclosure." [Para 61]

"… [T]he State relies on the provisions of section 41(b)(i) and section 44(1)(a)(i) of PAIA in withholding the report. As correctly submitted by the applicant, it is common cause on the papers that the report contains the findings of the two Justices regarding the conduct of the Zimbabwean elections, such as whether the legal requirements for the elections were met. I can now confirm that this is what the report reflects. This can never reasonably be construed as information supplied in confidence by or on behalf of another State. In my view, most of the information is public knowledge. The report itself does not reveal that it was intended to be kept secret. Further, information provided by individuals who happen to be members of the public service cannot be said to be information supplied by or on behalf of another state. Moreover, the information was supplied also by persons who do not qualify as members of another State. Information was also supplied by independent lawyers." [Paragraph 62]

The refusal by the respondents for access to the report was set aside, and the respondents were ordered to make a copy of the report available to the applicant within ten days of the order. The decision was upheld by the Supreme Court of Appeal in **President of the RSA v M & G Media Ltd (998/2013) [2014] ZASCA 124 (19 September 2014)**.

CRIMINAL JUSTICE

S v CHOKOE 2014 (2) SACR 612 (GP)

Case heard 28 March 2014, Judgment delivered 28 March 2014

This case was referred to the High Court on special review as all the case records, documents and court files were destroyed by a fire that ravaged the Polokwane Magistrate's Court, before the trial court could

finish proceedings. There was no way of recovering or reconstructing any documents or electronic backups destroyed in the fire.

Raulinga J (Pretorius J concurring) held:

"For purposes of an appeal or review or a continuation of the trial, an adequate record of the proceedings for such purposes is a prerequisite. The absence of such a record hampers a just hearing of the appeal or review, thereby constituting a 'technical irregularity or defect in the procedure' within the meaning of s 324 of the Criminal Procedure Act (CPA) read with s 313 thereof and renders the conviction and/or sentence liable to be set aside." [Paragraph 3]

"In casu, however, nothing appears to show that all the parties have been directed to assemble for the reconstruction of the record. There are preliminary steps that must be undertaken to reconstruct a record as authoritatively stated in S v Nortje 1950 (4) SA 725 (E). It was stated that in cases where the record of proceedings gets lost before being submitted to the high court, the clerk of the court concerned must submit to the high court the best secondary evidence he can obtain of the contents of the lost record. There is a five point procedure to be followed as restated in the case of S v Mahlehlele [2013] JOL 29974 (ECP):

(a) To obtain a proper affidavit that the record is indeed lost;

(b) to obtain affidavits from witnesses and, if necessary, others present at the trial, as proof of evidence recorded;

(c) prove in the same way the charge, the plea and all portions of the record;

(d) submit to the accused the record to be forwarded to see if the accused has any objections to the contents of it; and supply proof on affidavit of the reply of the accused;

(e) obtain a report from the presiding magistrate as to the correctness of the record who will certify whether the record is correct. ..." [Paragraph 12]

"The peculiarity of this case is the extraordinary circumstance in which the record was lost. There are incomplete notes kept by the defence attorney that are available, a portion of the transcription, and a charge-sheet with a record of postponements. It is not desirable for a court to prescribe a uniform course of conduct in matters involving missing records since circumstances of each case vary. Exercising its powers in terms of s 304(3), the court may in certain circumstances direct a question of law or fact to be argued by the Director of Public Prosecutions and by the counsel, as the court may appoint." [Paragraph 13]

"In conclusion, the court should try its level best to reconstruct the record. This reconstructed record from the best available secondary evidence must then be placed before all parties for scrutiny. For partly heard matters the trial court is not functus officio. Where secondary evidence cannot be obtained owing to the failure of the mechanically recorded evidence, all the witnesses may be recalled to give evidence once again. Thereafter the trial must continue in the normal way." [Paragraph 20]

Raulinga J made the following order:
(a) The processes involving the reconstruction of the record must be completed first. (b) Once the record has been reconstructed and the parties agree on its correctness or accuracy, then the matter must be proceeded with. (c) In the event that the parties do not agree on its correctness the matter must be

tried de novo — only if the disagreement is substantial and relevant to the disputes.(d) If the disagreement is trivial, the magistrate should record his version of saying so, in order for a review or appeal court to consider whether or not a trial de novo should be ordered.

CHILDRENS' RIGHTS

MEDIA 24 LIMITED AND OTHERS V NATIONAL PROSECUTING AUTHORITY AND OTHERS IN RE: S V MAHLANGU AND ANOTHER (55656/10) [2011] ZAGPPHC 64; 2011 (2) SACR 321 (GNP) (29 APRIL 2011)

Case heard: 22 November and 2 December 2010, Judgment delivered: 29 April 2011

This was an application based on section 63 (5) of the Child Justice Act, and relating to the trial of an adult and a minor accused on a charge of murder of Eugene Terre'blance, leader of the Afrikaner Weerstandsbeweging ("AWB"). The Applicants sought an opportunity to have journalists employed by them attend the proceedings in order to report on the evidence and the issues as they emerge. The amicus however, wished to deal with the special status accorded to the protection of children's rights under South African and International Law, the interpretation of Section 63(5) of the Act (which provided that proceedings in a trial of a minor accused are to be held in the absence of any member of the public barring the necessary parties), and the order that was proposed by the applicants. The Applicants argued that the court ought to permit journalists to be present because the trial concerned issues of profound public interest and that the holding of a trial completely closed to the media would significantly limit the right of freedom to information; and that there was a mechanism available to protect the best interests of a minor accused while preserving the right of members of the public to have knowledge of the proceedings.

Raulinga J held:

"I am in agreement with the amicus that the best-interest principle, coupled with the law's requirements that the child accused's dignity, privacy, and fair trial interest be protected, require that, as a general rule, s 63(5) of the Act must be understood to exclude public attendance at child justice court proceedings. However, this should be interpreted with the understanding that the legislature foresaw a possibility of exceptions. It is for that reason that the first part of the section — '(n)o person may be present' — should be interpreted as prohibiting the presiding officer from opening the child justice courtroom to a class of persons, such as 'the media' or 'the public'. The second part of the section — 'or the presiding officer has granted him or her permission to be present' — allows access to the criminal proceedings within the discretion of the court, which must be exercised with reference to the values of the Constitution, including the right to freedom of expression and the right to receive information. In doing so, the court must strike a balance between 'fair trial interest' and 'public interest'. …" [Paragraph 14]

"… [T]he constitutional promise of a free press is not one that is made for the protection of the special interests of the press. The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself. I agree with the amicus that the default position should not be shifted to an 'open to the media' position simply because the proceedings are newsworthy or controversial. … [I]f the application is refused, it will have

the effect of substantially limiting the right of members of the public to receive information and, therefore, the right to freedom of expression. The public will not know the circumstances of the killing. In the converse, if the media were allowed access into the courtroom, this may prejudice the right of the minor accused to be tried in camera. The minor accused may suffer emotional trauma and he may feel intimidated by the presence of the media. A choice will therefore have to made between limiting the rights of the accused to a trial by hearing the matter behind closed doors, and by that limit the rights of the public or to limit the rights of the accused in terms of section 36 of the Constitution and yield to the rights of freedom to receive information. It is important to observe that the unusual circumstances in this case may justify the exception to the general rule." [Paragraph 16]

"Whether a trial is held in camera or in an open court, the right to a fair trial still applies. Children have the right to adduce and challenge evidence. It is indeed true that the trial court environment is an. intimidating and frightening one. The fair trial standard associated with trying adult accused cannot be equated to a fair trial context of a child accused. It is always important to create a more sensitive court room environment for children. In doing so, the objectives of the Act regarding the protection of the rights of children are paramount. The issue of right to privacy and dignity also arises. Children are particularly susceptible to stigmatization. South African domestic law and international law seek to protect children from the adverse effects that may result from publication in the media and public attendance at trial. In addition to the requirements of Section 63 (5) of the Act, Section 63 (6) incorporates sectionl54 (3) of the Criminal Procedure Act which prohibits the publication of any information which reveals the identity of the accused under the age of eighteen years. The underlying principle is therefore that criminal proceedings involving children accused, should be that the court room should be closed from the public and entry should only be permitted by the presiding officer in very exceptional circumstances. The invasion of the child accused's privacy and dignity should be avoided at all costs. To this end, Section 63 (4) of the Act states: a child justice court must during the proceedings, ensure that the best interest of the child are upheld, and to this end must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child. This principle is also articulated in Article 40 of the Convention on the Rights of the Child as well as in Article 4 of the African Charter on the Rights and Welfare of the Child. Section 28 of the Constitution confers to children the rights under Sections 12 and 35 of the Constitution. Section 35 includes the right to a fair trial - that includes the right to be represented when being tried, adduce and challenge evidence. These rights were elucidated in Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 (6) SA 632 (CC)**.**" [Paragraph 19]

"While I am inclined to grant the Applicants permission to attend the proceedings, I am of the view that such permission must be more restrictive. One cannot open a pandora's box. I have already stated that such permission can only be granted under exceptional circumstances, which I agree exist in this case. Instead of granting permission to the media and the public to sit in an open court where the child accused will be sitting, I am of the view that the media and the public can only be allowed to sit in a close circuit tv room from which they will view the trial." [Paragraph 27]

SELECTED ARTICLES

'EXPERT TESTIMONY IN CASES OF CHILD SEXUAL ABUSE: DOES IT ASSIST JUDICIAL OFFICERS TO ARRIVE AT THE TRUTH?', CHILD ABUSE RESEARCH IN SOUTH AFRICA, 3, 1, 25-31 (1 APRIL 2002)

The article presents an overview of the role of expert evidence in cases of sexual abuse in the court system from the point of view of the presiding officer. It deals with the necessity of such evidence, and its admissibility. The central question addressed was whether expert testimony assisted judicial officers in arriving at the truth in criminal cases relating to child abuse.

"A crucial part of medical evidence is the ability of doctors to communicate their findings to the court. … In those instances where the individual in thorough enough during the investigation process to examine the complainant … and where he/she is disciplined enough to note all the relevant observations in the report … this will in most matters be of great assistance. Unfortunately … the ideal situation is not always the de facto position."

"Regarding intermediaries, the entire system is a plus factor. Trained social workers interacting with minor complainants in an adjacent room ensure a relaxed youth witness. …"

"In child abuse cases, the presiding officer is usually confronted with the evidence of the abused child only. Some victims are three years and younger, which makes it well nigh impossible for the prosecution to call them to testify. Furthermore, victims are often abused or raped in circumstances where a proper identification is impossible or very difficult … This is where the evidence of an expert witness takes on vital importance. The evidence of a forensic analyst on the examination of biological exhibit material found during a medical examination of the victim might be crucial in proving the identity of the rapist. …" (Page 27)

The article then considered South African and foreign case law, before concluding:

"The question … is whether the standard of approach in receiving or rejecting evidence is the same. IS there a need for uniformity for value judgement in matters of this nature? Should we rely only on the stare-desisis [sic] rule or can something more than just the wide doctrine of precedent be employed? Are prosecutors and investigators fully equipped to understand why it is so important to use expert testimony in criminal child abuse matters so that they can properly assist the courts in arriving at the truth?"

"It is suggested that judicial officers stick to the general rule and exceptions, but be more vigilant when it comes to matters of child abuse. They should not be rigid, but should adopt a flexible approach towards each expert testimony that may be presented before them. It is further suggested that courts keep pace with recent developments on the use of expert evidence to determine whether a particular issue expert testimony might be helpful or whether such has been overtaken by judicial notice or by the fact that c ourts can draw inferences. Courts should, however, be careful not to draw the wrong inferences, based on outdated assumptions or myths that have no scientific basis, such as that a complaint will be made at the first available opportunity; and that absence of medical evidence to corroborate the abuse points to a false complaint having been made; that child witnesses will always be consistent if they are telling the truth; or that children are always more suggestible than adults." [Page 31]