dgru Democratic Governance and Rights Unit

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

APRIL 2014

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. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research *inter alia* on the judicial appointments process and on the future institutional modality of the judicial branch of government.

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, monitoring 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, and February, April and October 2013.

3. The intention of these reports is to assist the JSC by providing an objective 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. The latter intention, to assist interested stakeholders in analysing and commenting on the appointments process, is pertinent to the submission we make below.

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, LexusNexus* and *SAFLII* legal databases. We have attempted to focus, as far as possible, on judgments most relevant to the courts to which candidates are applying. In this light, we have included only judgements relating to labour law matters in our summaries of the Labour Appeal Court candidates. Regarding candidates for the

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

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

6. As with most of our previous reports, 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. As with our most recent reports, we have continued to present the summarised judgements in thematic groups. Our aim in doing so is to try and make the report more accessible, and also to highlight more directly the candidates' track records on issues 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 should be taken into account 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. Labour Law;
    - 10.8. Civil Procedure;
    - 10.9. Criminal justice;
    - 10.10. Childrens' rights;
    - 10.11. Customary law; and
    - 10.12. Administration of Justice, within which we deal with issues such as the exercising of appellate functions, dealing with professional misconduct by members of the legal profession, and the awarding of costs.

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. As we have previously submitted, 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 the interests of brevity, we have sought to avoid making any detailed submissions on issues that we have covered in previous reports. These comments remain relevant to our assessment of the appointment process. In this submission, we make brief further comments on the issues of gender and fair questioning, before making a submission on the time available to comment on candidates for appointment.

14. In the submissions to our report for the October 2013 interviews, we commented positively on the significant number of female candidates to be interviewed.

Gender Equity

15. It is disappointing to note the small number of female candidates – by our count, only 4 out of 26 – to be interviewed at this sitting of the JSC. Some fluctuation in numbers is doubtless to be expected as a natural part of the appointment process. However, the decrease in numbers demonstrates again the need for all stakeholders – acknowledging that this is not a matter that can be solved by the JSC alone – to continue to be vigilant and proactive in addressing. One step could be for stakeholder groups to be encouraged to nominate more female candidates.

Fair Questioning

16. We have previously commented in some detail on issues relating to the fairness of questions asked, and the equality of treatment of candidates generally. It was encouraging to note that the October 2013 interviews generally appeared to consist of fair and balanced questioning. For reasons we have canvassed extensively in our previous submissions, we encourage the JSC to strive to ensure that this continues to be the case in these and subsequent interviews.

17. While it would probably be neither feasible nor appropriate for the JSC to adopt the approach of modern 'good' human resources practice by having the precisely the same template of questions put to each candidate for a position, because a judicial appointment should not be equated with the appointment of an employee, we do submit that each candidate for a judicial vacancy should be given the same, or at the least a sufficiently similar or equivalent, opportunity to answer any question of importance and substance related to the specific appointment.

Shortlist Timing

18. The shortlist of candidates for these interviews was announced, as far as DGRU is aware, on 5 March 2014. With the interviews scheduled to begin on 7 April 2014, there is ostensibly a month available to interested parties to prepare submissions on candidates, prior to the interviews taking place. However, as members of the JSC would ideally have at least a week (and, we would submit, ideally longer than that) to peruse the submissions made, there is 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.

19. The present interviews provide a good illustration of the challenges this may present. Thirteen candidates are being interviewed for positions on the Supreme Court of Appeal and Labour Appeal Court. All these candidates, having already served for significant periods on the High Court, have amassed a significant body of jurisprudence. It would be to the benefit of all involved for interested organisations to have more time available to them to consider such candidates' track records in greater detail.

20. Many organisations are of course able to prepare carefully considered submissions within the time available. But it is our respectful submission that the time available to prepare submissions is too short, and we request that the JSC adjust its timeframes to allow for a longer time period between the announcement of the shortlist and the interviews taking place. Doing so not only would facilitate greater public participation in the judicial appointments process, 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.

ACKNOWLEDGEMENTS

21. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was conducted by Chris Oxtoby, DGRU researcher, and Justice Mavedzenge and Esther Gumboh, DGRU research assistants.

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DGRU

2 April 2014

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 obligation [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 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

PRIVATE LAW

SMITH V ROAD ACCIDENT FUND (10/39870) [2011] ZAGPJHC 203 (15 DECEMBER 2011)

Case heard 17,18 & 25 October 2011, Judgment delivered 15 December 2011

The plaintiff claimed damages for bodily injuries sustained in a motor collision. The plaintiff was a pedestrian when he collided with the insured driver's vehicle.

Mbha J held:

"The issue that has to be determined is whether the insured driver negligently caused the collision, and whether the plaintiff was also negligent and if so, whether such negligence was a contributory cause of the collision" [Paragraph 11]

"The plaintiff testified that before traversing the highway he looked to his right and saw that there were two vehicles that were approaching from his right and which were travelling astride to each other along the two lanes for traffic travelling in the east-westerly direction along the Soweto Freeway. I accept his evidence that the robot was green for him before he traversed the highway but since the robot turned to amber and to red when he was not even halfway across the highway, it follows that the robot must have been green for some time well before he started traversing the highway. If one considers that he did see the two vehicles approaching from his right, one expects him to have waited to ensure that it was safe for him to cross since he was not aware for how long the robot had been green before he got to the intersection." [Paragraph 12]

"… Clearly, on his own version the plaintiff decided to step into the path of the insured vehicle. He stated in no uncertain terms that before stepping backwards he checked and saw that the insured driver even tried to apply brakes in an attempt to avoid the collision. What I find strange is that the plaintiff never furnished any explanation why he never proceeded and run across to the other side of the highway. He never mentioned in his testimony that there was traffic coming in the opposite direction to that of the insured vehicle. The picture that emerges is that he is the one who decided to walk backwards into the path of the insured vehicle. I accordingly find that the plaintiff acted recklessly in the circumstances." [Paragraph 13]

"One can also not exclude the possibility that the plaintiff was inebriated at the time the collision occurred. … [H]e testified that he and his friend consumed three 750 ml bottles of beer. Although he says he was sober, I have noted that in the hospital records it is recorded that upon admission he had clearly consumed alcohol although he was coherent in his speech. Unfortunately the plaintiff was not cross-examined extensively on this aspect so it is difficult to assess how he was affected by the consumption of liquor at the time of the collision. The court nonetheless accepts that he was somewhat under the influence of alcohol at the time of the collision." [Paragraph 14]

"I am however, unable to put the entire blame for the collision on the plaintiff. As it is common cause that the plaintiff was hit by the insured vehicle when he was in the middle of the two lanes, meaning that the plaintiff had already traversed the entire left lane in which the insured vehicle was travelling, this begs the question why the insured driver never saw the plaintiff before the collision. Unfortunately the

defendant never called the insured driver to come and testify and furnish his version. All that was suggested to the plaintiff was that the insured driver could not avoid the collision and that the plaintiff was solely to blame therefor." [Paragraph 15]

"It is trite law that a motorist approaching and entering an intersection while the traffic light is green for him or her must keep a diligent and proper lookout for traffic and pedestrians who are already in the intersection and who entered the intersection before the traffic light changed. Also, there is a duty not to ignore vehicles or pedestrians who are acting in a negligent manner. ... " [Paragraph 16]

"... I find that both the plaintiff and the insured driver were negligent in their respective conduct and that their negligence contributed equally to the collision. In the circumstances I find that there should be a 50:50 apportionment of negligence in respect of both parties." [Paragraph 19]

Taking into account the plaintiff's injuries and the sequelae thereto, the court held that an amount of R300 000,00 was a fair and reasonable compensation for the plaintiff's general damages and the defendant was liable for the 50% of that amount.

SOCIO-ECONOMIC RIGHTS

GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL AND ANOTHER V MEC FOR EDUCATION: GAUTENG PROVINCE AND OTHERS [2012] 1 ALL SA 576 (GSJ)

Case heard 03-04 October 2011, Judgment delivered 07 December 2011

In this case, the applicant sought a declaratory relief and an order setting aside a decision taken by the Head of Department: Gauteng Department of Education, instructing the Principal of the Rivonia Primary School to enroll a learner in Grade 1 at the school, contrary to the school's admission policy as determined by the applicant (the school governing body).

The court began by addressing the question of Interpretation the South African Schools Act, and considered the powers of the School Governing Body. Mbha J held:

"Our Constitution places a duty on all the courts to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values. The primary right involved in this matter is the right to a basic education. This right is guaranteed by section 29(1)(a) of the Constitution. It is enshrined in the Bill of Rights. In terms of section 7(2) of the Constitution the State must respect, protect, promote and fulfil these rights. Accordingly, the statutory powers, rights and obligations of the applicants and the first to third respondents must be understood in the context of the constitutional commitment to substantive equality in section 9, and, importantly the constitutional guarantee of access to a basic education in section 29(1)(a). The importance of the right to basic education is underscored by the fact that, unlike other socio-economic rights it is not subject to the limits of "availability of resources" or "reasonable legislative measures. Secondly, central to the quest and government's commitment to transforming the current, unjust and unequal basic education system is not only about redressing past injustices, but importantly it is also about breaking the cycle of poverty that perpetuates the patterns of class and racial inequality generation after generation. Undoubtedly, the right to education is an empowerment right that enables people to realise their potential and improve their conditions of living.

The importance of education as a tool to liberating and affirming people was recognised in Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo …" [Paragraphs 24-26]

"Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefits of the law. It further provides that equality includes the full and equal enjoyment of all rights and freedoms. Clearly, the Constitution is committed to redressing the injustices of our racist past including the creation of an equal and egalitarian society that is not only formally equal, but substantively equal. Substantive equality requires positive and purposive action to redress current imbalances in the distribution of resources. While many facets of present-day South African society remain unequal, the inequality is particularly stark and tragic in the realm of basic education. Our society still has a gargantuan challenge to undo what the Constitutional Court described in Hoërskool Ermelo … as the "painful legacy of our apartheid history" that effectively deprived black schools of resources, while lavishing resources on white schools. Regrettably this ill-advised policy resulted in a plethora of socio-economic problems plaguing our society, including the rampant crime. It is with that understanding of the right to equality … and the right to basic education … in mind, that I proceed to consider the proper interpretation of the South African Schools Act … in the context of the specific issues to be determined" [Paragraphs 29, 31-32]

"[T]he school governing body exercises its delineated functions subject to various forms and degrees of oversight, supervision and intervention exercised by the HoD and the MEC in fulfilling their broadly stated functions … From the provisions of the Act it is clear that the function of determining the admission policy of a school, is not an all encompassing one since the Act has allocated certain admissions related powers and functions to other role-players … This means that, under the Act, the MEC is the ultimate arbiter of whether or not a learner should be admitted to a public school. [Paragraphs 35; 59]

"In my view, providing a basic education across race and class requires government intervention in the preliminary power of school governing bodies to determine admissions policies. Leaving schools to determine their admission policy, including the power to determine their capacity, and subject only to appeals in individual cases, one unwittingly creates space privileged schools can use and manipulate that power to fortify rather than dismantle existing inequalities. Schools such as the applicants could thus craft admissions policies that allow them to continue to offer a premium education to their learners, while ignoring the increased demand their action places on other schools in the area that are already operating with fewer resources and higher learner-to-class ratios. In my view, interpreting the Act to deny government the ability to intervene to ensure an equitable distribution of learners across all schools in the areas prevents it from fulfilling its obligation under section 7(2) of the Constitution to "respect, protect, promote and fulfil" the right to equality and to a basic education. Denying government the power to distribute and equalise schooling resources is a serious barrier to its valiant and laudable attempts … to "eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege". As committed South Africans this is the new vision that we should all be aspiring for. A society where, irrespective of race or class, every child can, without hindrance, access education. " [Paragraphs 73-74]

"Clearly, while the power to determine an admission policy vests in the first instance in school governing bodies, that power must, as the court found in Hoërskool Ermelo … "be understood within the broader constitutional scheme to make education progressively available and accessible to everyone". This is a

constitutional imperative. The court also emphasised the vital role of government in regulating the language, and by logical extension, the admissions policies of schools. It held that permitting the power to rest exclusively with school governing bodies would be inconsistent with the state's duty to ensure that there are enough school places for every child who lives in a province in terms of section 3(3) of the Act, and its duty to ensure that a public school must admit learners without unfairly discriminating in any way … In fact to allow this kind of situation to prevail might subvert the very noble ideals by government to ensure equal and quality education for all. I accordingly conclude that section 5(5) does not and should not be interpreted to include the unqualified and exclusive power to any school governing body to determine a school's maximum capacity." [Paragraphs 77-78]

Mbha J then considered the procedural fairness of the decision by the HoD to order that the learner be admitted to the school contrary to the governing body's admission policy. Applicant argued that it had not been properly consulted by the HoD. Mbha J held:

"I have set out the structure of Regulation 13(1)(a) … In terms of this Regulation there was, in my view, no need for the HoD to consult the Principal or the school prior to taking his decision because the reasons for their refusal of the learner's admission had to be conveyed to him administratively. In any event, the Principal had furnished the reason for the learner's unsuccessful application in her email … wherein the Principal advised the learner's parent that the reason for the non-admission of the learner was that "the school had reached its capacity for Grade 1 2011." Furthermore, quite apart from the Principal's aforesaid e-mail, the Department and its representatives consulted with the school on four different occasions in an attempt to resolve the problem relating to the learner's admission to the school before the HoD made the decision to set aside the school's decision not to admit the learner. … In my view, the Department was accordingly well aware of the school's attitude in relation to the application for the learner's admission and there was no violation of procedural fairness in the HoD's decision … to set aside the decision to refuse the learner admission to the school." [Paragraphs 83-85]

"The HoD acted lawfully in deciding to overturn the Principal's refusal of the learner's application for admission. Once the learner's application had been accepted by the HoD, she had to be admitted to the school. It follows that there can be no valid complaint about the HoD's direction to the Principal to admit her." [Paragraph 86]

Mbha J found that the Schools Act did not grant a school governing body an unqualified power to determine a public school's admissions policy; that the power to determine the maximum capacity of a public school in Gauteng vested in the Gauteng Department of Education and not in the school governing body; that the Gauteng Department of Education had the power to intervene in the school governing body's power to determine the admission policy of a public school; and that the MEC for Education, Gauteng Province, was the ultimate arbiter whether or not a learner should be admitted to a public school.

The decision was overturned by the SCA in **Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others 2013 (1) SA 632 (SCA)**, finding that the instruction to admit the learner contrary to the school's admission policy, had been unlawful. However, the Constitutional Court in turn reversed the SCA in **MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others 2013 (6) SA 582 (CC)**, finding that the HoD of Education had been empowered to issue the instruction to the principal to admit the learner in excess of the limit in its admission policy, but that in exercising that power, the HoD had to act in a procedurally fair manner, and had not done so.

LOUISVALE PIRATES V SOUTH AFRICAN FOOTBALL ASSOCIATION (40614/2011) [2012] ZAGPJHC 78 (4 MAY 2012)

Case heard 14 February 2012, Judgment delivered 4 May 2012

The applicant football team had been thrown out of a competition following a ruling by the disciplinary committee of the respondent), and sought an order declaring this ruling null and void. The court had to decide whether the applicant had prematurely approached the court, having not exhausted all available internal remedies, and whether the decision was reviewable under the Promotion of Administrative Justice Act (PAJA).

Mbha J held:

"Clearly, the applicant, as a fully-fledged member of SAFA, is bound by and subject to SAFA's constitution, rules and regulations. There is thus a contractual relationship between SAFA and its constituent members. In Constantinides v Jockey Club of SA … the court recognized that the constitution of a voluntary association is a contract, resulting in a contractual relationship between the association and its members. This means that save in certain exceptional circumstances … the applicant is bound to exhaust all internal remedies provided to it in terms of the constitution, rules and regulations of SAFA, before it can approach this court for the relief it seeks. …" [Paragraph 16]

"It is trite law however, that the existence of internal remedies in the form of for example internal disciplinary procedures and arbitrations, do not automatically oust the court's jurisdiction. … The rule is therefore well-established that in the event of a domestic authority failing to comply with its own rules by, for example, acting ultra vires its powers or the rules of natural justice, the court has jurisdiction to determine the appeal. …" [Paragraphs 17 - 18]

"There is no justifiable basis for the applicant to approach this court, instead of exhausting the internal remedies available to it. The applicant has also failed to demonstrate any reason why I should exercise my discretion in favour of entertaining the dispute as opposed to SAFA's Appeal Board. For these reasons, I find that the respondent's point in limine must be upheld" [Paragraph 20]

On whether PAJA applied and if so, whether the applicant was obliged to exhaust available internal remedies, Mbha J held that:

"It has, in my view, correctly been contended, that the respondent is a private body and a voluntary association, that is wholly unconnected to the State. Indeed, in its Articles of Association it is described as a universitas with full legal personality and a public benefit organisation in accordance with the provisions of section 33 of the Income Tax Act …" [Paragraph 21]

"What must be considered is whether the respondent's action in subjecting the applicant to a disciplinary procedure, amounted to an administrative action. The corollary to this question is whether or not PAJA is applicable in this case. Clearly if it is, this would mean that the applicant would first have to exhaust the internal procedures as prescribed by SAFA's constitution, rules and regulations before it can approach the court." [Paragraph 22]

"PAJA [accordingly] does not confine the definition of administrative action to decisions only by organs of State or public bodies. It also includes any decision taken, or any failure to take a decision by a natural or juristic person when exercising a public power or when performing a public function, which adversely

affects the right of any person and which has a direct, external legal effect. An empowering provision is defined as "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken" (my emphasis). I am accordingly of the view that the constitution of SAFA in terms of which soccer is governed in this country, constitutes an empowering provision in terms of which the respondent carries out its functions including disciplining its members. The respondent is the dominant and only soccer body governing the game of soccer in the country. It exercises this power nationally and whatever decision it makes, on any matter involving soccer, effects the public. I am also informed that it partly receives its funding from the government. It is accordingly a body which performs a public function which is to, inter alia, entertain the nation, provide employment and develop, control and manage sporting activities for all young and old nationally. It is also a well-known fact that soccer is a sport which is enjoying wide-ranging support in South Africa resulting in the fate of soccer teams and players being a matter of public interest. It is thus of vital importance that the respondent exercises its decisions within the strict rules of natural justice as all soccer teams, players, soccer matches and associated activities fall within the public interest domain. Although the respondent is a private body or voluntary association, the public at large has an interest in what happens in soccer generally. It stands to reason that the disciplining and the possible subsequent suspension of soccer teams by the respondent, is of necessity a matter of public interest or concern." [Paragraphs 24-25]

"Applied to the facts of this matter, I am satisfied that the disciplinary procedure and hearing to which the applicant was subjected, constituted the exercising, by the respondent, of a public function. I accordingly find that the provisions of the Promotion of Administration Justice Act … are applicable to SAFA and its members in respect of matters concerning disciplinary procedures. Section 7(2)(a) of PAJA provides that no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for, has first been exhausted. It is common cause that the applicant has not exhausted the internal procedures in terms of the constitution, rules and regulations of SAFA. The applicant has also failed to show any reasons justifying a departure from the provisions of PAJA I have already referred to. It follows that the respondent's point in limine must be upheld" [Paragraph 29-30]

The application was dismissed.

CRIMINAL JUSTICE

S V MAFOHO 2013 (2) SACR 179 (SCA)

Case heard 12 March 2013, Judgment delivered 28 March 2013

Appellant had, in 2001, been sentenced to 275 years imprisonment having pleaded guilty to 60 counts of robbery with aggravating circumstances, attempted murder, rape, attempted rape and pointing a firearm. Appellant was described as the head of a gang which had targeted vehicles at night, committing "a series of serious, premeditated offences on at least 20 occasions" over a 2-year period. At issue was the appropriateness of the sentence in light of legislative provisions regarding eligibility for parole.

Mbha AJA (Mthiyane DP, Shongwe JA, Schoeman and Swain AJJA concurring) held:

"The appellant's complaint is that, as he was sentenced on 17 January 2001, his eligibility to be considered for parole is governed by the provisions of s 65(4) of the Correctional Services Act 8 of 1959 (the old Act), which means that he will only be considered for parole after serving half of his sentence, unless the date for considering parole is brought forward as a result of credits earned. ... He ... submits that ... it would be appropriate if this court substituted his sentence with that of life imprisonment. ... [T]hen he would in terms of s 136(3)(a) of the Correctional Services Act 111 of 1998 (the new Act), read together with para 59 of the Constitutional Court's judgment in Van Vuren v Minister of Correctional Services, be entitled to be considered for parole after serving a period of imprisonment of 20 years, unless the date for parole is brought forward as a result of credits earned ..." [Paragraph 4]

"The appellant's submission, that it is within this court's competence to substitute the sentence imposed by the trial court, of 275 years' imprisonment with life imprisonment, cannot succeed. It is common cause that the trial court did not have jurisdiction to impose a sentence of life imprisonment at the time. In the circumstances, this court cannot substitute a sentence for one which the trial court did not have the competency to impose at the time. ...In any event, life imprisonment is not the prescribed sentence for any of the offences for which the appellant was convicted. ..." [Paragraphs 7 - 8]

"... [A] number of sections of the new Act were brought into operation and a number of sections in the old Act were repealed, with effect from 19 February 1999, in terms of Proclamation R20, 1999 ... The sections of the Act that came into operation include that of s 136 while those sections of the old Act which were repealed included ss 61 and 64. Significantly, s 65, relevant to this case, was not similarly repealed." [Paragraph 10]

"Section 136(1) of the new Act provides that any person serving a sentence of incarceration (that is, offenders serving determinate and indeterminate sentences immediately before the commencement of the new Act) is subject to the provisions of the old Act. Clearly, this section preserves the policy and guidelines that applied at any time before the new Act came into operation in 2004. ... It is therefore clear that ... the parole provisions applicable to the appellant were those set out in s 65(4)(a) of the old Act, namely that a prisoner serving a determinate sentence imposed prior to July 2004 is not considered for parole before having served half of the sentence, unless the date for considering parole is brought forward as a result of credits earned. ..." [Paragraphs 12 - 13]

"On 1 October 2004 the Parole and Correctional Supervision Amendment Act ... (the 1997 Act) came into operation. The 1997 Act amended s 65(4)(a) of the old Act by providing that a prisoner serving a determinate sentence shall not be considered for placement on parole, unless he has served half of his term of imprisonment, provided that no such prisoner shall serve more than 25 years before being considered for parole. Of particular relevance to this case is that the 1997 Act also amended ... the old Act by providing that, in respect of imprisonment contemplated in s 52(2) of the Minimum Sentences Act ... the prisoner shall not be placed on parole unless he has served at least four-fifths of the term of imprisonment imposed, or 25 years, whichever is the shorter." [Paragraph 14]

"In my view, s 9 of the 1997 Act is intended to ensure legal continuity and to prevent a hiatus developing. Clearly, the repeal of s 65 of the old Act and its substitution in terms of the 1997 Act ensured that there was no gap in continuity between the provisions of s 65 as contained in the old Act, and as substituted in terms of the 1997 Act. ... The issue, accordingly, is the effect, of the amendment of the parole period in s 65(4) of the old Act, upon the appellant's right to parole. ... [T]he intention of the legislature was to create equality amongst those prisoners eligible for parole, irrespective of whether they were sentenced before or after the passing of the new Act. ..." [Paragraphs 16 - 17]

"It is trite that a statute may apply retrospectively where it is expressly stated to operate as such, or where it impliedly does so. Thus the provisions of the 1997 Act which substituted certain provisions of the old Act, which were simultaneously repealed, must have been intended to operate retrospectively to deal with the rights of prisoners to parole, who were sentenced before the new Act came into force." [Paragraph 19]

"An exception to the presumption that legislation does not apply retrospectively is where it benefits the subject. However, this is only so if all persons subject to its provisions would benefit from reliance on it. In the present case the amendment is indeed beneficial to prisoners serving determinate sentences …" [Paragraph 20]

"The appellant is entitled to be considered for parole once he has served 25 years of his term of imprisonment. There is accordingly no need to interfere with the sentence imposed in order to ameliorate its effect. This is not to say the sentence imposed by the regional court is appropriate (it clearly being a Methuselah sentence), but to interfere with it would, in the circumstances of this case, be purely academic because … the legislature has stepped in to ameliorate the position of the person subjected to that sentence …" [Paragraph 21]

The appeal was dismissed.

JEKE v S (A231/10) [2012] ZAGPJHC 153 (30 August 2012)

Case heard 24 July 2012, Judgment delivered 30 August 2012

The appellant and his co-accused appealed against conviction and sentence. The court a quo had found the appellant and the co-accused guilty on one count of robbery committed with aggravating circumstances and two counts of murder, and sentenced them to ten years imprisonment for robbery and life imprisonment on each count of murder. The appeal also turned on the question whether or not the directive by the magistrate in the court a quo that the trial must continue before him without the assessors previously appointed by him in terms of section 93ter (1) of the Magistrates Courts Act was irregular, and if so whether this vitiated the fairness of the trial. The assessors failed to continue with the trial because the Department of Justice could no longer afford to pay for their services due to budgetary constraints.

Mbha J held:

"The issue that must be determined is whether or not in the circumstances of the matter, the assessors became "unable" to act as assessors. In S v Malindi and Others … Corbett CJ stated that the "word 'unable' … conveys to my mind an actual inability to perform the function of acting as an assessor. Such an inability could derive from an inherent physical or mental condition or possibly also a situation which physically prevented the assessor from attending the trial, such as for example indefinite detention here or in a foreign country" [Paragraph 11]

"The appellant submits that on the facts, the absence of the assessors - because of non-payment for their services – does not amount to an inability to act as such. Reliance was placed on the decision in S v Petersen and Another … " [Paragraph 12]

"In my view the reasoning in Petersen … is with respect, unpersuasive. As the reasons for the assessor's refusal were unknown, it was simply not proper to merely conclude that the assessor was "unable" to continue to perform as such. What if it was eventually shown for example, that the assessor or his family were factually being intimidated or threatened with harm if he continued to act as such? Surely, if the assessor deemed the threats to be serious and refused to come to court, it cannot by any stretch of imagination be said that he was still physically able to continue to act as an assessor. In any event the facts of this case are in particular distinguishable as the reasons for the assessors' refusal are known, unlike in Petersen, where the reason for the assessor's refusal to continue with the trial was unknown. Moreover, the peculiarities of the reason for the absence of the assessors ought to be a crucial factor because any concept of "unable" must be "fact specific", an aspect addressed more fully hereafter. Furthermore, sight must not be lost of the important fact that the Act does give a court a discretion to formulate an opinion as to whether or not under the circumstances prevailing at the time, it can be said that an assessor is "unable" to act as an assessor. The proper formulation of an opinion about an inability of an assessor to continue participating implies more than a mechanical fact finding process; the magistrate unavoidably, must make a value choice, informed by policy considerations about the administration of justice and chiefly about the avoidance of a failure of justice. In Malindi, the policy choice excluded factors pertinent to grounds for recusal. Furthermore, the approach I adopt in fact is informed by the minority judgment of MT Steyn JA in S v Gqeba and Others … where an assessor sought, during a trial, to be discharged on the ground that he had wanted to be with his only child, a daughter, who was in hospital having been diagnosed with terminal cancer. The learned judge referred to The Oxford English Dictionary … definition of the word "unable", meaning, "Not able, not having ability or power, to do or perform (undergo or experience) something specified (chiefly of persons; and after considering the emotional attachment that existed between the assessor and his daughter, he held that: (a) the ability to pay proper attention to judicial proceedings is essential for the due performance of an assessor's task; and (b) should an assessor become incapable of paying such attention he would, whilst such inability lasts, be unable to act as an assessor … In my view this approach falls within what Corbett CJ had envisaged in Malindi, when he also spoke of an ability deriving from a mental condition or a (any) situation which physically prevented the assessor from attending the trial. This notion, derived from Malindi, was expressly acknowledged by the majority in Gqeba … but they differed from the minority judgment in that they construed the decision of the judge a quo to release the assessor to have been based on compassionate grounds not on inability. In this regard, the present case differs as the magistrate applied his mind to the question of whether or not there was an inability to continue to serve." [Paragraphs 14-15]

"I am of the view that the learned magistrate correctly formed the opinion that the assessors had become unable to act as such, and that it would have been inappropriate to postpone the matter and rule that the trial start de novo, after he had considered the following factors; namely 1. The total collapse of the pilot project by the Department of Justice as a result of a depleted budget resulting in the sudden withdrawal from court of the services of assessors. This dimension of the facts is most important because it was upon the premise of this project that the two individual assessors accepted office in the first place; ie, in the absence of the project, the two individuals would never have been available to join the magistrate in the trial and it was the very project that facilitated their "ability" to act at the outset of the trial. Its collapse also collapsed their "ability" to serve; ie as paid full time assessors. 2. Claims by assessors for court services rendered would not be paid due to the unavailability of budget. 3. The fact that there were no prospects of the pilot project being resuscitated in the near future. 4. The learned magistrate could not be able to cause the assessors to continue at his own expense. 5. The fact that the

court could not order the assessors' participation at their own expense. It ought to follow that if an assessor cannot be compelled to attend, then from the perspective of the administration of justice, such assessor is "unable" to participate. 6. The stage at which the trial was at when the assessors were dismissed namely, that Mohale was the last State witness to testify. " [Paragraph 16]

"Therefore, after the magistrate formed his opinion, he was wholly justified in moving to the next step; ie to address the requirements of the proviso to the section requiring informed consent by the parties. Most importantly, the court a quo correctly took into account the views, input and argument by the prosecutor and both defence counsel, as well as the interests of justice, before directing that the matter should proceed. As pointed out already, all counsel were agreed that the trial should proceed to finality without the assessors." [Paragraph 17]

"Section 93ter 11 (iii) specifically deals with a situation where the assessor is for any reasons absent. In such a case, the presiding officer must postpone the proceedings to obtain the assessors' presence. However, where it will be impossible to obtain or secure the assessors' presence, the court may in the interests of justice direct that the proceedings continue before the remaining member or members of the court, or direct that the proceedings start afresh. … I am of the opinion that the assessors attendance was impossible to procure. Furthermore, as it was almost at the end of the State's cases, it would not have been in the interests of justice, which ought to be the chief and overriding factor, to order that the trial start de novo. In the circumstances I find that the court a quo did not misconstrue the section, correctly found that the assessors were unable to act as such, and that it was properly constituted when it proceeded with the trial to its finality." [Paragraph 18-20]

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:

"The defendants in terms of their plea aver that the plaintiff was arrested on a warrant and that such arrest is thus lawful' or in the alternative that he was arrested by the first defendant in terms of section 40 of the Criminal Procedure Act … since the first defendant reasonably believed him to have committed an offence listed in Schedule 1 of the said Act and was thus entitled to arrest the plaintiff without a warrant.' At the commencement of the trial the defendants' counsel disavowed any reliance by the defendants on s 40(1)(b) of the Criminal Procedure Act ('the CPA'), which provides that '[a] peace officer may without warrant arrest any person - … whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'. 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, Mrs Greenberg, 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 … from entering her place of employment, which was at her residence; from preventing her or any child who ordinarily lived at her residence from entering or remaining in it; from following her; from sending faxes to her attorney; and from leaving messages on her answering machine. [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, who at that stage was almost thirteen years old, had disappeared from Mrs Greenberg's residence. The plaintiff, accompanied by a co-worker, Mr Madau, 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 on this aspect of the case, especially in the light of the undisputed domestic quarrel between the two former spouses that clearly got out of control to such an extent that the first defendant, who did not know them, considered it appropriate to intervene as well as their emotional states ... It is common cause that the first defendant detained the plaintiff in the holding cells area of the Edenvale police station. 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 dendant] 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, Mr Gary Hirscowitz, and of his counsel, Mr Laurentz Barrett, 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. The release on warning document A972617 that was issued at the time records that the plaintiff was released on warning and warned to appear before the Magistrate's Court at Germiston ... 'on a charge of intimidation...." [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, who for 24 years served on the town Council of Edenvale and its successors and also several times as deputy mayor and as mayor, 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. The arrest of the plaintiff did not take place 'at the scene of an incident of domestic violence' nor was it suggested that the offence which the plaintiff was alleged to have committed contained 'an element of violence against' Mrs Greenberg. [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 had applied for a tender that had been advertised by first respondent. These companies were Fidelity Security Services (Pty) Ltd, Mafoko Security Patrols (Pty) Ltd and Red Ant Security Services Pty Ltd. The tender was awarded to Mafoko security patrols. Initially, Red Ant and Fidelity took on judicial review the decision by Mogale to grant Mafoko the tender. Despite the fact that Red Ant had originally challenged the validity of the decision to award the tender to Mafoko, it went on to enter into an agreement with Makoko wherein Mafoko ceded 35% of its business on the tender to Red Ant. Pursuant to this agreement, Red Ant withdrew its application for judicial review of the Mogale city's tender decision. Fidelity Security Services however proceeded with its challenge of the validity of the tender decision. In addition, Fidelity also challenged the validity of the subsequent agreement between Mafoko and Red Ant. The court had to deal with two key issues. First, whether to condone the procedural irregularities associated with the manner in which Fidelity brought its application. The second was the review of the award of the tender by Mogale City. After the withdrawal by Red Ant, Fidelity Security lodged a counter claim against Mogale City.

On the question of whether to condone procedural irregularities in the applicant's application, 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 judicial review of the decision my Mogale city 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 from Mogale City officials 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 '[in] any event, the decision to disqualify Fidelity was not on the basis that it failed to respond to queries but rather that from the outset it was disqualified …'. The submission is 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 to which I have referred earlier on in this judgment 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 with this submission. 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. I agree with the submission made by Fidelity's counsel that such 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 of this matter 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. Jack resigned as a director of Fidelity on 6 September 2011. 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 in terms of s 6(2)(e)(iii) of the Promotion of Administrative Justice Act . 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 in terms of s 8(1)(c)(i) of PAJA should be granted remitting the matter for reconsideration by Mogale City" [Paragraph 38]

The application was granted.

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 the application of the appellant, who had sought an order 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 on 28 October 2009, that the Eskom 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 Eskom 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, in the Court a quo and in this Court, chose for the matter to be argued on the conflicting affidavit evidence. The basis upon which the disputed issues of fact are to be approached was thus stated by Heher JA in Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA),…:

'Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E – 635C.**'"** [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 from a reading of the judgment 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. I need not review these judgments. 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 on behalf of Mr Maroga … 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, I am accordingly of the view that 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, as was correctly held by the Court *a quo*, had the authority to accept Mr Maroga's offer to resign. Masipa J accordingly, in my view, 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]

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

FIKRE v MINISTER OF HOME AFFAIRS AND OTHERS 2012 (4) SA 348 (GSJ)

Case heard 18, 22 March, 21 April, 3 May 2011, Judgement delivered 11 May 2011

Applicant claimed an entitlement to protection as an asylum seeker under the provisions of the Refugees Act. He contended that his detention was unlawful, since he had not yet exhausted all available remedies and was entitled to protection under the Refugees Act as an asylum seeker.

Spilg J dealt with the question of onus:

"Under our law it is clear that the onus in respect of the deprivation of liberty of an individual is borne by the state… However, certain difficulties of application may arise because of our rules regarding what is to be treated as the evidence before a court in motion proceedings." [Paragraph 13]

"The restoration of the state's obligation to discharge the onus of proving facts justifying the deprivation of an individual's liberty is realised practically, by applying Plascon-Evans without distortion, but recognising that the usual grounds for refusing to hear oral evidence, ie that there are real and substantial questions in dispute that should be determined rather by trial, are not necessarily applicable." [Paragraph 21]

"In order to comply with its obligation under s 39 of the Constitution to promote the values that underlie it, including those based on dignity and freedom, when interpreting not only the Bill of Rights but in developing the common law in a manner that promotes the values contained in ch 2 of the Constitution, it appears prudent that a court give due effect to the wide discretion it enjoys under rule 6(5)(g) to allow the calling of oral evidence where a matter cannot be decided properly on affidavit so as to ensure 'a just and expeditious decision'. " [Paragraph 22]

"By transforming the proceedings to the hearing of evidence the court can then determine the facts based on whether the burden of proof in the true sense has been discharged by the state. While it is appreciated that there are practical difficulties attendant upon a prompt referral to oral evidence … this procedure may have to be accommodated in order to properly meet constitutional requirements." [Paragraph 23]

"There appears to be no reason … for a court not to refer mero motu a matter to oral evidence if it is of the view that this would ensure 'a just and expeditious decision' as contemplated in the rule. It appears that the practical means of reconciling the Plascon-Evans rules regarding the evidence which a court must accept with the court's obligation to give effect to constitutional values under ss 12(1) and 35(1)(d) – (e) is to more readily entertain the hearing of oral evidence. Once it is determined what evidence the court is entitled to receive then the second component of what makes up the onus comes into play, ie whether the applicant has demonstrated a deprivation of liberty and if so whether the state has discharged the onus of justifying the detention." [Paragraph 25]

"Even if the respondents were correct that the Immigration Act and not the Refugees Act applies to the applicant, it is difficult to appreciate how there can be any prejudice or on what basis a court would allow a technical point of this nature to delay the determination of the liberty of an individual. In my view it has

no substantive-law consequences where the same minister and same director-general are responsible for administering two pieces of legislation that may impact upon the rights sought to be asserted." [Paragraph 40]

"The question remains as to whether the applicant's continued detention is unlawful. Clearly the respondents are wrong to claim an entitlement to hold the applicant under the Immigration Act since the applicant's status after resurrecting his appeal … is governed once more by the Refugees Act ... In any event … even if the Immigration Act applied there is no warrant and the period of permissible detention has long expired." [Paragraph 83]

"What remains unclear ... is whether the applicant is subject to the ordinary criminal procedural laws. ... [B]oth sets of papers have mentioned the applicant being detained in the ordinary police cells and that he signed a Notice of Rights ... which indicated that he was formally charged with a criminal offence and brought before a court ..." [Paragraph 84]

"... [T]he applicant can only be detained under the provisions of the Refugees Act. In terms of s 29 of that Act, once the 30-day period has expired, the detention of the applicant must be reviewed by a high court judge." [Paragraph 89]

"The provision is unique. My research has revealed one other similar oversight provision. It is under s 37(6)(e) of the Constitution dealing with detentions under a declaration of a state of emergency." [Paragraph 90]

"It is evident that in discharging its functions a court seized with an application where detention has gone beyond the 30 days cannot stand idly by and await an application to be launched. The provisions of the Act, however inelegant and even though it is difficult to appreciate the nature of the proceedings envisaged ... are nonetheless couched in imperative language and require a review before a high court. ..." [Paragraph 91]

"I am satisfied that a court is obliged to give content to s 29. This is because the initial period of 30 days expired at a time when this matter was before it and, even though the 30 days had not expired when the application was brought or argued, the court must discharge its judicial functions having due regard to the express wording of s 29. In turn s 29 must be considered in light of the constitutional obligations entrusted to a court under the Constitution ... Section 29 ... provides for the considerations that must be taken into account if the individual is to be detained further." [Paragraph 94]

Spilg J ordered that the detention of the applicant be reviewed.

SOCIO-ECONOMIC RIGHTS

BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD V OCCUPIERS OF SARATOGA AVENUE & ANOTHER [2010] JOL 25031 (GSJ)

Case heard 17 - 18 June 2009 and 22 July 2009, Judgement delivered 4 February 2010

Applicant, a private property owner, sought the eviction of those occupying the property. The occupants claimed protection from eviction under the Prevention of Illegal Eviction from Unlawful Occupation of

Land Act (PIE) until the city of Johannesburg provided them with suitable alternative temporary accommodation.

Spilg J held:

"... [T]he principal point taken by the City in relation to the necessity to join the provincial government as a necessary party, because the City has no greater obligation than to seek financial assistance from the provincial government and is confined to the role of a passive bystander, is wrong. ... [T]he City should have fully appreciated that it is most directly involved and has the most direct and immediate control over housing and housing policy within its boundaries and in particular in relation to the attainment of the core rights under section 26 of the Constitution as read with the National Housing Act and the provisions of PIE." [Paragraph 68]

"Secondly, the constitutional challenge ... is not directed at the validity of any law but to the discriminatory and arbitrary policy adopted by the City to exclude destitute occupiers who are subject to eviction from privately owned land." [Paragraph 69]

"The right to property is an essential foundational stone of a democratic state. ... [T]he arbitrary seizure of land without adequate compensation strikes at the core of democratic values. The ability to strip people of the right to own private and commercial property without adequate compensation was an essential tool of the apartheid government's ability to implement a system that undermined the fabric of African society, stunted its economic growth and undermined dignity." [Paragraph 93]

"The right not to be deprived of property, except in terms of a law of general application and subject to further limitations, which are always subject to just and equitable compensation, is a constitutionally protected right under section 25. One of the express limitations concerns the need to acquire privately owned land, subject to compensation, in order to address both the forced removal of communities and the inability to fairly access our natural resources..." [Paragraph 94]

"... [T]he State is obliged to initiate and maintain the socio-economic objectives identified in sections 26, 27 and 29 of our Constitution as well as maintaining the necessary framework to protect the security of all South Africans. It must have the ability to structure sound economic growth and stability ... Its ability to do so is dependent on the State's ability to raise revenues by way of direct and indirect taxation, by the levying of rates and charging for basic services, such as water and electricity." [Paragraph 95]

"It is evident that section 26 of the Constitution affords everyone the right to have access to adequate housing and does not impose an obligation on the private sector to give up its property for this purpose. If this consequence had been intended, then the limitation of the right to use and occupy one's own property would have been founded in section 25. The private sector's obligation remains to provide the necessary revenues via taxation and the other means already referred to, to enable the State to achieve its duties under section 26." [Paragraph 96]

"Moreover, section 26 does not, whether directly or indirectly, permit the State to either abdicate or thrust its responsibilities to provide adequate housing onto the private sector, nor does it suggest that the private sector is obliged to itself indefinitely provide housing without compensation ..." [Paragraph 97]

"In my respectful view, the fact that the court's discretion under section 4 of PIE to delay the eviction of any unlawful occupier, whatever their personal circumstances, is temporary and what the exact period is

depends on the circumstances of the case save that a landowner cannot be effectively deprived of his property without adequate compensation and ought to retain the right to decide how he wishes to develop what he has paid for." [Paragraph 103]

"... [T]he case before me is an *a fortiori* one where there is no horizontal application to a private landowner of section 26 of the Constitution." [Paragraph 111]

"Constitutional Court and SCA authority ... make it plain that those in desperate situations who face eviction are entitled to have access to adequate housing on a progressive basis and that all tiers of government must take reasonable legislative and other measures within available resources to achieve this end. However, desperately poor families have no right to look to private landowners for indefinite continued accommodation at no cost." [Paragraph 127]

"It is clear from the Constitutional Court and SCA judgments... that the City has a positive constitutional duty to the desperately poor not to render them homeless should they be evicted." [Paragraph 128]

"Whatever the temporary period might be to assist in the amelioration of hardships caused by an eviction order in respect of those who are unlikely to find alternate shelter, no tier of government can transfer its constitutional obligations to private citizens on what, realistically, would be an indefinite basis rendering the ownership rights nugatory." [Paragraph 135]

"The consequence of excluding persons in the position of the first respondent occupiers of private property was to exclude them from both programme formulation and budget preparation. It is not surprising therefore that there has not been a budget allocation. It is, however, difficult to appreciate that the persons responsible for this policy decision could genuinely have believed it to be justifiable. The fact that it is not is demonstrated by the failure of any meaningful argument being presented on behalf of the City in that regard." [Paragraph 141]

"In my view, the City cannot rely on its own default to explain why it has neither the budget nor the accommodation to cater for indigent occupiers of private land facing eviction." [Paragraph 142]

"Accordingly, the City's policy not to provide accommodation or plan or budget for the procurement of accommodation on an emergency or temporary basis in respect of private land occupied unlawfully under PIE is unfairly discriminatory and offends the equality provisions of section 9 of the Constitution." [Paragraph 154]

"The remedy for the breach of the occupants' constitutional and statutory rights in respect of accommodation appear extremely limited. A court cannot dictate who should go to the head of the queue. What it can concern itself with is whether the order it makes will result in an impermissible queue-jumping. By reason of the failure to have any regard to the occupants' rights over a significant period of time, this issue does not arise." [Paragraph 176]

"While it is correct that compensatory damages until accommodation is provided may result in the City changing its policy and budgeting, nonetheless it is obliged to change its position not because the court has selected another route but because it is constitutionally obliged to include indigent occupants of private land threatened with eviction in the housing programmes and to budget for it." [Paragraph 177]

"In my view, the possible resolution of the case without a court decision has been explored during the hearing. It is evident that the parties now seek finality regarding their respective positions." [Paragraph 189]

"… Blue Moonlight is entitled to an eviction order. The only question is when it is to be implemented having regard to what is just and equitable in the circumstances." [Paragraph 191]

"Blue Moonlight has been unable to realise any benefit from its investment for some five years. … On the other hand, the occupiers live in squalid conditions with no water or other basic facilities." [Paragraphs 192 - 193]

"Resolution of what is just and equitable therefore depends on what constitutes a reasonable time within which the first respondent occupiers can find alternate accommodation. Clearly there can be no time stipulated if they do not have sufficient income to pay rental for even the most meagre of accommodation. … [H]owever … the rights of the landowner do not allow for an indefinite deprivation that renders their section 25 rights de facto nugatory and that the occupants are entitled to compensatory damages in the form of a subsidisation of their income that is likely to allow them a form of basic accommodation until the City remedies its breach." [Paragraph 194]

The first respondent and all persons occupying them were evicted from the property and ordered to vacate no later than 31 March 2010. The second respondent was ordered to pay the applicant monthly rental of the premises from 1 July 2009 to 31 March 2010. The second respondent's housing policy was declared unconstitutional to the extent that it discriminated against persons within their jurisdiction, and it was ordered to remedy this defect in its housing policy.

On appeal, the Supreme Court of Appeal substituted the order but substantively dismissed the appeal: **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2011 (4) SA 337 (SCA)**. An appeal to the Constitutional Court was dismissed. A cross appeal by the occupiers was upheld, ensuring that they would not be evicted until the City provided alternative accommodation. **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).**

CRIMINAL JUSTICE

S v MANGENA AND ANOTHER 2012 (2) SACR 170 (GSJ)

Case heard 9-25 March, 1-25 November 2010; 30 May, 6 June, 17-23 June, 26 June 2011, Judgement delivered 29 June 2011

This was a trial-within-a-trial to establish the admissibility of a statement made by one accused against the other accused. Spilg J found that accused number 1 had been assaulted before being transferred between police stations:

"The next question is whether, as a consequence of the assaults, the admissions were voluntarily made as required by s 219A of the CPA [Criminal Procedure Act]." [Paragraph 28]

"The natural meaning of the word 'voluntarily' … is 'done, given, or acting of one's own free will'. Since the provision is also an exception to the common-law hearsay rule and risks impacting on protected

constitutional rights ... full effect must be given to the broadness of the concept encompassed by the word. Moreover s 35(1)(c) of the Constitution provides that a suspect has the right 'not to be compelled to make any confession or admission that could be used in evidence against that person'. This provision is complemented and reinforced by s 12(1)(c), (d) and (2) (personal freedom and security), as well as s 35(1)(a) and (3)(h) and (j) (arrested and detained persons)." [Paragraph 32]

"... I am satisfied that the state has failed to establish beyond a reasonable doubt that the written statement of the accused ... was voluntarily made." [Paragraph 33]

"... [T]he state intended to rely on a portion of [the statement] against accused No 2 on the basis that such evidence was admissible against him under the exception to the hearsay rule. ... I expressed difficulty in appreciating the basis upon which an extracurial statement made by accused No 1, after he had been arrested for the offences with which he has been charged, could be admissible against his co-accused in relation to the same offence." [Paragraph 38]

Spilg J analysed the Constitutional Court and Supreme Court of Appeal decisions upon which the state relied:

"In my respectful view, the SCA decision was obiter and the Constitutional Court decision has no direct bearing on the issue. With the greatest respect to the high-court decisions to which reference has been made, including the decision of this court, I believe that they are clearly wrong ... because the courts were not invited to consider, and therefore did not address, what I believe are the a priori questions: ... on what basis is the testimony sought to be admitted and whether, properly characterised, there is a fundamental objection to its reception which precedes an enquiry as to whether or not such evidence is hearsay, and if so, whether it may nonetheless be admitted under the statutory exceptions permitted under s 3 of the Law of Evidence Amendment Act ... or any residual common-law exception. ..." [Paragraph 40]

"It is ... difficult to appreciate how evidence of an extrajudicial admission concerning a co-accused made otherwise than in furtherance of their common purpose can be allowed in when it can, as many cases illustrate, amount to a confession of all the facts or elements necessary to convict, save for one. It certainly is not so under the common law." [Paragraph 59]

"In my view the amendment [Law of Evidence Amendment Act] was intended to do no more than codify the law regarding informal admissions, whether by conduct or by statement. The mere fact that it did not expressly exclude the admissibility of such admission against a co-accused is of no consequence ..." [Paragraph 62]

"Moreover, the potential for abuse cannot be overlooked. In Molimi the SCA accepted that the statement made by the one conspirator amounted only to an admission, thereby allowing the evidence in, whereas the Constitutional Court on an overview of the conspirator's statement, found that it amounted to a confession, thereby rendering it inadmissible against the co-accused under the express exclusion provided for in s 219." [Paragraph 68]

"The extensive utilisation of confessions and admissions, particularly during the state-of-emergency era, cautions us, unless there is an express intention to the contrary in amending legislation, against eroding those common-law principles that were responsible, in numerous cases, for securing the rule of law, despite the absence of a Bill of Rights." [Paragraph 69]

"The unreliability of a statement made by one conspirator which contains an admission against the other at the time of arrest is fraught with danger. ... Another rule that comes into contention is the auxiliary rule relating to the possible inability to cross-examine for want of 'equality of arms' in establishing precisely what occurred to induce the accused to implicate his co-accused. These factors effectively destroy the reliability of the extracurial statement. Moreover a court should not be obliged to undertake an exercise of determining whether or not the accused will receive a fair trial where it is likely that such evidence would be provisionally admitted." [Paragraph 74]

"In my view the considerations adopted by the Constitutional Court in Molimi apply in the present case. Accused No 2 was not pre-cognised that, if accused No 1's admissions were received, they would be used as evidence against him." [Paragraph 80]

The Court thus refused to admit any extracurial admission that might have been made in a statement by accused No 1 *after* his arrest against accused No 2 since on the facts it could not have been made in furtherance of their conspiracy.

ADMINISTRATION OF JUSTICE

SHERIFF OF THE HIGH COURT, JOHANNESBURG SOUTH V SITHOLE AND THREE SIMILAR CASES 2013 (3) SA 168 (GSJ)

Case heard 2011, Judgment delivered 2011 [as indicated in law reports]

These cases saw a sheriff seeking an order under Uniform Rule 46(11), to set aside a sale in execution of immovable property due to non-payment of the balance of the purchase price under agreements concluded at auction between the sheriff and the purchasers. The rule provided that if a purchaser failed to carry out his/her obligations under the conditions of sale, the sale could be summarily cancelled by a judge on the basis of a report by the sheriff, with the purchaser being responsible for any loss due to their default.

Spilg J held:

"The purpose of rule 46(11) is plain. It provides an expeditious and cost-effective means of reselling a property pursuant to a judicial sale, without compromising the rights of notice and the audi alteram partem rule. Such an expedited procedure at nominal cost is necessary to ensure that the property is capable of realisation for the benefit of both creditors and the debtor, and is sold at the least expense in a manner that does not increase the interest on the outstanding debt. ..." [Paragraph 6]

"One of the concerns [with a rule 46(11) application] is that a forfeiture of deposit clause is often found in the conditions of sale ... Rule 46(11)(b) does not sanction forfeiture on breach. On the contrary, it expressly circumscribes the extent of liability pursuant to default and stipulates how it is to be determined. ... Consequently, a forfeiture provision is invalid. ..." [Paragraphs 9; 11]

"The other concern relates to the mechanism of refunding the deposit. Although it might be open to argue that no provision is made for retention of the deposit, the pro-forma conditions of sale contained in Form 21 expressly provide for a deposit, and there is nothing in the rules which precludes the retention of the deposit to meet any losses occasioned to creditors as a consequence of the purchaser's default. On an ordinary reading of rule 46(11)(b) the sheriff must refund the deposit, unless one of the

creditors entitled to participate in the distribution of the proceeds of the sale … applies for judgment to recover any loss sustained by reason of the purchaser's default." [Paragraph 12]

Spilg J surveyed case law on rule 46(11), and continued:

"… [W]ith respect to the learned judge in onderboom, the approach in Jaithoon is to be preferred. A deposit is required to secure a large transaction against other would-be purchasers and indicates both good faith and an ability to pay. Ordinarily the deposit would either be subject to forfeiture on breach … or subject to refund only after any losses have been deducted." [Paragraph 16]

"Neither rule 46(11)(b) nor the standard conditions of sale contained in Form 21 permit forfeiture of the deposit. They however do not expressly provide for the retention of the deposit, pending the court's determination … of any losses for which the defaulting purchaser should be liable. Nonetheless, the subrule contemplates an expedited determination of losses which are readily ascertainable … and therefore liquidated. In ordinary litigation a party is entitled to raise a liquidated claim for damages against an admitted liquid amount arising from the same transaction. It would make little sense if the expedited process for obtaining judgment precluded a similar entitlement." [Paragraph 17]

"Accordingly, even if the conditions of sale are silent, a court should not require repayment of the deposit immediately on cancellation. …" [Paragraph 18]

"Of concern is the inability of the sheriff to continue holding the deposit in trust beyond the reasonable time it is necessary for a distribution creditor to exercise the right to bring a rule 46(11)(b) application. … The question then arises whether there is a need to monitor what occurs to the deposit after an order of cancellation has been made … and, if so, how it can be done effectively, bearing in mind that a lengthy period may elapse before the sheriff can be satisfied that no distribution creditor intends bringing a rule 46(11)*(b)* application …" [Paragraphs 27 - 28]

"… [I]f a distribution creditor does not bring a rule 46(11)(b) application … then no written report will be filed by the sheriff. … It therefore appears advisable to retain some degree of control of events post-cancellation, without placing an undue burden on the court's administration. … [I]t seems appropriate to monitor these cases by providing for a report-back which is to be set down in chambers on a date by when it is likely that the sheriff will be in a position to inform … the judge allocated … whether any distribution creditor wishes to bring a rule 46(11)*(b)* application." [Paragraphs 30 – 31]

"Whether a judge in chambers should first have regard to the matter before directing a referral to open court, or whether the sheriff's legal representative should be able to exercise an informed decision as to whether the matter requires a hearing in open court, is resolved not only by cost considerations, but also by the need for expedition. ... An additional factor is the efficiency of the court's functioning. It is inappropriate to burden an already extensive weekly motion court roll with applications of this nature." [Paragraphs 35 – 36]

BLUE CHIP CONSULTANTS (PTY) LTD V SHAMROCK 2002 (3) SA 231 (W)

Case heard 17 – 24 November 2000, Judgment delivered 5 December 2000

After the plaintiff had completed its evidence in an action claim based on a suretyship, the defendant sought to re-open his case to call his attorney (Z) to give testimony relating to privileged communications

between himself and the plaintiff's managing director at a time when Z had represented the plaintiff in other litigation.

Spilg AJ held:

"The objection based on both privilege and relevance are good. The defendant prefaced his request to call Mr Ziman on the basis that the plaintiff's waiver of the privilege was first required. It was not forthcoming. There are sound reasons for respecting the attorney-client privilege. The desirability for skilled legal representation in litigation is axiomatic. In order for such representation to achieve its purpose, our system is predicated on the need for establishing trust between the lawyer and his client and securing freedom of communication between them without fear of disclosure. That can only be attained if communications are treated as confidential and inroads are confined to clear cases of greater competing interests" [Page 235]

"[Counsel] sought to meet this on the basis that the High Court decision which the defendant sought to introduce is not itself privileged. It is a public document that any other attorney could obtain." [Page 235 - 236]

"In my view, the possibility that such evidence existed, and that it was worthwhile to pursue by reference to content and ease of location, arose by reason of the content of the privileged communication made by the plaintiff's managing director to Mr Ziman. The knowledge that precipitates the acquisition of such evidence would be so closely linked to the communication itself that the very rationale for the privilege would be undermined if the document were allowed to be introduced. The existence of the judgment, its content and location was only known to Mr Ziman by reason of the attorney-client relationship. There is no evidence to suggest that another attorney would have embarked upon such an investigation, let alone know where to look. It was the disclosure during the privileged communication that opened up this avenue of investigation and would facilitate the expeditious location of the evidence by reference to a specific Court or case number" [Page 236]

In **City of Johannesburg Metropolitan Council v Ngobeni (314/11) [2012] ZASCA 55 (30 March 2012)**, the Supreme Court of Appeal (per Mhlantla JA, Navsa, Heher, Tshiqi and Wallis JJA concurring) unanimously upheld an appeal against a judgment by Spilg J in a claim for wrongful shooting, arrest and detention by the appellant. The SCA criticised Spilg J's conduct during the trial, finding that he had engaged in inappropriately active participation in the proceedings [para 29 ff], including descending into the arena, *mero motu* calling witnesses, and on his own initiative deciding to hold an inspection *in loco*. The SCA held that: "In the result, Spilg J breached many of the canons of judicial behaviour and was overzealous in his approach. Conduct of this nature cannot be countenanced and has the potential of bringing the judiciary into disrepute. His behaviour constitutes an irregularity which would have vitiated the proceedings but for the parties' request that we consider the merits on appeal." [Paragraph 48].

SELECTED ARTICLES

'A STATE OF DEMOCRACY', Advocate April 2008, pp. 42 - 44

"Almost immediately, court decisions post 1994 replaced the will of parliament as the supreme law with that of a people and its institutions under the rule of law. In the years immediately after the interim Constitution was adopted, judicial independence and acceptance that no person was above the law did not create tensions between the courts, parliament or the executive. ... Post-1994 decisions not only restored and protected the rights of the individual against improper state action but also asserted those rights in cases of state inaction." [The article cited the cases of *Carmichael*, *Van Duivenboden* and *Rail Commuters Action Group* to illustrate this development.]

"The Constitutional Court has also addressed the vexed question whether a court directive requiring the government to take measures to meet its constitutional obligations would not infringe the separation of powers doctrine. The court did so by adopting the standard of reasonableness. ... Our common law is presently being enriched by testing reasonableness and, where it is a relevant factor, public policy in the laws of delict and contract by reference to constitutional values rather than other norms or the proverbial man on the Clapham omnibus." (Page 42)

The article then considered Bills gazetted during 2005 and their impact on judicial independence:

"The Bills were subsequently withdrawn for reconsideration. However, the fundamental failure to appreciate the need to respect the separation of powers and the independence of the judiciary remains prevalent. ... [T]he novel idea that courts are there to represent the will of the majority or even of a ruling party undermines the clear distinction drawn by democracies, whether under a written constitution or not, that the courts interpret and apply the law without fear or favour and in accordance with the accepted values of a constitutional democracy."

"The extent of respect for human rights, and the extent to which a democracy is judged to enjoy such respect, are not finally measured by court pronouncements or legislation ... One finds and judges the extent to which a society respects human rights in the conduct and morality of its citizens."

"We must be measured by the extent to which our constitutional values are respected and nurtured amongst our people. By that standard we have a long way to go. And we have faltered since the turn of the millennium. The core values that are necessary for a democratic society to exist and prosper are eroding."

"Our society, which has claimed the rights and constitutional freedoms to which we are entitled has yet to embrace the obligation to respect the rights of others. We are witnessing an upsurge in intolerance. Compassion is a rarity treated with derision." (Page 43)

SELECTED JUDGMENTS

CIVIL PROCEDURE

PUTINI V EDUMBE MUNICIPALITY (11700/2011) [2012] ZAKZDHC 26 (15 MAY 2012)

Case heard 07 May 2012, Judgment delivered 15 May 2012

The applicant sought an order compelling the respondent to perform its obligations in terms of an agreement. The applicant was a former employee of the respondent. He had previously been suspended from his duties. Subsequently the respondent's newly elected leadership entered into an agreement with the applicant. The respondent argued that the essence of the agreement was to reinstate the applicant to his position, while the applicant argued that the agreement was intended to reinstate and as pay a sum of R3,5 million compensation. The agreement was concluded between a junior employee of the respondent, and the applicant. During the signing of the agreement, the applicant was accompanied by his attorneys, while the junior employee was not assisted by any legal counsel. However, the applicant's attorneys requested proof of authority to represent the respondent, which the junior employee produced. The court examined whether the respondent's employee had the actual authority to conclude an agreement obliging the respondent to pay R3,5 million in compensation.

Swain J held:

"It is quite clear that there is a dispute of fact on the papers, as to whether Makhoba was authorised to conclude such an agreement. Such a dispute of fact was raised by the respondent as a point in limine in its answering affidavit, on the basis that in a letter written by the respondent's attorneys, in response to a letter of demand from the applicant's attorneys … the authority of Makhoba to conclude the settlement agreement was raised. However, it is apparent … that the authority of Makhoba was denied simply on the basis that he was not the Legal Officer of the respondent, but only a clerk. The issue of the agreement to pay R3.5M, was disputed on the basis that the respondent never intended to pay this amount to the applicant and consequently there could be "no meeting of the minds" and hence no agreement. The authority of Makhoba was not however challenged on the basis set out in the respondent's answering affidavit. Be that as it may, I am nevertheless faced with a dispute of fact, in this regard on the papers. In the absence of a referral of this issue for the hearing of oral evidence, it must be dealt with on the basis of the respondent's averments. …" [Paragraphs 13-14]

"The fact that no financial compensation was discussed by the Executive Committee or Council of the respondent, supports the respondent's contention that there was never an intention to pay compensation to the applicant, which is supported by the terms of the resolution adopted by the Council. It is clear that the object was to ensure that the applicant returned to work immediately. I find it grossly improbable that if the Council of the respondent, intended to financially compensate the applicant, it would not have placed a limit upon any amount to be paid, or at the very least, stipulated that any amount agreed upon, would be subject to the approval of the Council. The applicant would have it that the authority of Makhoba, a housing officer in the Infrastructure and Technical Services Department, to agree to pay compensation to the applicant, was unlimited. When I put it to Mr. Pillay, during argument, that on the applicant's case, whatever Makhoba agreed to pay to the applicant as compensation, even if it was R100M, the respondent would be bound to honour, he quite fairly found difficulty in denying. That the authority to conclude the settlement agreement was delegated to an officer in the housing

department of the respondent, also supports the respondent's contention that the object was simply to get the applicant to return to work immediately, without the payment of compensation. How would Makhoba be qualified to quantify the applicant's alleged claims for unlawful suspension and defamation, when the applicant was represented by an attorney? Although the applicant in reply alleges that Makhoba made "various telephone calls to high ranking officials within the employ of the respondent in the course of these negotiations", no details are furnished as to how the applicant was aware who Makhoba was phoning. No details are furnished as to who these officials were. On the basis of the respondent's averments, it is clear that Makhoba was never authorised to agree to pay any financial compensation to the applicant." [Paragraph 15]

Swain J then considered whether there should be a referral to oral evidence:

"Mr. Pillay … submitted that if I found that there was an irresoluble dispute of fact on the papers, then I should refer the issue of Makhoba's authority for the hearing of oral evidence. Mr. Dickson SC … submitted however that the applicant was not permitted, as it were, in the alternative, to apply for the referral of this issue for the hearing of oral evidence, and was bound to elect at the outset of argument, to refer the issue for the hearing of oral evidence. As stated by Harms DP in the case of Law Society, Northern Provinces v Mogami …"An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail …. In the present case, it was quite clear from the respondent's answering affidavit, that the actual authority of Makhoba to conclude the agreement to pay the applicant R3.5M, was disputed. It should have been apparent to the applicant and the applicant's legal representatives, that this dispute could not be resolved on the papers, particularly as this issue was pertinently raised by the respondent as a point in limine. There are accordingly no exceptional circumstances present, which would justify a departure from the general rule, that the applicant was bound to elect to refer this issue to oral evidence, prior to argument on the merits. I accordingly decline to refer this factual dispute for the hearing of oral evidence.." [Paragraphs 16-18]

Swain J then dealt with the issue of costs:

"The respondent submits that the applicant should be ordered to pay the costs of the application on the attorney and client scale, because the applicant as the previous head of the respondent's administration, would have been aware that specific authority was required and it was never intended that he should be paid R3.5M. In addition, it is alleged that neither he nor his attorney, could have construed annexures "C", "D" and "E" as authority for the settlement agreement which was concluded. Although there may be some validity in this criticism of the applicant's behaviour, it is clear that the respondent's conduct is not above reproach. If the respondent had taken the trouble to clearly define the ambit of any settlement agreement to be concluded, the present dispute would never have arisen. In addition, the conduct of the respondent in delegating authority to an individual not qualified to conclude such an agreement, is deserving of censure. Taking all of this into consideration, I am not satisfied that the applicant should be ordered to pay the respondent's costs on an attorney and client scale" [Paragraph 20]

The application was dismissed, and the settlement agreement in question was declared invalid and unenforceable. Applicant was ordered to pay the respondent's costs of the application and the counter-application.

CRIMINAL JUSTICE

S V MAZIBUKO (AR 352/11) [2012] ZAKZPHC 32 (31 MAY 2012)

Case heard 25 May 2012, Judgment delivered 31 May 2012

The appellant appealed against his conviction by the Regional Court of the rape of a fourteen year old girl, for which he was sentenced to life imprisonment in terms of Section 51 of the Criminal Law Amendment Act. The basis for the appeal was that the complainant's evidence was fraught with inconsistencies.

Swain J held:

"As correctly appreciated by the Magistrate the evidence of the complainant has to be approached with caution, because the complainant was not only a single witness to the rape, but is also youthful. The complainant's merits as a witness must be weighed against factors which militate against her credibility. … What has to be decided by the trier of fact is whether the evidence of the complainant is trustworthy and "whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told"." [Paragraph 2]

"It is clear that the evidence of the appellant and his girlfriend, that they were together in the house with their child on the night in question cannot be true, for the following reasons:" [Paragraph 10]

"1. Sergeant Magaga said the appellant was alone in the house. Although the appellant said the police were drunk, which was denied by Sergeant Magaga, it would have been virtually impossible for Sergeant Magaga, not to have seen the appellant's girlfriend lying on the bed, if she was there. In addition, there would be no reason why Sergeant Magaga would lie about such an issue. 2. The appellant said he did not know when asked, how the complainant knew he was at home in order to direct the police there, when on his version the complainant had seen him braaing meat at a different location that night. 3. The appellant could not respond when it was put to him that the complainant, on the appellant's version, could not have known who was at home with him when she arrived with the police. If there were persons in the house with the appellant, this would have refuted her allegation of rape. 4. The evidence of the appellant's girlfriend is implausible and riddled with contradictions. She suggested that the police did not see her because it was a high bed. In addition, the appellant said that she had heard the police accusing him of raping the complainant, because she was surprised. She also knew why he had been arrested because the appellant said she had told a friend of his mother's in that street about it, who had telephoned his mother. The girlfriend however said that she had never heard the police accusing the appellant of rape and did not know why they had arrested him. In addition, she contradicted herself as to whether she knew the complainant and had seen her there in the company of the police." [Paragraphs 10.1-10.4]

"When this evidence is taken together with the evidence of the doctor, that there had been forceful penetration of the complainant's vagina and the evidence of Sergeant Magaga that when he found the complainant, she was crying and frightened, shortly after she had been raped, I am satisfied that the allegations of the complainant that the appellant raped her, are proved beyond a reasonable doubt. Of particular significance is the evidence of Sergeant Magaga that the complainant told him at the outset that the appellant has asked her to accompany him to his home to fetch a jersey, which is what she said when giving evidence. Such detail has the ring of truth to it and excludes the possibility that the

complainant's evidence in this regard was a recent fabrication. In coming to this conclusion I do not overlook the evidence of Sergeant Magaga that the complainant had said the appellant had produced a firearm during the rape, which is why they searched the appellant's premises, but did not find a firearm. The complainant never mentioned a firearm when giving evidence, but it was equally never put to her by the appellant's legal representative, that the police had searched the appellant's house for a gun, because she had alleged that the appellant had threatened her with it. The complainant was accordingly never given an opportunity to deal with this evidence. Be that as it may, I agree with the view of the Magistrate that this is not such a material defect in her evidence, to justify the rejection of her version. I also do not overlook the evidence of the appellant that he had dismissed the complainant from the choir of which she was a member. The appellant however when asked why the complainant would falsely implicate him said he did not know and did not rely upon this incident. The fact that the complainant had something to drink and was walking alone in the middle of the night, obviously does not constitute any grounds for doubting the veracity of her evidence." [Paragraph 12-13]

The appeal was dismissed.

CHILDRENS' RIGHTS

MS V KS 2012 (6) SA 482 (KZP)

Case heard 19 March 2012, Judgment delivered 03 April 2012

This was an appeal and cross-appeal against a maintenance order made by a magistrate in respect of the parties' two minor children.

Swain J (Mnguni J concurring) held:

"The most important factor is the needs and welfare of the children. The payment of maintenance for minor children is a priority in the demands upon the resources of the individual liable for the payment of such maintenance" [Paragraph 11]

"As regards the ability of the appellant to pay the required maintenance, there are certain aspects of his evidence, as high-lighted in cross-examination, which require closer examination. 1. An expense claim by the appellant was an amount of R1,391.00 per month, in respect of retirement annuity payments. The appellant agreed that he could stop these payments, but he did not think it was a wise thing to do. The Magistrate agreed, finding that it is a basic prudent provision for the future that any working person could "hardly afford to do without". This is obviously so, but what is required of the appellant, is not a permanent cessation of such contributions, but a temporary suspension of their payment, until the appellant is again in a financial position to pay them. The priority must be the support of his minor children. 2. An amount of R663.63 per month, was claimed by the appellant, in respect of a loan he received from his father, to enable him to pay some of his bills. His father had obtained a loan from ABSA, to lend him the money. The appellant agreed that he had no legal obligation to pay this money to his father. On the appellant's evidence it is apparent that his parents have been assisting him in various ways, to look after and support the children, when they were staying with the appellant. The Magistrate's views in this regard were simply that it was put to the appellant that it was a moral obligation and not a legal obligation, but "it has not been suggested how the applicant can get out of this obligation". It was never suggested that the appellant should avoid repaying the loan altogether. In my view, it would not be

unreasonable to expect of the appellant, to temporarily suspend the repayment of the loan to his father, in order to properly support his minor children. The appellant did not state that his father was financially dependent upon the appellant, repaying the loan at the rate of R663.63 per month, at present. There was no evidence to support the Magistrate's statement that suspending payment of the loan would "upset his relations with his parents". I would expect that knowing the reason was to properly support their grandchildren, they would be understanding of the appellant's predicament. 3. The appellant claimed an amount of R380.00 per month for clothes and shoes, and stated that over the past few months he had bought a few items. He agreed that he did not buy items every month. Again, I do not regard this claim as one that should take precedence over the appellant's obligation to support his children. Again the Magistrate's view that the appellant may "end up not buying any clothing at all. Even after divorce, a person is still entitled to some dignity and decency" is not supported by any evidence. There is no evidence to show that the state of the appellant's clothing is such that if he does not buy new clothes he will be reduced to a state where his dignity will be impaired. Again the interests of his minor children are paramount. 4. A further expense claim by the appellant was an amount of R400.00 in respect of entertainment expenses. When it was put to him in cross-examination, that this was an additional expense, which could be saved, his reply was "so you're saying that basically now that I am divorced I cannot have entertainment for a whole year". In my view, if the alternative is that the appellant's minor children are not properly supported, this is precisely what it means. Other than finding that the expenses incurred by the appellant in eating out were not extravagant, in finding that these took place before March 2011 and therefore had nothing to do with the present application, the Magistrate did not deal with the appellant's claim in this regard." [Paragraph 14]

"I am therefore satisfied that the Magistrate erred, in disregarding these reasonable savings in the appellant's expenses, which total an amount of R2,834.00 per month. When the amount tendered as maintenance by the appellant of R2,000.00 per month is added to this saving, a financial ability on the part of the appellant to afford payment of an amount of R4,834.00 as maintenance, is demonstrated. This is sufficiently close in proximity to the previous maintenance payable of R5,000.00 per month, to justify a finding that the Magistrate erred in reducing the amount of maintenance, to an amount of R3,000.00 payable per month, in respect of both children." [Paragraph 15]

Swain J then considered an application for the court to receive evidence on appeal:

"It is in respect of the other two requirements for the admission of this evidence [that there is a prima facie likelihood that the evidence is true; and that the evidence be materially relevant to the outcome of the trial], that I have cause for concern. This is because these requisites are predicated upon the objective existence of the evidence at the time of the trial. The evidence could only have been of material relevance to the outcome of the trial, if it were in existence at that time. Although the reason for the evidence not being led at the trial was because it was not in existence, this is quite obviously not the situation that the learned judges of appeal had in mind in *De Jager*'s case. …" [Paragraph 23]

"The danger of a party having seen where the weakness lies in his/her case, and shaping evidence to meet the difficulty … does not arise in the present case. That it is not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified, is clear … I regard the present case, however, as a 'rare instance' where, for a 'special reason' on its 'particular merits', the request by the respondent to place such evidence before this court should be permitted. … In a case such as the present this court, as the upper guardian of minor children, is obliged to allow the admission of this evidence, as it is relevant to ensure that the minor children are properly maintained. To ignore this evidence, in my view, would be

tantamount to a failure by this court to ensure that the interests of the minor children were properly safeguarded." [Paragraphs 26 – 28]

The appeal was dismissed and the cross-appeal upheld, so that the application to vary the original order was dismissed.

CUSTOMARY LAW

MNGOMEZULU AND OTHERS V PREMIER OF THE PROVINCE OF KWAZULU-NATAL AND OTHERS (6404/11) [2011] ZAKZPHC 52 (17 NOVEMBER 2011)

Case heard 9 November 2011, Judgment delivered 17 November 2011

Applicants sought an order of the court to compel the first respondent to recognize him as Ibambabukhosi of the Mngomezulu Tribal Community of Ingwavuma and surrounds, in terms of Section 30 read with Section 19 of the KwaZulu-Natal Traditional Leadership and Governance Act. The court dealt with the question of whether the first respondent is legally obliged to recognize the applicant as the Ibambabukhosi. The court also dealt with the question of applicability of the Promotion of Administrative Justice Act (PAJA) and whether the applicants were required to exhaust internal remedies within customary law before they could approach the court.

Swain J held:

"The defence advanced by the respondents is that the first respondent cannot recognise Bikizwe as Inkosi, because 1. The first respondent has to be satisfied in terms of Section 19 (4) and 19 (5) of the Act, that the identification was done in accordance with customary law. Whilst the issue of the competing claims to succeed as Inkosi, are pending before the Commission, the first respondent cannot be satisfied that the claim to Inkosi, advanced by Bikizwe is in accordance with customary law. 2. The first respondent does not have the authority to recognise the first applicant as Ibambabukhosi, whilst the dispute between the Houses has not been resolved." [Paragraph 6]

"Although Bekizwe is a minor, it cannot be said at this stage, while the dispute over who is the legitimate successor to Inkosi, has not been resolved, that Bekizwe is "the successor" to the position of Inkosi." [Paragraph 9]

"Mr. Mngomezulu submitted … that the first respondent had the power in terms of Section 30 (6) of the Act, to appoint the first applicant as Ibambabukhosi. It is however quite clear that this section only applies where Ibambabukhosi has not been identified. … [T]he applicants contend that the first applicant has been identified. Even if it is so that the identification of first applicant as Ibambabukhosi by umndeni wenkosi, has not been established on the papers … it is quite clear that the power vested in the first respondent, to act in terms of Section 30 (6) of the Act is permissive and not directory. It is provided that the first respondent "may" appoint an appropriate person to function in the interim as Ibambabukhosi, after consultation with the Provincial House of Traditional Leaders and the Executive Council. It cannot be said in the context of Section 30 of the Act, that the power of the first respondent to act, was coupled with a duty to do so. … The first respondent possesses a discretion whether to act, or not, in terms of Section 30 (6), and is not obliged by a specific statutory duty to do so. … The first respondent

consequently cannot be compelled by way of mandamus, to decide whether to appoint Ibambabukhosi or not, in terms of Section 30 (6) of the Act." [Paragraph 12]

Swain J then dealt with the question of the applicability of PAJA and the need to exhaust internal remedies:

"Section 6 of PAJA provides for the judicial review of an administrative action which includes a failure to take a decision by an organ of State, when exercising a public function. "Decision" includes any decision of an administrative nature "required to be made" "under an empowering provision". By reference to the definition of "failure" which in relation to the taking of a decision includes a refusal to take the decision, omissions of all kinds are included. ... Section 49 (1) of the Act provides that the parties "must seek to resolve the dispute internally". Section 49 (2) provides that any dispute that cannot be resolved "must" be referred to the bodies and individuals described in the sub-sections. It is therefore clear that the applicants are obliged to exhaust these remedies before approaching this Court, as no application was brought by the applicants in terms of Section 7 (2) (c) of PAJA for exemption from the obligation to exhaust these internal remedies. This Court is accordingly precluded in terms of Section 7 (2) (a) of the Act, from reviewing any such administrative action." [Paragraph s 20 - 21]

The application was thus dismissed.

ADMINISTRATION OF JUSTICE

LIBERTY GROUP LTD V SINGH AND ANOTHER 2012 (5) SA 526 (KZD)

Case heard 11 May 2012, Judgment delivered 7 June 2012

Defendants resisted a summary judgement application on the grounds, inter alia, that the applicant's pleadings had been signed by an attorney who lacked the necessary right of appearance.

Swain J held:

"... It is common cause that the attorney who signed the summons, as well as the particulars of claim, is admitted and enrolled as such in the Gauteng division of the high court in terms of the Attorneys Act, but has not been enrolled by the registrar of this court in terms of s 20(3) of the Attorneys Act as an attorney thereby entitled ... to practise within this division. It is also common cause that the attorney was issued with a certificate, by the registrar of the Gauteng High Court ... to the effect that he has the right of appearance in the high court." [Paragraph 2]

Swain J considered case law regarding whether the Right of Appearance Act had extended the territorial rights of practice of attorneys in the high court:

"Subsequent to the amendment of the Right of Appearance Act ... Tshabalala JP had occasion to consider the effect of this amendment upon the rights of attorneys to appear before, and carry out the functions of an advocate in, divisions of the high court other than the division of the high court in which they were admitted and enrolled in terms of the Attorneys Act, and other than the division in which the certificate of right of appearance was issued ... At issue in Zeda was whether an attorney who was not admitted and enrolled in the KwaZulu-Natal High Court, and whose certificate of right of appearance in terms of s 4(2) of that Act was not issued by the registrar of that court, was entitled to sign the particulars of claim,

forming part of a combined summons issued in that division, qua attorney and qua advocate, as required by the rules. Tshabalala JP concluded that the amendment 'affects right of appearance only and does not cover rights and obligations imposed by the Attorneys Act' " [Paragraphs 6 - 8]

"With great respect to the judges in Sewnandan, I fail to see why the requirement in s 4(3) of the Right of Appearance Act, that a register be kept of attorneys to whom right of appearance has been granted in that division, with the object of maintaining control over these attorneys, leads to the conclusion that such an attorney's right to appear in the high court is limited to the division in which the attorney is admitted or enrolled in terms of s 20 of the Attorneys Act. The requirements in terms of s 4(1)(b) and (c) of the Right of Appearance Act … ensure the same level of control of the issue of a certificate where the attorney applies in a division where he/she is admitted or enrolled. … The requirement, that a register be kept by the registrar of all attorneys to whom certificates of appearance have been issued in that division, has as its object control over those appearing in a division other than a division in which they were either admitted or enrolled. The object was not to limit the right of appearance to a division where the attorney concerned was either admitted or enrolled." [Paragraph 15]

"The interpretation of the Right of Appearance Act … adopted in Sewnandan … with respect, defeats the purpose of the Act by overemphasising the regulation of the appearance of attorneys in the high court without according sufficient weight to the object of extending such right of appearance. To limit the right of appearance to a division where the attorney was admitted or enrolled unreasonably limits the right of appearance which was extended by the Right of Appearance Act. … The decision in Sewnandan, albeit a decision of two judges, is of another division, and consequently not binding upon me. I with respect regard the decision as wrong." [Paragraphs 17 - 18]

"I, however … respectfully disagree with the conclusion of Tshabalala JP that the right of appearance of an attorney … is limited to the division where the attorney is admitted or enrolled, based as it is upon the decision in Sewnandan. I respectfully regard the decision of Tshabalala JP in this regard as wrong. It also follows that I, with respect, regard as wrong the decision by Tshabalala JP that the ability of an attorney, to exercise the functions of an advocate, is similarly restricted to the division where the certificate of the right of appearance was issued. …." [Paragraph 21]

"I am therefore satisfied that the attorney in the present case, by virtue of the issue of a certificate by the registrar of the Gauteng High Court, … acquired the right of appearance before this court." [Paragraph 25]

"The next issue for determination is whether the acquisition of a right of appearance before this court afforded to the attorney the right to sign the particulars of claim in question … The issue is whether the signature of pleadings constitutes a 'function of an advocate'. …" [Paragraphs 26 – 27]

"If I have misconstrued the judgment of Binns-Ward J [in *Absa Bank v Barinor New Business Venture (Pty) Ltd]* and he intended not only to limit the right of an attorney with right of appearance in the high court to sign a combined summons qua attorney, but also qua advocate, to the division where the attorney was admitted and enrolled, I respectfully disagree with it. If the reason for such a conclusion … was that the signature of pleadings is a function which is 'quite discrete from the appearance in court', and consequently not a function of an advocate which an attorney with a right of appearance can exercise, I respectfully disagree … [T]he attorney in the present case was entitled to sign the combined summons issued out of this division, qua advocate." [Paragraphs 34 – 36]

"The signature of the combined summons by an attorney as required by rule 18 — as distinct from the signature of the combined summons by an advocate — has never been the function of an advocate. A signature of the combined summons, qua attorney, cannot accordingly be justified in terms of s 3(4) of the Right of Appearance Act, where the summons is issued in a division other than where the attorney was admitted or enrolled. … An attorney would be entitled to sign a combined summons, qua attorney, issued in the division in which he/she was admitted and enrolled, or in a division in which he/she has been enrolled by the registrar of that division … as an attorney thereby entitled in terms of s 20(4) of that Act, to practise within that division. On the facts of the present case, the plaintiff's attorney was admitted and enrolled in the Gauteng High Court, and was accordingly not entitled to sign the combined summons, qua attorney, which was issued in this division, despite the fact that the attorney possessed the right to appear in this division." [Paragraph 40]

"… [I]n the present case Mr *Tobias* has not pointed to any prejudice suffered by the defendants as a consequence of the irregularity. When regard is had to the fact that the point was only seized upon by the defendants when I raised it at the hearing, I have no doubt that the irregularity should be condoned. I accordingly condone the irregularity." [Paragraph 44]

The summary judgement was granted.

SELECTED JUDGMENTS

COMMERCIAL LAW

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

Case heard 20 May 2013, Judgment delivered 13 September 2013

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

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

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

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

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

"In deciding this issue it is helpful to keep the following principles in respect of interest in mind. Interest remains interest and no method of accounting … can change its nature. Contractual interest may be compound interest or simple interest. Compound interest is interest on capital plus accrued interest. If compound interest is not provided for in an agreement, only simple interest on the capital will be payable in terms of the agreement. Mora interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora debitoris." [Paragraphs 11 - 12]

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

account that interest is the 'life-blood of finance' it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date." [Paragraph 19]

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

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

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

CIVIL AND POLITICAL RIGHTS

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

Case heard 16 August 2012, Judgment delivered 6 September 2012

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

Van Der Merwe J held:

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

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

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

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

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

The application was dismissed.

ADMINISTRATIVE JUSTICE

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

Case heard 8 December 2011, Judgment delivered 12 January 2012

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

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

"The head of the department says that he orally granted the governing body a reasonable opportunity … and that he acted on reasonable grounds. The applicants attack the decision … on two grounds, namely

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

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

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

"In my judgment, in such a case, the head of the department is obliged to invoke section 25 and cannot act in terms of section 22. Section 25 provides that if the head of department makes a determination that the governing body has ceased or failed to perform one or more of its functions, the head of department must appoint sufficient persons to perform all such functions for a period not exceeding three months. The head of department may extend the period of three months by further periods not exceeding three months each, but the total period may not exceed one year. The express purpose hereof is to build the necessary capacity of the governing body. If a governing body has however ceased to perform its functions, the head of the department must ensure that a governing body is elected within a year …

Section 22 is intended to deal with situations other than cessation or failure to perform functions. ... Essentially such decision can be based on any reasonable ground other than cessation or failure to perform functions by the governing body. A possible example of such instance is afforded by the ERMELO-case, namely the adoption by the governing body of an admission policy that is unconstitutional. The understandable frustration of the head of the department with the inaction of the governing body could therefore not form the basis of a decision to withdraw functions, but should have been dealt with in terms of section 25. My conclusion therefore is that the head of department did not in the circumstances have the power to act in terms of section 22." [Paragraph 18]

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

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

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

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

CRIMINAL JUSTICE

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

Case heard 10 February 2014, Judgment delivered 13 February 2014

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

Van De Merwe J held:

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

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

"Relying on the evidence of the forensic examination, the trial court nevertheless convicted the appellant. In my judgment the trial court erred. The regional magistrate said that expert evidence given in other cases indicated that normally injuries would not be noted where a person had been raped more than 72 hours before the time of the examination and that it can therefore be safely assumed that the injuries were inflicted within 72 hours before 16h45 on 12 June 2008. This is not permissible. It is trite that unless judicial notice can be taken of a fact, a court can only rely on the evidentiary material in the specific case before it. The exact nature of the injuries and the time of infliction thereof certainly are not notorious facts of which judicial notice could be taken. It is also trite that the verdict in a criminal case must account for all the evidence in the matter. In this regard the trial court failed to take into account that despite the allegation of the complainant that she had been raped on several occasions and that there had been deep penetration, there was no injury to the hymen at all. This casts considerable doubt on her evidence. In addition, on her own evidence, the complainant was clearly not raped on either the 11th of the 12th June 2008. It appears from the evidence that during the week the appellant stayed on another farm. According to the complainant the appellant arrived at home early on the morning of Thursday 12 June 2008 whereafter the said altercation took place and no sexual intercourse took place" [Paragraph 6]

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

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

ADMINISTRATION OF JUSTICE

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

Case heard 10 September 2013, Judgment delivered 30 September 2013

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

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

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

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

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

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

"… The court a quo correctly found that on his own version the respondent failed to comply with para 4 of the maintenance order for the period February to October 2010. Even though I have found that the

maintenance order was not varied, the question remains whether it could be determined on the papers whether the respondent was in arrears in respect of para 4 of the maintenance order as at the end of January 2010, and/or in respect of para 5 thereof as at the end of October 2010 and, if so, in what amount." [Paragraph 17]

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

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

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

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

The appeal was dismissed.

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

WOODWAYS CC V VALLIE 2010 (6) SA 136 (WCC)

Case heard 6 February 2009, Judgment delivered 17 April 2009.

This was an appeal against a judgement of the Equality Court, which had found that the appellant had unfairly discriminated against the respondent in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act. Bailey, an employee of the appellant, had asked the respondent to remove his fez while in the appellant's store. At issue was whether this request constituted unfair discrimination.

Zondi J (HJ Erasmus concurring) held:

"... The Act creates an informal and inexpensive platform for the adjudication of unfair discrimination disputes. It marks a shift from the conventional way of litigation, which emphasises elegance in the formulation of pleadings. It creates a space for the victims of unfair discrimination to tell their stories so that systemic inequalities and unfair discrimination, which ... remain deeply embedded in social structures, may be eradicated." [Paragraphs 36 – 37]

"The promise of equality and easy access to justice, which the Act seeks to fulfil, would never be realised if litigants in unfair discrimination cases were expected to be meticulous in the manner in which they plead their causes of action. ..." [Paragraph 38]

"The alternative cause of action, though not specifically pleaded ... was nevertheless raised ... during the hearing and was fully investigated. The appellant was not prejudiced, in that it pleaded its defence to the alternative cause of action. ..." [Paragraph 41]

"It is clear ... that the respondent made a case for unfair discrimination based on two legs. Firstly, he made a case for unfair discrimination based on the fact that the appellant's request to remove his fez was stated as a precondition to service ... The ... alternative leg ... was that, even if the appellant had not stated the request for him to remove his fez as a precondition to service, the mere request for him to remove his fez constituted discrimination. I am of the view that the court a quo was entitled to make a finding of discrimination based on the alternative ..." [Paragraphs 48-49]

"... The interpretation of "discrimination" contended for by the appellant tends to restrict its meaning and ... flies in the face of the broad interpretation injunctions that appear in the Act. The respondent brought his claim under the Act and not in terms of the common law. His claim must therefore be determined in accordance with the provisions of the Act and the Constitution which specifically establish the rights which the respondent seeks to assert. Section 3 ... enjoins any person applying the Act to interpret its provisions to give effect to, inter alia, the provisions of the Constitution relating to the promotion of equality ..." [Paragraphs 53-55]

"... The fact of the matter is not about injury to Vallie's religious feelings. It is about the extent to which a request impaired his dignity and identity. The wearing of a fez to Vallie is an expression of his religious belief which is central to his identity and dignity. ... Bailey's request left Vallie with a Hobson's choice. He had to choose between complying with Bailey's request and observing his religious faith. Thus the request imposed a disadvantage on him. In the circumstances I find that Vallie was discriminated against on the ground of religion when he was asked to remove his fez by Bailey." [Paragraphs 62 - 63]

"The appellant contends that when Bailey requested Vallie to remove his fez she was exercising her rights of religion and freedom of speech under the Constitution and that it is inevitable that in the exercise of her religious right a party who holds different religious belief will be offended. I find this argument untenable ... [The communication] took place in the commercial context in which, in my view, expression of religious beliefs was irrelevant and inappropriate. Vallie had come to buy a product. When he stepped into the appellant's premises he had no idea that religious beliefs would come up for discussion. Bailey may not exercise her freedom of expression and religious rights in a manner inconsistent with the provisions of the Constitution or which is violative of other person's rights." [Paragraphs 68-69]

"... Vallie is not only a member of a historically disadvantaged group but also belongs to a religion which has suffered marginalisation in the past. ... The discrimination is not limited to the respondent only. It extends to all members of the community of Muslim faith. It is clear from the record that the appellant readily accepts and welcomes other customers. The practice of requesting customers of Muslim faith to remove their headgear while on the appellant's premises humiliates and dehumanises them."[Paragraphs 72 – 73]

The appeal was dismissed.

BRÜMMER V THE MINISTER OF SOCIAL DEVELOPMENT AND OTHERS (2009) 2 ALL SA 583 (WC)

Judgment delivered 16 March 2009

Applicant sought access to information relating to a tender for the design, development and implementation of a grant administration system in terms of the Promotion of Access to Information Act. The request was refused, and an appeal to the first respondent dismissed. Applicant sought to set aside the first respondent's decision.

Zondi J held:

"Section 78(2) of the Act provides that a requester that has been unsuccessful in an internal appeal may, within 30 days, apply to Court for appropriate relief in terms of section 82. … [S]ection 78(2) … does not provide for condonation … I will assume that the court has a discretion to condone non-compliance with any of the time limit provisions and that the section has not taken away the court's discretion. Section 78(2) must be construed in the context of section 32(1)(a) read with sections 34, 36 and 39(2) of the Constitution. Section 34 of the Constitution guarantees everyone a right of access to courts … Section 78(2) … must therefore be interpreted in such a way that it does not take away or interfere with an individual's right to approach courts. A court is obliged in terms of section 39(2) of the Constitution to promote "the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. …. I … find that non-compliance with the time period provided for in section 78(2) … may be condoned on good cause shown." [Paragraphs 22-23]

" … Applications for condonation should in general be brought as soon after the default as possible. The applicant must produce acceptable reasons for the court to nullify any culpability on his part which attaches to the delay. In my view the applicant's condonation application is utterly lacking in this regard" [Paragraph 31]

"There is no doubt that the right of access to information is crucial to exercise or protection of the rights guaranteed in the Constitution. The issue on which the applicant intends to report will no doubt highlight the importance of promoting good governance and transparency. Members of the Cabinet are accountable to Parliament for the exercise of their powers and the performance of their functions. They may not act in a way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests. At the same time the fairness of a trial or the impartiality of adjudication is part of the judicial process. There is no

doubt in my mind that the integrity of the judicial process is an essential component of the rule of law and the integrity of the judicial process may be severely compromised if a record, which a party to litigation intends to use to prove his claim or disprove the other party's claim, was made available to a third party before the trial is finalised. A disclosure might create a huge risk of prejudice to the administration of justice." [Paragraphs 45-46]

"In my view a public body will be entitled to refuse access to a record in circumstances where it is able to show the existence of reasonable grounds to expect that prejudice or fairness of a trial or the impartiality of an adjudication will result if access to information was allowed. It does not have to prove that the results which are expected will as a matter of fact certainty occur. Proof of probability is sufficient and in my view the first respondent has met the required standard. In the light of this approach I am therefore not satisfied that the applicant has shown that he has reasonable prospects of success on the main application. In the circumstances the applicant's application for condonation must fail." [Paragraphs 47-48]

"… [T]he applicant seeks an order declaring unconstitutional and invalid the provisions of section 78(2) which limit the time period within which to approach a court. …" [Paragraph 50]

"A litigant wishing to challenge the first respondent's decision may have to overcome financial and/or geographical hurdles before being able to approach a court for a relief under section 82 ... These are the hurdles which an ordinary litigant may have to meet before being able to approach a court for an appropriate relief. The 30 day period provided for in section 78(2) of the Act is, in my view, grossly inadequate to enable an ordinary applicant to overcome the hurdles and challenges I have referred to. ... In my view the third respondent has failed to show that section 78(2) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In the circumstances I find that section 78(2) of the Act, in so far as it requires a litigant to bring an application to court within 30 days, is inconsistent with the Constitution and is unconstitutional." [Paragraphs 69-71]

On appeal, the Constitutional Court held that the 30-day time limit in S 78(2) was unconstitutional, and that in light of this finding, the High Court's refusal of condonation should be set aside: **Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC).**

DIRECTOR OF PUBLIC PROSECUTIONS (WC) V MIDI TELEVISION (PTY) LTD T/A E-TV 2006 (6) BCLR 751 (C)

Judgment delivered 5 December 2005

Applicant sought to interdict Respondent from broadcasting a programme until Respondent had furnished Applicant with a copy of the programme, and afforded Applicant 24 hours to view the programme and possibly institute further proceedings. Applicant was concerned that the broadcasting of the programme might prejudice the pending criminal prosecution of suspects in the high profile "Baby Jordan" murder case.

Zondi AJ held:

"... [T]here is no doubt that such an order limits the free flow of information and thus interferes with a right to the freedom of information. The freedom of expression however, does not enjoy superior status in our law ... [T]his limitation may be permissible if the applicant is able to demonstrate that it is reasonable and justifiable." [Paragraph 33]

"... I am satisfied that the applicant has met these requirements [for a final interdict]. ... If the respondent is allowed to proceed with a broadcast without the applicant viewing it, it will be unable to determine whether the broadcast would offend against its right to a fair trial or the effective prosecution of the criminal case. The applicant will have no other satisfactory remedy available to it should its right to a fair trial be violated as a result of the broadcast ..." [Paragraph 34]

"...These are conflicting claims to rights ... and these rights are not absolute. They may be limited ... I have to consider the standard of justification under section 36(1) of the Constitution namely the nature of the right that is limited, importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are any less restrictive means to achieve the purpose. The importance of the right should be considered within the context of the foundational values of democracy, dignity, equality and freedom. This is important because the right may have a different value depending on the context in which is claimed. In some cases the context in which the right is claimed will assist to give meaning and content to its value." [Paragraphs 39-42]

"It is correct that there has been substantial public interest in the murder of Baby Jordan ... These matters are in the public domain and it will be unfair to limit the respondent's right to

report on such matters or to prevent the public to receive information … What is however not in the public domain are the events surrounding the murder. … To hold a fair trial, in my view, it is important that the witnesses' statements about the events surrounding the commission of a crime, such as their ability to identify the suspects, should not be allowed to be in the public domain while the matter is still under investigation. Such conduct may endanger the lives of the state witnesses and it is definitely not in the interest of administration of justice." [Paragraph 43]

"… It is in the interest of the public that the applicant should effectively prosecute cases so that its safety and security is ensured. It will accordingly not be for the public good that information upon which the applicant will rely in prosecuting a case is used in a manner which undermines its obligation to fight crime. In this matter the applicant does not seek to arbitrarily interfere with the respondent's editorial independence. All that it seeks is to have access to the broadcast material in order to satisfy itself that its right to a fair trial is protected. The limitation to the respondent's right to freedom of expression claim is in the circumstances reasonable. It is reasonable in relation to the interest that is sought to be protected and does not go beyond that interest. The restriction is not only rationally connected to a legitimate objective that is sought to be achieved, but is also not overbroad. It is subject to judicial intervention. In other words should applicant, upon receipt of the requested copy of the broadcast, be of the view that the broadcast will interfere with the oncoming trial, it will approach the court to determine whether this is indeed so. In my view there are compelling reasons in this matter to justify the order sought by the applicant." [Paragraph 46]

The application was granted. The decision was overturned on appeal, the SCA finding that the requirement for an interdict, that there be a clear right, had not been met, as no law obliged the documentary to be furnished before broadcast: **Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA)**.

SOCIO-ECONOMIC RIGHTS

UNITING REFORMED CHURCH, DE DOORNS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2013 (5) SA 205 (WCC)

Case heard 31 May 2012, Judgment delivered 14 December 2012

Applicant owned three immovable properties, on which three public schools under the control and administration of the third respondent were located. In issue was the constitutional validity of clause 16 of the three notarial lease agreements entered into between the applicant and the former House of Representatives, entered into in 1987. The leases were due to expire in March 2007, and the clauses obliged the applicant then to transfer the properties to the House (whose functions had since been taken over by the third respondent) free of charge. Applicants disputed the enforceability of the provision, arguing that it was against public policy. Applicant argued that there was unequal bargaining power between the parties when the agreement was concluded, and that enforcing the clause would constitute an arbitrary deprivation of property in violation of section 25 of the Constitution.

Zondi J held:

"... There are two competing interests which should be borne in mind in the consideration of the fairness of the provisions of the lease. On the one hand public policy requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken ... Essential to this doctrine is the idea that individuals should be left free to conclude contracts and that the role of the courts is merely to enforce contracts and that judicial intervention should be kept to a minimum. ... [I]n determining the weight to be attached to the values of freedom and dignity and equality the extent to which the contract was freely and voluntarily concluded will be a vital factor." [Paragraphs 32 - 33]

"On the other end of the scale there is a public-policy consideration which recognises that all persons have a right to seek judicial redress and that the role of the courts is not merely to enforce contracts but also to ensure that a minimum degree of fairness, which will include consideration of the relative positions of the contracting parties, is observed. ... The question is whether the applicant has established facts which objectively demonstrate that at the time of the conclusion of the lease agreements it was in a weaker bargaining position than the Department and that the effect of inequality in bargaining position was harmful to public interest. I am satisfied ... that the applicant has succeeded in meeting the requisite threshold. ..." [Paragraphs 34 - 35]

"As far as the harmful effect which the relevant provisions of the lease have on the public interest is concerned ... on a proper analysis of the terms of the lease agreements the provisions of clause 16 are inimical to the values enshrined in the Constitution. The particular section of the Constitution which is implicated ... is s 25. This is so because clause 16 obliges the applicant, upon the expiry of the 20-year period and after 31 March 2007, to transfer its properties to the third respondent free of charge." [Paragraph 37]

"... [S]hould the third respondent proceed in enforcing the provisions of clause 16 the applicant will have no alternative but to transfer its properties to the third respondent without receiving any compensation. This constitutes deprivation as envisaged by s 25(1), which, there is no doubt in my mind, fails to comply with the requirements of s 25(2)(a) and (b) ..." [Paragraph 39]

"... [T]he provisions of clause 16 sanction arbitrary deprivation of property and are contrary to the provisions of s 25. There is no sufficient reason for the deprivation from the perspective of either the relationship between the means employed and ends sought to be achieved, or the relationship between the purpose for the deprivation and the applicant. ... To the extent that clause 16 ... seeks to deprive the applicant of its properties without creating an obligation on the third respondent to pay compensation, it is, in my view, unfair and therefore contrary to public policy. In the circumstances I hold that the provisions of clause 16 ... are invalid and unenforceable. ... " [Paragraph 40]

"... [T]here is no rational relationship between the means employed and the ends sought to be achieved. ... [T]he provisions of clause 16 in seeking to deprive the applicant of its properties are unnecessarily overbroad. The enforcement of clause 16 will completely extinguish the applicant's ownership in the relevant properties for which the applicant receives no compensation. It is clear that the provisions of clause 16 are a disguised form of expropriation and cannot be allowed to stand." [Paragraph 41]

The applicant was thus declared to be the lawful owner of the properties in question, and to be under no lawful obligation to transfer them to the state free of charge.

CRIMINAL JUSTICE

S V MATSHIVHA 2014 (1) SACR 29 (SCA)

Case heard 30 August 2013, Judgment delivered 3 September 2013

Appellant had been convicted on one count of murder and one of rape in the Limpopo High Court.

Zondi AJA (Ponnan, Maya, Shongwe and Tshiqi JJA concurring) held:

"... [I]n relation to the rape, the state's case rested exclusively on the identification evidence of the complainant and her brother, who, at the time they testified, were 8 and 13 years old, respectively. When the appeal record was perused it was not clear whether the reception of the evidence of the complainant and her brother complied with s 162 read with s 164 of the Criminal Procedure Act ...." [Paragraph 3]

"The reading of s 162(1) makes it clear that, with the exception of certain categories of witness falling under either s 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. And the testimony of a witness, who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to

speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible." [Paragraph 10]

"Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who … is found not to understand the nature and import of the oath or the affirmation. Such a witness must, instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear … that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. …" [Paragraph 11]

"… Before receiving their evidence the court below put certain questions to the child witnesses … [I]t is not clear from the questioning … what its purpose was. Was it intended to establish the capacity of the child witnesses to understand the nature and import of the oath or was it aimed at establishing their ability to distinguish between truth and falsity? The witnesses were simply sworn in, before their capacity to understand the nature and import of the oath was established. …" [Paragraph 12]

"… I am not satisfied that there was compliance with the provisions of s 162 read with s 164. That being the case, no reliance can be placed on the evidence of the complainant and her brother. Ngcobo J made it clear in Director of Public Prosecutions, Transvaal, that the evidence of a child who does not understand what it means to tell the truth is not reliable. The appellant's conviction for rape can therefore not stand. … [E]ven if there had been proper compliance … the evidence presented was insufficient to sustain a conviction on the charge of rape." [Paragraphs 14 - 15]

"… There is no factual support for the court below's finding that the complainant's brother 'told the court all what he saw'. It was his evidence that he could not see the suspect's face because he had it covered with his hat … In my view, as far as the complainant's brother's identification evidence is concerned, it did not take the state's case any further. The fact that the complainant's brother was frank and straightforward when he gave evidence does not provide support for the acceptance of his identification evidence. … The complainant's brother could not have had the opportunity to observe the appellant, as he fled the scene before he could do so. … It is clear from the court below's treatment and analysis of the complainant's evidence that it was alive to the fact that her evidence standing alone was insufficient to sustain a conviction, and for that reason it sought refuge in the evidence of her brother whose identification evidence was in itself lacking in substance." [Paragraph 21]

"The only evidence regarding the rape is that of the complainant herself. She is a single witness who is also a child and thus her evidence was subject to the cautionary rule to which it appears from the record the court below failed to give proper consideration. … I am not satisfied that the complainant's evidence is reliable, in the sense that she had a proper opportunity … to carry out such observation as would be reasonably required to ensure a correct identification. No reliance can be placed on the hearsay evidence of the complainant's mother, which contradicts that of the aunt to whom the complainant made the first report. …" [Paragraphs 22 - 23]

“The problems I have referred to above highlight the fact that the prosecution of rape presents peculiar difficulties that always call for greater care to be given, and even more so where the complainant is young. … I am unable to find that the state has proved beyond reasonable doubt that the appellant is the person who sexually assaulted the complainant. In these circumstances the conviction and sentence in respect of the rape should be set aside.” [Paragraphs 24 – 25]

Zondi AJA then turned to consider the murder charge, noting that the evidence of witnesses clashed regarding how the deceased had sustained the fatal stab wound [paragraph 28 ff]:

“The court below rejected the appellant's version as being not reasonably possibly true. This finding was based on the fact that the location and the depth of the stab wound were irreconcilable with the appellant's version. The court below reasoned that, if the appellant's version were correct, the stab wound would have been located on the back of the deceased's body, not in the chest area. … In my view the evidence adduced by the state was not such as to justify the conclusion that there is no reasonable possibility that the account of the appellant was not a truthful account. I do not share the court below's finding that the bartender's evidence was reliable, because 'he saw all these incidents while standing at the kitchen'. He was a single witness and therefore there was an obligation on the court below to have approached his evidence with caution. … [T]he objective medical evidence contradicts the bartender's evidence. He is the only witness who testified about a knife having been used. Ms Mukosi, one of the state witnesses, contradicts his evidence and Ms Mukosi's evidence is corroborated by that of Mudau. ... [H]ow, it must be asked, could he have seen two blows to the deceased's back with a knife, when there was no corroboration for that to be found in the medical evidence? Nowhere in its evaluation of the evidence does the court below deal with these shortcomings in the bartender's evidence.” [Paragraphs 33 – 34]

The appeal thus succeeded, and the convictions on both charges were set aside.

SELECTED JUDGMENTS

PRIVATE LAW

ORIENTAL PRODUCTS (PTY) LTD V PEGMA 178 INVESTMENTS TRADING CC AND OTHERS 2011 (2) SA 508 (SCA)

Case heard 12 November 2010, Judgment delivered 1 December 2010

This was an appeal against the dismissal of an application to vindicate certain immovable property. Appellant argued that it had been the lawfully registered owner of property which had been transferred to the second and then to the first respondent without appellant's knowledge or authority. Third respondent, a Mr Qu, was alleged to have purported to represent the appellant in passing transfer, but had never been authorised to do so. Before the SCA, it was common cause that third respondent lacked authority.

Shongwe JA held:

"It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause (iusta causa) giving rise to the transfer is a sine qua non for the transfer of ownership. In other words, if the cause is invalid, eg non-compliance with formal requirements, the transfer of ownership will also be void ... Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are ad idem regarding the passing of ownership ..." [Paragraph 12]

"It is correct that registration of title in terms of the Deeds Registries Act ... is a brilliant system of public access to the register of owners of property and the registration of other protected rights such as servitudes. What is even more important is the correctness of the contents of the register. ... The purposes are to publicise to the world and to protect registered owners ... Even though there is no guarantee of title, the record needs to be accurate, though subject to correction. The record provides proof of the present registered owner of the property or right." [Paragraph 13]

"Most cases deal with transfer of ownership of movables; however, there is no reason in principle why an abstract system of transfer should not be applied to immovables as well ...in effect the result is the same whether one deals with movable or immovable property. ..." [Paragraph 14]

Shongwe JA then turned to deal with the question of whether appellant was estopped from challenging first respondent's title:

"... It is common cause that the third respondent held a responsible position in running the affairs of Mr Kuk and the applicant. He became privy to transactions ... For instance, he knew of the intended sale of the very property, which fell through, although he was not directly involved. He was thereafter contacted telephonically by Mr Kuk to procure a new purchaser for the property. ... It is common cause that the property was transferred to the second respondent on 28 December 2005. Already at the end of 2006 Mr Kuk started making enquiries ... to ascertain whether the third respondent had been in contact ... regarding any sale of the property. Clearly Mr Kuk and Ms Cook were suspicious of the third respondent's conduct as early as December 2006." [Paragraphs 15 - 16]

"By 18 December 2006 the directors of the appellant knew that the property was no longer registered in its name, but in the name of the second respondent. They did nothing to intervene and put the record straight by either writing a letter to the registrar or the new registered owner … or launching an interdict … Since the appellant was represented by attorneys in Johannesburg, it cannot be heard … to plead ignorance of the South African system of registration of transfer of ownership of immovable property. …" [Paragraph 17]

"It is generally accepted that an owner of movable property is estopped from asserting his right to his property, only where the person who acquired his property did so because the negligence of the true owner misled him into the belief that the person from whom he acquired it was the owner, and was entitled to dispose of it. … There seems to be no reason why this principle cannot be applied to immovable property." [Paragraph 19]

"… The logical consequence of upholding the defence of estoppel is that the person in possession of the goods or property, raising estoppel, acquires an unassailable right to continue possessing the goods. … [I]t is still a defence entitling the possessor to continue exercising that right. In the present case transfer had already occurred long before the defence was raised. We were not referred to any unequivocal authority, nor have I found any, to the effect that estoppel can or cannot be used in cases involving the transfer of ownership of immovable property. …" [Paragraph 20]

"The relevant period in this case is between 18 December 2006, when attorneys … wrote a letter to Mr Kuk advising him that the property had been registered in the name of the second respondent, and 8 February 2007, when the property was indeed transferred to the first respondent. The directors of the appellant remained inactive for almost two months after learning that its property had been registered in the name of the second respondent. The inaction … is sufficient to constitute negligence, considering the surrounding circumstances … One must bear in mind that we are dealing with immovable property, which was the core business of the appellant. … They only launched the application for vindication on 7 May 2008, almost 17 months after knowing that the property had been fraudulently sold and transferred." [Paragraph 21]

"I am satisfied in concluding that the appellant's inaction was a negligent representation which led the first respondent to rely on it, to its detriment. … [T]he appellant is entitled to retransfer of the property, but for the fact that it cannot assert its right of ownership because of estoppel. Hence the applicant loses its ownership of the property. …"

The appeal was thus dismissed with costs. Harms DP (Lewis and Maya JJA, Pillay AJA concurring) agreed with the order and the finding on estoppel, but for different reasons.

CONSTITUTIONAL INTERPRETATION

MASHAVHA V PRESIDENT OF THE RSA AND OTHERS 2004 (3) BCLR 292 (T)

Applicant sought an order declaring that Proclamation R7 of 1996 was invalid, insofar as it purported to assign the administration and amend provisions of the Social Assistance Act (SAA); alternatively, that the Proclamation did not effectively assign the administration of any of the provisions of the Act to the provinces. The SAA had been enacted in 1992, but only came into operation on 1 March 1996. It has been

repeatedly amended in 1993 and 1994. The Proclamation, promulgated on 23 February 1996, since which the provinces had administered all the provisions of the SAA.

Shongwe J held:

"The applicant grounds the relief sought on the contention that the Proclamation that purported to amend and assign the administration of certain provisions of the SAA in terms of section 235(8) of the interim Constitution ("IC") was not a competent amendment and assignment under that section. Alternatively that the assigning was devoid of any meaningful content. The reason for the incompetence is that section 235(8) read with section 235(6)(b) of the IC only permitted the amendment and assignment of laws that were "in force" and were being "administered" immediately prior to the commencement of the IC … The contention being that the SAA was neither in force nor was it being administered before that date. The reason for contending that the Proclamation was vague or devoid of content is because in terms of section 235(8) an amendment and assignment may only be made within the framework of section 126 of the IC. Section 235(8) read with section 235(6) of the IC moreover made it clear that the only laws that could be amended and assigned were those with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3) of the IC. The applicant further contends that the assigned provisions are not Schedule 6 matters because the administration of the SAA does not fall within "Welfare Services" as "welfare service" is not a service. …" [Paragraph 4]

"The question to be asked is whether the assignment was valid on the date when it was made and by considering whether on that date the requirements for a lawful assignment were present and whether the assignment was undertaken in a lawful manner. Also inextricably linked with the above questions is the purpose and effect of the SAA as it read before the amendment under the Proclamation. … In terms of section 235(8)(a), the President may only assign the administration of a law referred to in section 235(6)(b). It means that law must have been "in force" before the commencement of the IC … and that was being "administered" by one of the authorities identified in subsection 235(6)(b)(i) and (ii) read with section 235(1) before the commencement of the IC. In casu the SAA had been enacted but was not yet in operation ("in force") when the IC came into effect … It was only put into operation ("in force") almost two years later with effect from 1 March 1996. I am in full agreement with the applicant's contention that the SAA was not "in force" and was not being "administered" when the IC came into effect" [Paragraphs 10 - 11]

"… [A]n Act cannot be said to be "in force" before it is promulgated or put into operation. It is "in limbo" awaiting promulgation after enactment. … [T]he purpose of section 235 was to provide for the continued exercise of the executive powers under the old order laws that were in force when the IC came into effect. Then the purpose of section 235(8)(a) read with section 235(6)(b) … was to provide for the continued administration of those laws that were being administered by the old order functionaries immediately prior to the commencement of the IC. Therefore the SAA was incapable of being assigned under section 235(8)(a) of the IC because it was not administered by any authority at the commencement of the IC. … The administration of an act comprises the executive and administrative steps taken under the Act in its implementation. It does not include the promotion and adoption of amendments to the Act in Parliament, that is part of legislature process by which the Act itself is amended. It is distinct from the administration of the Act in its implementation. It cannot be said that an Act is being administered merely by taking preparatory steps for its commencement, particularly when those preparatory steps themselves do not come into operation until the Act itself does. … The

contention that the SAA was being "administered" under section 14 before the IC came into operation … is unfounded because it was only put into operation almost two years later effective from 1 March 1996. … On this cause of action alone I am satisfied that the SAA was not "in force" and was in any event not being "administered" before commencement of the IC, therefore the assignment of the administration of the SAA was invalid." [Paragraph 13]

"The next enquiry is whether the SAA deals with matters listed in Schedule 6. … The test involves the determination of the "subject-matter or the substance of legislation, its essence or true purpose and effect". ... On its ordinary meaning welfare includes the provision of pensions and grants and welfare services are those services by which these are made available to those entitled to them. The proper and safer approach in the interpretation of a statute is to read the statute as a whole and ask the question: "In this statute, in the context, relating to this subject matter, what is the true meaning of that word?"… [I]n view of my earlier decision on the first cause of action, it is immaterial to decide this aspect. I, however, agree … that the subject matter of the SAA does fall within the functional area "welfare services" …" [Paragraphs 14 - 15]

"In view of my finding that the SAA was not "in force" and that it was not being "administered" and consequently invalid, I do not think that it will serve any purpose to decide on the other causes of action. Suffice to state that I am of the view that the SAA is a section 126(3) law as argued by the applicant, the President accordingly did not have the power to assign its administration to the provinces. … As to which matters require to be regulated or co-ordinated by uniform norms or standards that apply equally throughout the Republic is a question of divergent judgments, depending on one's view of the significance to society of a particular matter and one's concept of what constitutes effective performance. The request of equality lies at the heart of both the IC and the final Constitution. …" [Paragraph 16]

"If … the SAA were indeed validly assigned under section 235(8), the obvious effect of the assignment would have been to make the SAA "provincial legislation" within the meaning of section 239 of the Constitution. It would then have been competent for the provinces to amend or repeal the SAA as they deemed fit. This would then have ended up with patchwork of social assistance … that differed materially from province to province which would conduce to a chaotic situation. Such an outcome would not only have been unconstitutional but would obviously have been entirely impractical. …" [Paragraph 17]

The application was granted. The declaration of constitutional invalidity was confirmed by the Constitutional Court in in **Mashavha v President of the Republic of South Africa and Others 2005 (2) SA 476 (CC)**, but for different reasons.

CIVIL PROCEDURE

ARENDSNES SWEEFSPOOR CC V BOTHA [2013] 3 ALL SA 605 (SCA)

Appellant (defendant in the court below) had unsuccessfully raised a special plea of prescription to the respondent's claim for damages stemming from an accident on a cable car operated by the appellant. At issue was whether the service of a summons had served to interrupt the running of prescription. Appellant had operated the Haartebeespoort Cable car system, which had been closed down subsequent to the accident.

Shongwe JA (Mthiyane DP, Leach, Petse and Pillay JJA concurring) held:

"When the sheriff attempted service on 12 December 2006, … he was told that the defendant had ceased trading on the premises, only the restaurant which was operated by … the son in-law of … the sole member of the defendant, remained. However, when the defendant ceased trading, it never deregistered the corporation and therefore its registered office remained the premises as described in the return of service. … [T]he sheriff consulted the plaintiff's attorneys … and was instructed to serve the summons at the premises because the property remained the registered office of the defendant. Hence, on 14 December 2006 (second attempt) the summons was served on a Mr Pretorius, an employee of the restaurant on the premises. It is common cause that Mr Pretorius never handed the summons over to the defendant and that he was not employed by the defendant. The defendant contended that it never received a copy of the summons from the sheriff or Mr Pretorius and therefore contested that the summons was properly served. " [Paragraph 4]

"The plaintiff contended as follows. The summons was properly served at the defendant's registered office and registered address. … Although no responsible employee of the defendant was present at the registered address, the defendant "intentionally rendered impossible" the strict compliance with rule 4 by not changing its registered office or address with the office of the Registrar of Companies." [Paragraph 5]

"Counsel for the defendant submitted that the service was not in terms of rule 4(1)(a)(v) because first Mr Pretorius was not an employee of the defendant, second that in the absence of such employee a copy of the summons should have been affixed to the main door of the registered office. He further contended that because these two requirements were absent, the service was not a good and legally recognised one. … He contended further that the defendant had closed down the business a year before and no longer had any presence on the premises. … [D]efendant urged this Court not to create a precedent by placing form above substance which might bring about a differentiation between cases dealing with default judgments and those dealing with liquidation of companies or interruption of prescription. I do not agree. We were not referred to any authority, or practical example in support of this proposition. Service of a court process must substantially comply with the relevant rules. In my view, it does not matter whether one is dealing with a default judgment, a liquidation case or a case dealing with the interruption of prescription. … " [Paragraphs 12 - 13]

"… Brangus is the most recent High Court judgment which, in my view, is authority for the proposition that effectiveness of the service of a court process or substantial compliance should trump the form. In other words by reason of the fact that a copy of the summons was served at the registered office of the defendant there had been substantial compliance with the requirement of rule 4(1)(a)(v). Even though the service did not strictly comply with the Rule. … It would not be a proper exercise of a court's discretion to uphold the special plea in circumstances where there was substantial compliance with the rules. In this case, the defendant had not changed its registered office with the Registrar of companies. Where else could the plaintiff have served the summons? … I agree in this regard with the reasoning of the court a quo … that corporations should not be permitted to register an office address where it has no purpose or business and by so doing, frustrate services of summons and other court process upon it." [Paragraph 14 - 16]

"It is trite that the rules exist for the courts, and not the courts for the rules … Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this … Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case, in essence it is

a matter of fairness to both parties … With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. … And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice … Considerations of justice and fairness are of prime importance in the interpretation of procedural rules …" [Paragraphs 18 - 19]

Shongwe JA thus held that the service of the summons had been good, and served to interrupt the running of prescription. The plaintiff's claim had therefore not prescribed. Leach JA wrote a separate concurring judgement.

TSHETLO V TSHETLO [2000] 4 ALL SA 375 (W)

Applicant sought to set aside a write of attachment issued by the respondent. The parties had been married in community of property before divorcing. When Malan J issued the order dissolving the marriage, the order 'declared binding' the deed of settlement reached between the parties.

Shongwe AJ held:

"It is clear and undisputed that the respondent understood the words "deed of settlement is declared binding" to be a court order or a judgment which would entitle her to cause to be issued a writ of attachment. … [T]he applicant argues that the words "the deed of settlement is declared binding" simply mean that there is an agreement between the parties which is declared binding and not to mean a judgment or a court order. Hence the applicant says that the writ of attachment is invalid. … " [Page 376]

"… The basic principles of legal interpretation of statutes, contracts and wills is not different to that of court orders. … In my view the word "meaning" is defined as that which is meant or intended. In other words, what the court intended by the language it used or meant by the language it used is surely the same thing. The purpose of a divorce order is to regulate the consequences of the dissolution of a marriage. It would be an absurdity for the court dissolving a marriage to leave certain important aspects of the consequences of a marriage to chance, therefore although the court used the words "declared binding", it is my view that it meant and intended the usual well-known expression that the "deed of settlement shall be incorporated in the decree of divorce" or "the deed of settlement is made an order of court"." [Pages 376 - 377]

"… I agree fully … that the judgment or order must be read as a whole in order to ascertain its intention. … Without getting into the question of why did the applicant not do something about the writ issued on 1 October 1999 until 8 March 2000, and the question of whether or not he had paid the debt, I may mention that as at 1 October 1999 the debt was unpaid and therefore if we accept that there was a court order made on 11 December 1997, then the writ was legally or validly issued on 1 October 1999 and that the applicant was indeed and in fact in arrears on the date of its issue. " [Page 377]

"With the greatest respect, I am persuaded differently from my learned brother Boruchowitz J, when he says that there is no indication that the deed of settlement was intended to operate as part of the order of divorce or to have the force of a judgment or order capable of sustaining a warrant of execution. On the contrary, the purpose of a final order of divorce is to finally decide on the dissolution of a marriage and all resultant consequences flowing therefrom, my view is that if the parties did not intend to incorporate the deed of settlement in the final order of divorce, then they simply would have requested

the court to declare the marriage dissolved and to order a division of the joint estate without having to get into the trouble of constructing a deed of settlement." [Page 377]

"In the circumstances I am satisfied that the divorce order made on 11 December 1997 in its entirety is a judgment or an order of court capable of entitling the respondent to cause to be issued a writ of execution. In the result the application is dismissed with costs." [Page 378]

CRIMINAL JUSTICE

TOUBIE V S [2012] 4 ALL SA 290 (SCA)

Judgment delivered 27 September 2012

Appellant had been convicted by a single judge of the High Court on numerous counts stemming from a shooting which had occurred during the course of a robbery. Leave to appeal was granted to a full bench, in circumstances where neither the oral application for leave to appeal nor the notice of application for leave to appeal formed part of the record before the SCA. Whilst the appeal was made against conviction, the full bench dealt with the sentences imposed. At issue in the appeal was whether it was competent for the full bench to have done so.

Shongwe JA (Bosielo and Mhlantla JJA and Erasmus AJA concurring) held:

"The Full Court … turned to the question of sentence and the applicability of section 51 of the Criminal Procedure Amendment Act … It invoked the provisions of section 322 of the CPA after giving the requisite notice to the parties. The Full Court set aside the sentences imposed in respect of counts 1 and 4 and replaced them with 15 years imprisonment and life imprisonment respectively. … [T]he appellant contends that the Full Court was not competent to deal with the question of sentence at all as it did not form the subject of the appeal. Reliance is placed on … section 22 of the Supreme Court Act …" [Paragraph 8]

"Mr Omar contends that the words "which is the subject of the appeal" in section 22(b) should be interpreted to mean that because the appeal was against conviction only, the Full Court could not interfere with the sentence even if it was of the view that failure to interfere would result in an injustice. This argument is without substance and falls to be rejected outright. Subsection (b) of section 22 clearly and unambiguously provides that over and above the power to confirm, amend or set aside the judgement or order which is the subject of the appeal, the provincial or local division having appeal jurisdiction is also empowered to "give any judgment or make any order which the circumstance may require". …" [Paragraph 10]

"… Section 22 of the Supreme Court Act read together with section 322 of the CPA must be understood to provide that a Court of Appeal is empowered to confirm, amend or set aside a judgment or order which is the subject of the appeal and give any judgment or make any order which the circumstances may require. … The intention is for a Court of Appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not the subject of appeal. … I find that the Full Court was empowered … to deal with sentence even though it was not a subject of the appeal." [Paragraph 13]

"... This Court mero motu raised the question relating to the Criminal Law Amendment Act ... The indictment alleged, and it is not in dispute that the State proved the offence of robbery with aggravating circumstances as defined in section 1 of the CPA. Had the appellant been forewarned, by the trial court, that the State was going to rely on the provisions of the minimum sentence regime the appellant's conduct would have attracted the sentence prescribed ... [T]he appellant was also convicted of murder in circumstances as defined in section 51(1) read with Part I of Schedule 2 of the Act. Therefore, the sentences in both the robbery and the murder were subject to subsections 3 and 6 which provide that if the court is satisfied that substantial and compelling circumstances exist ... it shall enter the circumstances on the record and must .... impose such lesser sentence." [Paragraph 14]

"The record ... is, however, silent on the question whether the appellant was informed of the provisions of the minimum sentence legislation. The indictment also does not indicate any reliance on the Act. The first time the trial court mentioned the legislation and in particular the non-existence of substantial and compelling circumstances was when it was considering an appropriate sentence. Notwithstanding the finding that no substantial or compelling circumstances existed, the trial court imposed a sentence lesser than the prescribed minimum sentence. In my view, this irregularity is of a double-barrelled nature. First, the appellant was not informed of the applicability of the provisions of the minimum sentence regime and second, despite finding no substantial and compelling circumstances, the trial court did not impose the prescribed minimum sentence. ... [T]he Full Court attempted to rectify that mistake, but ... it was too late ..." [Paragraph 15]

"Failure to forewarn the accused is in conflict with ... section 35(3)(a) of the Constitution ...which provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This Court is entitled to raise this issue mero motu because the irregularity resulted in an injustice and was prejudicial to the appellant ... The appellant was legally represented ... I can only assume that Mr Omar should have been vigilant, but this is no excuse to prejudice the appellant." [Paragraph 20]

"The question is, whether the irregularity is of such a nature as to render the entire proceedings unfair. The answer is no: because not the entire proceedings are vitiated by the irregularity as this only affects that sentence. ... The irregularity ... lies in the fact that the appellant was not informed of the applicability of section 51 of the Criminal Law Amendment Act, either at the plea stage or during the trial. As the appellant was not informed that he was charged under the Criminal Law Amendment Act the Full Court erred in sentencing him in terms of that Act. ..." [Paragraphs 21 - 22]

The appeal was upheld. Heher JA dissented, finding that in this case the requirements for enlarging the issues beyond those in which leave to appeal had been grated were not met.

S V COMBRINK 2012 (1) SACR 93 (SCA)

Case heard 25 May 2011, Judgment delivered 23 June 2011

Appellant had been convicted of murder and sentenced to 15 years imprisonment, five of which were suspended. The majority of a full bench of the High Court dismissed an appeal against conviction, and substituted a sentence of 10 years imprisonment. It was common cause that a shot fired by the appellant had killed the deceased, who had been walking in a field on the farm where the deceased worked and

the accused farmed. The evidence was that the accused had called out to the deceased, who had not stopped. The accused then fired two shots, the second of which struck and killed the deceased.

Shongwe JA (Brand and Ponnan JJA concurring) held:

"Counsel for Combrink submitted that the fact that he repeatedly called the deceased is indicative of a lack of intention to shoot and kill. However, he was bound to concede that using a .308 hunting rifle under the circumstances was entirely inappropriate. The situation did not call for the use of any firearm, let alone one as powerful as a hunting rifle. The deceased was walking innocently and relaxed on the property of his employer; he did not pose any danger ... The State argued that Combrink could have driven towards him to stop him, or could have used the hooter of the vehicle. If he wanted to draw his attention, there were numerous other ways of doing so." [Paragraph 14]

"It is trite that the State must prove its case beyond reasonable doubt and that no onus rests on an accused person to prove his innocence. ... [I]t is well settled that the evidence must be looked at holistically." [Paragraph 15]

"... In my view, not only was Masilela an honest witness, his evidence is also reliable, and sufficient to sustain a conviction. This I say having considered all the evidence and the necessary caution required when dealing with the evidence of a single witness ... It is significant to note that Du Plessis' [the defence ballistics expert] theory is irreconcilable with Masilela's evidence. On his own version Combrink is an experienced hunter and a very good marksman. He said he aimed the second shot at the same place as the first. It is my view that, when doing so, he foresaw the possibility that a bullet might strike the deceased. ... [O]n the undisputed evidence, he plainly shot at the deceased. And in resorting to his firearm in those circumstances and in the manner that he did he must subjectively have foreseen the possibility (a real one I must add) that the bullet could ricochet after striking a stone or some other object and in the process strike the deceased. Regardless of that foreseeable possibility he went on to shoot. ... In my view, he is guilty of murder, the intention being dolus eventualis." [Paragraphs 16 - 17]

Shongwe JA then turned to deal with sentence:

"The trial court found substantial and compelling circumstances. However, it did not place those circumstances on the record as required by the Act. ... The court a quo found that the trial court misdirected itself, and I agree. The minimum sentence in the circumstances is 15 years' imprisonment. But for the finding of substantial and compelling circumstances, that is the sentence the trial court was bound to impose. ..." [Paragraphs 20 - 21]

"I am of the view that the trial court focused exclusively on the mitigating factors instead of balancing them with the aggravating factors. Firstly, Combrink's personal circumstances were overstated while the personal circumstances of the deceased and the gravity of the offence were virtually ignored. The court required direct evidence as to the effect of the deceased's death on his family. I do not think it is necessary to lead such evidence. It stands to reason that the loss of life will self-evidently have a negative impact. ... The fact that Combrink had a military background does not in itself, in my view, impact on mitigating factors. ... In my view, it was the most callous behaviour of Combrinck to have used a .308 hunting rifle just to deal with a 'suspicious' person who was just walking on the mealieland without posing any danger to anybody. ..." [Paragraphs 22 - 23]

"... I am not suggesting by any means that the murder committed in this case was racially motivated. However, I am saying that courts must be conscious and sensitive to cases which on the facts appear to

have a racial or discriminatory connotation, especially when dealing with the question of sentence. We all know that the public is incensed with sentences that appear to favour a particular group in society. The public interest is one of the essential considerations in determining an appropriate sentence. That the trial court appeared to ignore." [Paragraph 24]

"... I therefore agree with Poswa J [in the court a quo]: 'What the court a quo did not mention, which, in my view, merits mentioning, is the fact that the appellant's conduct was adding to a series of disturbing events in which a number of African people, some of them employees of the accused persons, are shot by a number of white farmers which episode definitely has a negative impact on race relations in a country with a painful history of relations between white and black citizens.' Counsel for Combrink argued that Poswa J was politicising the case. I don't think so. The public interest and discrimination are not necessarily between black and white but rather between people in general who perceive others, with prejudice, to be different or inferior to them. It is this perception that the judiciary should address. ..." [Paragraph 25]

"... I believe that the trial court erred in finding that the yardstick of substantial and compelling circumstances had been met. ... [T]his court is empowered to increase the sentence imposed by the court a quo. On the authority of *Malgas* ... the legislature decreed that in the absence of substantial and compelling circumstances, the prescribed minimum sentence must be imposed. ..." [Paragraph 26

The appeal against conviction and sentence was dismissed, and the accused was sentenced to 15 years' imprisonment.

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S v AM 2014 (1) SACR 48 (FB)

Case heard 20 May 2013; Judgment delivered 14 June 2013

The appellant was convicted of the rape of his 14 year old step-daughter and sentenced to life imprisonment, the prescribed minimum sentence. Mocumie J (Sepato AJ concurring) upheld the conviction, and held in respect of the sentence:

"It is, however, clear on the record that the trial court took into account as aggravating circumstances the following factors: The tender age of the complainant; the fact that the appellant raped her under the same roof where her mother and elder sister were sleeping; the fact that the appellant threatened to kill her if she reported the incident to anyone; the fact that the appellant abused his position as the complainant's stepfather; and the high rate at which the crime of rape was perpetrated against young children." [Paragraph 13]

"Rape of a young child such as the complainant is always an extremely serious matter, even in the absence of serious injuries and despite there being no evidence of permanent psychological aftereffects. This is all the more so where the perpetrator is a man in a position of trust *vis-à-vis* the complainant ... There is a responsibility on courts to impose sentences in respect of certain classified crimes, as the legislature prescribed, without any fear or based on any flimsy reasons, as set out clearly in *S v Malga*s." [Paragraph 14]

Referring to *S v Matyityi* 2011 (1) SACR 40 (SCA) holding that minimum sentences are consisted with the rule of law and the Constitution, Mocumie J held:

"If this approach is consistently applied by all courts in cases where victims are of the complainant's age group, which falls within the age group provided for specifically by the legislature, there is a great likelihood that this scourge can be eradicated. This is not to ordain that life imprisonment should be implemented blindly; the courts must still conduct a balancing exercise of all relevant factors. [Paragraph 15]

"In this case the appellant conducted himself with total disregard for this young girl's right not to be abused and to individual physical integrity ... I agree with the trial court entirely, that the appellant's personal circumstances and mitigatory factors referred to by the defence, in the light of the aggravating factors highlighted above, do not on their own, or cumulatively, amount to compelling and substantial circumstances which would justify it to deviate from the prescribed sentence. Having regard to all the circumstances in this case, the minimum sentence imposed is manifestly fair and just. This is precisely the type of matter the legislature had in mind when it enacted the minimum- sentencing legislation." [Paragraphs 16 - 18]

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

Case heard 29 July 2013; Judgment delivered 1 August 2013

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

Mocumie J (Molemela J concurring) held:

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

"The aggravating factors of this case are the following:. The second complainant was badly injured to the extent that he sustained a fractured skull. The first complainant was raped repeatedly. An older man at the house where the first complainant fled to just after their encounter with the appellant, tried to persuade the appellant from forcing himself on the first complainant as was evident he had all the intention to do. He ignored this man and took the complainant away to his home. This means the appellant had at least two distinct opportunities to withdraw from proceeding with this unlawful conduct but he simply continued. The appellant was not remorseful throughout the trial. The appellant's conduct was so brazen that after raping the complainant the next day he took her to a house she pointed out as her home and threatened to deal with her if she reported the incident to the police." [Paragraph 5]

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

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

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

sentence for attempted murder which could range between eight and ten years' imprisonment." [Paragraph 9]

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

Case heard 15 February 2013; Judgment delivered 25 April 2013

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

Mocumie J held:

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

"I am alive to the fact that the two appellants were not first offenders. They had a previous conviction which had an element of violence. Thus, they were not entitled to be treated as first offenders and the court *a quo* correctly took their previous conviction into account. This, however, does not detract from the fact that the second appellant was a juvenile at the time of commission of the offence. As for the first appellant, at 18½ years of age, he was indeed already an adult. Having achieved the age of majority a mere six months prior to commission of the offence, few can quarrel with the fact that he was still a youthful offender. I am of the view that all things considered, including the principles laid down in the afore-mentioned cases, as well as the value of the items the complainant was robbed of, a proper consideration of the triad of sentence ought not to have resulted in the sentence imposed on the appellants by the court *a quo.* The court *a quo* thus committed a material misdirection." [Paragraph 9]

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

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

S V MOCHOCHONONO (71/2013) [2013] ZAFSHC 100 (25 APRIL 2013)

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

Mocumie J (Molemela J concurring) held:

"Contravention of s49 (1) (a) is by its very nature a very serious offence. Lately it is an offence that is generally committed in conjunction with other serious offences such as trespassing, coupled with theft of minerals such as gold on old mines which have been shut down due to safety concerns on them or

exhausted resources. It is also sometimes linked to stock theft or more serious offences such as murder and drug trafficking." [Paragraph 6]

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

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

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

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

SELECTED JUDGMENTS

PRIVATE LAW

MINISTER OF LAND AFFAIRS V MPHUTI AND ANOTHER (3028/06) [2009] ZAFSHC 20

Heard 5 February 2009; judgment delivered 26 February 2009

Applicant sought an eviction order against the respondents. Moloi J held:

"While it is true that the High Court has no jurisdiction to hear the matters in which ESTA [Extension of Security of Tenure Act] is raised as an issue without consent of both parties, in this case the court can in view of the fact that the application was based on common law and 95% of the defence as well. Only a negligible part, in passing, referred to the provisions of ESTA though much was made of it during argument." [Paragraph 14]

"The respondents in this matter are farm owners and live adjacent to a farm they initially believed they had a lease over but realised, in due course, they did not. The initial occupation did not have a legal basis nor consent of the owner as this was based on a mistaken but *bona* fide belief that they had a lease over the land and it became clear, on their own admission, in April 2007 that the lease agreement did not relate to the disputed property. They utilised the property for residence, cultivation of crops, grazing of live-stock and exploitation of plantation. All these activities are generally conducted by commercial farmers and unquestionably are commercial farming activities as referred to in the definition of occupiers in section 1 of ESTA. The respondents can, as a result, not be the persons entitled to the protection of ESTA, simply because they belong to the so-called previously disadvantaged group." [Paragraph 14]

"The applicant has met all the requirements of proving entitlement to the relief sought under common law. The respondents have not been successful in proving their entitlement to the protection afforded by ESTA and have no defence against the relief sought." [Paragraph 15]

The eviction order was granted.

CIVIL PROCEDURE

COBRA TOWING CC AND OTHERS V OUTSURANCE INSURANCE COMPANY AND ANOTHERS (1535/2010, 2082/2010) [2010] ZAFSHC 157

Case heard 22 October 2010; Judgment delivered 25 November 2010

The applicant sought orders rescinding two judgments of the High Court, relating to a service agreement between the applicants and the respondent in terms of which the applicants would render roadside assistance to the drivers of the vehicles insured by the respondent. At termination of the agreement, it was agreed that the applicants would no longer render roadside assistance to drivers insured by the respondent. However, first applicant continued to offer roadside assistance to some vehicles insured by the respondent. The judgments were in respect of this assistance.

After reviewing the circumstances in which the roadside assistance was rendered, Moloi J held:

"In order to succeed with an application for rescission of a judgment or order made, the applicant should show good cause. The reliance by the applicants on the laxity and misinformation by their legal representative is not supported by the evidence and can safely be rejected … The court was asked to find the principles stated in that decision distinguishable to the facts of this matter. I cannot. The applicants clearly participated in the negotiations leading up to the draft order agreed to and finally made an order of court on 29 March 2010." [Paragraphs 10 and 11]

"The defence put up by the applicants is not plausible and has no prospects of success. The defence is that the respondent was not using only the contracted operators and the drivers of the vehicles involved in collisions in most cases did not know who they were insured with and that authority to render roadside assistance was often given after the services had been rendered. At times the police gave them orders to tow away vehicles without knowing with which company the vehicles were insured. The court order is, however, clear, namely that the applicants and/or their sub-contractors are interdicted to tow vehicles insured by the respondent. The duty is thus on the applicants to verify the insurer of the vehicle before they render roadside assistance. If the police ordered them to do so, they could simply tell the police to ascertain the vehicle was not insured by the respondent, because they are forbidden by court order to tow vehicles insured by the respondent." [Paragraph 12]

The applications for rescission were dismissed.

CRIMINAL JUSTICE

S V SIPRIAN AND OTHERS (294/2008) [2008] ZAFSHC 44 (12 JUNE 2008)

After sentencing the eight accused, the magistrate referred the matter to the High Court as a special review. Moloi J held:

"This court cannot consider the matter under section 304 A … as the accused had already been sentenced. The said section authorises a review only after conviction but before sentence is passed when the magistrate [is] of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice. … If that is found to be the case by this court, the conviction would be set aside and the matter remitted to the magistrate for a trial *de novo*. [paragraph 3]

"In the present matter the conviction was made in accordance with justice, the accused, being duly represented, having pleaded guilty and admitted all the elements of the crime charged." [Paragraph 4]

"We dealt with the matter in terms of section 304 (2) of Act … and found that the proceedings are not in accordance with justice in that the sentence of twenty eight months imprisonment wholly suspended conditionally for five years imposed by the magistrate in respect of each accused person on the count of trespass was in excess of the maximum sentence prescribed in section 3 of the Trespass Act … The said section prescribes the maximum sentence to be a fine of R2 000.00 or imprisonment not exceeding two years. …" [Paragraph 5]

"That the sentence is excessive of the prescribed maximum is obvious and the attendant prejudice to the accused persons is equally obvious. The matter was referred to this court by the magistrate himself presumably on realising that the sentence is not in accordance with justice, it being in excess of the legislated maximum. He did so under the section having no application to the proceedings. However, requiring him to state the reasons would result in an unnecessary delay and prejudice to the accused." [Paragraph 7]

The sentences were reduced.

S v TSHOPO AND OTHERS 2013 (1) SACR 127 (FB)

Case heard 17 June 2012, Judgment delivered 17 June 2012.

The appellants, convicted of fraud in relation to a tender from the Provincial Department of Education to distribute books and other educational material to schools, appealed against both conviction and sentence.

In dismissing the appeals, Moloi J (Cillié J concurring) observed:

"It was argued that the Department … has not suffered any prejudice … as it paid moneys for services actually rendered, and no more. The state has an interest in keeping strict control over state tenders which are being unscrupulously used for self-enrichment by public servants. So does the general public whose funds are used to finance such projects, and also other tenderers. There is evidence that members of the public complain that employees of the state misuse their position to obtain tenders. The failure to reveal in a tender application the employment relationship with the state and the relationship with the MEC, the first appellant's wife, and the relationship between the first and second appellants, is prejudicial to other tenderers and the community at large, and frustrates the state's efforts to eliminate the favouritism the declaration of interest seeks to combat. The third appellant also knew or should have known what his business was involved with. Failure to reveal the relationship with the state is prejudicial to other tenderers as well, and renders the state incapable of administering public funds fairly and equitably. Prejudice is not only proprietary …" [Paragraph 7]

MOKHEMISE V S [2008] ZAFSHC 10
Case heard on 12 February 2008; Judgment delivered 21 February 2008

The appellant appealed against a rape conviction and sentence of 12 years' imprisonment. Moloi J upheld the conviction, and turned to deal with the sentence:

"In the present case the Regional Magistrate considered the appellant's personal circumstances, *viz* that he was a 30 year old unmarried and unemployed male having no children of his own but supporting his sister's children. He passed Standard 5 at school and has a previous conviction for attempted robbery and attempted rape for which he was duly sentenced. These factors were balanced against the nature and seriousness of the crime of rape and the interests of the community to arrive at a sentence of 12 years imprisonment which is an upward deviation from the prescribed minimum sentence of ten years." [Paragraph 16]

"This Court is of the view that the trial court did not take into consideration other factors that could have persuaded it to impose the prescribed minimum sentence e.g. the fact that the complainant did not suffer serious physical or emotional injuries and the close relationship the appellant had with the complainant prior to the date of the commission of the offence. The court must haste to add that these factors would not constitute substantial and compelling circumstances now after the enactment of section 51(3) of the Criminal Law (Sentencing) Amendment Act … which came into operation on 31 December 2007, but did then. A further factor not taken into account by the trial court is the state of intoxication the appellant was in during the commission of the offence and the fact that he had started

drinking before the complainant made her appearance at the tavern. This suggests that he did not imbibe liquor in order to assault the complainant." [Paragraph 17]

"Although the aforesaid circumstances are not enough to constitute substantial and compelling circumstances which necessitate imposing a lesser sentence than the prescribed minimum of ten years, they do constitute mitigating factors which should have been taken into account by the trial court. In the circumstances this Court feels bound to interfere with the sentencing discretion of the court *a quo* and impose a sentence of ten … years imprisonment." [Paragraph 18]

MOTSEPE V S (A176/2011) [2011] ZAFSHC 173
Case heard 31 October 2011; Judgment delivered 10 November 2011

The appellant was convicted of the rape of a 7 year old girl, and was sentenced to 18 years' imprisonment. On appeal, Moloi J upheld the conviction and reduced the sentence, holding that:

"In this matter the trial court found that substantial and compelling circumstances were present entitling it to deviate from the prescribed minimum sentence of life imprisonment … This finding of the trial court is correct. I, however, agree with counsel for the appellant that 18 years imprisonment in the circumstances of this case is shockingly inappropriate. It should be noted that there was in fact no full sexual intercourse but only a slight penetration of the complainant, which would explain why she was not seriously injured. Nor was she assaulted. Besides, the influence of liquor is a factor to be taken into account. The appellant appeared to have been so drunk that he did not even notice the presence of the young witnesses and simply put on his pants in front of them. In addition, the appellant was a first offender, was gainfully employed and had spent a year in custody whilst awaiting trial … I am of the view that sufficient reasons exist to interfere with the sentence imposed and I think a sentence of 10 years imprisonment would be appropriate." [Paragraphs 6 - 7]

ADMINISTRATION OF JUSTICE

NONXUBA V SOUTH AFRICAN POLICE SERVICES (4479/2010) [2010] ZAFSHC 164

Case heard 25 November 2010; Judgment delivered 9 December 2010

The applicant, an attorney, was being investigated by the Commercial Branch of the South Africa Police Services in East London. The police obtained a warrant for search and seizure of certain specified files and computerised information in the possession of the applicant. The applicant's premises were searched by the police and certain files and computerised information were seized. The applicant sought an order that the police provide a detailed inventory of all documents and computerised information they removed from the applicant's premises alternatively the copies thereof. A dispute arose from the fact that the respondent had not provided the inventory as per court order but all the copies of the documents removed.

Moloi J held:

"Whilst it is true court orders must be obeyed, … and that the courts should not tolerate the flouting of court orders, that it is vital to the proper administration of justice that court orders be obeyed … and that failure to comply with court orders by state officials having a constitutional obligation to support the courts may undermine the state itself … each case must still be decided on its own merits. In this case as his evidence shows, the applicant wanted to have copies of the documents seized and the computerised

information more than the mere list of them. The reason he wanted copies was to enable him as practising attorney to respond to enquiries that may be directed to him in the time his files were in the possession of the police. ... If the inventory was so important to him, he had everything at his disposal to draw it up himself or through a staff member. This does not in any way exenorate the police for their behaviour in refusing to provide the applicant with an inventory as ordered. ... I am of the view that even the court that made the order, thought that was the easiest part the police could do. Even if they provided more than what the court had ordered, they were still obliged to comply with the court order to the letter. ..." [Paragraph 8]

"I am taken aback and cannot comprehend why the parties acted as they did to the extent of dispatching two counsels from Port Elizabeth to come argue the matter before me in Bloemfontein on behalf of the applicant. Looked at objectively, the applicant was in the same position as before the search and seizure took place as all the copies of the documents and computerised information remained in his possession and could carry on with his work as though nothing had happened. An inventory, never mind how detailed it could be, would not place him in that position. The refusal by the respondent to provide the list of documents seized is equally incomprehensible. The conduct of both parties boils down to senseless power-play bordering closely on abuse of the legal process." [Paragraph 9]

SPAR GROUP LIMITED V KLEYN NO AND ANOTHER (5890/2008) [2008] ZAFSHC 121

Heard 16 October 2008, Judgment delivered 30 October 2008.

The applicant sought an order in terms of which a Trust was ordered to pay the applicant's costs of the application launched to perfect its security in terms of a notarial general covering bond, registered by the Trust in favour of the applicant.

Moloi J held:

"For the respondents it was argued that the applicant is not entitled to the costs as no order was obtained in terms of the application for perfecting the covering bond. It was further argued that an arrangement was made with the representatives of the appellant prior to the launching of the application and that the applicant had no reason to launch the application. It was also averred and argued in terms of that arrangement certain periodic payments were made to applicant before the application was launched. These facts were uncontroverted." [Paragraph 7]

"It is trite that the granting of cost orders is in the discretion of the court." [Paragraph 8]

"The order of 18 September 2008 stated that the costs of that day would be costs in the application. The order of 2 October 2008 stated the costs would stand over i.e. would be argued when the application is heard. The application was not pursued as the respondent had in the meanwhile discharged his obligations against the applicant as per arrangement referred to above." [Paragraph 9]

"Regard being had to the particular circumstances of this matter, I am of the view that it is fair and just to order that each party pay its own costs." [Paragraph 10]

MUGOTA V S (A244/2013) [2014] ZAFSHC 25

Case heard 10 March 2014; judgment delivered 14 March 2014

The appellant, an illegal immigrant, pleaded guilty to trespassing on mine property. While dismissing the appeal against sentence, Moloi J commented:

"It is common knowledge that the majority of the illegal miners in this country are foreigners that are illegally in the Republic. There is no law regulating the illegal mining activities. The most the State can charge the illegal miners with is Trespass and Theft or Attempted Theft as in our case. It is hoped that the legislature can enact a law that will have harsh punishment for these illegal activities which are assuming horrendous proportions." [Paragraph 6]

SELECTED JUDGMENTS

PRIVATE LAW

SAAIMAN AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2003 (3) SA 496 (O)

Case heard 26 October 2001; judgment delivered 24 January 2002

The plaintiffs were travelling in a motor vehicle on a national road when they stumbled onto an armed robbery. The prime target of the robbers was a cash carrier belonging to the second defendant, a provider of cash transportation services. During the robbery several shots were fired by the robbers at the vehicle, as a result of which plaintiffs sustained bodily injuries, as well as traumatic and emotional shock. First defendant raised an exception to plaintiffs' claim that they were owed a legal duty by first defendant.

Rampai J held:

"To succeed in an action for damages based on negligence, it is usually said that the victim has to show that the injurer owed him a duty of care and that the damages suffered as a result of the alleged conduct were not too remote. There must be some recognised relationship between the duty of care and the remoteness of the damages … In this case the answer as to whether a legal duty exists or not is neither obvious nor covered by authority. We have here a novel situation. [I]n *Ancell and Another v McDermott and Others* [1993] 4 All ER 355 (CA) Beldam LJ observed … that English decisions have established the inability of a single general principle to provide a practical test which could be applied to every omission situation to determine whether a duty of care is owed and, if so, what its scope has to be. It seems to me that the absence of such a single general principle is also true for our jurisprudence." [Paragraph 13]

"The relationship of the parties involved is one of the vital factors for consideration. … [W]here the relationship between the victim and the passive defendant is a general relationship, an ordinary duty of care exists, but no binding legal duty arises. Failure by the defendant to prevent harm is not regarded as wrongful conduct that translates into an actionable omission giving rise to delictual liability attaching to the passive defendant. … [W]here the relationship between the victim and the passive defendant is a special relationship, a particular duty exists. From this a binding legal duty arises: failure by the defendant to prevent harm is regarded as wrongful conduct that translates into an actionable omission giving rise to delictual liability attaching to the passive defendant." [Paragraph 14]

"The relationship between the actual and careless wrongdoer and the passive defendant who is sued for the misdeeds of another may be a vital factor during the judicial enquiry. Where a close and narrow relationship between the careless wrongdoer and the passive defendant existed at the time of the victim's injury it strengthens the victim's contention that there existed a special relationship between himself (the victim) and the passive defendant by virtue of the particular control authority the passive defendant had over the careless injurer. Where only a distant or remote relationship existed between the careless wrongdoer and the passive defendant at the relevant time it strengthens the passive defendant's contention that there existed no special relationship between the parties." [Paragraph 15]

Ramapai J then analysed decisions on delictual liability on grounds of an alleged omission, and continued:

"These decisions underpin the principle that when it comes to cases where an attempt is made to establish delictual liability on the grounds of an alleged omission, foreseeability is not the decisive factor." [Paragraph 16]

"The powers, functions and duties of the police are set out in s 13 of the South African Police Service Act … read with s 205(3) of the Constitution … In brief they boil down to maintaining public order, protecting the citizens, preventing crime and combating it. Failure to perform any of these statutory duties does not necessarily give rise to civil liability …" [Paragraph 17]

"… In all civilised nations of the world, it is reasonably recognised and accepted that every human endeavour under the sun has two inherent aspects: namely the possibility of success on the one hand and the possibility of failure on the other hand. These public servants who do their bit in very trying circumstances but fail, deserve our society's appreciation instead of condemnation and delictual anxieties for the slightest dereliction of their public duties. Moreover our society also recognises that our police service is an agency with limited financial and human resources expected to perform their policing duties with reasonable diligence and not absolute perfection. Singling out cash couriers, because of their supposed vulnerability to armed robberies, as preferential beneficiaries of the police escort services would ignore the real fact that the cash carriers are not unique victims of crime. … The risk of crime is shared by all the members of the general public. …" [Paragraph 18]

"I have carefully examined the triangle of the relationships in the circumstances of this case. I can find nothing special between the plaintiffs and the first defendant or between the criminal wrongdoers and the first defendant. There exists an ordinary relationship between the plaintiffs and the first defendant. It is the same kind of an ordinary relationship which exists between the first defendant and any other member of the general public. … The police service does not, without more, owe each and every member of the general public a duty of care. An omission on the part of the police to perform their general public duties does not impose any delictual liability on them. … [O]ur Constitution is a realistic mission statement of our nation. It does not expect the Minister or the police to perform or to function perfectly and to guarantee absolute safety to any member of the general public…" [Paragraph 19]

"Nothing extraordinary emerges from the circumstances of this case to evoke the legal convictions of the community to demand that, in the circumstances of this particular case, the Minister owed a duty of care to these three particular victims of crime and nothing suggests that the community is convinced the police could and should have prevented the crime. The risk of crime is not a particular risk. It is a general risk shared by all members of the general public. … Most women in this country are deeply concerned about the crime of rape which appears to be on the increase. Probably women and girls are more concerned about rape than any other crime in the country. If therefore, police escort service is to be provided to cash carriers, women and girls will certainly have a much stronger claim for the provision of such police escort service for every woman and every girl." [Paragraph 20]

Now if such a new category of delictual liability based on omission is recognised and such a type of general benefit liberally given to indirect victims of crime as in the present case, on what logical, legal or moral basis can any of these vulnerable classes of direct victims of crime be denied similar relief? It is very clear that recognition of this type of a new delictual action as contended for in this case can have crippling and adverse effects on the State *fiscus* to run a police service. …" [Paragraph 21]

The exception was upheld.

CIVIL PROCEDURE

SCOTT v HOUGH 2007 (3) SA 425 (O

Case heard 15 July 2005; Judgment delivered 18 August 2005

The parties were divorced parents living in different provinces. Applicant had launched an urgent *ex parte* application for the provisional custody of one of their children, but had faxed a copy of the application to the respondent's attorneys a few hours prior to bringing the application. A rule *nisi* was granted in the absence of the respondent. The day after the application had been heard, respondent launched her own application calling upon the Court to reconsider the order granted, on the basis that the applicant had not complied with the *dies induciae* required by the Supreme Court Act.

Rampai J held:

"The service of Court papers upon an interested party is premised on the fundamental principle of *audi alterem partem*. This basic tenet of our law requires a court approached by the one party for certain relief to hear the other party as well before granting the relief sought. In general a court will decline to grant the relief sought unless the party against whom such relief is sought has been fully and timeously apprised that relief in a particular form would be sought and that he has had the maximum benefit of the *dies induciae*, in other words the fullest opportunity permissible in law of considering his defensive options and practically dealing with the claim for the relief being pressed." [Paragraph 12]

"In … urgent applications, there are again two scenarios. The first scenario applies in a case where the respondent resides within the jurisdiction of the Court. This scenario is governed by Rule 6(12)*(a)*, which provides that the Court may dispense with the formal periods of service as prescribed in the Rules. However, where the respondent resides outside the jurisdiction of the Court, there is no similar provision in the aforesaid principal legislation or statute which empowers the Court in urgent matters to relax formal periods of service as prescribed in the principal statute. The mere absence of such a statutory provision *per se* does not mean that an applicant who resides within the jurisdiction of one Court cannot launch an urgent application out of such Court against a respondent who resides outside the jurisdiction of such Court. Here Rule 6(4) applies together with Rule 6(12)*(a)*. This is the second scenario. This uniform Rule applies throughout the country irrespective of the respondent's residence provided the matter is urgent and there is one or other jurisdictional factor which connects the respondent to the applicant's Court of residence." [Paragraph 14]

"The respondent's argument boils down to this: it is permissible in such an urgent application for the applicant to seek and obtain a rule *nisi* in secret, in haste and *in camera* against the respondent who is an outsider. But it is impermissible in such an urgent application for the applicant to seek and to be granted a rule *nisi* in haste *in camera* but in the absence of the respondent who had been given notice which in terms of s 27 was short or irregular service. Since a High Court is empowered, in urgent matters, to relax the rules of service in respect of a respondent who resides within its area of jurisdiction I cannot see any reason in principle or logic as to why, in urgent matters, involving respondents who reside outside its area of jurisdiction, a High Court should be precluded from doing so. If this is what the Legislature had indeed intended, the Legislature would simply have enacted a provision in the principal statute to the effect that in all urgent matters the applicant must follow the respondent's Court, in other words the applicant must initiate an urgent application for a rule *nisi* out of the High Court where the respondent resides." [Paragraph 15]

"As regards the applicant it was contended on behalf of the respondent that by faxing the application to the respondent a few hours before the application was launched … the applicant committed a fatal procedural blunder. The effect of such a telefax was that the matter thereby ceased to be an urgent application brought *ex parte* and became an ordinary application brought on notice to the respondent." [Paragraph 17]

"This application was launched as a matter of urgency. I cannot accept the proposition that its urgency simply evaporated into thin air the moment the applicant faxed it through to the respondent. …" [Paragraph 23]

"I understand Levinsohn J [in *Turquoise River Inc v McMenamin and Others*] to be saying that, once an applicant sets in motion urgent application Court proceedings in terms of Rule 6(4), then the atomic heart and soul of such Court proceedings remains the same unless the Court decides otherwise after hearing argument - often in Chambers and in the absence of the respondent. The Rule allows the applicant who seeks interim relief where the circumstances show that his interest or right is in imminent danger of being infringed to hasten to Court alone in the absence of the respondent. An applicant in terms of Rule 6(4) is ordinarily exempted from giving the customary notice to the respondent provided he makes out a proper case. The exemption is not there for the taking. The procedure in terms of Rule 6(4) is somehow *sui generis*. Its rigid foundation is a degree of urgency. Such a quick procedure designed to provide immediate but interim relief in emergency situations does not lose its intrinsic and genuine character as a fast vehicle on a fast track to access justice merely because the applicant gave an unnecessary notice to the respondent."

"Our civil justice system would certainly be defective if such a fast train can easily be derailed or brought to a standstill or slowed down because an applicant, who is under no legal obligation, for that matter, had informally notified or alerted the respondent beforehand of his intention to approach the Court urgently for interim relief. In my view, such informal notice as was given in the instant case was undue and unnecessary. It had virtually no adverse impact on the true character of an *ex parte* application. By alerting the respondent as he did, the applicant did not thereby extinguish or erase the urgency of his *ex parte* application. …" [Paragraph 26]

The application was dismissed.

CRIMINAL JUSTICE

S v KHOLOANE 2012 (1) SACR 8 (FB)

Case heard 10 February 2011, Judgment delivered 10 February 2011.

This was a special review matter in terms of s 304(4) of the Criminal Procedure Act. The accused was convicted on four counts of theft, taken together as one offence for the purpose of sentence. The district magistrate then imposed on her a fine of R5000 or 90 days' imprisonment in default of payment. The accused had pleaded guilty to all the charges, but was not questioned in terms of s 112(1)*(b)* of the Act. Instead she was summarily convicted on her plea and sentenced. The magistrate's explanation for dispensing with the questioning was that she acted in terms of ss (1)*(a)* and not ss (1)*(b)* in convicting the accused.

Rampai J (Fischer AJ concurring) held:

"The purpose of the subsection is to ensure that the accused really admits all the elements of the crime to which he pleads guilty. The questioning strives to protect the innocent from erroneous convictions based on their own ignorance of the law or improper influence. By compelling the courts to embark on this procedure the underlying idea was that the court should make doubly sure that a person who pleads guilty has indeed no possible defence to the crime he admits committing. …" [Paragraph 5]

"Before the questioning in terms of ss (1)*(b)* can be jettisoned, before ss (1)*(a)* can be invoked and before an unrepresented accused can be convicted on her unexplained plea of guilty, a court has to form an opinion that the charge concerned is a minor crime, that the accused would have the option of paying a fine to stay out of a correctional facility and that such a fine would not exceed the statutory maximum limit. These then are the crucial segments of the jurisdictional facts. The court has to silently consider sentence before convicting the accused. Herein lies the uniqueness of the questionless or passive procedure. Therefore the sentence the court proposes imposing will determine which subsection the court should apply in the case at hand." [Paragraph 6]

"The request of the district magistrate … is that the conviction be confirmed on special review and that only the sentence should be rescinded. The district magistrate was of the view that the accused had suffered no real prejudice because the excessive fine was easily and immediately paid for her release. The learned district magistrate obviously takes a narrow view of the problem. … It is not a simple matter of correcting the sentence only by downward adjustment of the excessive fine imposed on the accused. The issue is more complex than that. It fundamentally affects the very foundation of the verdict. It is the lawfulness of the conviction and not so much the unlawfulness of the sentence which is in issue here. The sentence flows from the conviction. Because it does, it would be wrong to simply adjust the sentence ex post facto without enquiring into the lawfulness of the conviction from which the sentence stemmed." [Paragraph 8]

"It has been held that, where a court deals with an undefended and unsophisticated accused and proposes to impose a sentence substantially in excess of the statutory limit as laid down in ss (1)*(a)*, it remains not only desirable but essential as well, for the sake of fair administration of justice, that the court nevertheless question the accused as if ss (1)*(b)* applies … In my view, the configuration of the two procedures is undesirable. The important distinction between the two may thereby be blurred. If ss (1)*(a)* is not strictly complied with sentence-wise, then ss (1)*(b)* should not be used as a corrective procedure for a sentence which does not fully fall within the scope of ss (1)*(a)*." [Paragraph 15]

"The court has to decide whether to use ss (1)*(a)* or ss (1)*(b)*. There is no *via media* somewhere between the two for a hybrid procedure. I venture to say that the court which applies ss (1)*(a)* should only import the tool of judicial questioning into the subsection provided the fine component of the sentence it proposes imposing does not exceed the statutory limit. In other words, if the matter falls squarely within the ambit of ss (1)*(a)* the court is at liberty to pose certain judicial questions to the accused for the purpose already stated elsewhere. Conversely, if the proposed fine exceeds such limit, however marginal the excess may be, then the court should rather completely deal with the matter in terms of ss (1)*(b)* instead of using ss (1)*(b)* to perfect irregular use of ss (1)*(a)* procedure. In that way there will be no undesirable grey areas created." [Paragraph 16]

"The way the court below went about lacked procedural fairness and indeed substantive fairness. These are the two hallmarks of justice. In the circumstances it cannot be said that the guilt of the accused in this case was established beyond reasonable doubt by means of her dry and bare plea." [Paragraph 17]

The conviction and sentence were set aside, and the case remitted to the trial court.

S v MABITSE 2012 (2) SACR 380 (FB)

Case heard 6 September 2010; Judgment delivered 9 September 2010

This was an appeal against a sentence of 10 years for rape. Ramapi J (Molemela J concurring) held:

"It is so that the victim did not sustain visible, external physical injuries during the course of the incident. Counsel for the appellant contended that the absence of such injuries in itself demonstrated that the appellant used a minimal measure of violence to attain his criminal objective … However, counsel for the respondent contended that the fact that the victim did not sustain serious physical injuries did not count in favour of the appellant." [Paragraph 9]

"Just as the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next … so too must the courts realise that physical scarring is likely to differ in kind and degree from one rape case to the next." [Paragraph 17]

"The physical injury symbolises the measure of violence the perpetrator unleashed on a victim. The greater the degree of severity of the rape victim's physical injury, the greater the degree of the rapist's moral blameworthiness. I am of the firm view that dictates of justice demand that, in meting out sentence, differentiation be made, based on the degree of violent and brutal force used.

If the presence of physical injury is properly treated as a factor which aggravates sentence, then the absence thereof must necessarily be treated as a factor which mitigates sentence. If it can mitigate, then it qualifies, not singularly but collectively, along with other such factors, for inclusion in the melting pot of consideration in order to make a determination in terms of s 51(3) regarding the existence or otherwise of substantial and compelling circumstances …" [Paragraph 18]

"The absence of physical trauma in this case cannot be fairly treated as an irrelevant or neutral factor. It was an important mitigating factor for which the appellant should have been credited. The significance thereof lies in the fact that it indicated that the case we are dealing with does not resort under the most serious rape cases. By far, worst-case scenarios are conceivable. Injuries or no injuries, condoms or no condoms, rape strikes at the very core of the victim's femininity. This is true in all rape cases. However, it must also be accepted that lack of brutal force is a factor which diminishes the moral blameworthiness of a rape offender's actions. [Paragraph 21]

The sentence was reduced to 8 years' imprisonment.

ADMINISTRATION OF JUSTICE

MLENZANA v GOODRICK & FRANKLIN INC 2012 (2) SA 433 (FB)

Case heard on 14 May 2011; judgment 14 July 2011

The plaintiff sued the defendant law firm for damages relating to an alleged wrongful failure to lodge a claim with the Road Accident Fund within the prescriptive period. Defendant argued that the failure to lodge the claim was due to plaintiff's failure to provide certain information and sign certain documents.

Rampai J held:

"The critical question … was therefore whether the information the defendant had in its possession sufficed to enable the defendant to figure out an informed calculation and composition of the quantum of compensation to be claimed in order to satisfy the requirements of substantial compliance." [Paragraph 58]

"The defendant could, as knowledgeable practitioners often do, have performed a rough calculation of the compensation claimed in order to lodge the claim for the time being. Such a simple mathematical exercise would have sufficed to prevent the extinction of the claim by prescription. Doing this sort of estimation is a common practice. An inaccuracy does not invalidate a claim. …" [Paragraph 71]

Turing to the issue of how the defendant had sought to gather information, Rampai J noted:

"… Ms Smith wrote three more letters to her client between … asking her to furnish her with the documents she, the attorney, could readily get from the police and the employer. Her evidence was that it was the responsibility of her client to provide her with such documents. Therefore, so she testified, she expected her to travel to Theunissen and Bethal, far away from Bloemfontein, to get the required documents. And the poor client did." [Paragraph 85]

"I was amazed. It begged the question: what was the point of appointing and paying an attorney if the poor client, a widow at that, still had to travel to such faraway places where she probably had never been before to investigate and to gather the required information. …" [Paragraph 86]

"Not a single statement by an eyewitness was obtained. … The scene of the accident was never visited. There were no scenery photographs taken. The fact of the matter is that Ms Smith, on behalf of the defendant, did not take reasonable steps, not only to obtain the information she believed she required, but, and this is very important, also to exercise the skill, knowledge and diligence expected of an average attorney. As a result of such disturbingly shocking lack of skill, knowledge, diligence and care she failed to appreciate the value of the vital information her client had supplied almost three years before the expiry date of the prescriptive period."[Paragraph 92]

"Although the end of the prescriptive period was looming large on the horizon, Ms Smith did virtually nothing effective. She had enough information to lodge the claim. All she did in almost three years was to write to her client, who lived in an informal shack setting, asking her to provide information. Those letters failed to reach her client. … In the circumstances Ms Smith acted negligently, having regard to what was at stake, the available information and the time she had at her disposal before the date of prescription." [Paragraph 98]

“The vagaries of postal deliveries to shack communities are well known. An ordinarily competent attorney would have foreseen that letters mailed to a shack dweller were quite as likely to be delayed as to go astray. But even if the plaintiff had received the last letter, Ms Smith's remissive conduct in allowing the prescription to run out could not be excused. There comes a time when a diligent attorney has to leave the comfort zone of his or her air-conditioned office and venture out to do some fieldwork in order to safeguard the interests of a client. In the light of all this I can see no sound excuse for Ms Smith's conduct.” [Paragraph 99]

The court found that the defendant was liable to the plaintiff for damages proved or agreed.

SELECTED JUDGMENTS

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA OBO SINUKO V POWERTECH TRANSFORMERS (DPM) AND OTHERS [2014] 2 BLLR 133 (LAC)

This was an appeal against a judgment of the Labour Court, setting aside an award made by the second respondent arbitrator in favour of the appellant's member Sinuko on the basis that the third respondent had no jurisdiction to arbitrate the dispute. The two main issues that arose for determination were whether the court *a quo* had correctly held that the second respondent ought to have found that he had no jurisdiction to arbitrate the dispute before him and secondly, whether the Court could consider the other grounds of review, even though these had not been considered by the court *a quo*.

Coppin AJA (Waglay JP and Tlaletsi ADJP concurring) held:

"The fallacy in the judgment of the court *a quo* lays in the fact that it referred the matter back to the third respondent despite having found that the second respondent ought to have found that it had no jurisdiction to deal with the dispute. If it was indeed the finding of the court *a quo* that the true nature of the dispute was victimisation, because of Sinuko's union membership, then it was inappropriate and indeed wrong for it to refer the matter back to the third respondent for determination, because the third respondent would still not have had jurisdiction to determine such a dispute." [Paragraph 14]

"In my view, the court *a quo* misconceived and misapplied the principles that are found in the very decisions which it referred to." [Paragraph 18]

"In *Wardlaw*, this Court dealt with the Labour Court's jurisdiction under section 191(5) of the Act. It was stated that the two schools of thought that were applicable were the formalistic school and the substantive school. In terms of the former, the employee's characterisation of the nature of the dispute, or more particularly, the reason for the dismissal, would be decisive. If the allegation is made that the reason for the dismissal is one which falls within the jurisdiction of the Labour Court, that court would have jurisdiction even though it emerges later that the reason is, in fact, different and one that would have required the dispute to be referred to arbitration. In terms of the substantive school of thought, the employee's characterisation of the reason for the dismissal is only provisionally accepted until the Labour Court makes a finding as to the true reason for the dismissal. If the reason is the same as the one alleged by the employee, there is no difficulty and the court proceeds, but if it turns out to be a different reason and one in respect of which the Labour Court has no jurisdiction, the Labour Court should refuse to adjudicate the dispute … and allow it to be referred to the Commission or bargaining council, as the case may be, that has jurisdiction. The court referred to criticisms of the two schools of thought. One of the possible criticisms of the substantive approach was that it subjects disputes to a duplication process and could cause undue delay. Having considered sections 157(5) and 158(2) of the Act, this Court came to the conclusion that it is inescapable "that the formalistic school of thought does not enjoy the recognition of the Act and that it is in fact the substantive approach that enjoys recognition by the Act". [Paragraph 19]

"What is clear from *Wardlaw* is that a two stage process in the adjudication before the Labour Court was not necessarily being advocated. The Labour Court assumes jurisdiction on the basis of what the employee alleges the reason for the dismissal to be – but if it later becomes "apparent" to the court that the reason for the dismissal is a different one and one in respect of which it does not have jurisdiction, the Labour Court should not adjudicate the merits of the dispute, but allow the matter to be referred to the right forum with jurisdiction in order for that forum to determine the merits of the dispute. … [T]his

Court did not exclude the possibility that the true nature of the dispute may only become apparent once all the evidence has been led and the court has considered it. Generally, this is the time when the court will become aware of the true nature of the dispute. However … this Court also did not exclude the possibility that the true nature of the dispute may also become apparent earlier, i.e. before all the evidence is led. An example that readily comes to mind is if the issue of jurisdiction and the true nature of the dispute is separated from the merits of the dispute and raised at the outset of the proceedings, requiring the court to determine those issues on the evidential material available, or presented during that phase of the proceedings. [Paragraph 20]

"There is no valid reason why the procedure that applies in the Labour Court does not also apply in arbitrations conducted in terms of or under the Act. In my view, the court *a quo* erred insofar as it implied that the second respondent should have stopped the proceedings the minute when statements were made during the cross-examination of Sinuko suggesting that he was being victimised because of his union affiliation. This most certainly cannot be said to have been the moment when the true nature of the dispute became "apparent". At no stage before the statement was made during the cross-examination did either the appellant, or Sinuko, or the first (or any of the respondents) allege, or suggest, that the reason for the dismissal was victimisation, neither did any of them raise an issue concerning the jurisdiction of the second, or third, respondent." [Paragraph 21]

"… The second respondent did not err by not stopping the hearing when evidence of general union rivalry, referred to earlier, was raised. In my view, that evidence did not even make it "apparent" that the reason for Sinuko's dismissal was for a reason other than misconduct. Viewed in the context of all the evidence, the conclusion reached by the second respondent on the issue, was reasonable." [Paragraph 25]

"… [T]he court *a quo*, accordingly, erred in its conclusion on the issue of jurisdiction. The order of the court *a quo* remitting the matter back to the first respondent for adjudication before a different arbitrator, indicates, in essence, that it too did not believe that the third respondent had no jurisdiction, but that it merely had difficulty with the second respondent's approach. The difficulty of the court *a quo* in that regard was clearly based on a misconception of the legal position." [Paragraph 26]

"… I am of the view that … referring the matter back to the Labour Court would just compound, what I consider to be an inordinate delay in the finalisation of this matter. The interests of justice will be best served if this Court finalises the matter itself." [Paragraph 45]

"The reviewing court must decide whether the decision of the second respondent is one which a reasonable arbitrator could not reach. Taking all the circumstances into account it cannot be found that a reasonable arbitrator, or decision-maker, would not have come to the same conclusion as the second respondent. In my view, the first respondent never established an irretrievable breakdown of the employment relationship between itself and Sinuko. A fact which the second defendant did not mention, or allude to, is that the witness that gave evidence at the disciplinary hearing that the employment relationship had broken down, was the very person that presented the case for the first respondent at that hearing, namely, Harmsen. He had no personal knowledge of the incident and in the final analysis, was expressing an opinion which was, most certainly, not based on fact and was biased. No weight could be given to such an opinion, in light of the established facts." [Paragraph 52]

The appeal was upheld

DE BEER V MINISTER OF SAFETY AND SECURITY/POLICE AND ANOTHER [2013] 10 BLLR 953 (LAC)

Appellant, a police inspector, was dismissed for being absent without leave for a protracted period. He claimed that he was suffering from post-traumatic stress disorder, which amounted to an injury on duty, and that he had applied for incapacity leave. The appellant launched an urgent application in the Labour Court for an order directing the respondents to reinstate him on full pay pending the outcome of his application for medical boarding. The Labour Court denied the claim. On appeal, the respondent contended that the court *a quo* had arrived at the correct decision, but had erred in finding that it had jurisdiction, and that the matter should have been dismissed because it was not urgent.

Coppin AJA (Waglay JP and Tlaletsi ADJP concurring) held:

"In terms of rule 5 of the rules of this Court any respondent who wishes to cross-appeal must deliver a notice of cross-appeal (rule 5(4)) and the notice must be delivered within 10 days, or such longer period as may, on good cause, be allowed, after receiving a notice of appeal from the appellant (rule 5(5)). … The respondents have not delivered the required notice. They have submitted that it was not necessary to file a notice of cross-appeal on the jurisdiction issue. The appellant … adopted the attitude at the hearing of the appeal that the issue of jurisdiction could be dealt with by this Court in the absence of a formal notice of appeal. This Court is empowered in terms of rule 12(1) to excuse the parties from compliance with any of the rules if sufficient cause is shown." [Paragraph 21]

"Even though it is a well-established principle in the practice of superior courts that, generally, an order or judgment cannot be interfered with to the prejudice of an appellant in the absence of the necessary cross-appeal by the respondent there are exceptional circumstances where an order or judgment may nevertheless be interfered with in the absence of the necessary cross-appeal where it is in the interests of justice. The issue of jurisdiction is crucial, because it is directly linked to the validity and status of the order made by the court *a quo* and uncertainty on those aspects might negatively impact on the effectiveness of the order. In my view … sufficient cause has been shown to consider the issue of jurisdiction in the circumstances and it is, certainly, in the interests of justice to do so namely, the fact that it is not necessary to obtain leave to cross-appeal in respect of proceedings in the Labour Court, as well as the fact that the absence of a notice to cross-appeal has not been objected to by the appellant and has not caused any prejudice since the issue was pertinently raised and dealt with in the respondents' heads of argument… the fact that we are dealing with a crisp, fundamental, legal issue, namely, jurisdiction and, significantly, that the court *a quo* erred in dismissing the respondents' point that the Labour Court lacked jurisdiction." [Paragraph 22]

"In terms of section 158(1)(a)(i) of the Act, the Labour Court is empowered to, *inter alia,* grant a litigant appropriate urgent interim relief. On the other hand, the Labour Court is not empowered, for example, to adjudicate a dispute about the fairness of a dismissal in circumstances where the dispute was not first referred to the CCMA, or the relevant council … for conciliation within the prescribed period. Section 191(1) of the Act requires that such a dispute be first referred to conciliation. It is only after the council or the Commissioner had certified that the dispute remains unresolved, or a period of 30 days has expired since the council or the CCMA received the referral and the dispute remains unresolved that the council, or the CCMA, must arbitrate the dispute … or the employee may refer the dispute to the Labour Court for adjudication … [T]he referral of a dismissal dispute to conciliation is a pre-condition before such a dispute can be arbitrated, or referred to the Labour Court for adjudication. In the absence of a referral to conciliation, or if it was referred, but there is no certificate issued as contemplated in section 191(5) and

the 30-day period has not expired, the Labour Court has no jurisdiction to adjudicate the dismissal dispute." [Paragraph 23]

"… [T]he present case is not truly about whether the Labour Court may grant an order for interim reinstatement in terms of its powers under section 158(1) of the Act. Even if it assumed … that the court has such power, this is not a case in which interim relief was truly being sought. But one in which the dispute is about the fairness of the appellant's dismissal and the fairness of the suspension of the appellant's salary was raised as a pertinent issue, and in which, effectively, final reinstatement was sought by "leap-frogging" or "by-passing" the procedural requirements of section 191 and section 24 … of the Act, *inter alia*, under the (rather thin guise) that the appellant did not know which forum to approach for relief, and alleged "semi-urgency". [Paragraph 28]

"In my view, it was correctly noted in *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and another*, that if the Labour Court has jurisdiction to hear and determine a matter it would have the power to grant an appropriate remedy, but the mere fact that the Labour Court does have the power to grant a remedy does not mean that it has jurisdiction to hear and determine the issue between the parties. It is clear that the Labour Court does not have jurisdiction to adjudicate a dispute about an unfair dismissal or unfair labour practice, unless the dispute has been referred to conciliation and the reason for the dismissal is one of those listed in section 191(5)(b) of the Act. In terms of section 157(5) the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the Act requires that the dispute be resolved through arbitration, save as provided under section 158(2). In terms of section 193 if the Labour Court finds that a dismissal is unfair it may grant, *inter alia*, an order of reinstatement. Even though in terms of section 77 of the BCEA and subject to the Constitution and the jurisdiction of this Court, the Labour Court has exclusive jurisdiction in respect of all matters in terms of the BCEA … it has no jurisdiction to resolve a dispute about the interpretation and application of a collective agreement contemplated in section 24 of the Act. Section 24(1) provides that such disputes must be resolved in terms of the procedure provided in that agreement for the resolution of such disputes. That section also prescribes that the procedure must first require the parties to resolve the dispute through conciliation, and if the dispute remains unresolved, to resolve it through arbitration. …" [Paragraph 29]

"The Act does not refer to "semi-urgent interim relief". Section 158(1)(a)(i) refers to "urgent interim relief". A matter is either urgent or it is not. In my view, the matter was not urgent … The grounds for "semi-urgency" which were primarily relied upon by the appellant, was that he was not receiving a salary and had no other source of income, his savings were almost exhausted and that he had ongoing financial commitments that he could not, or had difficulty in honouring. The loss of salary and benefits, with the concomitant financial hardship, are not regarded as sufficient to establish urgency. In any case, any urgency that may have existed appears to have been self-created … by unreasonable delays and a failure to institute proceedings in the appropriate forum in time, or at all." [Paragraph 32]

"… [T]he crucial and central issue … was indeed about the termination of the appellant's employment and the fairness thereof, despite the appellant's averments to the contrary. … In order for the appellant to be "reinstated forthwith to his full salary, benefits and emoluments", as he claims, he would have to be reinstated in his employment. The court would, as a matter of necessity, have to decide on the fairness of the termination of his employment. The appellant cannot be reinstated in his employment, unless the court finds that his dismissal was substantively unfair." [Paragraph 38]

" … [T]he court *a quo* ought to have found that it had no jurisdiction to effectively adjudicate the termination of the appellant's employment … in the circumstances where there has been no compliance

with the jurisdictional requirements provided for in section 191 and section 24 of the Act." [Paragraph 39]

The appeal was dismissed.

BALL V BAMBALELA BOLTS (PTY) LTD AND ANOTHER [2013] 9 BLLR 843 (LAC)

The appellant worked as a sales consultant with the first respondent. Her contract included a confidentiality undertaking and a restraint of trade provision prohibiting her from working for any supplier of products similar to those sold by the first respondent. After resigning, she joined the second respondent, a direct competitor of her former employer, in a similar capacity. First respondent obtained an order from the Labour Court binding the appellant to obey the restraint clause and directing the second respondent to terminate the appellant's services "with immediate effect".

Coppin AJA held:

"The thrust of the appellant's arguments was directed at the reasonableness of the restraint. Prior to the decision in *Magna Alloys and Research SA* (*Pty*) *Ltd v Ellis*, restraints of trade were only enforceable if they were proved to be reasonable. Since then they have been regarded as enforceable, unless they are proved to be unreasonable. The effect of the *Magna Alloys*' decision was to place an *onus* on the party, sought to be restrained, to prove, on a balance of probabilities, that the restraint was unreasonable. However, because the right of a citizen to freely choose a trade, occupation, or profession, is protected in terms of section 22 of the Constitution and a restraint of trade constitutes a limitation of that right, the *onus* may well be on the party who seeks to enforce the restraint to prove that it is a reasonable, or justifiable limitation of that right of the party sought to be restrained." [Paragraph 13]

"… The enforceability of a restraint essentially hinges on the nature of the activity that is prevented, the duration of the restraint, and the area of operation of the restraint. … [T]he determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of "the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests." [Paragraph 17]

"It is perhaps so that the court *a quo* did not in its judgment illustrate a detailed analysis and balancing of the different interests of the contesting parties, but, in my view, the conclusion that the restraint was reasonable and enforceable cannot be faulted. There was a breach of the restraint simply by the fact that despite her agreement not to go and work for a competitor of the first respondent (ie based on the area covered by the restraint) for a year after the termination of her employment with the first respondent, the appellant nevertheless did so. The appellant averred … that the restraint agreement was entered into under duress. The court *a quo* made no specific finding on this point, but it seems to have fallen by the wayside because it was not raised as one of the grounds of appeal and was not argued before us. In any event duress is a technical defence and has to be properly made out. The impression one gets is that the appellant, a layperson, in drafting her own papers, used the term loosely, but intended to convey that she signed the agreement, because she needed the employment. It was not a case of her not having had any choice at all in the matter. She could have refused to sign the agreement which included the restraint but this would have meant possibly that she would not have got the employment. To require an employee to agree to a restraint as part of her contract of employment cannot, by itself, constitute duress as contemplated in the law of contract." [Paragraph 19]

"The appellant's own economic and financial circumstances made it imperative for her to find employment. The first respondent was not shown to be responsible for creating those circumstances and to have compelled, as it were, the appellant to enter into the agreement. ..." [Paragraph 20]

"The restraint was only for one year and was limited to certain provinces. ... Furthermore, it was common cause that the appellant had other skills and competencies. ... The restraint was not such that it nullified the appellant's right to choice of a trade, or profession, or occupation. There is no suggestion that the appellant was unable to secure employment within the fields of her expertise either as conveyancing secretary or in internal sales dealing with a different product or dealing with the same product as the first respondent, but in a province other than the provinces covered by the restraint." [Paragraph 24]

"In my view, quantitatively and qualitatively, the interest of the first respondent surpassed that of the appellant. The fact that the appellant stated that she did not intend and did not use any of the information in favour of or for the benefit of the second respondent is irrelevant in determining whether the restraint is reasonable, or in determining whether the restraint had been breached. Furthermore ... there was no other fact or aspect of public policy, at the time when the restraint was to be enforced, which required that the restraint be rejected. ... I am satisfied that the court *a quo* correctly concluded that the restraint was reasonable and enforceable ..." [Paragraph 25]

"However, I do have a difficulty with the relief ... ordering the second respondent to terminate the services of the appellant with immediate effect. In my view such relief was not competent. If that order was allowed to stand it would mean that the second respondent would have to dismiss the appellant even though the restraint has already expired, because that order is not limited to the period of the restraint. At best, the court *a quo* could have interdicted the second respondent for the period of the restraint if a proper case had been made out for such relief. In this case, it was not shown that any of the first respondent's confidential information had been disclosed to the second respondent, or had been used by the appellant to the advantage of the second respondent, or that it was reasonable, or within the power of the Labour Court, to order the second respondent to dismiss the appellant. ..." [Paragraph 26]

"I also have difficulty with the fact that the court *a quo* ordered the appellant to pay the costs of the application. No reasons were furnished by the court *a quo* for its costs order and it appears as if the court *a quo* granted costs purely on the basis of the principle that applies generally in courts of law, namely, that costs follow the result." [Paragraph 27]

"... In the Labour Court, specifically, the law and fairness are prime considerations when considering costs. The normal rule that costs follow the result is not automatically applicable in Labour Court proceedings. The court is required to consider factors like the financial state of the parties, their *bona fides* and their continuing relationship, in coming to a decision whether to order the unsuccessful party to pay costs. Litigants are not to be deterred from defending or prosecuting *bona fide* actions for fear of adverse costs orders ..." [Paragraph 29]

"Another important aspect which the court *a quo* clearly did not consider ... is the fact that the enforcement of a restraint, technically, involves a constitutional issue. Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of section 22 of the Constitution, which, arguably, requires justification ... In constitutional matters, the general rule that costs follow the result, does not apply. ... If constitutional matters are raised or defended in good faith and not vexatiously and the issues raised have merit or are important ... and the proceedings that ensued, resolved those issues,

the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs." [Paragraph 30]

The appeal was upheld. No order as to costs was made.

GREEFF V CONSOL GLASS (PTY) LTD (2013) 34 ILJ 2835 (LAC)

This was an appeal against the dismissal of an application in terms of s 158(1)*(c)* of the Labour Relations Act to make a settlement agreement an order of court, because no prior dispute relating to the settlement had been referred to the Labour Court for adjudication. The agreement related to the appellant's retrenchment which she concluded with her former employer, the respondent.

Coppin AJA (Waglay JP and Tlaletsi JA concurring) held*:*

"The court a quo, in essence, refused to make the settlement agreement an order of court, because no prior dispute relating to the settlement had been referred to the Labour Court for adjudication. In *Molaba*, the court interpreted s 158(1)*(c)* of the LRA with reference to s 142A of that Act and preferred a narrow interpretation of s 158(1)*(c)*, the effect of which was to limit the application of that section to those instances where a party had validly referred a dispute to the Labour Court for adjudication and where the dispute had become settled at any time after such referral. In terms of *Molaba*, 'an interpretation to this effect would preserve the integrity of s 142A. It would also avoid all of the difficulties, conceptual and practical, that the broad interpretation presents'. According to the learned judge, a broad interpretation was one in terms of which s 158(1)*(c)* would be read in isolation and literally and would mean that the Labour Court was empowered to make any employment related settlement agreement, including a collective agreement, an order of court. In terms of *Molaba* this would blur 'the line between a constitutive and a judicial act, a line s 142A clearly draws and that the broad architecture of the LRA preserves'. Further, according to *Molaba* 'a broad interpretation would also suggest that the limitation established by s 142A could be entirely undermined — none of the conditions attached to having a settlement agreement made an arbitration award in terms of that section would apply if a party were simply permitted to approach the Labour Court to have any employment related agreement made an order. Finally, a broad interpretation would blur the line between what are properly contractual claims to be enforced either by the civil courts, or by this court under s 77(3) of the BCEA'. [Paragraph 16]

"In my view, the court in *Molaba* … erred. The court … did not refer to the decision in *Bramley* and, seemingly, overlooked s 158(1A) of the LRA. Its interpretation of s 158(1)*(c)*, without taking into account s 158(1A), but with reference to, in particular s 142A(1), the equivalent of which is deliberately excluded from s 158, was, with respect, wrong. In *Bramley*, the parties seemed to have approached the matter on the basis that, because proceedings had been instituted before the 2002 amendments, the matter had to be decided on the basis of s 158(1)*(c)* as it read before those amendments. But the court, per Farber AJ, considered the matter on the basis of the section as it read before the amendment and 'ex abundanti cautela' as it read after the amendment and, particularly, in the light of s 158(1A), which was introduced by the amendment. In *Bramley*, the court propounded an interpretation which was not as broad as that said to have been applied in *Harrisawak* and concluded that the words 'any settlement' in s 158(1)*(c)*, as it stood before the 2002 amendment, refer to 'a settlement concluded in respect of a dispute which is justiciable in terms of the Act, irrespective whether

such dispute is settled prior to the need to invoke the dispute-resolution machinery of the Act or at some point in time thereafter' and that the amendments did not alter the position." [paragraph 17]

Coppin AJA then expounded on the scope of section 158(1A) of the LRA and held:

"... [I]n deciding whether to make a particular settlement agreement an order of court, it would first have to be established whether the settlement agreement satisfies the criteria stated in s 158(1A). If it does not, then the court does not even have a discretion. It cannot make such an agreement an order of court. On the other hand, if the agreement does satisfy the criteria, the court, nevertheless, would have to consider all the relevant facts and circumstances and in the exercise of its discretion decide whether to make the agreement an order of court. ..." [Paragraph 21]

"Making settlement agreements orders of court may be regarded as important for the protection of the rights of the parties to the settlement. It not only facilitates and enables execution through court processes, but would enable an aggrieved party to institute contempt proceedings if the order of court is not complied with. If the word 'right' in s 158(1A) were to be given a strict meaning, consequences would ensue that cannot be said to be consistent with the aims and objects of the LRA. With regard to the kinds of dispute envisaged in s 191 of the LRA — the power of the Labour Court to make settlements orders of court would be limited to those settlements entered into after failed conciliation and a certificate has been issued to that effect, or in respect of which 30 days elapsed from the date the dispute was referred to the council or CCMA, but which remained unresolved. Parties would be reluctant to enter into settlement agreements before the aforementioned events have occurred, because they would not be able to make their agreements orders of court. Since the identical phrase, 'right to refer', is also found in s 142A(2), the same would apply in respect of settlements which parties wish to make awards in terms of s 142A of the LRA. The only settlement agreements that the CCMA would be empowered to make awards would be those concluded after failed conciliation and a certificate had been issued to that effect, or 30 days had elapsed since the dispute had been referred to the CCMA and the dispute remains unresolved. Giving a strict meaning to the word 'right' in s 158(1A) would have the effect of differentiating between those settlements concluded before and those concluded after the statutory events pertaining to conciliation had occurred. Other than purporting to limit the potential number of applications to make settlements orders of court, there appears to be no rational basis for such differentiation. Moreover, any retardation, or discouragement of the early settlement of disputes is not consistent with the objects of the LRA, namely, the resolution of disputes as speedily as possible, in an efficient and cost effective manner. Lingering, unsettled disputes are not conducive to stability in the workplace and militate against the principle aims of the LRA in that respect." [Paragraph 24]

"Accordingly, I am in agreement with the conclusion of the court in *Bramley* regarding the meaning of the phrase 'right to refer' in s 158(1A). It needs only to be established, for the purposes of compliance with that section, that the dispute is of a kind, if unresolved and once all the procedural requirements have been met, which may be referred to arbitration, or to the Labour Court for adjudication. It does not have to be established that there is a 'right of referral', in the strict sense of a legal right capable of immediate exercise." [Paragraph 25]

"In my view the court a quo erred in dismissing the application for the reason(s) it did and without exercising its discretion correctly and on the basis of the facts and circumstances of the case. The court a quo ought to have found that the settlement met the criteria stipulated in s 158(1A) and should then have considered all the other facts in order to decide whether, in the exercise of its discretion, the settlement agreement, which otherwise met all the criteria stipulated in s 158(1A), should be made a

court order. Even though the settlement followed upon a dispute of the kind envisaged in s 158(1A), the court a quo could not, in the circumstances of the matter, make it an order of court without having first resolved (in the appellant's favour) the substantial dispute of fact on the papers, namely, whether the settlement agreement had been repudiated by the appellant and had, subsequently, been validly cancelled by the respondent. It does not appear from the judgment of the court a quo that these aspects were considered." [Paragraph 28]

The appeal was upheld and the matter remitted to the Labour Court, for rehearing and reconsideration.

SELECTED JUDGMENTS

MBANJWA V HEAD OF DEPARTMENT: PUBLIC WORKS, ROADS & TRANSPORT, NORTH WEST PROVINCIAL GOVERNMENT & ANOTHER (2013) 34 ILJ 87 (NWM)

Case heard 31 October 2013, Judgment delivered 8 November 2012

Applicant was a suspended Head of Department of the Department of Public Works, Roads & Transport: North West Province, and was the subject of a disciplinary enquiry. Applicant sought an interim order from the High Court interdicting respondents from continuing with the disciplinary enquiry, pending an application to be brought in the Labour Court. The High Court addressed the question of whether the exclusive jurisdiction of the Labour Court ousted the jurisdiction of the High Court to grant interim relief, pending the final determination of the matter by the Labour Court.

Landman J held:

"The law is clear. This court does not have the jurisdiction to entertain a final interdict to prohibit the further conduct of an uncompleted disciplinary hearing although this court enjoys concurrent jurisdiction with the Labour Court concerning matters listed in s 157(2) of the Labour Relations Act ... The application was not brought on the basis of this court's concurrent jurisdiction ... The Labour Court has jurisdiction to grant a final interdict prohibiting the further conduct of an uncompleted disciplinary hearing. ... However, a High Court has jurisdiction to grant an interim interdict even though it does not have jurisdiction to grant final relief. ..." [Paragraph 12]

Landman J considered decisions by the Constitutional Court and Supreme Court of Appeal, and continued:

"If the [High] court in the Goliath judgment meant to say that there is no authority for the rule that a High Court has an inherent jurisdiction to grant interim relief pending the final determination of a matter in which it does not ordinarily have jurisdiction, I would respectfully disagree. ... But I agree that the Labour Court and not a High Court has the exclusive jurisdiction to make a final determination interdicting uncompleted disciplinary hearing proceedings. ..." [Paragraphs 18 - 19]

"The order ... does not finally determine the rights of the parties to this application. It is an interim order pending a final decision of the Labour Court. ... I pause to ask whether it is notionally possible for a High Court's inherent jurisdiction to co-exist with the concept of exclusive jurisdiction." [Paragraphs 22 - 23]

"The existence of exclusive jurisdiction in one court does not necessarily entail that a High Court may not have jurisdiction to grant interim relief even if that other court has the jurisdiction to itself grant interim relief. ... On the other hand there may be instances where the provision in question not only confers exclusive jurisdiction on the other court as regards the main relief but also as regards interim relief. ..." [Paragraph 24]

"Would the general thrust of the LRA to create a one-stop shop indicate that a High Court's inherent interim jurisdiction is ousted? There is, in my view, nothing which indicates that the fundamental thrust of the LRA and the Labour Court's supervisory role would be impaired if a High Court were to maintain its inherent interim jurisdiction. On the contrary a High Court's inherent interim jurisdiction, given the limited seats of the Labour Court, aids access to justice for those litigants who find themselves far

removed from the seats of the Labour Court and it does this without impinging on the Labour Court's jurisdiction to decide on final relief." [Paragraph 29]

"I am unable to discern in s 157(1) of the LRA any special circumstances which would limit a High Court's inherent interim jurisdiction. … [S] 169 of the Constitution does not appear to exclude the operation of the inherent interim jurisdiction of the High Court. … What s 169 does is to provide the authority for limitations on the jurisdiction of High Courts and in effect confirms the validity of conferring exclusive jurisdiction on courts of a similar status to a High Court but it does not operate so as to remove the inherent interim jurisdiction of the High Court." [Paragraphs 30 - 32]

Having found that the inherent interim jurisdiction of the High Court was not ousted, Landman J proceeded to find that the requirements for an interdict had been met. The interim interdict was thus granted.

NATIONAL UNION OF LEATHER & ALLIED WORKERS UNION & OTHERS V BADER BOP (PTY) LTD (2004) 25 ILJ 1469 (LC)

"Bader Bop dismissed 428 employees who were on an unprotected strike. They and their union have referred a dispute to this court concerning the dismissal of the individual employees … At this stage I am only required to determine whether the dismissals were substantively and procedurally unfair." (Page 1471)

"The immediate trouble started … when Bader required the 26 workers in its trimming division to work a double shift to meet an urgent order from a client. It is doubtful whether Bader was lawfully entitled to make this request, but the trimmers agreed to work this overtime provided they were each paid R300 tax free. The company acceded to their demand."

Other workers who had previously worked overtime then demanded similar payment, and a strike ensued.

"The workers were on a full-time strike. They behaved badly and created a hostile atmosphere. Casual employees were threatened with the loss of their lives."

"The various meeting between management and the shop stewards, including those where the union leadership was present, constituted the audi alteram partem which the company was obliged to afford the strikers." (Page 1475)

"[M]anagement issued a written ultimatum to the strikers. … The ultimatum gave the workers sufficient time to reflect on the fact that their strike was an unprotected one and that only an unconditional return to work would prevent their dismissal. … [O]n the union's version the ultimatum had served its purpose for the strikers resolved to return to work."

"There was never any doubt that the strike was a wildcat strike. It had not been sanctioned by the union. … Not the slightest attempt had been made to engage the procedure laid down by the LRA. I assume in favour of the applicants that there was no prohibition on industrial action, but there was no attempt to conciliate the dispute. There was no notice of intention to proceed with the strike. There was no immediate and urgent need to embark on the strike."

"It has been submitted that Bader may have done more to resolve the dispute ... There is some merit in this. But the settlement of the dispute was primarily a matter for discussion at informal processes designed to conciliate disputes and the formal conciliation processes of the LRA.

In my view the dismissals following upon a failure to comply with a proper ultimatum would be substantively fair." (Page 1476)

"The behaviour of the strikers had persuaded management that an interdict was required to secure the safety of other employees and casual employees. ... Bader sought, on an urgent basis, and obtained an interdict from the Transvaal Provincial Division (TPD). The union was given notice of the application ...

The interdict itself has no legal validity. The TPD had no territorial jurisdiction over the parties. But the fact that it was issued and served upon most of the strikers must be taken into account. At the same time sufficient cognizance must be paid to the fact that the unlawful conduct of the strikers played a role in the decision to seek an interdict."(Pages 1476-1477)

"The applicants' case is simply that the interdict was read. It or rather its terms forbade them from entering Bader's premises and Bader dismissed the individual applicants. I have found that although the interdict was of no legal effect it must be treated as being of full legal effect where its true nature would prejudice the applicants. But I have found that the interdict was not read in isolation. It followed the reading of the ultimatum and an invitation to enter the premises and clock in. It was only when this invitation was refused that the interdict was read.

... [T]he evidence does not show that any applicants were dismissed without, at least, receiving orally the ultimatum."

"I am constrained by the narrow compass of the defined issues. On this basis I find that the dismissal of the individual applicants was procedurally and substantively fair." (Pages 1483-1484)

COETZER & OTHERS V MINISTER OF SAFTEY AND SECURITY & ANOTHER [2003] 2 BLLR 173 (LC)

The case concerned the promotion of members of the explosive unit of the South African Police Services (SAPS). SAPS had established guidelines whereby posts were classified as designated or non-designated. Designated posts were reserved for black people, women of all races and people with disabilities. White males not suffering disabilities were classified as non-designated, and thereby precluded from applying for designated posts, whereas designated individuals could apply for non-designated posts, in order to advance racial and gender representivity.

"The eleven applicants ... applied for designated posts for captains in other units and branches of the service. They would have preferred promotion within the explosives unit. But there were limited posts for the non-designated group. None of the applicants were appointed as captains in the explosives unit nor elsewhere... Fifty-one of the 70 advertised posts in the Lab [the Forensic Science Laboratory, where the explosives unit was based since 2000, located in the Detective Service] were filled. ... Twenty-eight unfilled posts (seemingly those in the Detective Service) were readvertised for designated members. Eight of these posts were filled by officers from the designated group. Twenty posts remained unfilled." (Page 176)

A letter was written by the Commander of the Lab requesting that at least some of the unfilled position be filled by members of the non-designated group, due to a lack of qualified and experienced members of the designated group. This request was rejected.

Landman J identified the main issue in the case as being whether SAPS had discriminated unfairly against the applicants by not appointing them to the 20 main posts, and continued:

"SAPS discriminated against the applicants on the grounds of their race. But it was SAPS's case that this discrimination was not unfair as it was in accordance with affirmative action measures consistent with the purposes of the Employment Equity Act ..." (Page 178)

"As a designated employer SAPS is obliged to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce." (Page 179)

"An employment equity plan is ... relevant because it contains the affirmative action measures which may be used to justify discrimination. ... The first round of the 2001 promotions did not place an absolute barrier on the promotion of non-designated members to the rank of captain in the explosives unit. Non-designated inspectors in the Lab could and did apply for posts allocated for this group. ... [T]he result shows that no absolute barriers were in place. ... There were limited promotional posts for non-designated employees in the explosives unit. All the non-designated posts were filled by non-designated members. No applications were received for the posts reserved for designated members."

"As far as the second round is concerned, ie the readvertisement of 28 posts, if it were taken as a second round, it would have constituted an absolute barrier. This is because non-designated members were not invited to apply. But it is not permissible in my view to separate the first and second rounds as distinct processes."

Landman J then analysed the SAPS employment equity plan in light of the Constitution:

"The injunction to interpret the EEA in compliance with the Constitution relates, in my view, not only to principles of interpretation, equality and the affirmative action provisions of the Constitution but also the Constitution generally.

The Constitution is the source of the EEA. It is hardly necessary to state that the Constitution also sets other goals and values for our society." (Page 181)

"The Constitution envisages a balance between the affirmative action imperative and other imperatives, including, for present purposes, the need for the police service "to discharge its responsibilities effectively". The Constitution does not prescribe how the two imperatives are to be balanced but the balance must be a rational one" (Page 182)

Landman J held that where an affirmative action justification is raised, it was necessary to show that the affirmative action measures were "in harmony with other constitutional provisions", "because the Constitution requires the common law and Acts of Parliament giving expression to the Constitution, to enhance the values and ideals set out in the Constitution. The Constitution envisages one whole integrated system of law and government."

Landman J then analysed the SAPS affirmative action measures:

"The EEA and the goals it is intended to achieve are critical to the normalisation of South African society. ... The EEP does not deal specifically with the obligation resting on SAPS to discharge its responsibilities effectively. But, undoubtedly this must have been in the mind of the planners. The migration from an unrepresentative police service to a police service representative of the demographics of the South African population is being done incrementally so as to retain the expertise of serving non-designated members of the police service." (Page 183)

"[N]o evidence was led that the National Commissioner had considered the efficiency imperative. .... But was it, in view of the absence of a specific plan and a rational consideration of the need for the explosives unit to be efficient, reasonable and rational not to consider or to reject the applicants for promotion to the designated posts in the second round? The evidence placed before me show that it would have been reasonable and rational to make these appointments." (Page 184)

"In my opinion SAPS's justification of its conduct *vis-à-vis* the applicants fails in two respects.

First there is no specific affirmative action plan for the explosives unit. ... [S]econd ... the National Commissioner's refusal to promote the applicants was based purely on the imperatives contained in the EEP to promote representivity. His decision overlooked ... a consideration of the constitutional imperative that the service maintain its efficiency." (Page 185)

The court directed that the applicants be promoted.

LOUW V GOLDEN ARROW BUS SERVICES (PTY) LTD [2000] 3 BLLR 311 (LC)

Applicant alleged an unfair labour practice on the grounds that respondent had paid him less than a white colleague for work of equal value, alternatively that the difference in their salaries was disproportionate to the difference in value of their jobs. Respondent acknowledged the wage differential, but argued that the jobs were not of equal value, and that the difference was not attributable to racial discrimination.

Landman J considered an argument by the Respondent that intention or motive was an integral part of a residual unfair labour practise. After considering United States case law, academic articles and the history of South African labour legislation, Landman J found:

"It does not seem that the LRA ... intended to change the basic fabric of the concept of an unfair labour practice, although it trimmed its ambit to the bare essentials pending the enactment of more comprehensive legislation. This has materialised as the Employment Equity Act ... I could trace no case which required an applicant to prove *culpa* ... on the part of an employer or employee. This is probably because the definition of an unfair labour practice was an effect-based one. ... The definition of an unfair labour practice and its successor, the residual unfair labour practice, is not based on delict which would require *culpa*. Nor is the concept deemed to be a term or an implied term of the contract of employment. ... The answer to the question of *culpa* lies in the interpretation of the statute. The statute creates, in my view, a form of strict liability. An applicant need not prove *culpa* although the act in question may, in the ordinary course of events, be accompanied by intention, negligence and motive..." (Pages 316-317)

"Fairness requires that persons doing equal work should receive equal pay ... The principle "equal work should receive equal pay" in its true form may be extended to an analogous situation namely that work

of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed ... it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is, however, an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds, eg race or ethnic origin." (Pages 318-319)

"It follows, in our law, that an employer may therefore discriminate, even unfairly, on any grounds or for any reasons which are not proscribed..."

"It is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. ... The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr Beneke's salary *because* of his race..." (Page 319-320)

Landman J then undertook an extensive survey of English case law on the standard of causation, and then turned to consider the burden of proof:

"I believe it is correct that the onus or burden of proof lies on the applicant claiming relief. I use the term onus or its equivalent, burden of proof, in the sense used in *Pillay v Krishna* ... to mean the duty upon the litigant, in order to be successful, of finally satisfying the court that he or she is entitled to succeed..." (Page 322)

"I do not think it will be helpful to go down the American road of the burden of production particularly where the applicant in a claim involving a residual unfair labour practice need not prove intention. The burden of production seems to involve the setting up of a skittle which if knocked down may have no appreciable effect. Nor is a consideration of the shifting onus useful. ..." (Page 324)

"To succeed the applicant must convince this Court on a balance of probabilities that the job of a buyer and a warehouse supervisor at Golden Arrow, not necessarily elsewhere, are of equal value. This presupposes that they are not the same job." (Page 331)

"I conclude that the applicant has not succeeded in demonstrating that the two jobs, on an objective evaluation, are jobs of equal value. It is therefore unnecessary to delve into the reasons, causes or motivation for the difference in wages. It does not mean that the difference is not attributable to race discrimination. It does mean that racial discrimination has not been proven." (Page 332)

Finally, Landman J rejected the argument that the salaries were disproportionate, and ordered absolution from the instance.

Upheld on appeal: **Louw v Golden Arrow Bus Services (Pty) Ltd (2001) 22 ILJ 2628 (LAC)**

SA CHEMICAL WORKERS UNION V AFROX LTD (1998) 19 ILJ 62 (LC)

Respondent had dismissed 52 workers, arguing that the dismissal was fair and justifiable for operational requirements. Applicants challenged the dismissal on the basis that it was dismissal for striking, alternatively a lock-out dismissal, and therefore automatically unfair. If the dismissal was for operational requirements, applicants argued that it was procedurally and substantively unfair. Respondent's drivers were working overtime in excess of that permitted by law and of the company's safety limits. Respondent attempted to introduce a system of staggered shifts, but agreement could not be reached with the applicant union, and the drivers embarked on a strike. Respondent implemented a lock-out but was unable to break the strike. It was common cause that the dismissal took place whilst the applicants were taking part in a protected strike.

Landman J began by exploring "the relationship between termination for operational requirements during a protected strike, which is permissible, and a dismissal for striking or in order to secure compliance with a lock-out demand, which is impermissible."

"The right to strike is guaranteed by s 23(2) *(c*) of the Constitution ... The right to strike is given further expression in the Labour Relations Act ... which removes the fundamental impediments to a right to strike. One impediment is the right or power of an employer to dismiss striking workers for breaching their contracts of employment by not tendering their services during the strike."

Landman J noted that the LRA provides two exceptions to this rule, by allowing dismissals for employees' misconduct during a strike, and for an employer's operational requirements.

" These two exceptions ... are the product of compromise between labour and management. ... The first exception may be explained by the fact that strikers are employees and, although one may say that the duty to work is suspended during a protected strike, the obligation to observe acceptable conduct towards the employer is not suspended." (Page 65)

"The second exception relates to the economic foundations of employment. Although we may speak of the right to a job, this right is itself dependent, at least in the private sector, on the existence in economic terms of the enterprise. ... Economics dictates that if it is necessary to shed jobs so that the enterprise may survive or alter or adapt its business then so be it. This basic economic premise has been incorporated in the Act by way of the exception permitting dismissal for operational requirements."

"There is a tension between the right to dismiss for operational requirements and the right to lock-out. ... A difference however lies in the fact that a lock-out may be instituted for a wide number of reasons falling with the phrase 'matters of mutual interest' and occurs in a province beyond the law - the realm of power play. In the case of dismissal for operational requirements the termination is limited to operational requirements as defined in s 213 of the Act and is moreover the subject of judicial scrutiny. ... Dismissal for operational requirements is expressly permissible. The other, the termination lock-out, is not." (Pages 66 – 67)

"It is clear on the evidence that Afrox was unable to continue doing business as it had in the past. It was obliged both morally and in law to eliminate excessive overtime. Afrox was aware that in order to dismiss its drivers for operational requirements it was obliged to follow the procedure laid down by s 189 of the Act. It informed the union representing the drivers that it was contemplating a change in the way it was doing business. It did so timeously. It consulted with the union on alternatives to address the overtime problem. ..."

"The decision to make the drivers redundant took place during a protected strike. It was a decision which was made because the strikers were too powerful and could not be broken. It was a decision which was an alternative to an unsuccessful lock-out. In this sense there is a real and definite link between the dismissals and the strike and the lock-out but this does not, on its own ... justify an inference that the dismissals were to compel compliance with the demand or to punish the strikers. On the contrary the evidence shows that there was good reason to declare the redundancy, in order to service the customers of Afrox through outside contractors and to combat the potential loss of custom to competitors. The decision was made in good faith. Exhaustive efforts were made over a long period of time to accommodate the union and to avoid dismissal but they were unavoidable for operational requirements ..."(Page74)

"Consultation during a process of retrenchment is the opportunity allowed by law and fairness to the consulting party, such as a union, to influence the exercise of the employer's managerial prerogative. A failure to utilize this opportunity closes this avenue. Criticism after the event is no substitute for cooperation when it is called for during the consultation process." (Page 75)

The dismissal was found to have complied with the requirements for a dismissal for operational requirements, and to have been substantively and procedurally fair.

Upheld by the Labour Appeal Court in **SA Chemical Workers Union & Others v Afrox Ltd (1999) 20 ILJ 17178 (LAC)**

SELECTED ARTICLES

'A STUDY IN DEFERENCE: LABOUR COURT DEFERENCE TO CCMA ARBITRATION AWARDS' (2008) 29 ILJ 1613

The article analyses "the role of the reasonable decision maker test which broadly requires a court of review to show a measure of deference to decisions by an administrative decision maker."

"The various judgments delivered by the constitutional Court in the *Sidumo* case accept that the CCMA is the primary decision maker in regard to disputes over which it has jurisdiction even though the decisions of the CCMA are subject to review upon certain grounds. … The judgments also emphasize that the test of review is not whether the award is correct (although this is perhaps too broadly stated) but whether it is fair and reasonable…" (Page 1614)

The article then focuses on "the question of 'curial deference'", starting with an analysis of the history of the concept of deference, with reference to Canadian, English and South African sources. It sets out to define the term 'deference, making reference to the *Sidumo* judgment, as well as English and Irish sources, and identifies the term as "one usually used to describe the attitude of a court to another decision maker or lawmaker under review." The author goes on to argue that "[t]he type of deference concerned here relates to a decision maker such as an administrative organ and similar bodies exercising … what may be described as judicial or quasi-judicial functions. The standard of deference extended to executive decisions and that of a legislature differs and is not generally applicable here."

The rationale for deference is then considered. Mention is made of issues of practicality, as well as the argument that "the decision maker, under review, has more expertise about the subject-matter than courts of law. " However, [t]his does not wash in the context of the CCMA and the LC for the LC is itself an expert body". The author then considers arguments that the rule "is… intended to acknowledge and buttress the separation of powers and separation of functions. … The rationale for the obligation to defer to decisions of the CCMA is to be found, I infer, in those judgments of the CC which characterise the dispute-resolution functioning of the CCMA commissioners, as 'administrative acts' in the constitutional principle of the separation of powers and in the rule of law." (Pages 1615-1616)

The author identifies the basis of the separation of powers argument in this context as being that the CCMA is an "independent and impartial tribunal" in terms of section 34 of the Constitution, and proceeds to consider further the source of the rule of judicial deference:

"Is judicial deference to another decision maker on review to be regarded as a rule or principle or doctrine or is it merely an attitude which courts adopt? There are some indications that courts have adopted a policy or attitude to such reviews. But the better view must be that this policy or attitude has a lawful and legitimate basis and that it is more than a rule of convenience. … The concept of deference has sometimes been ascribed to the distinction between appeals and reviews. But this is not necessarily so". (Page 1616)

"An important indication of the scope of the rule stems from the fact that it is especially recognized (although sometimes in the breach) that labour disputes should be resolved quickly and with the minimum of formality. The legislature decided to entrust this function to the CCMA and elected not to confer a right of appeal to the LC. The endorsement in *Sidumo's* case … that the emphasis must be one speedy and cheap resolution of labour disputes which come before the CCMA and that awards need not

be impeccable is a clear signal that a large degree of deference is required to be shown to awards of commissioners." (Page 1618)

FAIR LABOUR PRACTICES – THE WIEHAHN LEGACY (2004) 25 ILJ 805

The article examines the concept of fair labour practices and its reception from the United States into South African Law.

"The phraseology ... found its way into South African labour legislation, at a crucial moment in our political development. ... In the 1970s when industrial action by emerging or black trade unions, as a force for political enfranchisement, began strangling the economy. Professor Nic Wiehahn persuaded the government of the day to establish a commission to investigate labour legislation with specific reference to 'the methods and means by which a foundation for the creation and expansion of sound labour relations may be laid for the future of South Africa'. ... [T]he majority of the commission recommended that the Minister of Manpower be empowered to reinstate employees or restore their terms and conditions of employment in the case of disputes between employers and employees including 'irregular or undesirable labour practices'." (Pages 805-806)

The article then proceeds to analyse the history of the definition of fair labour practices in South African labour legislation, including a discussion of the impact of the Constitution:

"The Bill of Rights in the new Constitution had a special place for labour rights. The Bill provided that 'Everyone has the right to fair labour practices'. This right was carried through to the present Constitution. It is this right to a fair labour practice which will keep the torch burning. The constitutional right to fair labour practices is driving current developments in labour law." (Page 807)

The article then examines how "[t]he concept of an unfair labour practice has influenced our common law regarding the contract of employment without apparent or express reliance on the Constitution", and discusses a series of cases in that regard. The author concludes that:

"The unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, by conventional and unconventional means, as long as lawful, unilateral action is regarded by the courts, in their capacity as custodians of industrial justice, as unfair and inequitable. This is the legacy of the Wiehahn Commission." (Page 812).

SELECTED JUDGMENTS

SHELL SA ENERGY (PTY) LTD V NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY & OTHERS (2013) 34 ILJ 1490 (LAC)

Case heard 15 March 2012, Judgment delivered 12 December 2012

This was an appeal against a judgement of the Labour Court, the review having been directed at a ruling by the second respondent, finding an employer-employee relationship between appellant and fourth respondent. Fourth respondent had been assigned to the appellant while employed by Shell Sudan. Fourth respondent was subsequently advised that Shell Sudan was to be sold, and he that his services were to be terminated for that reason. He received a severance package from Shell Sudan. Rather than challenge the dismissal in terms of Sudanese dispute resolution mechanisms, fourth respondent returned to South Africa, and referred an unfair dismissal dispute against the appellant to the first respondent.

Molemela AJA (Tlaletsi JA and Murphy AJA concurring) held:

" ... At the commencement of the conciliation proceedings, the appellant raised a point in limine in terms of which the jurisdiction of the first respondent was disputed on the basis that there was no employer-employee relationship between the appellant and the fourth respondent. The fourth respondent objected to the presence of the appellant's legal representative at the proceedings." [Paragraph 5]

"The court a quo concluded that the proceedings ... were conciliation proceedings and that since a conciliator had no discretion to allow legal representation at conciliation proceedings, the appellant was, accordingly, not entitled to legal representation during the proceedings ... On the issue of the second respondent's conclusion that there was an employer-employee relationship between the appellant and the respondent without recourse to oral evidence, the court a quo found that the second respondent was well within his rights to do so ... The court a quo accordingly found that the second respondent had correctly found that the appellant was the fourth respondent's employer. ..." [Paragraph 8 - 9]

"The main issue in the appeal is the court a quo's finding that the proceedings before the second respondent, notwithstanding the jurisdictional objection that was raised, constituted a conciliation hearing thus entitling the second respondent to disallow legal representation and to engage in a fact-finding exercise, instead of allowing the presentation of evidence to establish the existence of the employer-employee relationship." [Paragraph 10]

Molemela AJA turned first to consider whether the proceedings in question were conciliation proceedings:

"It is evident from the authorities ... that a point in limine raised at conciliation proceedings disputing the existence of an employer-employee relationship necessitates a decision on the issue before the dispute is conciliated. ... That is indeed the correct interpretation of the LRA. ... [T]he second respondent was alive to the fact that the proceedings he presided over were not conciliation proceedings but rather entailed the determination of a jurisdictional point pertaining to whether the fourth respondent was the employee of the appellant or not ... The court a quo thus erred in concluding that those proceedings were conciliation proceedings and that the second respondent had conducted a fact-finding exercise as part of the conciliation process ..." [Paragraphs 13 - 14]

Molemela AJA then considered whether the leading of evidence should have been allowed before the second respondent made his ruling:

"... It was clear from the submissions made by the appellant's legal representative to the second respondent that there was a dispute of fact as to whether the fourth respondent was employed by the appellant or Shell Sudan. In reaching his decision, the second respondent chose to rely solely on the documents that were handed up to him, which included a letter of appointment issued by the appellant. The second respondent seems to have placed heavy reliance on this letter ... It is evident ... that some of the documents handed up ... were incomplete ..." [Paragraph 15]

"It is evident from ... the court a quo's judgment that it endorsed the second respondent's approach of deciding the point in limine in question without resorting to evidence ... The court a quo, like the second respondent, placed heavy reliance on the letter of appointment apparently issued by the appellant. Nothing much was said about the fact that the letter of dismissal was issued by Shell Sudan and not by the appellant, as well as the fact that the fourth respondent had subsequently received a severance package from Shell Sudan. I am of the view that such an approach is incorrect. ..." [Paragraphs 17 - 18]

"I am of the view that in the Denel judgment, the court's consideration of whether there was a need for viva voce evidence to be led when a jurisdictional point pertaining to the existence of an employer-employee relationship was raised was not confined only to instances where the question sought to be answered was whether the person rendering service was an employee ... as opposed to being an independent contractor. ... My impression is that the approach ... would be equally applicable even where the issue to be determined was the correct identity of the employer ... A party referring an unfair dismissal dispute must obviously be in the employ of the employer against whom such a dispute is referred. ... [T]here cannot be a dispute relating to unfair dismissal unless there is an employment relationship between the claimant and the respondent ... " [Paragraphs 20 - 21]

"The order made by the [Labour] court in the case of *August Läpple (South Africa) v Jarrett & others* ... and the cases discussed therein demonstrate just how complex the determination of the identity of the true employer can be, even where evidence has been adduced. On the basis of these authorities, as well as the *Denel* judgment, I am of the view that the question whether there is an employer-employee relationship in the context of the present matter is one that can be properly determined by adducing viva voce evidence, unless both parties are agreed that such a determination can be made on the basis of documentary evidence only. ... [T]he fact that the fourth respondent received a letter of termination of employment from Shell Sudan and even accepted a severance package from it were aspects which begged for an explanation from the fourth respondent, but these were not considered by the second respondent at all. There was a clear dispute of fact which the second respondent chose to decide without the benefit of affidavits or oral evidence. ..." [Paragraphs 24 – 25]

"... I am of the view that in refusing the appellant's request to lead viva voce evidence and instead being content to dispose of the matter on the basis of documents that were not properly admitted into evidence, the second respondent committed a material irregularity ... Insofar as the court a quo found otherwise, it erred. ..." [Paragraph 26]

The appeal was upheld, and the matter referred back to the first respondent for a de novo hearing before different commissioners.

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY V MARCUS NO & OTHERS (2013) 34 ILJ 1458 (LAC)

Case heard 12 December 2012, Judgment delivered 12 December 2012

This was an appeal against the Labour Court's dismissal of an application to set aside a demarcation award issued by the first respondent, which had found that the business of the third respondent did not fall within the registered scope of the appellant. Appellant was a bargaining council for the road freight industry, an industry defined as "the transportation of goods for hire or reward by means of motor transport in the Republic of South Africa". Third respondent hired tipper-trucks and drivers to clients in the mining and construction industries. A rental fee was charged for truck and driver, with no fee per load or per distance travelled being charged. In the arbitration proceedings, third applicant argued that it's activities placed it more appropriately in the mining or construction industry. First respondent found that third respondent did not fall within the appellant's industry definition.

Molemela AJA (Waglay DJP and Zondi AJA concurring) held:

"… [T]he first respondent recorded that for the third respondent to fall within the definition and the scope of the appellant, it would have to be found that the third respondent, 'in association with its employees, is in the business of transporting goods for its clients in its tipper-trucks for hire or reward'. … It is clear … that the issue pertaining to whether the third respondent fell within the appellant's registered scope turned on … whether the third respondent and its employees could be said to be associated for hire or reward in the transportation of goods. The first respondent answered this question in the negative. …" [Paragraphs 10 - 11]

"The court a quo held that it was not apparent that the first respondent had applied an unduly restrictive approach to the application of the industry definition. The court a quo … did not understand the judgment of Coin Security (Pty) Ltd v CCMA & others … to suggest that a commissioner engaged in a demarcation dispute is not required to have regard to all of the relevant facts and circumstances when seeking to identify the nature of the enterprise in which employees and their employer are associated for a common purpose. The court a quo pointed out that the Coin Security judgment laid down that a demarcation involves considerations of fact, law and social policy and that due deference ought to be given to a commissioner making a demarcation award. … [T]he court a quo agreed with the first respondent's interpretation of the term 'for hire', ie that the industry definition is intended to qualify 'the transportation of goods by means of motor transport' and not to qualify the business activity in which the third respondent is engaged." [Paragraphs 13 - 14]

"I … agree with the court a quo's finding that it could not be concluded that the first respondent had failed to apply his mind to the matter just because he stated in his award that the approach he would adopt was that contained in the Greatex Knitwear judgment. I agree … that even though the first respondent made reference to the approach referred to in the Greatex Knitwear judgment, it can hardly be said that he purported to reach his decision by the application of one or other approach or that his approach amounted to a wrong application of the law that prevented a fair trial of the issues. The court a quo correctly pointed out that the first respondent had not been required to consider whether an expansive or a restrictive definition ought to be applied, nor did he purport to reach his decision by the application of one or the other approach. The court a quo thus correctly ruled that the outcome of the arbitration proceedings was a mere application of facts to the definition and there was no application of

a restrictive interpretation. … I am satisfied that the approach adopted by the first respondent passes muster against the principles enunciated in the Coin Security judgment. …" [Paragraphs 20; 22]

"… [T]he first respondent correctly found that the word 'hire' applies to activities involving 'the transporting of goods by means of motor transport' and not to the business activity in which the third respondent is engaged. The court a quo correctly found that the appellant, by arguing that it was sufficient if the third respondent's employees were merely associated with the activities of transportation, was attempting to incorporate the third respondent into the jurisdiction of the council by focussing on the association between the employees and the clients of the third respondent instead of … looking at … whether its employees were associated with the transportation of goods. The court a quo correctly found that since the activity of hiring out plant and vehicles for rental is not contemplated by the industry definition, the third respondent's business activities fell outside the ambit of that definition." [Paragraph 24]

The appeal was dismissed with costs.

INDEPENDENT MUNICIPAL & ALLIED TRADE UNION ON BEHALF OF STRYDOM V WITZENBERG MUNICIPALITY & OTHERS (2012) 33 ILJ 1081 (LAC)

This was an appeal against a judgement of the Labour Court which had dismissed an application to review and set aside an arbitration award issued by the third respondent commissioner under the auspices of the second respondent. Strydom, a member of the appellant, had been dismissed by the first respondent following an inquiry into his incapacity on the grounds of illness. The commissioner found the dismissal to be procedurally and substantively fair. Strydom had been absent from the workplace for a period of around 8 months, on the grounds of a mental condition. During this absence, the employer had not initiated any enquiry into his absence on the grounds of ill health, only doing so once an insurance company repudiated Strydom's claim for medical boarding.

Molemela AJA (Waglay DJP and Zondi AJA concurring) held:

"It is trite that the code of good practice [in relation to dismissal under the LRA] is binding on commissioners. … My reading of items 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. … [T]he conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available." [Paragraph 6]

"… I have no doubt … that permanent incapacity arising from ill-health or injury is recognized as a legitimate reason for terminating an employment relationship … A dismissal would under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal. " [Paragraph 7]

"… J L Pretorius et al submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but 'is a duty that is implied in the concept of unfair discrimination in a general sense' and 'is one of the judicial and legislative tools for realising substantive

equality'. I agree ... Surely non-compliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?" [Paragraph 8]

"... At the [incapacity] enquiry, the employer relied on the medical report filed by a Dr van Niekerk (a psychiatrist) ... The employer also relied on the assessment report submitted by Metropolitan in support of its decision repudiating the employee's application. ... [A]t the time of the enquiry, Dr van Niekerk's report was six months' old. ... [T]he chairperson ... concluded that the employee's continued employment with the employer would be contrary to medical opinion and would not be viable. It is not clear ... why the chairperson found that 'insufficient argument had been presented for me to conclude that the condition of the employee is directly linked to his work circumstances (sic)', when the undisputed medical evidence ... actually stated that the employee's condition was indeed caused by work-related stress. Furthermore, he chose to finalize the enquiry on the basis of a medical report that was issued six months prior to the enquiry, despite the employee's having indicated that he intended seeking a second opinion from another psychiatrist. ... Furthermore, the chairperson ... seems to have used the enquiry for other purposes which had nothing to do with establishing the extent of the employee's incapacity, thus fortifying the appellant's contention that the enquiry was not only about incapacity but also about misconduct. ..." [Paragraphs 11 - 13]

"... It is settled law that an arbitration hearing is a hearing de novo. ... [O]ne would have expected that the commissioner would listen to evidence afresh and then make a determination as to the fairness or otherwise of the employee's dismissal. Instead ... the commissioner sought to confine himself only to the evidence that was available as at the time of the enquiry notwithstanding the fact that new evidence was adduced before him ... The latter approach was wrong as it equated an arbitration hearing with an appeal hearing of some sort ..." [Paragraphs 14 - 15]

"... [T]he commissioner failed to consider certain evidence that was put before him. If an arbitration hearing is a hearing de novo, then there is no valid reason why the additional evidence that was presented at the arbitration hearing was not considered. Failure to consider all the relevant evidence clearly resulted in the employer's failing to do a proper assessment of the employee's capability to continue working ... [T]he decision of the commissioner was one that a reasonable decision maker could not reach and thus fell to be set aside on review." [Paragraph 25]

"The court a quo, however, dismissed the application for review, having stated that the question that needed to be answered was: 'Can an employee insist on being employed in the same workplace that he alleges has induced his depression?' ... [T]he question posed and the ... remarks made by the court a quo were misplaced ... [T]here was no basis for finding that the employee was permanently incapacitated or that he could not reasonably be accommodated by the employer. " [Paragraphs 26 - 27]

" In addition ... it is patently clear from the award that the commissioner did not pay due regard to items 10 and 11 of schedule 8 and thus failed to comply with s 188(2) of the LRA ... This is another reason why the award fell to be set aside, which the court a quo did not do." [Paragraph 28]

"I am satisfied that the decision of the commissioner was not one that a reasonable decision maker could have reached under the circumstances and ought to have been set aside by the court a quo and substituted with an order that the dismissal of the employee was both substantively and procedurally unfair. The court a quo therefore erred in coming to the opposite conclusion. ..." [Paragraph 29]

The appeal was thus upheld. Molemela AJA held that reinstatement was not appropriate in the circumstances, but that the employee should be compensated for being dismissed [paragraphs 34 – 35]. Compensation of 12 months' remuneration was ordered.

SELECTED JUDGMENTS

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY AND ANOTHER V CARLBANK MINING CONTRACTS (PTY) LTD AND ANOTHER [2012] 11 BLLR 1110 (LAC)

After the termination of his employment by the first respondent, a labour broker, the employee referred a dispute to the appellant bargaining council for conciliation. The first respondent raised two preliminary points: first, that the employee had not been dismissed because his contract had expired by effluxion of time; second, that the council lacked jurisdiction because the parties had concluded a contract in terms of which disputes relating to the employee's contract of employment were to be referred for private arbitration. The respondent commissioner dismissed both points and certified the dispute unresolved.

Murphy AJA (Waglay DJP and Davis JA concurring) held:

"Section 51(9) provides that a bargaining council may, by collective agreement, establish procedures to resolve any dispute contemplated in the section. The NBC … has adopted an Exemptions and Dispute Resolution Collective Agreement for, amongst other things, the resolution of disputes ("the collective agreement"). The collective agreement sets out in some detail the procedures for dispute resolution and the rights of the parties in relation to both conciliation and arbitration. … The collective agreement is binding on the parties to the present dispute because it has been extended to non-parties within its registered scope …" [Paragraph 8]

"Clause 5 of the collective agreement provides that all disputes shall, if required by the Act, be referred to the council for conciliation and arbitration. It sets out in detail the procedure to be followed in respect of both processes. The envisaged conciliation process may be formal or informal. In terms of clause 5(2), a party to the dispute shall appear in person and may be represented by an industrial relations practitioner, legal practitioner or a trade unionist in any conciliation proceedings that may be held. The process may result in the conciliator issuing an advisory award if it is apparent that the employer has made no reasonable attempt to comply with the provisions of the Act or any Codes of Good Practice, or, where the dispute is found to be without merit, and having no possible prospects of success, the referral is construed as frivolous and/or vexatious. Where the conciliator makes an advisory award, he or she is obliged to inform the affected party that if the dispute proceeds to arbitration and the arbitrator's award concurs substantially with the advisory award, costs will in all probability be awarded against the affected party." [Paragraph 21]

"The arbitration clause in the present matter does not grant an employee the benefit of such a procedure. The virtue of conciliation is in the possibility it presents for the dispute to be resolved in a less adversarial fashion by means of a consensus-seeking process. This has obvious advantages for the

continuation of the employment relationship should reinstatement prove to be the appropriate remedy. The conciliation procedure in the collective agreement has the additional advantage of being an opportunity to obtain a quick non-binding award by less litigious means from a skilled independent mediator ... The arbitration clause in the contract of employment denies the employee these benefits and thus permits less favourable treatment." [Paragraph 22]

"Moreover, clause 5(3) of the collective agreement makes it clear that where conciliation fails the Secretary of the NBC will be obliged to arrange for arbitration if any party to the dispute has requested in writing that it be resolved through arbitration. The Secretary is further obliged within 14 days of a proper request for arbitration to arrange for the signing by the parties of an arbitration agreement detailing the arbitrator's terms of reference. It is incumbent on the Secretary to appoint an arbitrator from the panel accredited by the council, to schedule the time and place for the hearing and if necessary to arrange for witnesses to be subpoenaed to attend the hearing. The NBC, it would seem, will bear the costs of the appointment of the arbitrator, the arrangement of the hearing and the subpoenaing of witnesses. The implication of the provisions dealing with the advisory award in conciliation is that the parties normally will bear their own attorney and client costs in the arbitration, unless the referral is construed to be frivolous and vexatious." [Paragraph 24]

"In contrast to clause 5(3) of the collective agreement, clause 13 of the contract of employment, the arbitration clause, is silent or at best ambiguous in relation to these critical aspects of the arbitration process. It places no duty upon the employer or any independent third party, on request of the dismissed employee, to submit the matter to arbitration, to appoint an arbitrator or to arrange the hearing. ... There is no indication to whom or to what institution the notice should be submitted or of what rights a referring employee might have to compel the process. There is, in addition, no indication as to the basis for payment of the arbitrator or the costs of the process. There is also no bar to the arbitrator awarding costs against the unsuccessful party notwithstanding the referral being neither vexatious nor frivolous. ... On these further grounds, the arbitration clause must be held invalid in terms of section 199(2) of the LRA for permitting less favourable treatment than that prescribed by the collective agreement." [Paragraph 25]

"What clause 5 of the collective agreement means is that all disputes in respect of which the council has subject-matter jurisdiction shall be referred to the council for conciliation and arbitration, if and once a party exercises the entitlement to refer it, such being disputes the LRA requires the council to conciliate and arbitrate. Clause 5 is a *provision* of the collective agreement, which, by the Minister's extension of it to non-parties in terms of section 32 of the LRA, has the status of subordinate legislation. And section 199(1)(c) unequivocally provides that a contract of employment may not waive the application of any provision of the collective agreement. Any provision in a contract of employment that purports to permit

such a waiver is invalid … Clause 13 of the contract of employment purports to waive the application of clause 5 of the collective agreement which requires disputes over which the NBC has subject-matter jurisdiction to be referred to conciliation and arbitration in accordance with the provisions of the collective agreement. Clause 13 is, accordingly, also invalid for this reason." [Paragraph 30]

The appeal was upheld.

DEPARTMENT OF CORRECTIONAL SERVICES & ANOTHER V POPCRU & OTHERS [2012] 2 BLLR 110 (LAC)

The respondents were correctional officers who were dismissed for wearing dreadlocks. The Labour Court found the dismissal to be automatically unfair.

Murphy AJA (Waglay DJP and Davis JA concurring) held:

"The dress code introduced differentiation in respect of hairstyle, which is not facially neutral. "Rasta man" hairstyles are directly prohibited among male correctional officers. The code makes a distinction between male and female officers. … Contrary to the finding of the court *a quo*, there is irrefutably another comparator besides gender … It is those male correctional officers whose sincere religious or cultural beliefs or practices are not compromised by the dress code, as compared to those whose beliefs or practices are compromised. The norm embodied in the dress code is not neutral but enforces mainstream male hairstyles … at the expense of minority and historically excluded hairstyles … It places a burden or imposes disadvantages on male correctional officers who are prohibited from expressing themselves fully in a work environment where their practices are rejected and in which they are not completely accepted for who they are." [Paragraph 25].

"… [T]he respondents all wore dreadlocks because it was either an expression of their Rastafarianism, their religious beliefs, or an expression of their cultural practices and beliefs pertaining to the calling and traditions of Xhosa spiritual healing. The constitutional court has accepted that Rastafarianism is a religion entitled to protection under our Bill of Rights. It has not been contended that the spiritual practices of Xhosa culture are not similarly entitled. There is also no dispute … that the wearing of dreadlocks is a central tenet of Rastafarianism and is a form of personal adornment resorted to by some who follow the spiritual traditions of Xhosa culture. Courts, in any event, are not usually concerned with the centrality or rationality of beliefs and practices when determining questions of equality or religious and cultural freedom. … Equality and freedom of religion and culture protect the subjective belief of an individual provided it is sincerely held; though there may be room for a more objective approach to cultural practices of an associative nature." [Paragraph 26]

"The dress code directly discriminated against the respondents in that they were treated less favourably than not only their female colleagues but also those upon whom the code imposed no religious or cultural disadvantage. The respondent's beliefs were necessary factual criteria upon which the decision to dismiss was based in a causative sense: but for their beliefs, the respondents would not have been dismissed. ..." [Paragraph 28]

"... [D]iscrimination is not saved by the fact that a person acted from a benign motive. Usually motive and intention are irrelevant to the determination of discrimination because that is considered by asking the simple question: would the complainant have received the same treatment from the defendant or respondent but for his or her gender, religion, culture etc? ..." [Paragraph 35]

"Direct discrimination does not require that the employer intends to behave in a discriminatory manner or that it realises that it is doing so. Only where the factual criteria upon which the alleged differential treatment is based are unclear, will the court investigate the mental processes of the employer in order to infer, as a question of fact, from that mental state the existence of discrimination on prohibited grounds. In the present case, the reason for the dismissal was that the respondents wore and refused to cut their dreadlocks. But for their gender, religion and culture, they would not have been dismissed. The evidence establishes beyond question that the reason for their dismissal was discrimination on grounds of gender, religion and culture. ..." [Paragraph 36]

"... A dismissal is automatically unfair only if the discrimination complained of is unfair. The LRA does not define the concept of fairness in the context of section 187(1)(f), but it may be accepted that the considerations normally applicable in determining fairness under the EEA and the Promotion of Equality and Prevention of Unfair Discrimination, apply equally under the LRA. The test of unfairness under these provisions concentrates upon the nature and extent of the limitation of the respondent's rights; the impact of the discrimination on the complainants; the social position of the complainants; whether the discrimination impairs the dignity of the complainants; whether the discrimination has a legitimate purpose; and whether reasonable steps have been taken to accommodate the diversity sought to be advanced and protected by the principle of non-discrimination. ... The provisions of the Constitution find no direct application in the present dispute. However, it is permissible when determining fairness to have regard to considerations similar to those usually taken into account when weighing the justifiability of a measure that is the questions normally relevant to a limitations analysis under the Constitution. These include the purpose of the prohibition; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose." [Paragraph 37]

"Courts must show a measure of deference to the authorities who are statutorily required to run the security organs of State and have the necessary insight and expertise to do so. But that deference must

always be tempered by a concern that the fundamental right to equality has not been violated. ... Of importance ... is an evaluation of any impairment to the dignity of the complainants, the impact upon them, and whether there are less restrictive and less disadvantageous means of achieving the purpose. Perhaps most importantly, an employer must show that the discriminatory measure or prohibition achieves its purpose. ... [T]here must be a rational and proportional relationship between the measure and the purpose it seeks to achieve. Reasonable accommodation of diversity is an exercise in proportionality bearing upon the rationality of the means of achieving the legitimate purpose of the prohibition." [Paragraph 43].

"The appellants have not put up any defence that short hair or un-dreadlocked hair is an inherent requirement of the job and that the measure was, accordingly, protected by section 187(2) of the LRA. The suggestion that short hair offered greater protection against assaults by inmates by leaving them with less hair to grab during an assault cannot be entertained seriously. Firstly, the same rationale does not apply to women; and secondly there is no evidence supporting the claim that such events are a genuine or recurring threat outweighing the rights to equality and dignity." [Paragraph 45]

"To the extent that the appellants' submission is that neatness, uniformity and discipline were the purposes of the discrimination, there is no rational connection between those purposes and the measure. ... These examples of permissible hairstyles ... reinforce the impression that dominant or mainstream hairstyles, representing peculiar cultural stereotypes are to be favoured over those of marginalised religious and cultural group." [Paragraph 47]

"It is also difficult to understand how the prohibition of dreadlock hairstyles contributes positively to the issues of discipline, security, probity, trust and performance, which were the focal concerns of the commissioner. Non-compliance with a valid, constitutional, lawful and reasonable rule is undoubtedly a disciplinary infraction. But that proposition provides an insufficient answer to a request for reasonable accommodation or exemption on the grounds of religion and culture. ... There is ... no rational basis to the apprehension that Rasta hairstyles lead to ill-discipline. One has only to state the proposition to realise the unacceptable pejorative stereotyping which it entails. ..." [Paragraph 48]

The appeal was dismissed. The decision of the LAC was upheld by the SCA in **Department of Correctional Services & another v Police & Prisons Civil Rights Union & others (2013) 34 ILJ 1375 (SCA).**

LEWIN V CCMA & OTHERS [2005] 3 BLLR 263 (LC)

The applicant, a postal official, was dismissed for misappropriating funds from his employer, the SA Post Office. Evidence led at his disciplinary hearing indicated that after receiving a cash deposit from a client, he had entered the amount in her savings book, but had not completed a deposit slip. The respondent commissioner found that the applicant must have stolen the money, and ruled his dismissal fair.

Murphy AJ held:

"The appropriate standard question to be asked in this matter … was to ask whether there was sufficient evidence on a preponderance of probabilities for the arbitrator to conclude that the dismissal was justified." [Paragraph 15]

"In the review proceedings, the applicant contended that the second respondent failed to properly consider the evidence led by the applicant, in particular that a procedural lapse due to work pressure might have resulted in the loss." [Paragraph 16]

"I cannot agree that the award is reviewable on the grounds that the second respondent appears to have ignored the speculative possibilities put forward. While they do not appear to be canvassed in the award, their tentative and improbable nature may have led the second respondent quite reasonably to have attached little weight to them. Accordingly … the most probable explanation is that the applicant misappropriated the deposit. As I have stated, it is highly unlikely that there was a corresponding error of the kind suggested by the applicant on the day in question. There is no reason at all to doubt Mr Wong's evidence that he had handed over the money and that he had filled in the deposit slip. Cumulatively, the absence of an entry in the journal, the failure to transmit the deposit slip to Bloemfontein, the entry of the transaction in Mr Wong's savings book and the loss of the audit roll at Retreat post office for the day in question provide sufficient circumstantial evidence from which the plausible and legitimate inference can be drawn that the applicant misappropriated the money." [Paragraph 17]

The appeal was dismissed.

KHANYILE V CCMA & OTHERS [2005] 2 BLLR 138 (LC)

The applicant had many years' experience as a magistrate, and has served as an acting senior magistrate. However, the Minister, presumably acting on the advice of the Magistrates Commission, chose not to promote him to the vacant senior position. The applicant's cause of action was that the Minister's refusal to appoint him constituted an unfair labour practice.

Murphy AJ held:

"Proceeding from the trite proposition that the intention of the legislature in relation to the scope and application of the LRA should be ascertained from the wording of the applicable sections, or looked at from a purely textual point of view, magistrates *prima facie* fall within the definition of "employee", by virtue of being persons who work for other persons or for the State and who receive a remuneration. However, given the special constitutional nature of a magistrate's position, it is necessary to construe the definition within a broader constitutional framework." [Paragraph10]

"The constitutional objective set out in section 174(7) of the Constitution has been given effect to by the Magistrates Act 90 of 1993. This statute was subjected to extensive scrutiny by the Constitutional Court in *Van Rooyen v State (General Council of The Bar of SA Intervening) …* in which the learned Chief Justice pronounced on various aspects of the legislation and handed down an authoritative account of the status and position of the magistracy within our judicial system." [Paragraph 13]

"The Constitutional Court's point of departure was to note that the Constitution … not only recognises that the courts are independent and impartial, but also provides important institutional protection for the courts. That said, the constitutional protection in section 175(2) of the Constitution does not mean that the lower courts have, or are entitled to have, their independence protected in the same way as the higher courts. The mere fact that the statutory provisions regulating magistrates are provided for in an Act of Parliament and, hence, are different to the constitutional provisions governing the independence of judges, the court found was not a reason for holding them to be unconstitutional. More-over, the court noted that the different functions of magistrates (the fact that their decisions can be appealed against and that they exercised no real review functions) might justify a lower standard of independence. However, it is clear from various pronouncements throughout the judgment that magistrates are to be seen as occupying a constitutional position similar in many respects to judges." [Paragraph 14]

Murphy AJ then further examined the Constitutional Court's decision in *Van Rooyen*, and discussed differences and similarities between the position of judges and magistrates, and the relevant legislation:

"Thus, the findings in paragraphs [139] and [195] of the [Van Rooyen] judgment strongly suggest that, by virtue of their office, magistrates should not be seen as employees entitled to engage the processes of the Labour Relations Act … for the purposes of protecting their rights. As judicial officers they hold constitutional and statutory office and the requirements of judicial independence render it inappropriate for commissioners of the CCMA, who are not judicial officers, to pronounce on their conduct or suitability for promotion." [Paragraph 27]

"This latter pronouncement [in *Van Rooyen*] is unassailable authority for the proposition that the constitutional structure contemplates disputes about the promotion of magistrates to be matters falling within the exclusive remit of the Magistrates Commission and the Minister subject to judicial review by "the higher judiciary". Such matters therefore do not fall within the province of the Commission for Conciliation, Mediation and Arbitration established by the Labour Relations Act …. [Paragraph 29]

"In the premises, I am persuaded that a magistrate is not an employee as defined within the Labour Relations Act, by virtue of the special constitutional position a magistrate holds as a judicial officer appointed in terms of Chapter 8 of the Constitution …" [Paragraph 30]

Murphy AJ then considered cases from Namibia and India:

"… [I]n *Union of India v Pratibha Bonnerjea* … the question to be considered was whether under the Indian Constitution there was, strictly speaking, a relationship of master and servant between the

government and a High Court Judge. That court concluded …: "A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill-will, unless he was totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone . . . That is because the Constitution makers were conscious that the notion of judicial independence must not be diluted. If the relationship between the government and the High Court Judge is of master and servant it would run counter to the constitutional creed of independence for the obvious reason that the servant would have to carry out the directives of the master. Since a High Court Judge has to decide cases brought by or against the government day in and day out, he would not be able to function without fear or favour if he has to carry out the instructions or directives of his master. The whole concept of judicial independence and separation of the Judiciary from the Executive would crumble to the ground if such a relationship is conceded. High Court Judges would not be true to their oath if such a relationship is accepted."" [Paragraph 32]

"Given the evolving concept of judicial independence in respect of the magistracy in South Africa, as identified by the Constitutional Court in the *Van Rooyen* judgment, there is no reason why these considerations cannot be seen as applying equally to magistrates." [Paragraph 33]

"In the premises, as I have already stated, the only appropriate finding in this matter is that the applicant is a judicial officer and not an employee in terms of the Labour Relations Act or an officer employed in terms of the Public Service Act and hence is subject to Chapter 8 of the Constitution … the Magistrates Act … the regulations for judicial officers on the lower courts and the jurisdiction of the Magistrates Commission … It follows that neither the Commission for Conciliation, Mediation and Arbitration nor this Court has jurisdiction regarding disputes about promotion involving a magistrate in his capacity as a judicial officer. The consequence of such a finding is that the arbitration award handed down by the second respondent … is defective in that the Commission for Conciliation, Mediation and Arbitration did not have jurisdiction to entertain the dispute in the first place and hence must be set aside." [Paragraph 35]

The application was dismissed and the arbitration proceedings set aside.

SELECTED JUDGMENTS

APOLLO TYRES SA (PTY) LTD V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2013) 34 ILJ 1120 (LAC)

Case heard 31 August 2012, Judgment delivered 21 February 2013

This case dealt with the question of whether an employee who alleged that her employer committed an unfair labour practice relating to the provision of benefits would only arise if it could be shown that the entitlement to benefits arose from contract or law. Appellant had instituted an early retirement scheme. Third respondent (Hoosen) applied, but was denied entry. She referred an unfair labour practice dispute, and the CCMA and reviewing court found in her favour.

Musi AJ (Patel JA and Hlophe AJA concurring) held:

"There is no shortage of judgments and academic writings wherein it is endeavoured to capture the essence of and define the word 'benefit' in the context of s 186(2)(a) of the Act. What is clear … is that the word is, in this context, imprecise and defies definition." [Paragraph 20]

Musi AJA considered Labour Court decisions, and continued:

"These decisions were influenced by policy considerations in order to keep the distinction between disputes over rights and conflicts of interests pure and in separate compartments. This consideration is important because such a categorization and separation purport to give meaning to s 65(1)(c) which proscribes industrial action over disputes that the parties can refer to arbitration or the Labour Court, ie disputes over rights. A wide definition of benefits would, so it is said, undermine the right to strike which is constitutionally entrenched. … The distinction that the courts sought to draw between salaries or wages as remuneration and benefits is not laudable but artificial and unsustainable. The definition of remuneration in the Act is wide enough to include wages, salaries and most, if not all extras or benefits. …" [Paragraphs 24 - 25]

"In Protekon (Pty) Ltd v CCMA & others, it was correctly, in my view, stated that the concern that a wide definition of 'benefit' might curtail the right to strike needs not persist. …" [Paragraph 28]

"… The court [Labour Appeal Court in the Scheepers case] clearly recognized that the unfair labour practice dispensation does create rights. This is a significant shift from the notion espoused in HOSPERSA that the right to a benefit must be derived from statute, contract or a collective agreement. … It is unfortunate that the court [LAC] in GS4 Security Services did not consider what was said in both the majority and minority judgments in the Department of Justice v CCMA matter. In both judgments it is categorically stated that item 2(1)(b) creates a right not to be treated unfairly in relation to promotion, demotion, disciplinary action short of dismissal, training and the provision of benefits. … The unreserved acceptance of HOSPERSA by this court in GS4 Security Services to the exclusion of other cases where a different view was enunciated renders it difficult for me to embrace the judgment or to endorse it in the wake of the criticism to which the HOSPERSA judgment was subjected … GS4 Security Services is therefore susceptible to and deserving of the same criticism visited upon HOSPERSA." [Paragraphs 35; 37 - 38]

"… It is … clear from the reasoning in the majority and minority judgment [in Department of Justice v CCMA] and the judgment of Scheepers that the unfair labour practice dispensation creates rights and

that an employee has an ex lege right created by s 186(2)(a) not to be treated unfairly in relation to promotion, demotion, training and the provision of benefits." [Paragraph paragraph number]

" ... The Labour Court [in Protekon v CCMA] .. concluded that [s 186(2)(a)] was introduced primarily to permit scrutiny of employer discretion in the context of employee benefits. I agree ... I also agree, with qualification, ... that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit." [Paragraphs 45 - 46]

"The first instance is in sync with the HOSPERSA approach. The second ... calls for qualification. Mr Pretorius argued that ... there must be contractual terms even in instances where the employer exercises a discretion. If that is indeed what the Labour Court meant, then I cannot agree with it. I am of the view that the Labour Court used the words 'contractual terms' loosely. It did not mean that the source of the discretion must be found in a contract. ... [I]f one has regard to the context of the whole judgment and the Labour Court's conclusion, it actually meant when the employer exercises a discretion under the terms of the scheme conferring the benefit. ... The facts of this matter clearly illustrate that the HOSPERSA approach ... is untenable. ... [Hoosen] would ... on the HOSPERSA approach, be able to challenge, by way of arbitration, any unfairness relating to the ordinary retirement benefits. When the appellant decided to accelerate the existing contractual benefits and retained a discretion to grant the accelerated benefits, the benefits would strangely morph into something less than benefits because according to the HOSPERSA approach she did not have a contractual right to the accelerated retirement benefits. The employer would then have a licence to act with impunity. ... Clearly the notion that the benefit must be based on an ex contractu or ex lege entitlement would, in a case like this, render the unfair labour practice jurisdiction sterile." [Paragraphs 47 - 48]

"...In my judgment 'benefit' in s 186(2)*(a)* of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as *HOSPERSA*, *GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong." [Paragraph 50]

"In my view, Hoosen qualified to participate in the scheme and was unfairly disallowed to participate therein. In my judgment the appellant committed an unfair labour practice by not allowing her to go on early retirement." [Paragraph 60]

"The appellant acted in a deplorable manner towards Hoosen. When she ... asked ... whether she could get a legal opinion on the issue of managerial discretion he threatened her, no, he in fact intimidated her. When the referral documents were served on the appellant, she was told to leave with immediate effect. So despicable was its conduct that a farewell party that was arranged for her was cancelled. That is not the way to treat an employee who has, by all accounts, given more than 24 years of dedicated and excellent service. The appellant ought to be mulcted in costs." [Paragraph 60]

The appeal was dismissed.

PT OPERATIONAL SERVICES (PTY) LTD V RETAIL & ALLIED WORKERS UNION ON BEHALF OF NGWELETSANA (2013) 34 ILJ 1138 (LAC)

Case heard 19 September 2012, Judgment delivered 27 November 2012

This appeal revolved around the question of whether the functus officio doctrine applied to CCMA commissioners, and if it did, whether the commissioner Cellier had been functus officio after a ruling given on 12 August 2004. The Labour Court had found that the doctrine did apply to rulings made by commissioners acting under the auspices of the CCMA, and that CCMA commissioners could not se aside their own rulings.

Musi AJA (Waglay AJP and Ndlovu JA concurring) held:

"It is now settled that commissioners conducting arbitrations under the auspices of the CCMA are performing an administrative function. Although commissioners perform an administrative function such function includes adjudicative functions." [Paragraph 23]

"Section 10(1) of the Interpretation Act must always be read in conjunction with the empowering legislation, in this case the LRA, in order to determine whether the empowering statute contains a contrary intention. There was no need for the court a quo and there is no need for this court, given the clear provisions of the LRA, to embrace, in this matter, a restrictive or broad interpretation of s 10(1). Section 10(1) must yield to a contrary intention in the LRA. … Section 144 of the LRA gives commissioners the right to vary a decision under certain limited circumstances. They therefore have a limited right to revoke their decisions." [Paragraph 27]

"In Minister for Immigration & Multicultural Affairs v Bhardwaj, … the Federal Court of Australia suggests that one should have regard to the statutory context in order to decide whether there is a contrary intention. … This statement applies, in my view, with the necessary changes, to the detailed provisions in the LRA pertaining to the conduct of arbitrations and the review of CCMA commissioners' decisions. In my view the court a quo was correct in its conclusion that the *functus officio* doctrine applies to CCMA commissioners. They may therefore only revisit their decisions to the extent that it is permitted by the provisions of s 144 of the LRA. They may not do so whenever they like, but may do so if the jurisdictional facts in s 144 are present. They may also do so, as I will show presently, when they have performed an allied function but not yet performed the power or duty bestowed on them by the legislature." [Paragraph 28]

"The veritable question is whether a final decision was taken on 12 August 2004 by Cellier. Mr Gerber argued that Cellier was not functus officio and relied exclusively on Ex parte Koster. … Erasmus J found that the assurance that the master gave could not be compared to a final decision of a court and that the assurance was not a recommendation in terms of … the Insolvency Act. Erasmus J further found that the master had to have the application before him before making the recommendation. He found that the master was not functus officio when he refused to recommend the application." [Paragraph 29]

"I fully agree with Erasmus J's reasoning and conclusion. One can strengthen it by stating that it is only after an administrative agency has finally performed all its statutory duties or functions in relation to a particular matter which is subject to its jurisdiction that it can be said that its powers or functions were spent by its first exercise." [Paragraph 30]

"It is unfortunate that Cellier decided to dismiss the application instead of striking it from the roll. I have seen many rulings of a technical … nature where the correct order ought to be striking a matter from the roll but the matter would be dismissed instead." [Paragraph 31]

"Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word 'dismissed' is used it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits then the order is final. If not, then it is not final. … Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance." [Paragraph 35]

"The same applies … to applications for rescission that are out of time and not accompanied by an application for condonation. Although the appropriate order would be to strike it from the roll, dismissing it does not mean that the merits of the rescission application have been considered. … The commissioner could not consider the rescission application which was out of time without an application for condonation. He could therefore not exercise his powers, duties or functions in terms of s 144 because a condition precedent (condonation) has not been fulfilled. …" [Paragraphs 36 – 37]

"I conclude that Cellier did not finally perform his statutory function or duty in relation to the merits of the rescission application on 12 August 2004. It cannot therefore be said that he exhausted his powers and discharged his mandate in relation to the rescission application. The court a quo erred in coming to the conclusion that the ruling of 12 August 2004 rendered Cellier *functus officio* and that he could therefore not entertain the subsequent applications for condonation and rescission on 26 February 2007. There were proper applications before him. … " [Paragraph 38]

"Taking all the circumstances of this case into consideration, especially the dilatoriness of the appellant, fairness and the law dictate that no order as to costs should be made … The Director of the CCMA is requested, in the interest of justice, to ensure that the arbitration proceedings are expedited." [Paragraphs 41 – 42]

The appeal was upheld

NATAL WITNESS V GOZUNDER & OTHERS (2010) 31 ILJ 2339 (LAC)

Case heard 25 February 2010, Judgment delivered 4 June 2010

This appeal dealt with the common-law rule of peremption of a right to appeal. First respondent worked for the appellant newspaper, and was charged with misconduct over anonymous e-mails he had sent to a female colleague. He pleaded guilty to contravening the company's internet and sexual harassment policies, and was given a warning for the former and dismissed for the latter. Following arbitration, the second respondent commissioner found the dismissal to have been substantively fair. The Labour Court found the dismissal to be procedurally fair but substantively unfair, and ordered reinstatement.

Musi AJA (Waglay JP and Tlaletsi JA concurring) held:

“The appellant subsequently applied for leave to appeal. The application for leave to appeal was dismissed … on 24 November 2008. … The appellant was granted leave to appeal by this court on 31 May 2009. The appellant did not mention anything, in its founding affidavit in support of the petition, about the interaction between the parties between 24 November 2008 and December 2008. …” [Paragraphs 14 - 15]

The interaction in question involved correspondence from the appellant’s attorneys to first respondent’s attorneys, indicating that despite disagreement with the Labour Court’s decision, appellant had elected to accept the finding, and expected first respondent to report back to work. First respondent argued that appellant’s right to appeal had thereby been perempted.

“Although peremption contains elements of waiver and estoppel, the focus is exclusively on the express or implied conduct of the unsuccessful party. Whether the other party acted in a particular manner based on the representation is generally irrelevant. It can however be relevant in order to prove the renunciation, ie that the successful party would not have acted in a particular manner if the renunciation was not communicated to such party. The successful party does not have to adjust his/her position. He or she will normally wait for the unsuccessful party to act in accordance with the judgment or it will take steps to enforce the judgment or order. An unsuccessful party that unequivocally, expressly, unconditionally and unilaterally acquiesces in a judgment should be bound by such election irrespective of whether the other party has adjusted his/her position to his/her detriment or not. The acquiescence in this matter was, in any event, not induced by the conduct of the first respondent. There is no reason why the appellant's election should be made subject to his conduct. All that the successful party has to prove in order for the unsuccessful party to forfeit its right to appeal, is that the latter's conduct points unequivocally, indubitably, necessarily or irresistibly to the conclusion that there would be no attack on the court's judgment.” [Paragraph 25]

“… 'Despite our client's dissatisfaction with the ruling of the Labour Court. . . .' Nothing turns on these words, if anything they show conduct that is inconsistent with any intention to appeal. The appellant is dissatisfied with the ruling. It knows it can petition the Judge President but decides consciously not to do so. In any event, many losing litigants that have fought a fierce legal battle are dissatisfied when they lose. It is exactly their dissatisfaction that propels them to challenge the judgment. If that statement is read in context it becomes clear that there was an unequivocal acquiescence. …” [Paragraph 26]

“The appellant's other argument was that it cannot be held to the decision of a lower level of management unless it is found that they had ostensible authority to take the decision. The issue of ostensible authority does not arise in this matter. Nowhere is it ever alleged that the lower level of management did not have the necessary authority to take the decision that it took. When lower level of management has actual authority to represent the appellant, the appellant is bound by the decisions of the lower level of management. It is only when the agent does not have the necessary authority (actual) and the principal creates the impression that the agent has the necessary authority that ostensible authority arises. Ostensible authority flows from the appearance of authority created by the principal” [Paragraph 27]

“Actual authority is binding as between the company and the agent and also as between the company and others, whether they are within the company or outside it. The fact that a higher level of management has overruled a lower level of management that had actual authority does not make the decision of the lower level of management less binding.” [Paragraph 28]

"The appellant's last argument was that it has not put into operation the judgment of the Labour Court because the first respondent was not reinstated neither was he paid any backpay, therefore the right to appeal has not been perempted. Total or partial fulfilment of the terms of the order is indicative of acceptance of the judgment. It is however not a prerequisite for peremption. The right to appeal can be perempted without there being any fulfilment of the terms of an order or judgment." [Paragraph 29]

"... My finding that the appellant has forfeited its right to appeal means that there is no proper appeal before us. The appropriate order would therefore be to strike the matter off the roll." [Paragraph 31]

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT V VAN DER MERWE NO & OTHERS (2010) 31 ILJ 1184 (LC)

Applicant sought to review and set aside a ruling made by the first respondent commissioner, under the auspices of the second respondent bargaining council, on the basis of a lack of jurisdiction. Applicant argued that the dispute was an interest dispute, not a rights dispute. The dispute centred on applicant's performance management system policy, in terms of which performance bonuses were awarded. The union had referred an unfair labour practice dispute, on the grounds that payments for performance bonuses and notch increments had not been implemented..

Musi AJ held:

"It is the duty of the commissioner to ascertain whether he/she has jurisdiction to adjudicate the dispute. .... This is so because lack of jurisdiction renders the proceedings and resultant award a nullity. ..." [Paragraph 20]

"The categorization of the dispute generally determines its path. Interest disputes take the path of resolution by way of interaction by the parties to the dispute. Rights disputes generally take the adjudication route. To allow an interests dispute to be arbitrated under the pretext that it is a rights disputes would lead to the subversion of the collective bargaining process. ... The Constitutional Court has recognized the general rule that, except in organizational rights disputes, the scheme of the LRA is that where a dispute may be referred to arbitration, it is not a matter that can constitute the basis for a strike. See NUMSA & others v Bader Bop (Pty) Ltd & another ..." [Paragraph 24]

"The argument of the union that the collective agreement contained a dispute-resolution mechanism that must be adhered to in these kinds of disputes is untenable. ... [The collective agreement] make[s] it clear that it is only disputes about the interpretation or application of the collective agreement that may be referred to the GPSSBC for conciliation and arbitration." [Paragraphs 25 - 26]

"This dispute is not about the application or interpretation of the collective agreement. In fact the applicant alleged, and it was not disputed, that it stuck chapter and verse to the provisions of the collective agreement. ... The commissioner clearly misconstrued the union's case by stating that the dispute was about the union member's claim to be fairly treated with regard to awarding or not of a performance reward in the form of a merit bonus. That was never the case. The union wanted all those who were assessed and found eligible for performance bonuses to receive same irrespective of the limit set in the collective agreement. ..." [Paragraph 27 - 28]

“It is not in the province of arbitrators to grant awards in respect of matters that are properly reserved for the terrain of collective bargaining. The arbitrator had no jurisdiction or power to order the applicant to pay an amount in excess of the 1,5% and 1% limits set in the collective agreement. That is clearly a classical interest issue. The commissioner exceeded his powers. ” [Paragraph 30]

“The applicant's second argument, ie that performance bonuses and pay progression awards are not benefits, is also compelling.” [Paragraph 31]

“It is common cause that the union members did not have a right ex contractu (in terms of their employment contracts or the collective bargaining agreement) or ex lege to performance bonuses and pay progression. The commissioner correctly … found that those rewards were given annually, to those who qualified, at the discretion of the applicant. An employee cannot utilize his/her right not to be subjected to unfair labour practices where the employee believes that he/she ought to enjoy certain benefits which the employer is not willing or unable to give to him/her, to create an entitlement to such benefit through arbitration in terms of the LRA. …” [Paragraph 32]

“Performance bonuses and pay progressions are not given arbitrarily or to every employee irrespective of performance. The performance of the individual employee is assessed over a fixed period of time. If the performance of the employee is good, 61% to 79% of the performance objectives met, or outstanding, 80% and more of performance objectives met, that employee qualifies to be rewarded by way of merit and/or pay progression.” [Paragraph 36]

“These awards are clearly a quid pro quo for good and outstanding services rendered. It is nothing else but remuneration for services rendered. It is therefore remuneration and not a benefit. … The commissioner's ruling that he had jurisdiction to adjudicate the dispute is clearly wrong. He has no jurisdiction to adjudicate an interest dispute.” [Paragraphs 37; 39]

The first respondent’s ruling was thus set aside for lack of jurisdiction.

SELECTED JUDGMENTS

NCHABELENG V UNIVERSITY OF VENDA AND OTHERS (2003) 24 ILJ 585 (LC)

Applicant, an academic employed by the University of Venda, was accused of misconduct and dismissed following a disciplinary process. He referred a grievance about an unfair dismissal to the CCMA. Meanwhile he also launched an urgent application in the Labour Court.

Sutherland AJ held:

"... [T]he validity of the dismissal of 28 May 2002 is attacked. This relates to the lawfulness of that act on behalf of the university rather than its unfairness. The second point of controversy is, independently of the validity of the dismissal, that the dismissal be suspended pending the finalization of proceedings of which the CCMA became seised on 20 June 2002. This axiomatically relates to the conciliation and the subsequent arbitration proceedings which might proceed if conciliation fails. The third issue is the prayer for an interdict to maintain the applicant in occupation of the residence provided to him as part and parcel of his terms and conditions of employment, 'pending the finalization of the dispute between the parties'. Precisely what event the 'finalization of the dispute' is intended to identify is not entirely clear. ..." [Paragraph 6]

"The thrust of the relief sought is to require of this court to order specific performance of the applicant's contract of employment until such time as litigation concerning its termination has been exhausted. Moreover, this relief is sought while the very issue of the continuation of his employment is a dispute already referred to the CCMA for resolution." [Paragraph 7]

"It is not apparent to me on what proper basis it can be contended that the relief sought in this court is competent. ... The Labour Court enjoys no jurisdiction which is not expressly conferred upon it by the provisions of the Labour Relations Act. ... There are few exceptions to the general structure of the LRA that the Labour Court enjoys jurisdiction over a labour dispute only after that dispute has been processed by the CCMA." [Paragraphs 8 -9]

"... [T]he notion that the Labour Court may be called upon to intervene in respect of a dispute referred to the CCMA whilst it is being dealt with there is misconceived. ... Whilst his referral of a dispute concerning an unfair dismissal is working its way through the labyrinthine processes of conciliation and of arbitration before the CCMA, he seeks the intervention of this court to prevent such harm as may befall him in consequence of the dismissal. The proposition is novel. If it were valid, it would unquestionably ensure that in respect of every dismissal of any person for whatever reason, the employment relationship could be preserved until such time as litigation about the issue had been exhausted. ... " [Paragraphs 10 - 11]

"... [I]n my judgment ... there is no general jurisdiction conceivable which is vested in the Labour Court which can preserve the status quo of an employment relationship, pending finalization of CCMA proceedings or any further proceedings flowing from dissatisfaction with the results of such proceedings." [Paragraph 12]

"... [A] further question arises from the basis of the averment that the dismissal is unlawful, as distinct from unfair. If the Labour Court is satisfied that the dismissal is indeed unlawful, may the court intervene to declare it so, and thus restore the status quo ante?" [Paragraph 13]

"No sound reason exists in law why an employee, who is the victim of an unlawful dismissal, cannot approach a court of law in order to have the unlawful act declared thus, and obtain an order of specific H performance. … [T]he jurisdiction enjoyed by an ordinary civil court to afford such relief would also be enjoyed by the Labour Court." [Paragraph 14]

"The postulates of the scenario … would be relatively uncomplicated if the only forum which the applicant had approached for relief had been this court or the High Court. The applicant's cause of complaint would have been one which was plainly premised upon his rights at common law, rather than his rights to fair treatment flowing from the provisions of the LRA. However, in this matter, the applicant has sought to have his cake and eat it. His initial sortie was to refer a dispute concerning an unfair dismissal to the CCMA. Thereafter he took up the view that he can also approach a court of law to have the dismissal declared invalid for want of lawfulness. The question thus arises, whether or not it is appropriate, even if competent, that the applicant should be indulged the opportunity to ventilate his dispute in two fora simultaneously? …" [Paragraph 15]

"It seems to me wholly inappropriate that it is open to a litigant to do so. The fact that this court has an umbilical relationship with the CCMA makes it particularly odious, but it would only be in a matter of degree less odious had this application been brought before the High Court. In my view, for reasons of policy, the Labour Court or the High Court should decline to entertain an application over the identical *dispute* being prosecuted in the CCMA." [Paragraph 17]

Sutherland AJ then found that in any event, the decision had not been unlawful:

"The contention is advanced that the only person who had the lawful power to discharge [applicant] was Professor Nkondo, but this letter proves that he was discharged by Mr Matidga. … [T]he contention is misconceived. It is true the bearer of the power did not sign the document in person. It is plain that another person signed the document on behalf of the bearer of the power. In the absence of some basis for concluding that this form of signature renders the act described in the text of the letter invalid, the document constitutes evidence of a decision taken by Professor Nkondo and not of the person who, upon the authority of the professor, signed the document. It is plain from the papers filed … that Professor Nkondo indeed sought to have the applicant dismissed. …" [Paragraphs 19 – 20]

"…In my view if there was no validly constituted appeals committee on 16 March 2002 and the appeal therefore could not have validly been heard the consequence is simply that no appeal has been heard. The unfairness of the failure to hold a valid appeal timeously is not for the present exercise a point of concern. The effect of these circumstances is not to render the dismissal any less valid or unlawful. … Accordingly, even on the premise relied upon by the applicant, no invalidity or unlawfulness necessarily follows in respect of the dismissal. …" [Paragraph 21]

"An ingenuous contention advanced by the applicant is that the dismissal … is automatically suspended because he noted an appeal against it. In this regard he relies on the common-law rule that the noting of an appeal suspends an order of court. … In my view it is wholly misconceived to attempt to import the doctrine of the automatic suspension of an order of a court upon the noting of an appeal, into the industrial relations environment. It should not be forgotten that a valid lawful dismissal does not incorporate as a matter of law any right to an appeal. A 'right' to appeal flows solely from the practice, endorsed in the LRA Code of Good Conduct: Dismissals, as a ready means by which a procedurally fair dismissal, give the equitable norms promoted under the provisions of the Labour Relations Act, may be proven. The provision of an appeal is confined to the arena of unfairness." [Paragraphs 22 – 23]

The application was dismissed with costs.

LENTSANE & OTHERS V HSRC (2002) 23 ILJ 1433 (LC)

The three applicants were retrenched by the respondent. They filed a statement of claim on 5 December 2001. According to the Rules of Court within ten days thereof, that is to say on 20 December 2001 the respondent was obliged to serve a statement of defence. It failed to do so; instead it filed its statement of defence on 25 March 2002. This application sought condonation of that late filing.

Sutherland AJ held:

"Mr Wesley urged on me to take seriously the injunctions mentioned in A Hardrodt (South Africa) (Pty) Limited v Behardien and Others (unreported) (LAC); ... In that matter Nicolson JA had occasion to consider the considerations pertinent to the granting of condonation in respect of the late bringing of a review to set aside an award of a commissioner of the CCMA. He referred with approval to the decision in Oueenstown Fuel Distributors CC v Labuschagne NO and others ... in which Conradie JA had considered the principles which should prevail. ... Conradie JA pointed out that the principles of condonation should be much stricter than those which were applied "in normal circumstances". This remark I understand to be an endeavour to distinguish the considerations pertinent to challenging an award granted by a commissioner of the CCMA, in relation to other litigious issues, such as for example an application for condonation of the late referral of a statement of case or of defence. The policy reasons for that distinction are clear. Once a party has an award in his or her favour, the failure to respond within the six-week period to challenge that award gives rise to considerations which are absent at the outset of litigation, where the table is being set for debate. I am not of the view that the decision in the Hardrodt case or for that matter the Queenstown Fuel Distributors' case assists the applicant in its resistance to the relief sought by the Respondents in this matter, where non-compliance with a rule of court is the controversy. I prefer to draw inspiration for the approach to be adopted in a case such as the present, from Melane v Santam ... where is was held ... that: "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation."" [Paragraph 14]

"The fact that the Rules of Court furnish ten days to a respondent in which time to file a statement of defence does no more than create a prima facie reasonable time within which that task is to be completed. Some time period must be laid down, and the policy choice is that ten days will be that period. This establishes no more than a default period by which the other party can expect a reply. However, it is a matter of practical experience in litigation that from time to time matters are of such complexity that a practitioner cannot prudently perform his professional duties within the time periods prescribed, or particular circumstances arise which it make unreasonably difficult to comply. When that occurs in practice practitioners liaise with one another and arrange on a common sense basis extensions and indulgences in relation to the rules, in order for them to attend to their professional responsibilities with the appropriate degree of diligence and prudence. Independently of such practical arrangements which take place, a party who is unable for good cause to comply with the ten day period, is left with the

option to seek condonation upon proper explanation of its reasonable incapability of complying with the ten-day period." [Paragraph 18]

"A distinction of importance is that whereas the Labour Relations Act prescribes a period within which a statement of case must be filed, and failure to do so requires formal condonation, the time period for the filing of a statement of defence is regulated solely by the rules. The Act regulates the initial referral because the referral is a jurisdictional event. The rules exist to facilitate disciplined litigation and their role as servant of that process is the point of departure for any examination of non-compliance." [Paragraph 19]

"Mr Wesley contends that a generous indulgence had already been granted to the respondent in respect of the period from 20 December 2001 to 14 January 2002. This period accommodated the month during which Mr Carman was out of his office on holiday. When I invited Mr Wesley to consider that traditionally South African culture resulted in the entire country virtually coming to a standstill during the December/January holiday period, he reminded me that the Rules of this Court do not provide for dies non as is the case in the High Court. In my view the omission of such an institution in the Rules of this Court is lamentable. It is not necessary for one to approve of the near complete collapse of national enterprise during the traditional year end holiday period, but is seems to me to be manifestly obvious and sensible that any legal practitioner who institutes an action in the first week of December must appreciate that there will be considerable hardship, done unnecessarily, if individuals who are required to respond have, at the last moment, to rearrange their family and other commitments. An attorney who in December seeks an indulgence until he returns from holiday in the new year, is not acting unreasonably and should not be left to believe that his request for such an indulgence is in the least degree unprofessional. No case is made out in this matter that the relief sought by the applicants is required on a genuinely urgent basis that would require personal sacrifice from not only the practitioners involved, but also from other individuals on the other side." [Paragraph 24]

Condonation was granted in respect of the late filing of respondent's statement of defence.

B D O SPENCER STUART (JOHANNESBURG) INCORPORATED V OTTO (2002) 23 ILJ 1374 (LC)

Sutherland AJ held:

"This case illustrates how bizarre practice in the Labour Court can become. The application … is to rescind an order … making an award of the commissioner of the CCMA an order of court." [Paragraph 1]

"The respondent employee referred a dispute concerning his dismissal by the applicant to the CCMA which was eventually arbitrated. An award in the respondent's favour was handed down on 3 July 2001. The award was thereafter served on the applicant. On 23 July 2001 the applicant wrote to the respondent to state that a review would be brought to set aside the award. However, by 30 July the applicant had neither brought the review nor complied with the order in the award. On 30 July the respondent faxed to the applicant an application in terms of s 158(1)(c) to make the award an order of court. Some of these documents were not properly transmitted … There is no reason to conclude that the applicant's affidavit stating that the founding affidavit was not received by them is untruthful. …" [Paragraphs 2; 4]

"... On 16 August 2001 the registrar, acting on the returns of service dated 30 and 31 July 2001, prepared a notice of set down for default judgment and nominated 16 October 2001 upon which date it would be heard. The date of preparation of the notice of set down is significant. At the time when the set down was prepared ... ought it be assumed that the opposing documents filed by the applicant on that same day had not yet found their way into the file? It is clear that at some time on 16 August 2001 they were indeed received by the registrar. ..." [Paragraph 5]

"On 23 August 2001 the registrar telefaxed the notice of set down to the respondent alone. No notice of set down was sent to the applicant. If it is assumed that the preparation of the notice of set down occurred at a moment on 16 August 2001 before the opposing affidavits were actually placed into the file, and thus the registrar was ignorant of their existence, the same cannot be said of the circumstances on 23 August 2001 ... when the notice of set down was sent. Either the registrar did not deem it necessary to check for developments in the file ... or a deliberate decision was made to ignore the fact that a notice of opposition, albeit late and uncondoned had been filed. If this is what happened it follows that the registrar served a notice of set down on the respondent alone, well knowing that the applicant would be ignorant of the set down and could not conceivably learn that a judgment would be taken behind his back. ..." [Paragraph 6]

"... When the respondent's representative moved for the order, he must have been aware that there was an affidavit of opposition which had been filed, albeit two days late. Furthermore, the representative definitely knew that on 23 July 2001, a review had been threatened, which nevertheless, had not yet been launched ... At that time, some 14 weeks after the date of the award, the six-week period within which a review should have been brought, was well exceeded. The order was granted." [Paragraph 8]

"The crisp questions that arise for adjudication are whether or not the incomplete service constitutes an irregularity, and whether or not the judge's ignorance of that incomplete service constitutes a fact which, had he been aware of it, he would not have granted the order." [Paragraph 13]

"Precisely what was before the judge and precisely what was drawn to his attention are not matters that have received attention in the papers... If he did not have regard to the late and uncondoned affidavit of opposition by the applicant in the file, then it may be assumed that the judge relied on the returns of service alone. The returns of service were accurate to the extent that it was true, and therefore wholly uncontroversial, for the judge to believe, that the applicant had notice of the application for default judgment. ... [E]ven if the judge had read the late uncondoned opposing affidavit what he would have learnt from that document is confirmation of the fact of receipt of the application for an order in terms of s 158(1)*(c)*. He would also have learnt that there was a threat to take the matter on review, but on the papers before him, there was no basis to conclude that a review would be launched. In point of fact, on 16 October 2001 no review had been launched, nor had a review been launched at the time this matter was argued before me in June 2002. The judge would also have learnt that the attack on the alleged fatal irregularity of the s 158(1)*(c)* application rested on the idea that the omission of the founding affidavit rendered it null and void. Perhaps the judge took a sceptical view that if this was the sole basis which stood between the grant and the refusal of the relief that, in the circumstances, an order was warranted. After all, the pertinent content of an affidavit to support a s 158(1)*(c)* application required the deponent merely to state C that an award was made, that the party who must comply is aware of the award, and that compliance has not occurred. ..." [Paragraph 14]

"In my view it is by no means obvious that had the judge been as informed as I am today, he would not have granted the order. Even if incomplete service ... may be regarded, strictly, as an 'irregularity', it is

not in my view, an irregularity within the contemplation of an 'erroneously sought or granted' order contemplated by s 165 of the Labour Relations Act. … [I]t is manifestly clear that the applicant was indeed aware of the application ... The fact that it filed its opposing papers late, and then did nothing further in regard to protecting its interest, constitute difficulties which must lie at its own door. In my view, an 'irregularity' which results in an erroneous order being sought or granted, ought to be a fact which, in a material sense, subverts procedure or the rights of a party. I am not satisfied that the incomplete service, in these circumstances, can be characterized as such." [Paragraph 15]

"… [T]he notice of set down … was prepared on 16 August 2001. …. The rule amendment came into force on 20 August 2001. … [T]he registrar waited from 16 August when he prepared the set down, until 23 August when at 14:25 he telefaxed the notice to the applicant. Axiomatically, on 23 August no obligation existed in terms of rule 7*(b)* upon the registrar to give notice to the applicant in this matter. Rule 16(1) seems to suggest that the registrar is directed to ignore an uncondoned late notice of opposition. Why the registrar delayed sending the notice of set down is self-evident. In my view it is a questionable practice that the registrar may ignore the plain evidence of opposition, albeit out of time, and facilitate a hearing without notice to such a party, yet that seems to be precisely what these rules prescribe. In my view these rules warrant revision." [Paragraph 17]

"… Had the notice of set down been sent by the registrar on the day he prepared it, or perhaps on the day following, the contention of the applicant that the set down was irregular, relying on *Mthembu's* case, would have succeeded. By a choice of the registrar the difference in outcome was determined. It is difficult to imagine a more Byzantine regime under which those who dare to practice in the Labour Court are required to submit themselves." [Paragraph 18]

The application was dismissed with costs.

MANYELE & OTHERS V MAIZECOR (PTY) LTD & ANOTHER (2002) 23 ILJ 1578 (LC)

Applicants sought recession of a judgement of the Labour Court which had on review set aside the award of a CCMA commissioner in favour of the applicants. Applicants had been dismissed by the first respondent for dishonesty. When the review application was brought to the Labour Court, there had been no appearance or any other response by the applicants. It was common cause that the review judgement only came to the notice of the applicants some two months after being given.

Sutherland AJ held:

"The cardinal controversy is related to whether or not the applicants knew of the review application which came before Basson J on 4 August 2000, and the validity of the service of that application ... The case was argued on the assumed fact that the service of the review application … did not as a matter of fact actually come to the attention of the four individual applicants. It is common cause that no service was effected upon any of them personally. … [T]he four applicants … were grouped together for the purposes of the style and name of the arbitration proceedings as 'FAWU obo Mailola and three others'. … There is … an acknowledgment [of receipt] and the person who so signed was the union official who had dealt with the first respondent in respect of the unfair dismissal proceedings before the CCMA. …" [Paragraphs 6 - 7]

“It seems to me plain that the purpose of this section [s 200 of the LRA] is to confer on a trade union a right in law to make itself a party to any dispute between an employer and the employees of the employer if the employees are members of the union. A union comes into proceedings relating to such a dispute without having to require the leave of the CCMA or the Labour Court in order to do so. The union also has various choices in regard to how it participates in those proceedings. It can … become a party distinct from its members. It may also pursue interests of its own which are not necessarily coexistent with those of its members. It may also in two distinct ways either act 'on behalf of' any of its members, or act 'in the interest of any of its members'.” [Paragraph 12]

“These last two mentioned categories warrant examination. To act in the interest of any of its members would be evidenced by an application by a union where, other than asserting its representative capacity, it need not cite any of its members as such. This would cover situations where a controversy affected members other than personally or individually, in other words, intrinsically collective interests. It might be regarded as a species of class action. Where a union 'acts on behalf of' members, it does not 'become' the agent of those members, because its pre-existing representative relationship already constitutes the foundation for that status and power. In my view, the union's role under this rubric is akin to that of a curator ad litem in civil proceedings; that is to say, the union is the party in the proceedings. Philosophically, the union constitutes the institutional embodiment of the several members involved in the dispute.” [Paragraph 13]

“… [A]n official of a trade union is a person from a designated class of representatives in litigation before the Labour Court. Where a legal practitioner is appointed by a party to represent it in the Labour Court, it is implicit that the legal practitioner must be properly authorized by way of a power of attorney. In the practice of the High Court, rule 7 regulates the furnishing of powers of attorney in order to eliminate any question of lack of authority to act on behalf of a party. No similar requirement exists in respect of an official of a trade union, who, for no reason other than his status as such, is entitled to represent members of his union in proceedings. This role … is to be contrasted with the role of the union itself when it is a party to proceedings … What is noteworthy … from the judgment of the Labour Appeal Court [in Mzeku v Volkswagen SA], is the clear indication that once an union is involved in representing its members in a dispute, an obligation is cast on the employer party to acknowledge that fact and to deal directly with the union. ” [Paragraphs 16 - 17]

“The thrust of the applicants' contention … is that no proper reason existed in law or in fact to suppose that … when Lessing served this application on the trade union, the trade union was entitled to accept service 'on behalf of' the four applicants. It is contended that although the trade union admittedly acted on behalf of the four applicants in the CCMA proceedings, that conduct of the union is to be distinguished from the quite different proceedings in the Labour Court in the application for review.” [Paragraph 21]

“I am not impressed by that analysis. … [T]he trade union is entitled as of law to act 'on behalf of its members' in respect of any dispute, and in my view the dispute encapsulates any and all proceedings which take place in pursuit of the resolution of the dispute. It matters not a jot that the proceedings in the CCMA and the proceedings in the Labour Court are distinct proceedings in two different fora; the structure of the dispute-resolution system created by the Act does not acknowledge the distinction as being material in these circumstances, and indeed, the dependency of each institution upon the other to sustain a holistic process of resolution of disputes renders the notion silly. ….” [Paragraph 22]

"... [T]he union who 'acts on behalf of' its members in an unfair dismissal case cannot be heard to deny its capacity to continue to act in that way unless it expressly disavows that role. ... The special status of trade unions in the Act ... operates not only for the benefit of individual workers, but for all parties to the labour relationship. ... Accordingly ... service of the review application was effected properly ..." [Paragraphs 23 - 24]

"The ... question concerning [applicants'] individual and personal ignorance of the review proceedings does not on this analysis carry any weight, because they were not, other than through the medium of their union, parties to the dispute, even though they were the subject-matter of the controversy." [Paragraph 27]

The application was dismissed with costs.

SELECTED JUDGMENTS

COMMERCIAL LAW

NEDBANK V OOSTHUIZEN (6588/2012) [2014] ZAKZPHC 9 (28 FEBRUARY 2014)

Case heard 17 February 2014, Judgment delivered 28 February 2014

The applicant sought an order declaring certain immovable property executable. Previously, the Applicant had obtained default judgment against the respondent. A writ of execution was issued. The Sheriff found no moveable property and returned a *nulla bona* return. The Applicant wished to proceed against the immovable property, a house which was being used by the respondent as his primary residence.

Bezuidenhout AJ held:

"Before a primary residence can therefore be declared executable the court must first consider all relevant circumstances. The question arises whether the authorisation of a writ in the present circumstances must be dealt with as in the case of a bondholder in terms of the practice directive. If not, would a creditor who is not a bondholder not be placed in an advantageous position as the burden of proof would be less strenuous but the effect the same in that a debtor loses his primary residence." [Paragraph 10]

"In *Standard Bank of SA Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) referring to the decision of the Constitutional Court in J*aftha v Schoeman and Others*, *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) it held ...:

"Nor did the Constitutional Court decide that s26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her s26(1) rights and would therefore need to be justified as contemplated by s36(1).""[Paragraph 11]

"From the above quotations it is apparent that before any primary residence is declared executable there are many factors to be considered to ensure that there is no abuse of the execution process. At all times the provisions of the Constitution must be considered and applied" [Paragraph 14]

"Commercial activity must be allowed but as the Constitution demands that every citizen is entitled to adequate housing, this factor must be considered before declaring a person's primary residence executable. The harm that both parties may suffer must be weighed up in an attempt to arrive at a just and fair decision" [Paragraph 15]

"It would appear to me that when a writ of execution is to be authorised in respect of the primary residence of a debtor, the same principles must be applicable whether it is a bondholder or a creditor of other sorts wanting to declare the property executable. This requires that all relevant facts be placed before court. Judicial oversight is required irrespective whether the application to declare immovable property executable results from a bond or any other debt. There is however a distinction between a bondholder declaring a property executable and a non-bondholder in that in the latter case there must be a nulla bona return from the Sheriff in respect of movables, or that there are insufficient movables. Accordingly the immovable property is the only remaining asset of the debtor. The bondholder does not have to first proceed against moveable property. However if a primary residence of a debtor is to be

declared executable by a creditor who is not a bondholder a valuation of the property concerned would be of assistance and if there is a bond registered against the title deed of the property the outstanding amount in respect of the bond would also assist the court in exercising the judicial oversight required. An attempt should be made by applicant to provide such information. If it is not provided the reasons therefore must be set out in applicant's affidavit." [Paragraphs 16-18]

"In the present case respondent was present at court on previous occasions and the notice of set down … was served on him personally. Respondent elected not to appear or to place any facts before court why his property should not be declared executable. He was in the papers specifically informed that he had the right to do so. Standard Bank, the bondholder, also placed no facts before the court. In those circumstances there was nothing more that applicant could do. [Paragraph 19]

The application to declare the house executable was granted.

CIVIL PROCEDURE

RAHIM KHAN NO V MAXPROP HOLDINGS (PTY) LTD AND GARLICKE AND BOUSEFIELD INC, UNREPORTED JUDGEMENT, CASE NO. 5419/2012 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Judgment delivered 17 DECEMBER 2013

The applicant had previous obtained a court order in which the first respondent was interdicted from withholding the January 2013 salary of the applicant. Applicant argued that the first respondent had failed to fully comply with the order. The court had to decide two legal questions. One was whether the second respondent had properly been joined in the proceedings. Relying on the State Liability Act, applicant added the second respondent (as the accounting officer who should effect the payment sought) to the application (as a second respondent) without any order authorizing such joinder. The second question was whether the first respondent was indeed in contempt of court for failure to comply with the court order which interdicted him from withholding the applicant's salary for the month of January 2013.

On whether the second respondent had been properly joined, Bezuidenhout AJ held:

"It is indeed so that the State Liability Act which I have been referred to indicates the accounting officer of that specific department who is the second respondent herein must ensure that the payment is made. Accordingly, from the reading of the Act, the second respondent should have been joined as a respondent in these proceedings to make any order sought effective" [Paragraph 9]

"However the Rules make it very clear that in the event of any party having to be joined as a respondent an application to that effect should be brought. This is to entitle the party which is sought to be joined as a respondent to place before the court any facts or circumstances or points of law why they may object to being joined as a respondent. That procedure was not followed neither was there consent to be joined as already stated."

"Accordingly it is necessary for an application to be brought to join the second respondent as a party to these proceedings" [Paragraph 10]

On whether the first respondent was in contempt of court, Bezuidenhout AJ held that:

"However … there is no proof of service of the order which applicant contends is the correct one upon the first respondent and further in the letter on behalf of the first respondent it was specifically stated that they do not have knowledge of the registrar." [Paragraph 16]

"There is no proof of service of the order that applicant is relying on the first respondent, and further there is clearly a dispute as to what the correct order was which was granted." [Paragraph 18]

"It has not been proved beyond reasonable doubt that the correct order was served on first respondent and it failed to complied therewith." [Paragraph 19.1]

In the case of Jayiya v MEC for Welfare, Eastern Cape 2004 (2) SA 611(SCA) … it states "Save for one exception, an order for the maintenance of one whom the judgement debtor is liable to maintain, a money judgement is not enforced by contempt proceedings but by execution….It is accordingly apparent from the decision of Jayiya referred to above that monetary claims cannot be enforced by way of contempt proceedings. In my view, the payment of salary is a monetary claim and cannot be enforced by contempt proceedings. [Paragraph 20.3]

In conclusion the court ruled that there was no joinder of the second respondent and that the application for the first respondent to be held in contempt was dismissed.

SELECTED JUDGMENTS

PRIVATE LAW

SOUTH AFRICAN NATIONAL DEFENCE UNION V MINISTER OF DEFENCE AND OTHERS (19949/2008) [2013] ZAGPPHC 232 (1 AUGUST 2013)

Case heard 30 April, 2-3 and 13 May 2013, Judgment delivered 1 August 2013

Plaintiff instituted two claims of defamation, for R250 000 each, arising from the publication of two documents authored by the fifth defendant, a colonel in the SANDF, and authorised by the fourth defendant, the Director responsible for labour relations in the military. The documents in question were an article published in a military publication, and an Administration Order issued by fourth and fifth defendants. The documents related to the role of the union in salary adjustment negotiations at the Military Bargaining Council (MBC).

Chetty AJ held:

"… [I]t is common cause between the parties that the relationship between them has been strained over the years. Much of this tension is owed to the competing interests of the military striving to operate in a disciplined and efficient manner, and the right of the trade union to exist and pursue issues on behalf of its members. … According to the plaintiff's witness this is neither the first nor the last instance in which the defendants have made defamatory statements towards the plaintiff. …" [Paragraphs 5; 26]

"The issue to be determined, in light of the evidence, is whether the contents of the articles … were of a slanderous nature and defamatory. Both Greef and Dubazane testified that the use of the word "counterfeit" to describe the plaintiff's salary proposal was without foundation and false. … The defendant … admits to the publication of the articles but relies on the defences that they were true and in the public benefit. …" [Paragraph 41]

"There is nothing from the demeanour of the witnesses of either the plaintiff or the defendants to tell them apart. Both Col. Dhlamini and Mr Dubazane proved to be equally argumentative … I am unable to make any credibility findings based on their evidence. Where there are two diametrically opposed versions of the facts, the test to be employed in determining which of the two versions is more probable was set out in Stellenbosch Farmers Winery Group limited and Another v Martell Et Cie and Others … (SCA) … The probabilities, in my view must favour the plaintiff, as it seems to me to be entirely improbable that the defendants would not have received the proposal either before or at the MBC meeting. … Having reached that conclusion, there would therefore be no basis for the defendants to have been unaware of the proposal from the plaintiff, and their evidence to this effect must be rejected." [Paragraph 46]

"The evidence of the fifth witness, Col. Dhlamini, is crucial to determining the merits of the claim. He was present at the MBC and stated that no agreement on salaries was reached at the meeting. … [H]e, more than anyone else, should have known that there was no agreement struck between the parties and there could be no basis for the use of the words "purported agreement" and "counterfeit" as being either constituting the truth, or that it was made in the public interest. … [F]ully aware that no agreement had been concluded at the MBC, Col. Dhlamini proceeded to draft the Administration Order referring to the

plaintiff's proposal as "a counterfeit Military Bargaining Council agreement". His conduct was clearly actionable." [Paragraph 48]

"Similarly, the article … refers to a "purported agreement dated 19 July 2007". Col. Dhlamini was cross examined at to the existence of an "original" MBC agreement, as he repeatedly used the word "counterfeit" and "purported" in the context of the publications. The contention of the plaintiff is that if there is reference to a "counterfeit" agreement, an original or true version must exist. Col. Dhlamini was unable to produce any such document. …" [Paragraph 49]

"… [T]he enquiry that must follow is what would a reasonable reader of ordinary intelligence attribute to the words used in the Administration Order and the Bulletin? … [D]efendants submitted … that I should not subject the words … to any closer analysis as a reasonable reader would have probably "skimmed" through the article without giving concentrated attention to the meaning of the words used in the publications. I respectfully disagree with this contention, as my interpretation of the decision in Sindani is that it is important to consider the meaning of the words in the "context of the article as a whole". …" [Paragraphs 50 - 51]

"Mr Greef stated that soldiers receiving a copy of an Administration Order would regard this as an instruction … It was a means of ad hoc communication within the military. This evidence was not disputed … Having regard to the obligation to follow orders within the context of the military, I am not persuaded by the argument that a reasonable reader of the Administration Order and the Bulletin – not being a member of the public, but a reasonable soldier – would have given the publications no more than a cursory "skim". … [T]hose within the military would have given closer attention to the contents of the publication than an ordinary reader of a newspaper article." [Paragraph 52]

"… I am in agreement with the contention on behalf of the plaintiff that the title of the article in the Bulletin, "Greatest Lies ever told by a Military Trade Union", suggests that a reasonable reader of ordinary intelligence would infer that the plaintiff is guilty of spreading lies and untruths. This directly impacts on its reputation and whether it is an institution that new members of the military may wish to join." [Paragraph 54]

"I am accordingly satisfied that the plaintiff has established that the words and statements attributed to it in the Bulletin and the Administration Order were defamatory, and calculated to harm the plaintiff's reputation as a trade union within the defence force. …" [Paragraph 58]

Plaintiff's claim thus succeeded, and it was awarded R40 000 damages in respect of each article, making a award of R80 000.

KWATHANI V ROAD ACCIDENT FUND (71348/11) [2013] ZAGPPHC 174 (14 JUNE 2013)

Case heard 23 May 2013, Judgment delivered 14 June 2013

Plaintiff instituted an action for damages for bodily injury she suffered when involved in a collision with a motor vehicle, while she was a pedestrian. There was a separation of issues, with the court being called on to determine the issue of liability only.

Chetty AJ held:

"The cross examination of the plaintiff produced no inconsistencies in her evidence and her version remained essentially intact. … The failure to call the driver of the insured vehicle is surprising especially as

the defendant knew the identity of the driver and that this matter was set down for trial almost nine (9) months ago. It would seem as though little, if any, preparation had been given to the defendant's case, despite the persistence in the matter proceeding to trial." [Paragraphs 8 - 9]

"... The Court must consider the merits and dements of evidence, and having done so, must be satisfied that the witness has told the truth. There was nothing in the demeanour of the plaintiff that would suggest she was being evasive, un¬cooperative or contradictory in her evidence, and accordingly there would be on basis to reject the plaintiff's version as being false. She came across as an honest witness. ..." [Paragraph 11]

Chetty AJ then considered the defendant's argument that there should be an apportionment of damages:

"... The problem with the contention of the defendant is that it has not laid the basis or foundation for this Court to apportion blame to the plaintiff. The defendant failed to call any witnesses which may have provided an explanation for why, if at all, the driver drove in the manner as alleged by the plaintiff. ..." [Paragraph 12]

"In support of the submission that I should apply a 70/30% apportionment, counsel for the defendant relied on Gaba v Minister of Police ... I find that the above case is distinguishable ... in that the road on which the plaintiff was travelling was not busy, and although there was no lighting, the plaintiff at no time gave evidence that she walked on the road as opposed to the 'shoulder' ... " [Paragraphs 13 - 14]

"In my view, on the basis of the evidence presented by the plaintiff, I am satisfied that the injuries sustained by her were due 100% to the negligent driving of the insured driver. ... The plaintiff was a pedestrian walking on a part of the road not traversed by vehicles. In my view no negligence can be attributed to her." [Paragraph 17]

ADMINISTRATIVE JUSTICE

POTWANA V UNIVERSITY OF KWAZULU-NATAL (5347/2012) [2014] ZAKZHC 1 (24 JANUARY 2014)

Case heard 4 November 2013, Judgment delivered 24 January 2014

Applicant sought to have the decision of the respondent's senate, to withdraw the applicant's PHD degree, set aside. Applicant's PHD thesis had been submitted after certain revisions, recommended by examiners, had purportedly been effected, and her PHD was conferred. Subsequent to applicant's graduation, a series of events took place prompted by revelations that the applicant's former supervisor had acted improperly in supervising another student. Applicant acknowledged having obtained assistance from a consultancy owned by the supervisor to input and prepare data for her thesis. A sub-committee of the respondent recommended that the applicant's thesis be assessed by an additional examiner, and the degree be withdrawn should applicant refuse to rectify any shortcomings identified in that process. Applicant's degree was subsequently withdrawn.

Chetty AJ began by considering the basis for a power of revocation:

"... [A]pplicant submitted that whilst the respondent has the express power to confer a degree ... only in very limited circumstances, can a university take steps to revoke the degree. If the respondent were to act in accordance with this framework, it could proceed to withdraw a degree but only after such action

was sanctioned by a Court. … [T]he respondent can only proceed on one of two grounds: [m]aterial error [or] fraud or dishonesty … The above two grounds … would seem to accord with the institutional practice at some universities in the United Kingdom … where the common law position finds expression as part of the university rules. … In essence, the university, under the common law had no authority to act without sanction of the Court." [Paragraphs 25 - 26]

" It is common cause that the respondent is a statutory corporate body that exists in terms of … the Higher Education Act. … The respondent … contends that inasmuch as the Senate is obliged to conduct its duties in the best interests of the respondent, this must extend to include protecting the integrity and standard of the degrees conferred by the respondent. I am not convinced by this argument for the simple reason that one must also assume that when council discharges its duties … it too must be inferred as is acting in the best interests of the university. … The underlying assumption that both senate and the council will act in the best interests of the university affords no basis for reading in to the statute powers that are not conferred on them. " [Paragraph 30]

"Of particular importance to the application before me is the wording in section 65B(2)(b) [of the Higher Education Act] … Ms Gabriel submitted that it is implied in the wording of this section that where an institution … has the power to confer degrees, so too must it have the power to revisit the awarding of degrees on good cause … A literal reading of the section, read as a whole, suggests that a university … reserves the right not to confer a degree or diploma on a student who has not attained the requisite standard of proficiency in a particular course. This, on my interpretation, is a power vested in the institution before a student is conferred with the degree. …" [Paragraphs 32 - 33]

"… [T]he plain wording of section 65B … confers no express power on a university to revoke a degree, once it has been conferred. What then of the argument of an implied power? Words cannot be read into a statute by implication unless the implication is a necessary one, in the sense that without it, effect cannot be given to the statute as it stands … On my interpretation, it cannot be said that the provisions of the section 65B … cannot be given effect to. The section plainly provides for the university not to confer a degree to a student who has not achieved a level of academic proficiency. … This, in my understanding, does not detract from the common law right of the university to withhold or revoke a degree for reasons of material error or fraud or misconduct. In any event, one of the criteria for a degree being conferred is that the student must have been "*registered*" with the university. In my view, where this registration comes to an end, in the sense of the student having completed his studies and exited the university, there would no longer exist the pre-condition for the university to act as set out in section 65B(2)(a) of the HEA. …" [Paragraphs 34; 36]

"It is trite that a functionary can exercise no greater rights than that conferred by statute. While section 65B of the HEA provides that a degree cannot be conferred unless a student attains a degree of proficiency set by senate, this does not necessarily equate to senate having the powers to revoke a degree. … There is nothing in the HEA or the institutional statute that points to the senate as the body which confers degrees. It must follow that unless otherwise stated, such powers of revocation, if they existed at the time, could vest only in the body that conferred the degree and not the body which was vested with powers to set the standards for academic achievement. … I can find nothing in either the HEA or the institutional statute that vests the power to revoke a degree exclusively with the senate or council. The formulation now contained in the institutional statute presently provides that such a decision must be the result of a concurrence between the two entities. … Accordingly, and to the extent that the respondent has not been able to refer to any express provision in the legislation authorising it to

act, or for a basis for such powers to be exercised to the exclusion of the council, I find that the senate had no authority to take the decision it did …" [Paragraphs 40 - 41]

Chetty AJ then considered an argument that having conferred the degree, respondent was functus officio and had no power to revisit the decision or revoke the degree:

"… [O]nce a functionary, in this case a university, has exercised a public power in terms of the HEA and conferred a degree upon a student, it should not be permitted to reverse that decision unless in the narrow circumstance of fraud or misconduct. As to the respondent's argument that its authority for revocation, if not implied under the HEA, must stem from a contractual relationship with the student. I find this argument unconvincing for the simple reason that the university's contractual relationship with a student ceases upon the conferment of his or her degree. … Ms Gabriel informed me that she was unable to find any South Africa case authority which permits a university to withdraw a degree which has been already conferred on a student. She instead relied on a host of foreign cases and journal articles, all of which I found very academically interesting. …" [Paragraphs 50 - 51]

After considering various foreign judgements, Chetty AJ continued:

"It seems to me that these cases are distinguishable from the present matter in as much as Waliga and Crook were concerned with universities exercising powers conferred on them by state legislation. … What the respondent appears to be contending … is for a retrospective application of section 67 of the institutional statute. … I am not convinced that the dictum of Waliga finds direct application to the matter before me, or in the context of the legislative framework, is authority to extend an implied power to revoke a degree conferred by a university, without the need to approach a Court." [Paragraph 54]

"… [T]here is no basis for the contention that the respondent's senate, when it acted to revoke the applicant's degree, did not do so in the belief that it was exercising a public power in terms of the HEA. The conclusion is bolstered by the respondent's averment that it took the decision to revoke as part of its 'public law duties' to protect the integrity of its degrees and maintain its reputation in the eyes of the public. … [T]he institutional statute refers to the senate as having jurisdiction in matters of "academic integrity". This, in my view, gave the respondent's action "the necessary public character, as opposed to a private character." … The actions of the respondent clearly had a direct, external, legal effect on the applicant - she was suspended from employment, criminally charged with corruption and her reputation stymied as a result of the revocation. …" [Paragraph 56]

The decision to withdraw the applicant's PHD was thus reviewed and set aside.

SELECTED ARTICLES

'HUMAN RIGHTS, ACCESS TO HEALTH CARE AND AIDS', 9 South African Journal on Human Rights 71 1993

The article examined the issue of the denial of public resources, especially medical treatment, to people suffering with AIDS. The article focused on the Supreme Court (now High Court) decision of Schmidt v Administrator of the Transvaal.

"The case raised important issues relating to the obligations of the hospital authorities to render treatment to patients and more particularly the extent of such services. Prior to Hansen being refused the drug, the hospital authorities had provided a free supply to five other patients … The hospital then imposed a blanket restriction on the supply of the drug to persons with AIDS …It is important to note that the hospital authorities were never concerned with the toxicity of the drug at the time when it was administered free of charge, but that these concerns arose as soon as the drug had to be purchased. … "

"Courts, however, are reluctant to interfere with the decisions of administrative bodies, such as provincial hospitals, whose officials are vested with discretionary powers. …" (Page 72)

"The judgement … serves as an important barometer in evaluating the obligation of a provincial hospital to treat patients, irrespective of whether they have AIDS, cancer, or any life threatening disease. The Administration also contended that the cost and treatment of persons with AIDS would have an impact on the economy … Once again, there appears to be an attempt to resuscitate the argument concerning the distinction between the 'rights of the few' as opposed to the 'rights of the many'. … " (Pages 73 - 74)

"Central to any discussion pertaining to AIDS must be the realization that AIDS threatens human life and is ultimately fatal. The right to life is a fundamental right and entails the obligations of governments and the international community to undertake all appropriate measures to protect human life." (Page 74)

"I believe that the pharmaceutical industry also has an important role to play in the regulation and marketing of new drugs. In the United States, the patents on new drugs expires only after seven years, thereby excluding price competition from 'generic' brands. In many instances, whilst pharmaceutical companies may make HIV/AIDS drugs freely available for trial purposes, by and large the cost of such drugs is excessive and constitutes an obstacle to the effective treatment of people with HIV/AIDS." (Page 75)

"It would appear that while efforts have been made by the government in the field of AIDS prevention, that is, by education and awareness programmes, not much is being done to provide persons with AIDS access to faculty-saving drugs. The task in curbing the spread of AIDS, however, lies not only with governments, provincial authorities, pharmaceutical companies and medical practitioners. IT should become the moral and social obligation of all citizens to take active measures in 'making war against AIDS, and not against people with AIDS'. Similarly, an informed and altered human rights network can help protect public health and promote the human rights and dignity of all people, including those with AIDS." (Page 76)

SELECTED JUDGMENTS

CIVIL PROCEDURE

NAIDOO V NAIDOO (1722/2013) [2014] ZAKZDHC 3 (3 MARCH 2014)

Applicant sought confirmation of a rule nisi, and an order directing respondent to take steps to cause various corporations and companies to pay monies to the applicant 'as his drawings for personal living expenses.' Applicant, respondent's older brother, alleged that he had been sequestrated, and had arranged for all his assets to be transferred into the respondent's name, on the understanding they would be returned once he was rehabilitated. Respondent, however, claimed to be the lawful owner of the assets in question, and denied applicant's claim to them, and respondent further denied making any undertaking to sign a division of assets agreement.

Chili AJ held:

"… I propose dealing firstly with the criticism levelled [sic] against the applicant relating to either omitting or withholding material facts which in all probabilities would have influenced the court hearing the ex parte application. The applicant was criticized for not disclosing to the court that he previously testified at an insolvency enquiry and also attested to an affidavit in Rule 43 divorce proceedings involving him and his ex-wife, where he made damning averments about his assets. … [T]he respondent filed copies of transcripts of the record of an insolvency enquiry … where the applicant repeatedly denied … that the respondent was his nominee. The applicant conceded having lied at the insolvency enquiry …" [Paragraphs 5 - 6]

"It was submitted on behalf of the applicant, that the applicant's conduct during the insolvency enquiry and the divorce proceedings is history. It was argued that the Court should only focus on the present vis-a-vis is the agreement between the applicant and the respondent relating to the division of assets." [Paragraph 8]

"It may very well be there was an arrangement of some sort … regarding the division of certain assets. However, the most unfortunate part is that the foundation … is lies and deception. It seems to me that the applicant was on a mission to defraud his creditors … This is evident from the allegations levelled against him and the averments he himself makes both in his founding and answering affidavits. … I am satisfied, on probabilities, that the applicant, to some extent with the assistance of other persons, was on a mission to defraud his creditors. …" [Paragraph 9]

"In as much as it was submitted on behalf of the applicant that he … is prepared to reimburse the respondent in the event that it is established at the trial that he is not entitled to any of the assets… what concerns me mostly is the fact that no undertaking of that sort is made by the applicant in the papers." [Paragraph 12]

"This document … merely reflects expenses in respect of certain business entities and nothing more than that. Nowhere in this document is any mention made of the applicant's living expenses. … The document … purportedly to reflect the applicant's monthly living expense, does not advance the applicant's case at all. It is without foundations and thus confusing. … Perhaps the reason why the applicant is unable to provide any proof of the moneys he received either from the respondent or any of the entities listed in the relief is because there are no records to that effect. Who could blame him for not keeping records of

transactions that could probably link him to the entities that he denied ownership of?" [Paragraphs 14 - 15]

"I am expected to close my eyes to the applicant's fraudulent schemes which in all probabilities put him in the position in which he presently finds himself, and treat him as an innocent litigant who approached the court with clean hands. I am not inclined to do that. What the applicant did amounts, in my view, to a gross violation of the uberrima fides rule which places a duty on a litigant who approaches the court in ex parte applications to disclose every circumstance which might influence the court in deciding to grant or refuse the relief sought. … [H]e created an impression that he was a legitimate owner of such assets, the factor which was very influential in the court's decision. In the process he deliberately withheld or suppressed extremely vital information regarding his interrogation at an insolvency enquiry into his estate." [Paragraph 16]

"Had the court been alive to the manner in which the applicant conducted himself at that enquiry, denying ownership of the very assets which he now claims as his, with the view to defrauding his creditors, I seriously doubt that it would have granted him the relief. … The reason for non-disclosure was in my view simply to suppress the facts which if disclosed would have influenced the court into denying the applicant the relief sought, For that reason alone, I would be justified in discharging the rule. But that is not only reason, The overriding factor in my view is the extent of prejudice that the applicant's fraudulent acts must have caused his creditors. It could safely be inferred, based on the applicants own admissions, and his assertion to the effect that the assets he claims to be his are worth millions of rands, that the prejudice his fraudulent acts must have caused his creditors is enormous. … I am of the view that there is no justification in confirming the interim order …" [Paragraphs 17 - 18]

"I was requested to make a punitive costs order against the applicant because of his audacity to mislead the court. I was tempted to do that. However, it seems to me that at least a possibility exists, that the respondent was himself involved in the applicant's fraudulent scheme. In as much as I am satisfied that the applicant should bear the costs of bringing the respondent to court, I am not persuaded that such cost should be awarded on a punitive scale." [Paragraph 19]

The rule nisi was discharged, and the remainder of the relief sought dismissed. Chili AJ recommended that the record of proceedings be forwarded to the Master of the High Court, the trustees of the applicant's insolvent estate, and the Director of Public Prosecutions.

KHUZWAYO AND OTHERS V PRESIDENT, INDEPENDENT BAPTIST CHURCH [2013] JOL 31074 (KZP)

Case heard 28 October 2013, Judgment delivered 6 December 2013

The court was required to determine an objection raised by the respondent in limine, that the court lack jurisdiction to hear the application. Applicants sought to set aside their suspensions, and be reinstated to their positions as ordained ministers of the Independent Baptist Church.

Chili AJ held:

"It was argued … that, before approaching the Court … the applicants ought to have exhausted all the internal remedies available to them. It was submitted that they had an option either to appeal the

respondent's decision to the relevant domestic tribunals or refer the matter to the annual general conference." [Paragraph 7]

"Indeed, it is trite that if an institution like the church, has internal remedies available to a party seeking redress, such remedies should be exhausted before approaching a court of law …" [Paragraph 8]

"… [T]here are three very materially distinctive features calling for an approach different from the one taken in Jamile." [Paragraph 9]

"Firstly, unlike in the present case, the Court in Jamile was dealing with one constitution, not two constitutions. … In the present case, two constitutions have been presented to court … The Court is called upon to decide which of the two constitutions is in force." [Paragraphs 10 - 11]

"Secondly, the only relief sought in Jamile was restoration of the applicants status quo ante, and nothing more. … [I]n addition to an order affecting their status, the applicants are seeking an order declaring the old constitution to be operational. …" [Paragraph 12]

"Lastly, the applicants aver in their papers that the respondent left them no choice when he denied them the opportunity to have the matter resolved out of court. … Having regard to the letters referred to … I am of the view that there is merit in that averment. …" [Paragraph 13]

"… [A] few weeks before their suspension, the applicants addressed a letter to the respondent requesting him to constitute domestic machinery… in order to deal with the validity or otherwise of the new constitution. They stated … that if that did not happen, they would be obliged to approach this court for recourse. … Instead of addressing the issues raised … the respondent slapped the applicants with undated letters of suspension … [C]an it seriously be contended that the applicants ought to have approached domestic tribunals before seeking recourse from the Court? That question should, in my view, be answered in the negative. … I therefore conclude, given the fact that the other form of relief sought by the applicants is declaratory in nature, and that the only course open to the applicants was to approach a court of law, that the present application is properly before court and that this Court has jurisdiction to entertain same." [Paragraph 15]

The point in limine was dismissed with costs, including the costs of two counsel.

CRIMINAL JUSTICE

THEMBA THULANI NDAMASE V THE STATE, UNREPORTED JUDGEMENT, CASE NO: AR 558/2012 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 21 May 2013, Judgment delivered 26 September 2013

Appellant appealed against his conviction and sentence of life imprisonment in the regional court on a charge of rape. On appeal, the case centred on whether the appellant had received a fair trial, in light of comments and interventions made by the regional court magistrate.

Chili AJ (Moodley J concurring) held:

"... It is clear from the record of the proceedings that the Magistrate engaged counsel at length, expressing his displeasure at his style of cross examination. ... The learned Magistrate clearly showed his impatience with counsel from the commencement of the trial. The comments he made when the first question was asked of the first State witness were uncalled for. In my view, there is nothing wrong with reminding the witness that he/she is sworn to tell the truth. There have been cases where the witness would, upon being reminded that they have taken the oath, change their story before they are even cross-examined." [Paragraphs 6; 8]

"Further, I do not see anything wrong with reminding a witness of what he or she said in evidence in chief before posing a question on that evidence. ... [I]t is only fair. It allows a witness the opportunity to reflect on that piece of evidence and prepares them for the question or questions that ... follow based on that evidence. On the other hand, it is simply an art of cross-examination. ..." [Paragraph 9]

"As the trial progressed, the exchange of words between the Magistrate and counsel became increasingly heated. ... That question viz "Ok, what is true?" led to the exchange of words between counsel and the Magistrate, which was inappropriate to the dignity of the courtroom and adverse to the perception of a fair trial" [Paragraph 11]

"The Magistrate began by insinuating that counsel did not know the Criminal Procedure Act. ... Following on that comment he threatened to curtail Counsel's cross examination ... It is clear ... that the court had by that time become an arena of conflict. Counsel who clearly had had enough of the Magistrate's outbursts ... lashed back at him ... insinuating that he (the Magistrate) was biased in favour of the State. During the heated verbal exchange counsel appears to have pointed at the Magistrate ... The situation in the courtroom grew steadily worse. ... It is only when counsel threatened to bring an application for the learned Magistrate to recuse himself that he (the Magistrate) suggested that he had to intervene because counsel was repeating the questions ... That was clearly contrary to the accusation he had made to counsel during the heated debate, viz that counsel was asking the witness questions which counsel himself could not answer. ..." [Paragraphs 13 - 14]

"Had there been no antagonism ... one would have attached little or no weight to or perhaps condoned the comments made by the Magistrate towards the end of his judgment when he stated: - "I am satisfied to arrive at a conclusion that the accused version is pathetic. I reject it with the contempt it deserves". ... [G]iven the manner in which the learned Magistrate conducted the trial and the attitude he displayed towards the appellant's counsel, one is tempted to conclude that "instead of playing the ball", the Learned Magistrate 'played the man'. His comments are, in my view, an indication that his vision was clouded by the dust of conflict, thereby undermining the fairness of the trial. ... I am therefore of the view, that the events that occurred during the trial cast doubt on whether the appellant received a fair trial. ..." [Paragraphs 15 - 16]

"Section 166(l) of the [Criminal Procedure] Act gives an accused person a right to cross examine any witness called by the State at criminal proceedings. ... The limitation created by subsection (3) clearly raises constitutional issues as it relates to a fair trial, and a right to challenge evidence. I echo the view ... that subsection (3) should be applied with caution so as to ensure a fair trial. Although subsection (3) permits the presiding officer to "impose reasonable limits on the examination regarding the length thereof", ... the comments made by the Magistrate ... was misplaced and unfairly curbed [counsel for the appellant's] cross-examination to the prejudice of the appellant's defence." [Paragraphs 17 - 18]

"... These sarcastic comments and threats by the Magistrate clearly threw counsel off his stride. It is apparent from the record ... that from then on, counsel did no more than go through the motions. He had lost every bit of confidence in the court." [Paragraph 19]

"I align myself with the view taken by TSHIQI J in S v Musiker, that unwarranted interruptions by the court undermine the fairness of the trial. ... I am satisfied that the appellant did not receive a fair trial. It would appear that the Magistrate lost sight of his role in conducting a fair and impartial trial, ad his responsibility to direct and control the proceedings ... but not to interfere unduly with the proceedings in court, thereby placing the administration of justice and the impartiality of the court at risk." [Paragraphs 23 - 24]

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

SELECTED JUDGMENTS

CIVIL PROCEDURE

BRIAN ROSS V BRACKENHYRST BODY CORPORATE AND ANOTHER, CASE NO. 4810/2010, INCORPORATING BRACKENHYRST BODY CORPORATE V BRIAN ROSS, CASE NO. 2613/2010, UNREPORTED JUDGEMENT (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 5 December 2012, Judgment delivered [?] February 2013

Both applications related to arbitration proceedings. In case number 4810, applicant sought to have a decision of the second respondent arbitrator set aside. In the second case, applicant sought to make the arbitrator's ruling an order of court. At the conclusion of the arbitration proceedings, the arbitrator had made a part award in favour of the first respondent (in case number 4810), with a directive that the parties attempt to arrive at an agreement as to how applicant would remedy certain defects. The parties were given time to return with a written agreement. Applicant did not adhere to the award, hence the first respondent instituted proceedings under case number 2613. Applicant under case number 4810 sought to set aside the award on the basis of several alleged misdirections by the second respondent, and one ground of gross irregularity relating to the second respondent's possession of a "secret" letter.

Marks AJ considered whether the applicant had established special cause for extending the time limits in which to bring the review, and held:

"Having regard to the evidence in the filed affidavits and the probabilities, I find it improbable that briefs or other documents would lie around unattended in the "post room" due to the very nature of the urgent matters and specified time frames … Moreover there are no confirmatory affidavits filed by either the Applicant's attorney or the counsel initially briefed … It is further improbable that any attorney or advocate would have handled this matter in such a negligent and shoddy fashion. The court cannot accept that the instructing attorney would: … Send unmarked files to initial counsel without any direction as to which advocate the papers should be delivered to. .. Not make any follow up enquiries whether counsel has received the file. The probabilities indicate that the applicant only decided to launch this application after the respondent launched the application to make the award an order of court." [Paragraph 10]

"The applicant has failed to establish that he has a reasonable prospect of success in the review proceedings. … There is nothing … in the record to indicate that the second respondent misdirected himself at any stage. To the contrary his award in the two parts displays an unbiased disposition. …Moreover, the so-called secret letter … was not secret at all. It was part of the bundle of documents that were referred to in the arbitration proceedings. The applicant and his legal representative must have been aware of it … at the very least when the Part 1 Award was made. They could have at that stage noted their objection and requested recusal. They did not. … " [Paragraph 11]

Marks AJ thus refused condonation, and turned to consider the application under case number 2613:

"… [T]here were several contraventions of the Conduct Rules, and the deliberate non-compliance with the instructions from the Board of Trustees as was determined by the Arbitrator. … Having perused the entire record of the arbitration proceedings and having found no misdirection, misconduct, mistake, bad

faith or carelessness on the part of the Arbitrator, the Court finds in favour of the applicant …" [Paragraphs 14.5 – 14.6]

"… [T]he court needs to determine whether there are circumstances justifying a special costs order on an attorney and client scale. As the body corporate in essence reflects the interests of all the Sectional Title holders, neither the body corporate, nor the Sectional Title holders should be forced to bear the costs of the respondents refusal to adhere to Arbitration Award. Considering that the Body Corporate had not [sic] other option but to approach the Court … and also have a duty to contain expenses, they should not be forced to bar the costs of the applications and should not be out of pocket for the legal epenses incurred." [Paragraphs 15.2 -15.4]

In case number 4810, the application for condonation was dismissed with costs. In case number 2613, the application was granted, with costs awarded on an attorney and client scale.

CRIMINAL JUSTICE

BRIAN ALI AND ANOTHER V THE STATE, UNREPORTED JUDGEMENT, CASE NO: AR354/12 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Appellants had been convicted on one count of robbery with aggravating circumstances, and two counts of murder, by the High Court, and sentenced to 15 years imprisonment in respect of the robbery, and life imprisonment in respect of both counts of murder. The appeal was against sentence only.

Marks AJ (Bezuidenhout AJ and Balton J concurring) held:

"… [C]ounsel for the appellant conceded that the murders were committed in an aggravating and serious manner. He nevertheless argued that the appellant should receive lengthy sentences short of life imprisonment. He based his assertions primarily on the fact that they were first offenders, that they were 'relatively young', that they had confessed, co-operated with police and had pleaded guilty and not wasted the court's time." [Page 3]

"The issue is … whether or not there was either a material misdirection by the trial court in determining an appropriate sentence or whether such sentence was so shockingly inappropriate that it can be inferred that the trial court's sentencing discretion was not properly exercised. …" [Pages 4 - 5]

"… While youthfulness is generally regarded as a mitigating factor, this is not by virtue of the offender's age per se, but rather because of the immaturity associated with being of a youthful age. … The appellants were at the time they committed the offences aged 23 and 27 respectively, well beyond ther teenage years and therefore not considered to be prima facie immature. … The manner in which the offences were committed does not suggest that they are individuals with a particularly low level of immaturity. There is thus nothing to suggest that their maturity levels are below that which can be expected of an adult, and it cannot therefore be said that their ages constitutes either wholly or in combination with other factors, a substantial and compelling circumstance." [Pages 6 - 7]

"Another ground which the appellants allege as a substantial and compelling circumstance, is the fact that they are remorseful. … A guilty plea on its own is, however, not a suitable demonstration of remorse and the courts have warned against inferring genuine remorse simply because an appellant has pleaded guilty and co-operated with authorities. … A court must look at the intensity, longevity and foundation of

the appellant [sic] remorse to determine if it is sincere or whether it merely constitutes regret at getting caught." [Page 7]

"The argument for the appellants alleging remorse … are largely based on their plea of guilty, their co-operation with police officials and taking the court into their confidence. … [T]his is not enough and far more is required before genuine remorse will be inferred. Nothing further was pro-offered to substantiate the alleged remorse … No apparent demonstration of genuine penitence on their part can be drawn from anything on record, nor is there any kind of attempt made at seeking amends or apology to the families of the deceased. There is therefore, nothing … to conclude that the appellants' alleged remorse is such to constitute a substantial and compelling circumstances warranting a lesser sentence." [Page 9]

The appeal was dismissed

SELECTED JUDGMENTS

PRIVATE LAW

CYNTHIA ZONDO V NOKUTHULA PHYLODAVIA NGCOBO AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 1235/2013 (KWAZULU-NATAL HIGH COURT, DURBAN)

Case heard 28 November 2013, Judgment delivered 12 December 2013

The Applicant had allegedly been married to the deceased, a Mr Zondo, under customary law. When applicant applied for a death certificate, she discovered that a marriage between the deceased and the first respondent had been registered on 19 December 2012, the day on which the deceased had died. Applicant sought to have that marriage declared null and void ab initio.

Msani AJ held:

"This matter … is yet another of those unfortunate instances where, upon the passing (death) of the deceased two, or more women go for each other's jugular. The ultimate main aim at all times being to inherit, to the exclusion of the other(s), all or some of the earthly belongings of the deceased. Quite often the fighting starts immediately upon the passing of the deceased, i.e. before burial. …" [Paragraph 1]

"… [T]he First Respondents case is that on 14 December 2012 while the deceased was in the intensive Care Unit at Bay Hospital she got married to him. …The essence of what the Doctor is saying … is that at the time First Respondent claims she got married to the deceased … the deceased was ona Life Support machine." [Paragraphs 6 - 7]

"The First Respondent seems to want the court to accept that the deceased could exercise his volition and consciously participated in a wedding under those circumstances." [Paragraph 8]

"… First Respondent acknowledges that she knew Applicant and children fathered to applicant by deceased. What she did not know was that deceased was married to Applicant. She does not say what she thought they were. This assertion … does not accord with probability because she lived in the same ward with applicant while in love with deceased. She only maintains that deceased and Applicant were not in good terms which has no bearing on the existence or otherwise of the marriage. According to the local tribal constable, he only knew First Respondent as deceased girlfriend." [Paragraph 10]

"Strangely First Respondent says she never discussed the relationship between deceased and Applicant … The registration of the marriage on the date of death itself seems too opportune to be true, to put it mildly. It remains unexplained." [Paragraph 11]

"There was no family member of the deceased at the alleged marriage. … On the facts … it appears there was a cloud of secrecy around the alleged marriage which renders everything under this cloud very suspect." [Paragraph 12]

"According to Annexure A of the First Respondents affidavit (marriage register) and annexure C … (marriage certificate) the marriage took place at Empangeni. However the oral evidence of First Respondent is that it took place in Richards Bay hospital. … The extent of these anomalies is such that it becomes doubtful if there was such a purported marriage at all. … The bottom line is that it was not

established don [sic] a balance of probabilities that First Respondent was ever married to deceased." [Paragraph 13]

Finally, Msani AJ found that there was no putative marriage, and granted the application.

STUART V STUART, UNREPORTED JUDGEMENT, CASE NUMBER 4959/06 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 28 April 2010, Judgment delivered 29 April 2010

This was a divorce action. The parties had been married in community of property. It appeared that the defendant had lived separately from her husband and children for some time prior to the divorce. At issue was the forfeiture of benefits of the marriage, particularly the interest in plaintiff's pension benefits accruing from the Government Employees Pension Fund.

Msani AJ held:

"There is good argument for the fact that guilt having been replaced by irretrievable breakdown in our divorce law, this idea of 'forfeiture' suggesting a punitive element does not sit well with the present day jurisprudence regarding divorce. … But as correctly pointed out by Baker J in the Singh case … it is for the courts to order forfeiture on the old grounds until the situation is normalised by the legislature." [Paragraphs 51 - 52]

Msani AJ then listed factors of misconduct by the defendant:

"Defendant would … Not come home on time … Would come home intoxicated … Would claim endless stock takings until 2h00-3h00am … Plaintiff once went to investigated but found no such stock taking … Would be nowhere to look after children … When retrenched, she did not join her family … She squandered R46 000 package money … Did not help with school fees for four children … She was rendering no support to plaintiff yet using his medical aid – even at the time she was living with the boyfriend. … She has the guts to approach Plaintiff whenever she needed money … she brought a Rule 43 Application in circumstances where it was totally unjustified – when she could not have her way, she abandoned it. … For a long time, she has virtually been living her own life, that is, as if she were a single woman. … She ended up using her monies for her own purposes alone, leaving Plaintiff struggling on his own. " [Paragraph 53]

"… [I]t appears just and equitable that what Defendant can get out of the joint estate can only be minimal. The only saving grace being her marriage in Community of Property and the minimal period she lived with the plaintiff as a wife." [Paragraph 54]

The decree of divorce was granted, and defendant was awarded 10% of plaintiff's pension benefits.

CHILDREN'S RIGHTS

E V E (3718/2013) [2014] ZAKZDHC 10 (26 MARCH 2014)

Applicant sought to remove a minor child from South Africa to relocate with her to Luxembourg. Respondent refused to give his consent and opposed the application. The parties had previously divorced, with joint custody awarded to both, the children's primary residence being with the applicant.

Msani AJ held:

"What emerges from the interviews with both Family Advocate and Mr De Marigny is that none of the parents is disqualified as a custodian parent. It also emerges that the applicant and respondent do not see eye to eye. … Applicant believes that the respondent is withholding his consent only to get to her. Respondent on the other hand contends that the applicant wants to relocate with … only to frustrate his access to [the minor child]. The only report proposing otherwise is that of Dr Beverly Killian. …Unfortunately Dr Killian's report as well as the oral evidence showed clear signs of partiality." [Paragraphs 13- 14]

"The applicant must have considered that J [the minor child] would be well cared for in the care of the respondent. Nothing has been brought forward to show that this is not the case. On the contrary there is evidence that J has improved remarkably in her school work … This did not happen while she was in the care of the applicant. She is flourishing intellectually, physically, emotionally and socially. A joint letter from her school teachers supports this. To uproot her from this set up would be moving her from the known into the unknown and clearly not in her best interests." [Paragraph 31]

"It was not seriously suggested and I did not find that the applicants decision to emigrate to Luxemburg was unreasonable. But I also looked at the practical and considerations on which her decision was based and the extent to which one has engaged with and properly thought through the real advantages and disadvantages to the child. In this exercise I have concluded that it would not be in the best interests of the child for her to leave." [Paragraph 32]

It was ordered that the children would primarily reside with the respondent, with specified contact with the applicant.

CRIMINAL JUSTICE

AMIE CALLIXRE BAKUNDAKIZE V THE STATE, UNREPORTED JUDGEMENT, CASE NO: AR 456/2008 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Judgment delivered 22 April 2010

Appellant had been convicted in the regional court on one count of attempted rape, as a competent verdict to the main charge of rape, and one count of indecent assault. He was sentenced to five years imprisonment on each count, to run concurrently. He appealed against conviction and sentence. The complainant had been the only witness to the alleged rape.

Msani AJ (Gorven J concurring) held:

"Now, looking at the evidence of the complainant generally it shows a host of improbabilities, for instance [s]he had maintained an acquaintancy with the appellant for at least two years but did not know the actual location or address of the appellant's surgery in Durban … There is nothing on the record to show that she did anything to avoid sharing the bed with the appellant. The probabilities suggest that she willingly shared a bed with the appellant because how could she share a bed with a man who had clearly told her that he was sexually attracted to her. On her evidence this happened long in advance on the day that they had dined in a restaurant in Durban. The appellant had made no bones about this and had been forthright." [Page 10]

"She had herself not done anything to discourage the appellant from his advances. In fact, on her own evidence, she had not been offended by this. The complainant, in many ways, presented the most improbably story of a man and a woman totally unrelated … and having no love relationship at all but sleeping in the same bed. This is the kind of stuff that can occur in movies and not in reality in our assessment of the situation. … "

"Now to look at the evidence of the appellant … all that the appellant had to do was to present evidence hat would be reasonably possibly true. Despite some minor details that could have been lacking or could have been problematic in his evidence, he clearly managed to discharge this duty. In all fairness one could not have expected much more than what the appellant achieved in this matter."

"His evidence was a lot more probable when compared to that of the complainant. He knew just too much about the complainant then a casual acquintancy would. … The complainant's conduct on the night was so absurd as to border on tacit consent or consent by conduct to sexual intercourse with the appellant. …" [Page 11]

"The explanation by the appellant that the complainant was insane or under the influence of liquor is quite probable on a proper evaluation of the inherent probabilities and improbabilities of this matter. This is the explanation that the appellant gave to the inmates of his cottage when they came to investigate what was happening and he has stuck to this through and through."

"In the final … analysis it appears that the complainant did not tell the whole truth about her relationship with the appellant. She seems to be somewhat of a gold-digger on a proper assessment of all the evidence … In any event we did not have to reject her version in order to acquit the appellant because the only duty on the appellant was to tender a story that could be said to be reasonably and probably true in the circumstances and as I have indicated, in our assessment the appellant has managed to discharge this onus. " [Page 12]

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

SELECTED JUDGMENTS

COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LIMITED V BERNICE MADELENE WATTERSON AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 11325/2011 (KWAZULU-NATAL HIGH COURT, DURBAN)

Case heard 19 November 2012, Judgment delivered 26 November 2012

Plaintiff sought payment of moneys lent to a close corporation, on the basis of a suretyship agreement entered into between the plaintiff and the two defendants (husband and wife). Defendants disputed the suretyship contract and put palintiffs to the proof thereof.

Ncube AJ held:

"… [T]he Second Defendant admitted that he owes the Plaintiff but disputed the amount claimed. He told the court, he did not get statements but he never asked for copies from the Plaintiff." [Paragraph 12]

"It is important to mention that Defendants do not contend that the Plaintiff never sent a section 129 [of the National Credit Act] notices, but that they never received one. However, the track and trace report shows delivery of notices to the First Defendant. Delivery by registered mail is acceptable." [Paragraph 13]

"The Defendants dispute the amount claimed but have failed to state what the correct amount should be. The credit agreement which is the subject matter of this case was never disclosed to the Magistrate in a debt review application and it is not affected by that process. The said debt review order was never handed in at the trial and no evidence was tendered in proof thereof." [Paragraph 14]

"The Plaintiff has proved its case on a balance of probabilities. In fact, looking at the evidence in its totality, one gets the impression that the Defendants had no defence to the Plaintiff's claim. …" [Paragraph 15]

The plaintiff's claim was upheld.

SOCIO-ECONOMIC RIGHTS

MHLONGO V SELSELY FARM TRUST & ANOTHER [2008] JOL 21541 (LCC)

Judgment delivered 29 February 2008

Plaintiff sought an order declaring that he was a labour tenant at Selsey Farm. He had moved to the farm in 1954. His mother had worked for a Mr Kimber for 43 years. Kimber's son subsequently took over Selsey Farm, and continued to employ plaintiff as a tractor driver, and plaintiff also performed other duties on the farm.

Ncube AJ held:

"... It is clear that the Mhlongo family was allowed to crop on Selsely Farm. According to the plaintiff they were cropping in front of their homestead and also at the back of their homestead ... The Mhlongo family also had a right to graze cattle on the farm. ..." [Paragraph 4]

"... The plaintiff told the court that he inherited his mother's cattle when his mother passed away in 1982. This shows that from 1954 up until 1982... he himself had no cattle but he was working on the farm and he was paid a salary ... Mr Mhlongo ... told the court that at Selsely Farm he had the right to crop and right to graze cattle. ..." [Paragraph 8]

"Looking at the evidence of the plaintiff in its entirety, he impressed me as being an honest, reliable and truthful witness. He is very old, sick and weak but he survived a long cross-examination ... There were few instances where he appeared to be evasive. This, however, cannot be said to be caused by deliberate untruthfulness or to say the least, recklessness in giving evidence." [Paragraph 14]

"... I am expected to make my determination on the evidence as it stands before me. I must look at the evidence in its totality. In making a determination, I am guided by the fundamental principles of our law. One of those fundamental principles is that in a civil trial the onus is on the plaintiff to prove his or her case on a balance of probabilities." [Paragraph 57]

"It is clear from the evidence before me that there are enormous problems on Selsely Farm. ... The first defendant has a registered title over that land. On the other hand, Mr Mhlongo is living on the land. Mr Mhlongo grew up on that farm. He has stayed on the farm for 54 years. Mr Mhlongo worked on Selsely Farm for 44 years. He stopped working because of ill health. Mr Mhlongo knows no other life apart from farm life and that farm happens to be Selsely Farm." [Paragraph 58]

"What is also clear from the evidence is that all occupiers of Selsely Farm were given freedom on the farm during the days of Mr Michael Kimber. They could freely graze their cattle. They could use water on the farm and they could hold cultural functions as they liked. ... One can understand why occupiers find it difficult to co-operate with Mrs Wray, who now comes with restrictions and rules which they must comply with. These restrictions are new and the occupiers are not used to them. However, that does not mean that occupiers should not obey the instructions of the owner of the farm." [Paragraphs 59 - 60]

"... [T]he fact that the plaintiff and his mother were resident and working on the farm for such a long time, does not in itself qualify them as labour tenants. ... The contract of labour tenancy has been described as a contract falling somewhere between a lease of land ... and a contract of employment ... It is not a true lease because the rent does not take the form of money; it is also not an ordinary contract of employment because the reward does not consist in money but in the right to occupy and use the land. ... [I]t is clear that the contract of labour tenancy is a contract sui generis. ..." [Paragraphs 63 - 65]

Ncube AJ considered the definition of "labour tenant" in the Land Reform (Labour Tenants) Act, and continued:

"In my view, the test is whether a person is a farm worker or not. The fact that a person was paid a salary cannot in itself lead to an inference that he is not a labour tenant but a farm worker. The Act has, to a greater extent, altered the common-law position. The definition of a "farm worker" in the Act contemplates a situation where a person can still be a labour tenant even if he or she is paid in cash or some other form of remuneration provided that payment does not predominate over the value of the right to use the residence, grazing and cropping land. ... In my view, the first defendant has failed to

prove that the plaintiff is a farm worker. Accordingly, the presumption remains that the plaintiff is not a farm worker but a labour tenant." [Paragraphs 70; 72]

Ncube AJ then dealt with a counter-claim for eviction:

"In terms of section 14 of the Act, no labour tenant may be evicted while an application by him for acquisition of rights in land is still pending except where the court finds that special circumstances exist which make it fair, just and equitable to do so. *In casu*, there are no such circumstances. The eviction of the plaintiff in this case is also prohibited in terms of section 9(1)(a) of the Act. It is clear from the evidence that there is a breach of the relationship between the plaintiff and first defendant, but it is still possible to remedy it. …" [Paragraph 75]

Plaintiff was declared to be a labour tenant, and the first defendant's counterclaim was dismissed. Pending the determination of the issue of acquisition of land, conditions were imposed on plaintiff's use of cattle.

CRIMINAL JUSTICE

THE STATE V THILENDRA NAIDU, UNREPORTED JUDGEMENT, CASE NO: DR222/2013 (KWAZULU-NATAL HIGH COURT, DURBAN)

This was a special review submitted by a magistrate, asking that an order made in terms of the Firearms Control Act be set aside.

Ncube J (Balton J concurring) held:

"The State led the evidence of the complainant, who was the only witness for the State. The accused and the complainant are legally married and they stay together as husband and wife. … [T]he complainant expressed her unwillingness to testify against her husband since they had reconciled … Despite this, the Prosecutor forced the complainant to testify … As the complainant's testimony differed from her statement to the police and upon application by the Prosecutor, the complainant was declared a hostile witness. … " [Paragraphs 6 - 8]

"… [T]he complainant conceded that she had told lies to the police. She conceded that she voluntarily handed the accused's firearm over to the police because she wanted the accused to be locked up just for one night. She conceded that the accused never pointed a firearm at her and that she had given the firearm to the police just because she did not like the fact that the accused owned a firearm " [Paragraph 10]

"The Magistrate is of the view that it was wrong of him to be dismissive when the accused enquired about his right to appeal the order … The Magistrate is of the view that his attitude in this regard was not in keeping with the provisions of Section 35(3)(O) of the Constitution. That Section affords every accused person a right to a fair trial which includes that right of appeal to or review by a higher court. It was for this reason that the Magistrate asked that his order be reviewed and set aside." [Paragraph 17]

"The conviction was not in accordance with justice. The complainant proved herself to be unworthy of credence. The Magistrate ought to have discharged the accused at the close of the State's case." [Paragraph 18]

The conviction and sentence were thus set aside.

SELECTED JUDGMENTS

PRIVATE LAW

MTWALO V MINISTER OF SAFETY AND SECURITY (8772/2009) [2014] ZAKZPHC 18 (27 MARCH 2014)

Case heard 4, 6, 18, 18 and 26 September 2013, Judgment delivered 27 March 2014

Plaintiff sued for damages for unlawful entry, search, arrest, detention and assault, arising from a search conducted by the police in respect of dagga that the plaintiff was allegedly selling. The trial was conduct on the issue of liability only.

Nzimande AJ held:

"… [T]he plaintiff challenges the defendant's evidence on the basis that there were immaterial contradictions and improbabilities, which render the defendant's case false, unreliable and lacking credibility. Such discrepancies, it is argued, include the following questions, inter alia: whether the police informer referred to the specific locations of dagga at the plaintiff's house; why the plaintiff bit April [a police officer involved in the search]; how the plaintiff sustained his injury; the weighing of dagga; the detention of the plaintiff at his house post hospitalisation; the missing police statements and the withdrawal of the charge against the plaintiff. " [Paragraph 29]

"In the case of Magobodi v Minister of Safety and Security & Another … Miller J held that proper consent in terms of Section 22 (a) of the Act [for a search without a warrant] must be voluntary. I am satisfied that in this case the plaintiff voluntarily gave consent, as in his own words he stated that he has respect for the police. In the circumstances the defendant's evidence in support of Section 2 (b) was superfluous. … I am of the view that the evidence proves that the police complied with the statutory provisions relating to search including Section 11 of Act 140 of 1992 [the Drugs and Drug Trafficking Act], as dagga is a drug mentioned in the schedule to this Act. … In the case of Minister of Safety and Security v Sekhoto & Another … the Court held that in terms of Section 40 [of the Criminal Procedure Act] the purpose of the arrest must be to bring the arrestee before court. I am satisfied that the arrest of the plaintiff was necessitated by the uncovering of a large quantity of dagga from his premises, which is an offence in terms of the law. Evidence revealed that the plaintiff was formally charged in the criminal court for dealing in dagga and assault." [Paragraph 31]

"The plaintiff's argument that this was a sting operation by the police begs the question as to why the police chose the plaintiff's house out of all the houses in the village … In the circumstances, my view is that it is highly improbable that the police officers would have embarked on such a search without just cause. Common sense dictates that if the plaintiff was detained by the police immediately after his arrest, he would have been placed under police guard for the duration of his hospitalisation. However, the circumstances dictate that this was not the case. Upon discharge from Edendale hospital the plaintiff was transported to Matatiele by ambulance. It is only then that he contacted Nketu to provide transport for him. In my view this also gives credence to the version that the plaintiff was not detained by the police upon his discharge from hospital." [Paragraph 32]

"In all the circumstances of this case I find that the police witnesses were clear, honest and forthright. These witnesses corroborated each other in all material respects. The contradictions existing in the defendant's evidence were of no material nature. I am satisfied that the police officers acted within the

ambit of the relevant statutory provisions in relation to the search of the plaintiff's house and the arrest of the plaintiff on the day in question. My findings are based on the facts which are common cause as well as the corroborated evidence of the defendant. The presence of dagga at the plaintiff's house is not disputed, only ownership thereof. This in essence lends support to the defendant's version that the police witnesses were justified in arresting the plaintiff. ..." [Paragraph 33]

"The plaintiff is a single witness on the claim of assault. This is so because the second witness for the plaintiff categorically stated that she did not witness how the plaintiff sustained his injury. The plaintiff's version that he bled from his nose and mouth due to the kicking and punching at the hands of the police was not supported by the available medical evidence (J88 form). Even on the nature and extent of the injury he sustained, the plaintiff's version was not supported by any medical evidence to prove that such injury would have been caused by the booting only." [Paragraph 34]

"I am satisfied that the defendant has succeeded in justifying the search of the plaintiff's premises without a warrant. I arrive at a similar conclusion with regard to the arrest and detention (if any) of the plaintiff. Finally I find that the plaintiff has failed to discharge the onus to prove that his injury was caused by the police." [Paragraph 35]

Plaintiff's claim was thus dismissed with costs.

COMMERCIAL LAW

ABSA BANK LIMITED V SHABALALA N.O. AND OTHERS (9734/12) [2014] ZAKZPHC 17 (19 MARCH 2014)

Case heard 24 February 2014, Judgment delivered 19 March 2014

Applicant sought judgment against the respondents for the amount outstanding on a mortgage loan agreement, together with an order declaring the mortgaged property specially executable. It is alleged that the Trust (of which first and second respondent were trustees) had breached the terms and conditions of the loan agreement in that it had failed to pay its monthly instalments.

Nzimande AJ held:

"The only issue to be considered by this Court is whether the applicant has proved a breach of the mortgage loan agreement." [Paragraph 6]

"The applicant's cardinal argument is that the Trust was obliged to pay the loan and it elected to make payments by stop order against the third respondent's personal bank account. Mr. Stokes S C, who appeared for the applicant, argued that the parties had agreed that the method of payment elected by the borrower would not in any way detract from the borrower's obligations to ensure that the Bank received the payments in terms of the agreement ... He further argued that the third respondent was aware that no deductions were made from his personal bank account for eighteen months, but he did nothing about it." [Paragraph 7]

"The respondents' fundamental argument is that the applicant should have used the existing stop order to service the bond account at all times. Mr. Bedderson argued that the onus is on the applicant to prove the breach of the mortgage bond and the loan agreement on a balance of probabilities. He further

argued that there were material contradictions in the applicant's affidavits with regard to the certificate of balance and the allegation that no bond repayments had been made in 2011." [Paragraph 8]

"My considered view is that the points raised by the respondents regarding the breach of the mortgage loan agreement were not supported by the facts, which are common cause. … I am satisfied that the applicant has established the breach of the mortgage loan agreement and that there were no contradictions in the applicant's papers." [Paragraphs 10 - 11]

The application was therefore granted.

CIVIL PROCEDURE

CHETTY T/A NATIONWIDE ELECTRICAL V HART N.O. AND ANOTHER (12559/2012) [2014] ZAKZDHC 9 (25 MARCH 2014)

Case heard 25 October 2013, Judgment delivered 25 March 2014

Applicant sought an order setting aside an award made by the first respondent in arbitration proceedings. The defendant in the arbitration had applied for business rescue prior to completion of the arbitration. Argument in the arbitration proceedings was delivered, and the arbitration award signed and published, during the business rescue proceedings. A written consent was not given and the Court did not grant leave for the proceedings to continue. Therefore, applicant argued, the award was defective and fell to be set aside.

Nzimande AJ held:

"The issue that arises therefore is whether the arbitration proceedings constitute legal proceedings for purposes of Section 133 of the [Companies] Act." [Paragraph 10]

"In the applicant's short heads of argument it is contended that arbitration proceedings are legal proceedings as contemplated by Section 133 of the Act. The Court was referred to Bristol Airport plc v Powdrill and others (1990) 2 All ER 493 (CA) … where Sir Nicolas Browne-Wilkinson V-C stated the following: "In my view the natural meaning of the words 'no other proceedings may be commenced or continued' is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration". No argument was provided by the second respondent in this regard." [Paragraph 11]

"No definition of the term "legal proceedings" or "enforcement action" is provided in the Act. In Lister Garment Corporation (Pty) Ltd. v Wallace N.O. … the Court was dealing with security for costs in "legal proceedings" by companies and body corporates in terms of Section 13 of the Companies Act … which also did not define "legal proceedings" … Howard J P referred to the case of Van Zyl v Eudodia Trust (Edms) Bpk … where Dijkhorst J pointed out that the ordinary meaning of "legal proceedings" is a "lawsuit" or "hofsaak"." [Paragraph 12]

"From the reading of the Bristol Airport plc case, the contention by the applicant that the arbitration proceedings are legal proceedings for purposes of Section 133 of the Act cannot be sustained. I am of the view that the interpretation of "legal proceedings" in Van Zyl's case above should be applied to legal proceedings, as envisaged by Section 133 of the Act. In the circumstances I hold the view that arbitration

proceedings are not legal proceedings as contemplated in Section 133 of the Act. Therefore the application to set aside the award made in the arbitration proceedings must fail." [Paragraph 13]

The application was thus dismissed with costs.

SELECTED JUDGMENTS

COMMERCIAL LAW

ABSA BANK LTD V MKHIZE AND ANOTHER AND TWO SIMILAR CASES 2012 (5) SA 574 (KZD)

Case heard 28 June 2012, Judgment delivered 6 July 2012

Applicant sought default judgement in four cases, in respect of home loan mortgage bonds, for monies owing and for an order declaring the property specially executable. In light of the Constitutional Court's decision in Sebola v Standard Bank, post office "track and trace" notices were submitted in order to show delivery of the s 129 notice required before launching proceedings. In three of the four cases, the registered item was returned unclaimed. The issues were whether there had been compliance with the section despite the notices being unclaimed, and if not, what steps applicant should be directed to take before continuing to seek judgement.

Olsen AJ considered statistics provided by the applicant, illustrating "the extent of the problem" with which it was confronted, and continued:

"It seems to me that the procedure or system in place for the handling of registered mail in 1976 (when Maharaj was reported) was not the same as the one which operates now. … [T]he court spoke of the letter reaching the purchaser 'or, at least, (being) made available to him at an address where he is likely to be placed in possession thereof'. It spoke of evidence that the letter was 'delivered at the specified address' as constituting prima facie proof of delivery to the addressee. That no longer happens. Registered letters are collected, not delivered; and the notifications that they are available for collection proceed as ordinary mail from the addressee's post office to the address in question, with the result that there is no record of the actual delivery of the collection notice at the intended recipient's address. … [T]he current system is more often than not inadequate when employed to bring notices to the actual (as opposed to presumed) attention of consumers who are in financial distress." [Paragraphs 33 - 34]

"… I do not think that I overreach the boundaries of judicial notice by suggesting that, in the case of post directed at consumers in financial distress, ordinary post is by a substantial margin more reliable than registered post. The country would be in an uproar if anything like 50% (let alone 70%) of ordinary mail went astray. … But, of course, the difficulty with ordinary mail in the context of s 129 of the Act is that nothing can be proved through direct evidence — besides posting — unless the credit provider receives a response to the letter from the consumer." [Paragraph 35]

Olsen AJ then turned to deal with the question of whether the letters being retuned unclaimed required the cases to be adjourned. He analysed the statutory framework and case law, and continued:

"The marriage of the judgments in Rossouw and Sebola proposed by Absa would make a contribution to the efficient and cost-effective administration of justice in connection with the enforcement of credit agreements. Indeed, the essence of Absa's argument before me — that the risk of non-delivery lies with the consumer once the registered item reaches the consumer's post office — accords with the judgment of the Western Cape High Court … in the matter of Nedbank Ltd v Anelene Binneman and Thirteen Similar Cases. …My difficulty with many of Absa's arguments is that they offer more support for the proposition that Rossouw was correctly decided than they do for the proposition that Sebola actually endorsed Rossouw … Furthermore, Absa's submissions do not address the crucial difference between the

reasoning adopted in Rossouw and that followed in Sebola. In Rossouw the court decided that upon a proper construction of the provisions of the Act dealing with delivery, all that the legislature required was that the (registered) letter should be despatched. ... In Sebola, on the other hand, according to Absa, the court decided that the credit provider's duty is discharged ... when the letter reaches the consumer's post office. Given how registered post works, the selection of that point in the process may very well have been significant, given the facts in Sebola, but in the ordinary case (where the letter reaches the correct post office) the selection of that point in the process would be entirely arbitrary but for the fact that the attainment of it can be proved. That seems to me to be no justification for a finding that the legislature ordained that the credit provider's obligations under s 129(1) of the Act are discharged when the letter reaches the consumer's post office. " [Paragraph 50]

"Applying the well-known principles governing the rules of interpreting a court's judgment ... I am unable to reach the conclusion that the majority judgment in Sebola sanctions this court ignoring conclusive evidence that the s 129 notice did not reach either the consumer or the consumer's address — which is what would be required to be done to hold, in the circumstances of the three cases before me, that compliance with s 129(1) of the Act has been proved. ..." [Paragraph 51]

"... [O]ne may deduce that the majority judgment in *Sebola* holds that actual notice to the consumer is indeed the standard set by s 129(1) of the Act. ... In my view a proper reading of the subsequent paragraphs of the judgment does in fact reveal that the decision of the court in *Sebola*, as to what will 'ordinarily' suffice, cannot be read to convey or imply an endorsement of the decision in *Rossouw*, that, once what will 'ordinarily' suffice is proved, the question as to whether the notice actually reached the consumer is irrelevant." [Paragraph 53]

"I conclude, accordingly, that in the three matters before me there has not been compliance with the procedures required by s 129 of the Act, as a result of which I must adjourn these matters and make appropriate orders as to the steps Absa must complete before these matters may be resumed." [Paragraph 60]

"... [T]he order I make ... should be consistent with what I might regard as an appropriate wider framework within which to handle the problems which have arisen in connection with registered post, and which will in the future arise in many thousands of cases ... [I]t must not be overlooked that, whereas s 129(1) has the most laudable purpose of avoiding litigation, it and the related sections of the Act cannot be taken to have been designed as a mechanism either to prevent access to court by credit providers, or to render it so difficult and time- consuming that otherwise unnecessary write-offs feature as viable alternatives to the enforcement of a credit provider's rights. ..." [Paragraph 63]

The default judgment applications were postponed, and plaintiff was given the opportunity to provide a s 129 notice "through one or more of the mechanisms listed in s 65(2)(a) of the Act, as well as by registered post.

SECTION THREE DOLPHIN COAST MEDICAL CENTRE CC AND ANOTHER V COWAR INVESTMENTS (PTY) LTD 2006 (2) SA 15 (D)

Case heard 14, 15 March 2005, Judgment delivered 26 April 2005

Applicants sought an order compelling respondent to complete the opening of a sectional title register, and to compel the transfer of sectional title units. First applicant's case was settled. Second applicant's claim turned on whether the agreement under which the unit was purchased was invalid due to non-compliance with the Alienation of Land Act.

Olsen AJ held:

"... [T]he agreement made no reference to s 29A of the Act, nor to the rights of the purchaser under that section. The respondent contends that the agreement is therefore null and void, as ss 2(2A) of the Act provides as follows: 'The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of s 29A.' ..." [Paragraph 5]

"The relevant considerations, when interpreting a statutory provision which requires compliance with some step or formality when agreements are entered into, are 'the language of the Act, its nature and scope, the mischief it seeks to prevent, and the consequences of visiting invalidity upon the transaction'." [Paragraph 13]

"Taking the language employed as a starting point, it is significant that, having chosen to place the provision under consideration in s 2 of the Act, the Legislature refrained from using the language of ss 2(1) of the Act to convey that non-compliance with the new provision would visit unenforceability on the offending contract. ... Having regard to the well-established construction of ss 2(1) of the Act, and of its predecessors, that non-compliance with it results in a nullity, it is difficult to reconcile the failure to adopt the language of ss 2(1) with the notion that the Legislature intended non-compliance with the new provision to render the contract null and void. " [Paragraph 14]

"I am in respectful disagreement with what seems to be implied in the judgment in the case of Sayers ... that the decision to introduce the new provision as part of s 2 reflects an association between it and the legislative intent behind ss 2(1). ... [B]earing in mind that the earlier subsection requires rights to be contained in a written record in order to render them enforceable, whereas the rights contemplated by the later subsection are in any event enforceable, there seems to be no reason to assume that non-compliance with the one requirement should have the same consequences as non-compliance with the other, because of the use of similar words to convey that something should appear in writing." [Paragraphs 15 - 16]

"In my view, having established the right of a purchaser to a cooling-off period, the Legislature's intention in enacting ss 2(2A) was to bring the right of revocation or termination ... to the attention of the purchaser. ... [T]he right has a finite life which is not dependent upon or affected by a purchaser's knowledge of it. There is every reason to make provision for steps directed at seeing that a purchaser has

knowledge of the certain and indisputable right to a cooling-off period established under s 29A." [Paragraph 17]

"I cannot think of any reason why, when seeking to protect hesitant or uncertain purchasers of smaller properties … the Legislature would intend to take the risk of causing manifest injustice to more decisive purchasers of the same class. It strikes me as more logical that the Legislature intended that non-compliance with the statutory provision would render the transaction voidable at the instance of the party for whose benefit the provision was enacted. …" [Paragraph 19]

"In my view s 29A of the Act, read with ss 2(2A), has not achieved the all-embracing protection in exchange for which the Legislature might have considered it worthwhile to interfere with the common law of sale to the extent that it would have done by rendering void all contracts not in compliance with ss 2(2A) of the Act." [Paragraph 24]

"I conclude that there is an element of arbitrariness which characterises the operation of ss 2(2A), and which sits uneasily with the notion that non-compliance with the section renders the agreement void *ab initio*." [Paragraph 30]

"…I respectfully disagree with the propositions that the intention or purpose of the Legislature is best served by a construction of ss 2(2A) which dictates the automatic invalidity of a deed of alienation which does not comply with ss 2(2A), and that a different construction of ss 2(2A) would frustrate or seriously inhibit the object of the legislation. … In the circumstances I respectfully disagree with the decision in Sayers, and accordingly propose to grant an order in favour of the second applicant." [Paragraphs 31; 33]

Respondent was accordingly directed to take the necessary steps to pass transfer of the immovable property in question to the second applicant. The decision was upheld on appeal: Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC and Another 2007 (3) SA 100 (SCA).

CRIMINAL JUSTICE

FRASER AND ANOTHER V NATHE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER, IN RE: THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V FRASER AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 18832/2004 (DURBAN AND COAST LOCAL DIVISION, APRIL 2005)

A restraint order had previously been obtained against the first and second applicants in respect of various property, under the Prevention of Organised crime Act (POCA). Applicant sought an order authorising the sale of the member's interest in the second applicant (wholly owned by the first applicant) and authorising the use of the proceeds of that sale for the first applicant's reasonable legal expenses in the criminal proceedings (relating to "serious" charges of drug dealing) to which the restraint order related. There was also an application to intervene by Absa Bank, who claimed to be owed monies by the first applicant.

Olsen AJ held:

"… [T]he existence of a discretion to grant relief under section 26 is dependent only on my being satisfied that the first applicant has disclosed under oath all his interests in property." [Pages 5- 6]

"In the answering affidavit delivered on behalf of the first respondent the Deputy Director of Public Prosecutions … concedes that he has no knowledge of any assets of the first respondent other than those dealt with in the founding affidavit. However that did not prevent the first respondent contending … that the first applicant had failed to make a disclosure as to his interests in property, such as should satisfy the court … They involve challenging the first applicant where he has merely estimated, or does not know, the price at which any item has been realised, and asserting that he has not given an exact account of how monies realised were disbursed. … [T]hese challenges … are not sufficient to disturb the conclusion one must, in my view, draw from the founding affidavit, namely that a sufficient disclosure has been made." [Page 9]

"Firstly, the first applicant cannot say what he cannot remember, and he cannot say what he does not know. He has been in prison … He does not have access to any records. There is no evidence … to raise a doubt as to whether the disclosures are as accurate as the first applicant can make them in the circumstances. … Secondly, the challenges … go to the level at which the first applicant has dealt with property … which he says is no longer his, Section 26(6) … does not require a disclosure concerning property not subject to the restraint order. …" [Page 10]

"The legislature has prescribed a disclosure of assets as a prerequisite to the grant of an order which would allow an accused person access to the funds required in order to exercise his or her rights in terms of sections 34 and 35 of the Constitution. I do not think that any harm is done to the language of subsection 26(6) of the Act if recognition is given to the constitutional implications of the requirement that the curt must be "satisfied" that the accused person "has disclosed under oath all his or her interests in property", bearing in mind the presumption of innocence, and the fact that the right to choose a legal practitioner may … be rendered nugatory if the means to pay for representation are withheld. …"" [Page 11]

"… There is a suggestion by the first respondent that persons who are too senior have been instructed. However subsection 35(3)(f) of the Constitution affords an accused person the right to choose legal representation, and given both the nature and anticipated duration of this trial, one cannot question a decision to brief counsel of some experience." [Page 12]

"… I have some difficulty in understanding how a balance is to be struck when the reasonable legal expenses have a substantial impact on the available fund. It strikes me that allowing legal expenses to be paid at something less than what is reasonable involves … some curtailment of the accused person's right to legal representation at trial, and may indeed result in an unfair trial … [O]nce a reasonable level of legal services … has been established, no question arises as to whether something less than that should be allowed. …" [Pages 15 - 16]

"It seems to me that section 33 of the Act should be interpreted in the light of this primary objective [to deprive convicted persons of 'ill-gotten gains', rather than enrich the state, as per the SCA judgment in NDPP v Rebuzzi], and that the potential "impoverishment" of the State by reason of expenditure on reasonable legal expenses is not that prominent a feature. … Whilst the accused person may enjoy the benefit of expenditure on lawyers' fees, there is also advantage in that to the State. Fair criminal processes are a prominent feature of the Bill of Rights which, in terms of subsection 7(2) of the Constitution, the State must respect, protect, promote and fulfil." [Page 17]

Olsen AJ then turned to the intervention application by Absa Bank:

"I conclude … that the legislature intended that a restraint order under the Act should deprive third parties such as ABSA of some of their ordinary rights as creditors of a defendant. Not only the rights of a defendant, but also hose of such third parties, have been affected by the exceptional and unconventional provisions designed to deter crime. … It seems to me that the legislature has made provision to exclude such interventions in the interests of achieving the swift implementation of measures designed to prevent criminals from benefitting from … the proceeds of crime, on the understanding that the appropriate account will be drawn, and discharged where possible, once the procedure has run its course." [Page 24]

"… The exercise of rights of appeal by persons unconcerned with the delays in the criminal process which are the near inevitable consequence thereof, could pose a substantial obstacle to the achievement of justice in the criminal process in accordance with the tenets of the Constitution. …" [Page 25]

Olsen AJ thus concluded that Absa did not have the right to intervene. An order was made allowing the membership interest to be sold, and setting numerous conditions for how the proceeds should be used towards legal expenses. On an appeal by Absa Bank, the decision was overturned, the SCA granting Absa leave to intervene and setting aside the relief granted to the extent that the monies advanced for payment of legal expenses could not cause the monies retained by the curator dropping below a specified amount: **Absa Bank Ltd v Fraser and Another 2006 (2) SACR 158 (SCA)**. That decision was itself overturned in part by the Constitutional Court in **Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC).**

SELECTED JUDGMENTS

CIVIL PROCEDURE

THE MEMBER FOR THE EXECUTIVE COUNCIL FOR KWAZULU-NATAL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS V INKATHA FREEDOM PARTY AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 10304/2013 (KWAZULU-NATAL HIGH COURT)

Judgment delivered 1 October 2013

Applicant brought an urgent application to interdict respondents from installing the second respondent as Municipal Manager of Abaqulusi Municipality. The parties had previously been involved in litigation, in which applicant had been unsuccessful. She sought to enforce the principle of suspension of judgements when an application for leave to appeal is brought. The judgement against which she soguht to appeal had been handed down on 30 August 2013.

Poyo-Dlwati AJ held:

"A meeting of the Executive Committee of the AbaQulusi Municipality … was purportedly held on 4th September 2013 and sought to put into effect the court order … The meeting resolved to appoint the second respondent as the municipal manager of the municipality … Later after that meeting a notice of application for leave to appeal against the court order … was filed and served on the respondents. The respondents' legal representatives refused to give an undertaking that the resolution of the meeting would not be put into effect pending the appeal. They further alleged that the appeal might be perempted. The applicant then lodged this application on the basis of urgency." [Paragraph 4]

"The applicant contends that the filing of the notice of application for leave to appeal suspends the judgment unless leave to execute is sought and granted by the Court which granted the order. … It is accepted in our courts that the execution of a judgment is automatically suspended upon the noting of an appeal with the result that pending the appeal the judgment cannot be carried out and no effect can be given thereto ..It was argued on behalf of some of the respondents that at the time when a decision to implement the court order was taken, there was no notice of an application for leave to appeal before them. … [T]he respondents argued that the court order has been put into effect and executed and in that way the appeal is perempted. … " [Paragraphs 5 - 6]

"There is nothing in the papers nor in argument that was presented to suggest that the applicant conveyed an intention to be bound by the judgment. There is nothing that suggests that she has acquiesced with the court order. In my view, she had a right to appeal the court order and she exercised that right within the time frames allowed in the rule and in the court order. The respondents, on the other hand, when they implemented the court order ran the risk of this litigation. At the very least the respondents should have allowed the applicant the five days within which to implement the court order to react. … I am therefore of the view that the respondents have failed to establish pre-emption and the appellant should be allowed to exercise her appeal right. Our courts are loath to debar a party from exercising a right which is conferred upon them by law. …" [Paragraph 8]

"In conclusion therefore the fact that the respondents are keen to put into effect the court order … makes this application urgent and that makes the balance of convenience to favour the applicant. …" [Paragraph 9]

The interim interdict was granted.

HESSE NO AND OTHERS V HLANGANISANI CONSTRUCTION CC AND ANOTHER (8963/2011) [2013] ZAKZPHC 36 (20 JUNE 2013)

Applicant sought to stay the implementation of an arbitration award, and to compel the second respondent arbitrator to provide full reasons for the award.

Poyo-Dlwati AJ held:

"It is the Applicant's case that the Second Respondent had no mandate to deal with the claim for preliminaries and generals and default interest. If the Second Respondent dealt with these then the Applicant … should have been allowed to present its case fairly to the Respondent. The Applicant argued that their absence in the Richards Bay meeting … was grossly irregular and unfair as they were not able to present their case with regards to preliminaries and generals and default interest. In fact the contention of the Applicants is that the preliminaries and generals and default interest were not part of the mandate in the first place. … [I]t was argued on behalf of the First Respondent that the preliminaries and generals and default interest were a direct consequence once the date for practical completion and the extension of time claim had been dealt with. …" [Paragraph 10]

"Interest is defined as the bank rate that is applicable from time to time to registered banks when borrowing money from the Central or Reserve Bank of the country named in the schedule … Penalty on the other hand is defined as penalty as stated in the schedule. …In my view, the Second Respondents' determination dealt with penalties and not interest. It was suggested on behalf of the First Respondent that the issue of preliminaries and generals had always been a contentious issue between the parties and had to be dealt with. Whilst this could have been so it was not part of what was determined by the Second Respondent … as being part of his adjudication once he had dealt with the severable issue. …" [Paragraph 11]

"The Second Respondent had made it clear … what he was going to determine and this was agreed to by the parties and it was definitely not the claim for preliminaries and generals but the claim for date for practical completion and penalties. In my view there was no agreement by the parties that the claim for preliminaries and general would be determined by the Second Respondent. …" [Paragraph 12]

"The second ground deals with the meeting of 7 July 2011 in Richards Bay. It is common cause that Taylor, Richards, Kunneke and the Second Respondent were in attendance … It is also common cause that contrary to the procedure laid down … the meeting … was not recorded … There is therefore no independent minutes of that meeting. The Applicants allege that they … were denied permission to attend the meeting by the Second Respondent. We do not know how it came about that Kunneke was at the meeting. Kunneke in his replying affidavit avers that he only participated or dealt with the issue relating to latent defects. … It is clear … that it was always the intention of the parties … that Taylor, Richards and the Second Respondent would try and resolve the remaining issues. Kunneke was never supposed to be part of the three …" [Paragraphs 14 - 15]

"… Taylor and Kunneke do not agree that there was consensus. This obviously is the undesirable consequences of the failure to record the proceedings or even the Second Respondent making available his notes pertaining to the meeting. I agree with the First Applicant that the conduct and the results of

the meeting in Richards Bay taint the entire award. The Applicants were denied the same opportunity that was afforded to the First Respondent. ... The fact is that they were not equally represented so as to be able to deal with the issues that were dealt with at the meeting." [Paragraph 16]

"... In my view the presence of Kunneke in that meeting tainted the proceedings. I find it difficult to understand why the Second Respondent deemed it necessary to conduct meetings separately and individually with the parties. This, in my view, is a very undesirable situation that cannot be said to be transparent nor fair. In any event this approach ... was found at in Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) ... where the court held that were an arbitrator to discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity which may without more warrant the award being set aside. ... I view, the meeting at Richards Bay, as grossly irregular as the parties were not given an equal opportunity to present their case on the issues discussed in that meeting especially taking into account the Second Respondent's view on Taylor. It seems the Second Respondent was guilty of deliberate partiality against Taylor and therefore Applicants. The Applicant should also succeed on this ground. " [Paragraph 17]

The arbitration award was set aside, and it was directed that the dispute be re-heard before a new arbitration tribunal.

CRIMINAL JUSTICE

FOX SITHOLE AND OTHERS V THE MINISTER OF CORRECTIONAL SERVICES AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 6009/2013 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 14 November 2013, Judgment delivered 30 January 2014

Applicants had been sentenced to various long terms of imprisonment for serious crimes. They sought an order compelling respondents to transfer them from the Ebhongweni Correctional Centre to a facility in Johannesburg or any other correctional centre in Gauteng. Applicants were all originally from Gauteng, or had resided their before arrest, and had families living in Gauteng. Applicants complained of being kept in single cells, of not being allowed to exercise or communicate, and of a lack of rehabilitation programmes. Due to the remote location of Ebhongweni, it was difficult for applicants' families or legal representatives to visit them. Respondents argued that applicants were classified as a high security risk, and that there were no suitable facilities in Gauteng to accommodate them. Furthermore, most correctional centres in Gauteng were overcrowded.

Poyo-Dlwati AJ held:

"... There was no dispute ... about how the security classification is done. It was argued, however, that their families needed to see them and that they needed to consult with their legal representative ... and these override the classification." [Paragraph 6]

"It is not in dispute that the applicants are allowed visits by their friends or family members and access to their legal representative but their complaint is that it is expensive for them because of the location ... It seems to me that there is no dispute that if maximum security facilities were available in Gauteng then the Applicants could be transferred. The applicants however seem not to appreciate the over

crowdedness of these facilities. The figures … reveal an undesireable situation. Most of these facilities are 200% overcrowded. This court cannot condone an inhumane situation by granting the order prayed. It is trite that a convicted prisoner 'retains all the basic rights and liberties of an ordinary person except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he or she as a prisoner is placed', … It is so that the rights granted to the applicants about where they are to be accommodated are limited … due to their security classification and the availability or otherwise of accommodation." [Paragraphs 10 - 11]

"Section 12(1)(a) of the Constitution provides that nobody may be deprived of 'freedom arbitrarily or without just cause'. Since a decision to transfer or not to transfer a prisoner is an administrative decision, it has to comply with the provisions of Section 33 of the Constitution that it must be lawful, reasonable and procedurally fair. … There are no such facilities available in Gauteng and it therefore follwos that they must be accommodated in Ebhongweni until such time that the maximum security facilities are available in Gauteng. … As the applicants were convicted of carious serious offences … their interests are outweighed by the security requirements. In my view that decision of the respondents is lawful, reasonable and procedurally fair." [Paragraph 12]

"I agree … that the application was prematurely launched and referring the matter to the Independent Correctional Centre Visitor could have assisted the applicants with their complaints … " [Paragraph 13]

The application was dismissed, and the judgment was referred to the Independent Correctional Centre Visitor to investigate the applicants' complaints in relation to exercise and communication.