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

OCTOBER 2012

## 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 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 the judiciary's 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 the September 2009, October 2010, April 2011, October 2011, April 2012 and June 2012 interviews, as well as the Chief Justice's interview in September 2011.
3. The intention of these reports continues to be 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 a basis on which to assess candidates' suitability for appointment to the bench.

## METHODOLOGY OF THIS REPORT

4. The methodology followed will be familiar to readers of our previous reports. We set out summaries of the nominees' judgments, as far as possible by quoting their own words. We do not advocate for or against the appointment of individual candidates, and do not provide analysis or criticism of the judgments summarised. 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 contribute to 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.
5. We have searched for candidates' judgments on the *Jutastat* and *Lexis Nexis* online legal databases. We have generally prioritised judgments that have been reported and are available on these databases. Where there are few or no judgments available on these resources, we have drawn on judgments found on the *SAFLII* online database, or attached to the applicants' application forms.
6. For candidates with a large number of judgments, we have sought to present a range of judgments which we think will be useful for the JSC in assessing the candidate's suitability for appointment. We have not limited the judgments included in the report to those focusing on constitutional issues. We have done so in an attempt to make the report more

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

comprehensive and therefore, we hope, more useful to members of the JSC and other stakeholders in the process.

7. Broadening the scope of the report presents obvious difficulties in selecting which judgments to include. We have been guided by factors which we have used in previous reports, such as:
    a. The importance of a judgment, and whether it broke new ground;
    b. Evidence of independent-mindedness (as demonstrated by, for example, giving dissenting or separate judgments); and
    c. Judgments from different stages of a candidate's career, in order to show the growth and development of their judicial philosophy.
8. Within our summaries of the judgments, we have where possible included the dates when cases were heard and when judgment was given, to provide evidence of a candidate's industry and capacity for hard work. We have also attempted to note evidence of significant research in judgments. We have also summarised academic articles written by candidates, where these are available.
9. We have not included judgments or articles that have been co-authored.
10. Regrettably, we have not had the capacity to accurately summarise or translate judgments or articles written in Afrikaans. The source material for this report is thus confined to judgments and articles originally written in English.
11. We are alive to the possibility that different researchers may apply some of these criteria differently. It is important to re-emphasise that this report is not, and does not claim to be, a comprehensive analysis of candidates' entire track records. This is particularly true in the case of candidates who have already served as judges for a long period of time (such as candidates for Judges President and Deputy Judges President positions). Instead, the report is an attempt to provide insights so as to guide and prompt further research and analysis. Furthermore, we reiterate that the selection of material for the report is not intended to advocate implicitly for or against any particular candidate.

**SUBMISSION REGARDING THE INTERVIEW PROCESS AND OBSERVATIONS ON THE APRIL 2012 INTERVIEWS**

12. We have made numerous submissions and comments regarding the qualities which we think should inform the selection of South African judges, as well as the questioning of candidates by the JSC. We do not intend to repeat our previous submissions here, although they continue to inform our assessment of the interview process.
13. We do wish, however, to take this opportunity to make some observations about the April 2012 interviews.[2] We do so under the themes of the time allocated to interviews; the doctrine of the separation of powers; the breadth of questioning and discussion of judgements; and dual citizenship.
14. We emphasise that, in commenting on the interview process, we do not seek to criticise for the sake of criticising. Rather, we try to give an honest appraisal of our perceptions of the interview process, in the hope that they will be of some use JSC in assessing how it performs its constitutional mandate.

[2] Our observations on the June 2012 interviews for the Constitutional Court vacancy also inform this analysis, although we take into account that those interviews were structured differently to the normal High Court and other superior court interviews.

**Time**

15. We were particularly concerned by the time allocated to many of the interviews. Interviews for the four Eastern Cape High Court were concluded, by our calculation, in an hour and a half, when originally an hour had been allocated for each interview.
16. It might appear that we are taking a contradictory stance in making this criticism, as we have previously criticised the commission for asking questions of questionable relevance, and for a lack of focussed questioning.
17. But meeting this criticism requires more questioning of greater relevance to clearly established criteria for suitable judges, not less questioning of candidates. Whilst we would welcome interviews that are focused, this should never be at the cost of failing to examine a potential appointee adequately.
18. We acknowledge that in some instances, candidates who were given short interviews had been interviewed by the JSC before, and therefore it would be logical for these interviews to be shorter than those for candidates who are being interviewed for the first time. Certainly, we would not wish to see ground that had already been covered in previous interviews being gone over again. However, it was not always the case that having been interviewed before meant that a candidate would face a shorter interview.
19. Furthermore, the fact that a candidate had been previously unsuccessful must mean that a majority of the commissioners were not satisfied about their suitability. One might expect, in these circumstances, questions to provide candidates with the opportunity to engage with problematic aspects of their candidacy.
20. The danger with cursory interviews is that they may fuel perceptions that appointments are decided before hand, and that the interview is a sham. However misplaced such a perception might be, it would be highly problematic as it undermines the credibility of JSC and indeed the judiciary.
21. The purpose of establishing the JSC was that appointments would no longer be a private, behind closed doors affair, but would be open to broader input and scrutiny. This laudable goal must not be undermined.
22. As a general principle, but especially at a time when there has been speculation that judicial appointments are being predetermined by caucusing behind closed doors,[3] it is thus imperative that the interview process which precedes appointments be rigorous, transparent and fair.
23. If the JSC is altering its internal procedures in order to streamline the interview process, then we would urge that any such procedures be made public, in order to prevent the credibility of the appointment process from being tarnished.

**The Separation of powers**

24. We have previously commented on the increasing prevalence of questions on this issue. We have argued that, whilst this is an issue that is a relevant and legitimate topic for questioning, caution needs to be exercised to ensure that candidates who assert the constitutionally mandated review powers of the court are not penalised for doing so.

[3] See Niren Tolsi, "Is the JSC courting favourites?", *Mail & Guardian* 26 April 2012, available at http://mg.co.za/printformat/single/2012-04-26-is-the-jsc-courting-favourites/

25. In this submission, we wish only to highlight one aspect of this issue. It was put to one candidate that his judgements showed a preponderance of decisions in favour of one side (i.e. against the state), and the candidate was asked if he could identify cases where he had found for the state rather than for individuals (against the state).
26. It may not have been intended this way, but if this question suggested that candidates should show some form of equivalence in the number of times they have found for categories of litigants, such an implication would be problematic.
27. Whilst we applaud candidate's track records being scrutinised, the crucial issue is surely whether the judgements are correct or defensible on their own facts. One might imagine a situation where a candidate has given judgements in several cases impacting on systematic violations of the law by a particular government body. To expect an equivalence of findings for different parties in such a situation might have the effect of expecting candidates to have given judgements contrary to the law.
28. It is worth mentioning in addition that, to the extent that any such conclusions might be drawn from our own reports, our reports have always focused on providing a sample rather than a comprehensive record, and on substantive reasoning rather than the identity of the successful party.

**Breadth of questioning and discussions of Judgements**

29. Despite our concerns about the brevity of many of the interviews, we also note that questions are frequently asked of candidates in very broad terms – such as asking for their views on issues such as access to justice or transformation – which in our view often elicit responses that are similarly broad and often unhelpful in assessing a candidate's suitability for the judiciary.
30. One way to provide more focus to such questions may be to find "hooks" for these issues in the judgements written by candidates. Of course, where there is no such link, the issue should not be forced. But as we have previously submitted, examining a candidate's judicial track record may provide useful insights into their views on other issues which may otherwise be difficult to interrogate.
31. We have long advocated for the JSC to give a central role to candidates' judgements. One objection which has been raised to such a line of questioning is that it may be inappropriate (and presumably in extreme instances even an infringement of judicial independence and the separation of powers) for judges to be required to defend judgements outside of court: a judgement, in other words, should speak for itself.
32. We recognise the force of this contention. Nevertheless, whilst some questions may have overstepped this boundary, our observations of the JSC suggest that commissioners are generally sensitive to the appropriate boundaries of engaging with candidates on their judgements, and indeed a particular judgement may often be used as a stepping stone to a discussion of more general issues.
33. We recognise that finding an optimal ground between questions that are too general and questions that are overly narrow must be challenging. In our comments on the October 2011 interviews, for example, we questioned whether frequent questions about candidate's briefing patterns was sufficient to capture their attitude towards transformation. It seems to us that finding this balance will be greatly enhanced when candidates' own views, as expressed in their judgements, can be used as the starting point for such discussions.

**Dual citizenship**

34. Over the last two years, we have noted several candidates being asked whether they hold dual nationality. We have criticised any suggestion that dual nationality should be a bar to judicial appointment.[4]
35. In the first place, there is no legal basis for any such prohibition. The constitution requires only that constitutional court judges be South African citizens (section 174(1)) – there is no prohibition on them holding other citizenship, and there are no citizenship requirements for other courts at all.
36. It is understandable that holding a second nationality might be seen as an indicator of a lack of commitment and loyalty to South Africa. But this does not necessarily follow at all. Another citizenship might be acquired by happenstance – for example, a child born to South African students in a foreign country. What is important, surely, is to examine a candidate's overall record and life circumstances in order to assess their commitment to the country and its constitution.
37. Judging is a challenging job. We should not deny ourselves talented individuals who might otherwise be eminently suitable for the judiciary, simply because they hold a second passport. Nor should we deny that we might benefit from perspectives that our prospective judges might have gained from other parts of the world.
38. This argument is not intended to advocate implicitly for the appointment of any candidate who may happen to be a dual citizen. Just as we argue that dual citizenship should not prevent appointment, it clearly should not mandate it either.

**ACKNOWLEDGMENTS**

39. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was carried out by Chris Oxtoby, research officer of the DGRU, and Sarai Chisala and Nomhle Gubula, research assistants of the DGRU.
40. We are grateful for the financial support of the Open Society Foundation in making this project possible.

**DGRU**

**4 October 2012**

[4] See Oxtoby, "Dual citizenship should not be a curse", *Cape Times* 1 June 2011, page 9.

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## SELECTED JUDGMENTS

**UNITRA COMMUNITY RADIO VS MAGXAJI AND CO. INC & ANOTHER [2011] JOL 27197 (ECM)**

**Case heard 18 April 2011, Judgment delivered 28 April 2011**

This was an urgent application where the applicant sought a rule nisi calling upon the first two respondents to show why a final order should not be granted, inter alia, staying a warrant of execution pending the final determination of a rescission application, and interdicting the respondents from attaching and removing applicant's properties pending final determination of the rescission application. The warrant of execution arose from the taxing Master's allocator, and it was common cause that the taxation had taken place in the absence of the applicant, in contravention of rule 70 (3B)(a) and (b). The first respondent (amongst other things) contended that the taxed bill of costs can only be reviewed in terms of rule 48(1) and 53(1) of the Uniform Rules of Court and cannot be rescinded by rules 31 and 42 as the applicant sought to do.

Hinxa AJ held:

"The facts and circumstances in both cases were similar to the present, save that in both cases the applications were not moved on urgent basis. … [I]n Grunder's case, Conradie J expressed the view that the Taxing Master's allocator is a quasi-judicial administration act. He (the Taxing Master) must hear parties or their legal representative (and if need be also evidence) and exercise a judicial discretion. In as much as proceedings before the Taxing Master constitute an action in miniature, common-law principles applicable to the setting aside of the default judgments apply also to the setting aside of the Taxing Master's allocator. … [A] quantification in the absence of the litigants ought to be open to challenge on the same basis as on default judgments. Similar sentiments were echoed in Barnard v Taxing Master of the High Court of South Africa (TPD) … as the applicant, having failed to attend taxation due to his attorney's fault, applied for a review of the taxation in terms of rule 53. The court held that he should have followed the rescission of judgement procedure entrenched in rule 31. It is also useful to refer to Singh & another v JobaShairam t/a Ship & Anchor Liquor Store & others where Naidoo AJ acknowledged that rescission procedure in cases of this nature is settled law and ordered that the applicants were entitled to follow it in lieu of a review one. Similarly, it appears to me that the position in the present matter is no different. The applicants are, accordingly, entitled to pursue the judgement rescission procedure. ...." [Paragraphs 13 - 15]

Hinxa AJ then considered the issue of the non-joinder of the Taxing Master:

"In the present matter, it is of critical importance to differentiate between the application for a stay of execution of warrant pending rescission application on one hand, and the actual application for rescission on the other. The first one forms the subject-matter of the present litigation, whilst the latter will be moved later …. The question of law and fact upon which the applicant's right to relief in the present matter depends is an interdict … which does not impact on the Taxing Master's *allocatur*. The latter will remain intact even if the relief sought herein is granted. Only the later application for rescission of the *allocatur* can evoke the joinder of the Taxing Master since the question arising between the first respondent and the Taxing Master on one hand, and the applicant on the other, will depend upon the determination of substantially the same question of law or fact (ie rescission). The two remedies of the applicant depend on separate and distinct laws of interdict and rescission (with their separate and distinct attendant facts) which can, *a fortiori*, not substantially be the same, as each is governed by its

own requisites. LTC Harms *Civil Procedure in the Superior Courts …* advocates another requirement for joinder, to wit, direct and substantial interest. … *In casu*, the interdict can be sustained … without prejudicing the Taxing Master since his *allocatur* will still remain in force notwithstanding the interdict …" [Paragraphs 17 – 18]

Hinxa AJ then found that the issue of the balance of convenience for granting the interdict had not been properly canvassed in the papers or in oral argument, and found:

"For the aforementioned reasons, I am inclined to agree … that the applicant has failed to make out a case for the relief sought in prayer 3. The application is, accordingly, dismissed with costs, such costs to include the costs of opposition to this application" [Paragraph 25]

**PAUL MAHLASELA V MINISTER OF SAFETY AND SECURITY AND TWO OTHERS, UNREPORTED JUDGEMENT, CASE NO: 1798/2010 (EASTERN CAPE DIVISION, MTHATHA)**

**Case heard on 13 May 2011, Judgement delivered on 17 June 2011**

The applicants (defendants in the main action) excepted to the particulars of the plaintiff's claim on the ground that paragraphs 12.1-12.4 thereof were vague and embarrassing. In the particulars of claim, the respondent/plaintiff in the main case claimed damages for unlawful arrest, malicious prosecution, and falsification of criminal charges.

Hinxa AJ held:

"Mr Hobbs, counsel for the applicants, premised his exception on the basis that paragraph 12 of the respondent's particulars of claim is vague and embarrassing because, "The claims for general damages … are all essentially claims for one and the same thing and should have been claimed under one head, yet on one hand the plaintiff claims the amount of R200 000,00 twice in paragraph 12.1 and 12.2, and on the other hand the plaintiff claims R100 000. 00 in paragraph 12.4" [Paragraph 4]

"In opposing the exception, Mr Makade for the respondent contended that an exception that a pleading is vague and embarrassing cannot be directed at a particular paragraph within a cause of action. The exception ...must go to the whole of the cause of action, which must be demonstrated to be vague and embarrassing... In support hereof, Mr Makade referred to the case of Jowell v Bramwell Jones and Others and Southernport Development (Pty) Ltd v Transnet Ltd. Another useful test on exception is apparent in the dictum of McCreath J. in Trope v South African Reserve Bank and Two Others ... in the following terms, "An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not be taken by suprise may well be defeated"." [Paragraphs 9,11]

"Mr Makade also placed in contention the applicant's simultaneous reliance on Rules 18 and 23 of the Uniform Court Rules for the relief sought. He submitted that the procedures prescribed by these rules are distinct and separate and cannot co-exist. Failure to comply with any of the provisions of the Rule 18

cannot be remedied by resort to Rule 23 but by Rule 30, his argument continued. In my view, Mr Makade's submission is devoid of substance and credence. Whilst indeed Rule 18(12) provides for remedy in Rule 30 in cases of non-compliance with any of the provisions of Rule 18, and indeed there is essential difference between the two rules, there is nothing in principle and in the interests of justice that suggests that Rule 18 and 23 are mutually destructive. It is of crucial importance to observe that on a reading of Rule 18(12) the discretionary clause "shall be entitled to act" is glaring, whereas Mr Makade, for unexplained reasons, only refers to and relies on the abridged peremptory clause "shall act" ... Furthermore, the co-existence of, and the relationship between, the two rules were articulated by McCreath J in Trope case ... in the following observations, "It is desirable that I first state certain general principles of the law relating to an exception on a ground that a pleading is vague and embarrassing. Rule 18(4) of the Uniform Rules of Court provides that every pleading should contain a clear and concise statement of the material facts. The ultimate test, however, must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) (my emphasis)." [Paragraph 12,14]

"In order to determine whether paragraphs12.1:12.2, and 12.4 are vague and embarrassing, it is apposite at this juncture to also refer to paragraph 11 of the particulars of claim which reads, "As a result of the said malicious prosecution the plaintiff was humiliated and degraded by the conduct of the 3rd defendant ..." [Paragraph 17]

"Upon a reading of paragraphs 12.1, 12.2 and 12.4 together with paragraph 11, I find that they can all be read in any one of a number of ways, a fortiori, they all either leave one guessing as to their actual meaning or are tainted with meaninglessness, It is my finding that the whole cause of action, and not a particular paragraph, is adversely affected by the aforesaid dubious meaning since it (whole cause of action) arises out of the allegations embodied in these three paragraphs...In my view, the excipient has directed the court to the vagueness and embarrassment triggered by paragraphs 12.1;12.2; and 12.4." [Paragraph 19-20]

The exception was thus upheld.

**GOLIMPI V UNITRADE 117 CC T/A STOP DISCOUNT (996/2010) [2011] ZAECMHC 13 (23 JUNE 2011)**

**Case heard on 6 May 2011, Judgement delivered on 23 June 2011**

In this matter the applicant instituted application proceedings against the respondent seeking that the respondent be directed to complete and sign unemployment insurance fund application forms of the applicant.

Hinxa AJ Held:

"When the matter came for hearing on an opposed basis, the respondents having filed the answering affidavits, it turned out that the applicant had already been furnished with the forms in question, duly completed by the respondent in compliance with prayer a, and b, supra. On this basis, the application became academic and only the issue of costs remained outstanding and fell to be considered and discussed. [Paragraphs 2-3]

"In the circumstances, I am persuaded to find merit in Mr Pangwa's submission that compliance with legal obligation only took place on 16 April 2010 when the respondent deemed it fit to notify the

applicant about the readiness of the documents. The situation in this case is in all fours with the case of Mapela Fikiswa v Experian SA (Pty) Ltd and Fikiswa Mapela v Transunion (Pty) Ltd (both unreported cases from this division). In both cases the court held that where the respondent was obliged to comply with statutory obligation to furnish the applicant with the documents, and it does so only after the legal proceedings have been instituted, it would at the very least at that stage tender to pay the applicant's costs. At this junction it is apposite to refer to the remarks of Combrick AJA in Claase v Information Officer South African Airways (Pty) Ltd …(SCA)…where he said, "The present appeal illustrates how a disregard of the aims of the Act and the absence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation." [Paragraphs 10, 12, 14]

"In all the aforementioned three cases, the courts concluded by expressing the view that where the state body or private person or institution obdurately and unreasonably refuses to furnish records in circumstances where it obviously should have, the court may make a punitive order of costs to mark its displeasure. It is trite exposition of our law that the courts have discretion in the award of costs. In the exercise of such discretion, I find myself unpersuaded by Mr Pangwa's inexplicable mercy [Mr Pangwa did not argue for punitive costs, but for costs on a party and party scale]. In these circumstances, I am of the opinion that the stern approach adopted by the courts in the abovementioned cases on punitive costs should obtain with more vigour in this case." [Paragraphs 16, 18, 19]

**S V NOMBONA AND TWO OTHERS, UNREPORTED JUDGEMENT, CASE NO. 215711 (EASTERN CAPE – MTHATHA)**

The three accused stood trial in the magistrate's court charged with theft out of a motor vehicle. All the accused tendered pleas of not guilty to the charge and were not invited by the trial court to, and consequently did not, disclose the basis of their defence in terms of section 115 of the Criminal Procedure Act ("the Act"). The accused were not legally represented. They testified in their defence and were convicted as charged and sentenced accordingly.

Hinxa AJ held:

"When the matter served before me on an automatic review … I formed an opinion that the conviction and sentences could not be sustained despite the evidence being perceptibly impeccable. This view was based on numerous irregularities confounding the trial which undoubtedly prejudiced the accused and vitiated the entire proceedings. I felt that the irregularities were of such a nature that it could not be argued with any measure of justification that they did not vitiate the legal validity of the trial."[Paragraphs 4-5]

"I now turn to the irregularities with which the accused, unlettered in law, were confronted … the accused were not apprised of their right to access to information … the defense was accordingly deprived of its crucial right to fully prepare for the trial…The trial commenced without the accused being alerted to the competent verdicts…the court did not explain to the accused the right to cross-examination and the purpose thereof. The spate of irregularities continued to unfold with no sign of abatement as the trial progressed. " [Paragraphs 12-13]

"…most of the irregularities besetting this matter are common occurrence, not only in the courts resorting under the jurisdiction of this division, but countrywide…The major underlying reason is the arduous task to be discharged by the presiding officers in undefended cases." [Paragraph 15]

"…in my view the maxim "res ipsa loquitur" applies herein. The facts speak for themselves to an extent that it will deal a nullity to the constitutionally entrenched right to freedom if the release of the accused is not hastened without further ado. I am thus not persuaded by the DPP's opinion that "from reading this record it does not appear that the proceedings were clearly not in accordance to (sic) justice. The Magistrate did explain the rights of the accused on numerous occasions (sic)"… Pertaining to the Magistrate's response, it cannot be gleared with certainty therefrom whether or not he unequivocally concedes to the gravity of the irregularities and their consequential fatal effect to the proceedings." [Paragraphs 17-19]

"The conviction of all the three (3) accused and sentences imposed on them are accordingly set aside." [Paragraph 20]

**S V HEADMAN NDUMISO MBODLA, UNREPORTED JUDGEMENT, CASE NO. 214700 (EASTERN CAPE HIGH COURT: MTHATHA)**

The accused was charged with one count of driving under the influence of liquor. He was not legally represented and pleaded not guilty to the charge, but was convicted and sentenced inter alia to pay a fine or undergo one and a half years imprisonment. The matter came to the High Court on an automatic review, where the issues of an accused's right to call witnesses, and the standard of proof in criminal cases came under scrutiny.

Hinxa AJ held:

"It is a hallowed principle of our criminal procedure that an accused is entitled to adduce relevant evidence of as many as possible witnesses to buttress his/her case. This principle is now entrenched in section 35 (3) of the Constitution..., which entitles an accused as integral part of the right to a fair trial to, inter alia, adduce evidence….it is trite exposition of our criminal law (which warrants not even citation of supportive authority) that the state must prove guilt of the accused beyond reasonable doubt." [Paragraphs 11-12]

"[Regarding the accused's right to call witnesses]The Magistrate's response that, "the matter stood down for that purpose and when the Court reconvened, it was accused himself who indicated that he was dispensing with the witnesses," is, to put it kindly as I can, belied by the record. The record reflects…that the court indeed saw the relevance of the witnesses; adjourned; and afforded the accused an opportunity to go and call them. The turn of events was on resumption when the accused apprised the court that one witness was working night shift and another was in Cape Town. For inexplicable reasons, the court, all of a sudden, deemed irrelevant the testimony of such witnesses….the view I take is that it (the court) discouraged the accused from adducing such evidence or painted such a strong impression on an unrepresented accused." [Paragraph 13]

"Before concluding on this aspect, I deem it apt to consider the probative value of the evidence sought to be placed on record by the accused. This can be effectively achieved by having recourse to the nature of the accused's defence… Accused maintained, in essence,…that he was not inebriated at all; the entire

saga was triggered by the political differences between him (as ANC member) and the state witnesses (as COPE members); and because of this, he was not only arrested, but was also subjected to excrutiating handcuffing; teargas spraying; and assault…In the premises, at the heart of dispute in this case was whether the accused was tortured and arrested exclusively for political reasons as he contended, or whether he was merely arrested solely for drunken driving without any ill-treatment as asserted by the state witnesses. [Paragraphs 15-16]

"The sentiments expressed by Innes CJ in R v Mpanza (AD)…in this regard are as valid today as they were nearly a century ago. He held, "…any facts are…relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue." It is not open to doubt that if the above dictum were to be applied for the benefit of the accused in this matter, the torture would indubitably be a fact from which the inference of the existence of political intolerance…would be properly drawn. " [Paragraph 17]

"Having regard to the factual and legal issues outlined in the preceding paragraphs..., it is evident that the accused suffered both procedural and substantive prejudice. Accused was not only deprived of his constitutionally enshrined right to call his witness/es but also of evidence amounting to highly probative value. The procedures adopted in the present case can thus not pass the muster hence the conviction and sentence fall to be set aside on this aspect alone. " [Paragraph 18]

"Notwithstanding the finding in the preceding paragraph, I consider it necessary to also deal with the last query (proof of guilt of the accused beyond reasonable doubt)... It may serve a useful purpose if I quote the sentiments of Kruger AJ in S v Goosen … "…in order to find a conviction as drunken driving the State must show…that the driving ability of the accused has been affected by the liquor he has taken." With regard to "liquor triggered driving inability," the State sought to rely on two intoxication characteristics apart from others which had nothing to do with driving… They are: (a) That the accused drove the vehicle with the lights off; and (b) He failed to stop when directed to do so ... In considering these aspects one must bear in mind that both state witnesses formed a view that the accused was hopelessly drunk. In such circumstances, I find the version so highly improbable as to border untruthful, if not dishonest, that such a person can without a miracle manage, even for a few metres, to drive a vehicle at night with the lights off. " [Paragraphs 19-22]

"Coming to the allegation of failure to stop, the accused emphatically and specifically refuted it during the outline of his defence. The prosecutor never cross-examined the accused on this issue. " [Paragraph 23]

"In concluding, it behoves me to record some observations and the predisposition of the accused on the day in question. Firstly, it would deny human frailty that a person excessively inebriated like accused as potrayed by the State witnesses could concoct such a watertight defence; abide by it on the following day when he was presumably beset by excessive hangover; reconcile with, and rely on it even when in his normal, sober senses during trial. Secondly, the vivid memory…depicted by the accused defies and repels any reminiscence of intoxication, let alone an excessive one sought to be advanced by the State witnesses" [Paragraph 29]

"A fortiori, the magistrate's ratio dicidendi that "I find it difficult to fathom how you would be victimised in this fashion, when there has been no rally either of the African National Congress, or the Congress of the People, or any party for that matter" is misconceived. It does not resonate well with the common occurrence in our country where (because of the historical, painful, political past) the members, and even supporters, of adversant, and even rivalling, political parties go to the lengths of revenging against one

another for political adversaries. It would thus not be preposterous to imagine that such members/supporters, whenever opportune, would even abuse their authority to perpetuate their political ideologies and/revenge for political differences. [Paragraph 30]

"It is thus my pronouncement that what at first sight appeared to be corroboration in this matter is in the final analysis a concoction…it deals a nullity to the very objective sought to be achieved by corroboration if it (corroboration) is considered in isolation…In the premises, the conviction and sentence cannot prevail and fall to be set aside. " [Paragraphs 31-32]

**S V NOYISHILE ZITHA, UNREPORTED JUDGEMENT, CASE NO. 206408 (EASTERN CAPE: MTHATHA)**

The accused (father of the complainant) was charged with rape in the Regional Court. He was legally represented and pleaded not guilty on the basis that that he never raped the complainant. The accused was convicted. The Regional Magistrate harboured some doubts about the propriety of the conviction and requested this court to review the matter in terms of section 304 A (1) (a) of the Criminal Procedure Act.

Hinxa AJ held:

"The central issues herein, as I see them, are two-fold (a) Procedural i.e. whether the review court can entertain matters of this nature in view of the fact that the accused was legally represented; (b) Substantive i.e. the appropriate remedy warranted in the circumstances of this case." [Paragraph 7]

"In the light of the aforegoing judicial decisions, it is not open to doubt that legally represented cases also resort under the realm of Section 304 A... this approach is also consonant with the constitutional dictates like section 39 (2) of the Constitution…." [Paragraph 13]

"It is settled law that the review courts accede to the lower courts' requests to review and set aside the conviction if new evidence surfaces and casts some doubt on the justification of such convictions … the Magistrate mero motu conceded in hindsight, a concession properly taken in my view, that the state did not prove its case beyond reasonable doubt … the trial court should have seriously considered the admission by the second state witness that a bad blood was flowing between the accused and the entire family (the witness inclusive). This was completely analogous and comfortable to the accused's defence that the rape was concocted pursuant to the enmity plaguing their relations. " [Paragraphs 14, 19]

"One last point elucidating why the conviction cannot be sustained, admits of scrutiny…the complainant was a single witness … I need merely emphasise that the caution adopted by the trial court should not just be lip service. The Magistrate, in her acknowledgment of the cautionary duty resting upon her, discharged same cursorily … Consequently, there is, with respect, nothing I can glean from her treatment and analysis of the complainant's testimony which is reminiscent of a cautionary approach. While it is emphasised that the cautionary rule should not be treated as an irrationally reverenced or mechanical yardstick, the trial court should go more than merely averring that the evidence of a single witness was treated with caution. It must be lucidly clear from the reasons advanced that in favourably considering the evidence of a single witness the trial court cautioned itself against particular peril attaching to convicting on the evidence of a single witness. This certainly did not happen in casu." [Paragraphs 21-23]

"In all the circumstances aforesaid of this matter, the conviction cannot stand. It is accordingly set aside." [Paragraph 25]

**SELECTED JUDGMENTS**

**S V CUKU AND ANOTHER, CASE NO: RC4/49/11 (REGIONAL COURT FOR THE EASTERN CAPE REGION), EAST LONDON (AS PER TRANSCRIPT OF THE COURT PROCEEDINGS, VOLUME 3)**

**Judgment delivered 9 February 2012**

The accused, Mr Cuku and Mr Pokina, were charged with the offense of housebreaking with intent to rob and robbery.

Magistrate Jacobs held:

"In issue is [(i)] whether the two accused broke into the property of the complainant. [(ii)] whether the two accused robbed the complainant." [Page 212]

"No evidence was presented as to how the perpetrators gained entry into the house of the complainant. The State thus failed to prove one of the elements of the offence, housebreaking. Further the State bears the onus to provide a basis for the admission of evidence pertaining to a pointing out. No basis was laid in this regard. No evidence was presented indicating that the accused were informed of their rights, to self incrimination in this regard as well as their other constitutional rights..." [Pages 218 - 219]

"The Nokia cell phone...identified by Mr Murphy [complainant] was stolen during the robbery. The Logic DVD player and pocket knife recovered from Mr Pokina's house..., identified by Mr Murphy was stolen during the robbery. The fingerprints lifted from the ice cream container, and compared with the fingerprints of Mr Cuku places him on the scene of the robbery. The Complainant was threatened with weapons and sustained injuries during the robbery" [Page 219]

"… The only inference the court can draw from the possession of these items, was that Mr Pokina was aware that it was stolen items. Having applied the factual findings to the legal position the Court is of the opinion that the State proved beyond a reasonable doubt, robbery with aggravating circumstances against Mr Cuku, and possession of stolen property against Mr Pokina" [Page 219 - 220]

"… [T]his Court has found you guilty respectively of robbery with aggravating circumstances and possession of stolen property. I must now impose an appropriate sentence on you. In doing so it must have regard to your personal circumstances, the offence that you committed and the community interests. … The seriousness of the offence...depends upon the outlook of society. The more repugnant the crime is in the eyes of society, the more public outrage is elicited and the greater the punishment should be. ... it is against this background the Court will view the offence that was committed by yourselves " [Page 236]

"The complainant and his wife being two elderly people who were in the morning in their house. When they were overcome by two perpetrators. Their property was taken away from them. During the robbery this elderly gentleman was shoved into a cupboard, and he thus landed on his head, and according to his evidence he sustained injury to his head, though he did not receive any medical treatment" [Page 236]

"Your personal circumstances before this Court was set out … you are not first offenders … You have limited education, and as such were not gainfully employed. The interest of society lies in their need that people should be punished according to what they deserve…the legislature has determined that in a case of robbery with aggravating circumstances the prescribed Minimum Sentence should be one of 15 years

direct imprisonment for a first offender. Provided that if the Court is satisfied that there are substantial and compelling circumstances present, that allows it to deviate from such prescribed sentence it may do so." [Pages 236 - 237]

""In mitigation the Court finds, your personal circumstances. In aggravation the Court found the offence that the offence was perpetrated against an elderly couple…having had regard to the mitigating and aggravating circumstances present, that given the facts of this particular case, it does allow this court to deviate from prescribed minimum sentence. [The Magistrate relied on the case of S v Malgas (2001) in this regard].[Page 238]

The court imposed a sentence of 9 years direct imprisonment in respect of Accused No 1 and a sentence of 4 years direct imprisonment in respect of Accused No 2.

**S V SAM, CASE NO: RC4/63/10 (IN THE REGIONAL COURT FOR THE EASTERN CAPE REGION), EAST LONDON, (AS PER TRANSCRIPT OF THE COURT JUDGEMENT)**

**Judgement was delivered on 31 May 2011, Sentencing on 13 July 2011**

The accused was charged with the offence robbery with aggravating circumstances. The accused was a first time offender and pleaded not guilty to the charge.

Magistrate Jacobs held:

"…In issue is…the identity of the perpetrators… [T]he defence intimated that the State failed to prove that you are indeed the person that was recorded on that close circuit television." [Page 72]

"The version of the accused is that he has no knowledge of the offence and that he was with his wife, sleeping in bed at the time of the commission of the offence. This alibi of his was corroborated by his witness, his wife. There is however one aspect with regard to the alibi witness which the Court thinks necessary to point out that… when this witness was questioned…with regard to the lighting… in the footage she became evasive, she was not willing to commit herself as to being able to identify any party on the footage…This witness in that regard as the Court indicated, was evasive. " [Page 75-76]

"The conclusion that the Court reach with regard to the evidence of the State witnesses is that … they did have sufficient opportunity to observe, there was sufficient lighting, there was close proximity and there was corroboration in the form of further evidence and the CCTV footage and…independent identification which the court accepts the identification parade." [Page 81]

"The Court is also guided by case law as to how the Court should deal with alibi witnesses and with alibis. And in this regard with reference to the matter[s] of Holongwane, 1959 Appellate Division…as well as Rex v Khumalo and Others … Appelate Division…" [Page 82]

"What is required is that all the evidence should be viewed, and in light of all the evidence the Court must make a conclusion then as to the reliability of that alibi that was presented. Now this Court has looked at the evidence… And it is this Court's opinion that having had regard to all these factors that the Court is satisfied that the State proved that the person in that footage is in fact the accused before Court…accordingly…you are found guilty." [Page 82-83]

"In determining an appropriate sentence it is trite law that the court should bear in mind the main objective of criminal punishment, namely retribution, prevention of crime and the deterrence of criminals as well as the possibility of rehabilitating the accused. [Reference to State v Rabie, State v Tanga.]" [Page 100]

The Court analysed further the factors that it must take into account in sentencing.

"… [F]or an offence of robbery with aggravating circumstances … the prescribed sentence is a minimum period of 15 years and not a period of 15 years … our case law was developed in this regard and has given us guidance indicating what the Court should take into consideration to deviate from such prescribed minimum sentence. [reference to State v Malgas]" [Pages 102-103]

"It has been argued by your legal representative that this case is not one of the most serious of robbery with aggravating circumstances cases … it may not be one of the most serious, but the Court can indicate that in the region of East London it is one of the more serious ones with which this particular court has had to deal with. Further with reference to the case of Malmotsa, 2002 [(SCA)]…, it was stated that even in the cases falling within the categories delineated in the Act there are bound to be differences in seriousness. …" [Pages 103-104]

"The personal circumstances of the accused are substantial circumstances, in that he as a mature adult person is a first offender in front of this Court and that he has been an employed person for most of his adult life and therefore contributing to society in a positive manner and maintaining his dependants." [Page 104]

"The Court is of the opinion that the aggravating circumstances far outweighed the mitigating factors and therefore does not provide substantial and compelling circumstance to deviate from prescribed minimum sentence… And in aggravating the Court has found the manner in which this offence was committed, the fact that a group of three people entered [the shop], prepared to rob and robbing those that they found… the assault on the victims, the fact that a firearm was pressed against the head of Ms Botha and Mr Boffa [sic], that this firearm was cocked whilst these victims was being subdued indicating a willingness to use it to its fullest extent… And further the fact that this offence was committed with precise planning. " [Pages 104- 105]

The court imposed a sentence of 15 years direct imprisonment.

An application for leave to appeal was submitted to the Court, appealing both the conviction and sentence. Magistrate Jacobs held:

"With reference to ground 1, referring to Section 169 … the finding of the court, that the witness' evidence was corroborated by the said video footage… Ground 2, it is the finding of the court that the general appearance of the appellant at the identity parade was no different to that of the other seven participants in that manner were of short bulky stature, clothing of similar nature and the Fact that they were all standing against a wall resulted in their physical appearance not becoming a distinguishing feature." [Reference to the case of S v T 2005, with regard to identification parades][Pages 217-218]

"… [N]on-compliance with a rule or rules is not fatal to the admissibility of identification evidence, but will usually have an effect on the weight to be attached to the evidence as to identification … [A] full explanation was presented as to how the identification process developed. The witnesses were cross-

examined in detail regarding this aspect … The Court is therefore of the opinion that identity parade was conducted without any prejudice to the appellant. ” [Pages 218-219]

“Ground 4 & 5 ... the alibi defence is rejected … The Alibi witness’ version is verbatim is the same as that of the appellant. The Court therefore could not exclude the possibility that this evidence was rehearsed, and as the spouse of the appellant, her evidence was biased in his favour. This aspect the Court illustrated with reference to the question regarding the lighting of the video footage. This aspect was correctly argued on behalf of the appellant as to not being a material aspect, but the witness’ unwillingness to assist this Court on an immaterial issue supports this above conclusion that was reached by the Court pertaining to the said witness. ” [Pages 219-220]

“The Court is of the opinion that having taken into consideration all these grounds, that another Court having given an opportunity to view these grounds, this evidence, will come to the same conclusion as the Court did.” [Page 222]

“… [A]pplication regarding sentence… The Court has taken cognisance of the leading case of S v Malgas in guiding it as to what can be regarded as substantial and compelling. Has taken cognisance of the fact that minimum sentence legislation has been enacted for specific purpose and specific offences… It has accepted that this cannot be said to be the most grievous of robberies that was ever committed, but it has also noted that it is more serious than some of the other robbery with aggravating circumstances that it regularly deals with… it further takes into consideration that in making a just decision it need to have a balanced approach… the Court wishes to refer to the matter of S v Ubisi (2005) (2)… ” [Page 223]

“…[H]aving considered these arguments [relating to the grounds of appeal that this was not such a serious offence, and the personal circumstances of the accused] even the evidence that was presented to it, the sentence imposed is one that is readily being imposed in courts of law for similar types of offences and given the circumstances peculiar to this case, that it does not induce a sense of shock.” [Page 224]

An application for leave to appeal was dismissed.

## SELECTED JUDGMENTS

**KLAAS WINDVOGEL V THE STATE, UNREPORTED JUDGEMENT, CASE NO. CA&R 304/02 (EASTERN CAPE DIVISION)**

Appellant was convicted in the Regional Court on one count of robbery, two counts of attempted murder and one count of murder, and sentenced to 15 years imprisonment on each of the counts of robbery and murder, and 5 years imprisonment on each of the counts of attempted murder. The magistrate ordered that the 15 year sentences would run concurrently with the five year sentences, making the effective sentence one of 30 years imprisonment.

Lowe AJ (Pickering J concurring) held:

"The question remains as to whether or not there were circumstances that justify that counts 1 and 4 should run partially, or completely, concurrently … When a person is convicted of two or more offences the Court may sentence him to several punishments, and if those punishments consist of imprisonment the one sentence commences after expiration, setting aside or remission of the other, unless the Court directs that the punishments run concurrently." [Paragraphs 11 - 12]

"There is no need that there should be a close connection or similarity of offences before sentences may be ordered to run concurrently. S v Pase … [W]here two offences are closely related in time and place, and in reality form part of the same transaction, concurrent sentences should usually be passed. S v Nkhumeleni … Murder and Robbery sentences may be concurrent if arising from the same incident. S v Mate … The cumulative effect of sentences must always be borne in mind and concurrently served sentences may prevent an accused from undergoing a severe and unjustified long effective term of imprisonment. S v Breytenbach …" [Paragraphs 13 - 16]

"… I consider that the Magistrate did not afford sufficient weight to the cumulative effect of the sentences in respect of counts 1 and 4, and that he ought to have ordered that a portion of these sentences run concurrently." [Paragraph 17]

The court ordered that the sentences of 5 years run concurrently with those of 15 years, and that 7 years of the sentence for robbery run concurrently with the sentence for murder, resulting in an effective sentence of 22 years imprisonment.

**LULAMA MALUTI V THE STATE, UNREPORTED JUDGEMENT, CASE NO. CA & R242/02 (EASTERN CAPE DIVISION)**

Appellant was convicted of armed robbery and unlawful possession of a firearm without a license, on the basis that he had acted in common purpose with the actual possessor of the firearm. The State's case was based on the evidence of a single witness, the store manager of the venue where the robbery had occurred.

Lowe AJ (Chetty J concurring) held:

"When he [the State witness] was asked on the first occasion whether any of the persons in the shop were compelled to remove money from the tills he replied 'No'. … Curiously not having suggested at any time that Appellant held the firearm … he suggests in answer to a question by the Court that the

Appellant held the firearm whilst the other two emptied the tills – which appears wholly out of step with the remainder of the State case." [Paragraphs 7 – 8]

"It is, fair to say, that the Appellant in cross-examination was not disclosed in any way to be inconsistent or untruthful in his version." [Paragraph 11]

"The Magistrate … disposed of the matter on the basis that although the State had presented the evidence of a single witness, even at a superficial glance the evidence of the Appellant was false and that his defence was spurious. The Magistrate comes to this conclusion on the basis that: … The Appellant could easily after the robbery have gone to the police (but withheld certain of the evidence) essentially suggesting that he should have lied to the police in order to protect himself … That there were at least four robbers involved on his evidence (although the State mentioned only one with a gun and two others), and that there was no reason for the robbers to have needed his assistance." [Paragraph 12]

"Both these grounds are … insufficient to justify the conviction. The first is wholly speculative and somewhat bizarre, and the second does not even accord with the State's evidence of what occurred. It is further … not improbable that the man armed with the gun would have wanted assistance emptying one of the three tills especially if there were only two robbers to assist him …" [Paragraph 13]

"While a Court may base its finding on the single evidence of a competent and credible witness, and whilst there is no statutory requirement of formal corroboration, our Courts treat the evidence of a single witness with more caution than that of a number of witnesses who corroborate each other. In a criminal case the evidence of a single witness is relied upon only if his evidence is clear and satisfactory in every material respect." [Paragraph 16]

"… [T]he Magistrate in assessing Stuurman's [the state witness] evidence failed to give proper regard to this cautionary rule and failed to appreciate … that whilst certain of the evidence was common cause, that the essential elements of the offence were not. The Magistrate misdirected himself *inter alia* in find that Mr Stuurman stated that no person was forced in his presence to participate in the robbery, he having conceded in cross-examination that … he could not dispute that it happened." [Paragraph 18]

"I find that, the Appellant's version was reasonably possibly true, and in the circumstances of this matter, whatever the Magistrate's misgivings were, the Appellant ought not to have been convicted." [Paragraph 19]

**THE STATE V DESMOND MALI, UNREPORTED JUDGEMENT, CASE NO. A1465/2001 (APPEAL: 82/2001) (EASTERN CAPE DIVISION)**

Appellant was convicted of theft of an extension cord and sentenced to three years imprisonment. He purported to appeal against the sentence only, but the court noted that it appeared from the application for leave to appeal that what was intended was effectively an appeal against conviction and sentence.

Lowe AJ (Smuts AJ concurring) held:

"Unfortunately, the contents of the record does not in any way indicate what facts or circumstances that Magistrate took into account in determining the sentence other than the previous convictions referred to … The Magistrate has declined to add hereto … There are no reasons for sentence on record, this leaving the Appeal Court in an invidious and difficult position. This is most unsatisfactory and simply should not

be the position. It is wasteful of this Court's time and prejudicial to the proper administration of justice." [Paragraphs 15 – 17]

"… [I]n the event that Appellant in this matter intended to or wishes to appeal against his conviction, I have carefully considered the record, and Magistrate's reasons, and find that there is no merit in such an appeal, which is accordingly dismissed." [Paragraph 18]

"… [T]here seems real merit in the argument that the Appellant who was not represented was no sufficiently questioned by the Magistrate in respect of possible mitigating circumstances relevant to the sentencing … This being so, and as insufficient in this regard appears from the record …. Ignoring for the moment his previous convictions, this is a matter in which I consider justice cannot be seen to have been done." [Paragraphs 20, 22]

"In the result, I have no alternative but to set the sentence aside referring the matter back to the trial Court, that Court to conduct a proper enquiry into the personal circumstances of the Appellant, and mitigating circumstances, with a view to considering sentence properly afresh …" [Paragraph 23]

**DAN ZAMILE VLEI V THE STATE, UNREPORTED JUDGEMENT, CASE NO. CA & R 213/2002 (EASTERN CAPE DIVISION)**

Appellant pleaded guilty to charges of house breaking with the intent to steal, and theft. The value of the stolen goods was R550.00. The Appellant was sentenced to 8 years imprisonment, and appealed against that sentence.

Lowe AJ ( held:

"He [Magistrate] referred to the fact that in this particular instance on Appellant's own evidence he was taking advantage of the people who usually gave him food. The appellant had a fairly lengthy list of previous convictions… [which] commences in 1972 and continues through to 1993. Several of the previous convictions relate to theft [Paragraphs 10 - 12]

"Mr Rugunanan … submitted that the Magistrate had misdirected himself, in stating that Appellant's intention had been to commit the crime in respect of persons who usually gave him food. He submits that: [i] There was insufficient factual evidence to enable the Magistrate to properly exercise his sentencing discretion; [ii] The Magistrate had failed to give sufficient weight to factors in mitigation inter alia that the Appellant acted impulsively and intended to use his ill-gotten gains to buy food." [Paragraph 14]

"I have given careful consideration to all the relevant facts and circumstances ... In the circumstances … whilst it is certainly true that the Appellant acted impulsively when he committed the offence, it is also true that this offence is prevalent, and it is one which has become pernicious, and against which society deserves and requires to be protected. " [Paragraphs 15 -16]

"… [W]hilst the sentence was certainly severe, the Magistrate committed no misdirection in sentencing, and the severity of sentence is not such as to entitles me to be interfere therewith." [Paragraph 17]

The appeal was dismissed.

## SELECTED JUDGMENTS

**ONKE MYATAZA V MINISTER OF JUSTIE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO. 1678/2011 (EASTERN CAPE HIGH COURT, MTHATHA)**

**Case heard 26 April 2012, Judgment delivered 19 July 2012**

Plaintiff, a Magistrate, sued the defendants for alleged defamatory statements. Defendants excepted to the summons on the ground that it did not disclose a cause of action.

Majeke AJ held:

"An excipient who relies on the ground that the plaintiff's summons does not disclose a cause of action has a duty to persuade the court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. …" [Paragraph 7]

"The exception … is predicated on the assertion that the communication giving rise to the action is conditionally protected because it falls within the scope of qualified privilege. It has been contended … that, to sustain a cause of action, the plaintiff ought to have stated … the respects in which the bounds of privilege had been exceeded." [Paragraph 8]

"The plaintiff was only compelled to aver sufficient facts to sustain a cause of action based on defamation. The inquiry at this stage … is limited to the question as to whether or not he has done so. The answer must be a resounding yes. … He was not required to anticipate all possible defences … and to couch his particulars of claim accordingly. His remedy in such an event would be to deal with any special defences in a replication." [Paragraph 12]

"To expect a plaintiff to plug up every possible defence is not practicable and could unnecessarily confuse the function which the pleading serves, namely to identify issues pithily." [Paragraph 13]

The exception was dismissed with costs.

**MAKHWENKWANELE DAYENI V MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGEMENT, CASE NO. 1267/2007 (EASTERN CAPE DIVISION, MTHATHA)**

**Case heard 14 November 2011, Judgment delivered 17 May 2012**

Plaintiff sued the defendant for wrongful and unlawful arrest and detention, pain and suffering as the result of an assault, contumelia, and emotional shock and distress. Plaintiff alleged that he had been arrest, detained and tortured by members of the police stock theft unit, and then released without appearing in court.

Majeke AJ considered the evidence of the witnesses, and then dealt with the question of onus:

"In an action for unlawful arrest and detention, the plaintiff must prove the arrest itself whereafter the *onus* will then be on the person responsible to establish that it was legally justified. … Accordingly, the plaintiff must first prove that he was indeed arrested and detained." [Paragraph 12]

"Assault on the one hand affects the bodily integrity of an individual. Assault is a physical interference which is wrongful and that it is for the plaintiff to establish the physical interference. …" [Paragraph 13]

Majeke AJ considered the case of National Employer's General Insurance v Jagers 1984 (4) SA (E), relied on by the plaintiff, and continued:

"… I do not agree that the onus rests with the defendant as contended … it is only when the plaintiff has proved the arrest and assault that the onus rests on the defendant to show justification … In the present case there are two mutually destructive versions. When the Court is confronted by two irreconcilable versions, it ought to weigh the versions by the parties and decide on a balance of probabilities which of the two versions is more credible. …[Reference to High Court authorities]" [Paragraphs 15 – 16]

Majeke AJ noted that the plaintiff's witness had not witnessed the arrest, that the witness and plaintiff's versions differed on the time of the arrest and on where plaintiff was held in the police vehicle in question. Majeke AJ then considered the provisions of s 39 of the Criminal Procedure Act, dealing with arrests, and continued:

"There is no evidence that Inspector … Ndiya informed the plaintiff that he was under arrest. No evidence that he physically touched his body or that the plaintiff voluntarily submitted himself to the custody of Inspector Ndiya. The requirements of Section 39 do not appear to have been complied with. … It does not appear that … on the evidence of the police that they had control of the movements of the plaintiff hence he was able to go to his witness Dubulingqanga Faku without an escort to make a report that he was arrested. … The plaintiff remained alone in the Police vehicle while Ndinga was busy performing his duties at the pound. Plaintiff from the above facts does not appear to have been under arrest. The fact that … Faku contradicted himself on how the arrest occurred creates doubt on his credibility." [Paragraph 18]

"The evidence … clearly shows that the plaintiff was not detained at Mthatha Central Police Station hence his name was not recorded in the SAP 14 and the occurrence book. In the absence of evidence from the plaintiff disproving this fact, I come to the conclusion that he was not detained at Mthatha Central Police Station." [Paragraph 19.1]

"The doctor's report was … not produced in court. No proper and credible explanation was given … Why his legal team did not assist him is not clear. A doctor's certificate would have presented the Court with independent evidence and would have enhanced the probability that the plaintiff was indeed assaulted. … The marks caused by the handcuffs would clearly go a long way in supporting the plaintiff's version. Accessing the relevant medical records would not have presented a difficult task. In the absence of the medical report, the Court finds it difficult to believe that he was assaulted." [Paragraph 21.1]

"Plaintiff also testified that he laid a charge with the police. There is absolutely no evidence to back up his assertion. If a charge had been laid, the plaintiff would have been provided with a J88 to be completed by a doctor. I find it difficult to accept that indeed a charge was laid." [Paragraph 22]

"The defendant was highly prejudiced in that the version pleaded … differs materially … to plaintiff's oral evidence … The plaintiff was not a satisfactory witness and without evidence to corroborate his version, little reliance can be placed on his testimony. Whilst noting that the plaintiff is illiterate, nobody could have provided he details relating to dates, times and places other than himself." [Paragraphs 23 - 25]

The claim was dismissed with costs.

**S V FANOE AND ANOTHER (CA&R 9/2009) [2011] ZAECGHC 70 (30 JUNE 2011)**

**Case heard 30 March 2011, Judgment delivered 30 June 2011.**

The two appellants were convicted of fraud in the Regional Court. Appellants had been accused of falsely representing that blood samples submitted to determine the paternity of a child born from the relationship between the second appellant and one Anna Van Lingen were drawn from the second appellant. In fact, the sample had been drawn from the first appellant. The appeal was against conviction only.

Majeke AJ (Makaula J concurring) held:

"The appellants are appealing against conviction only. Appellant … argued that the state witnesses testified that they did not witness any tempering with the blood samples and in the absence of proof that the samples were tempered with, the state failed to prove the guilt of the appellants beyond reasonable doubt and it was further argued that if the evidence relating to the non-tempering of the blood samples is accepted all other evidence should fall away or be weighed with serious doubt." [Paragraph 33]

"The state did not submit evidence proving a direct act of tempering on the part of the appellants. It relied on circumstantial evidence out of which certain inferences were drawn. The state can discharge the burden of proof by relying on the circumstantial evidence provided. '(i) the inference which the state pleads is consistent with all the proved facts; and ii. no other reasonable inference can be drawn from those facts.'" [Paragraph 36]

"To suggest that the appellants should have been acquitted on the strength of the evidence of nursing-sister Haywood, Mountford and Da Silva because they did not see any tempering would amount of looking at the evidence in a piecemeal manner. Before reaching a verdict a court has to consider all the evidence before it, weigh its cumulative effect and decide if it points to the guilt or otherwise of the accused. … Such cumulative effect of the evidence must form a network *"so coherent in its texture that the appellants cannot break through it."* There is no doubt that the first appellant orchestrated the process leading to the drawing of blood samples … in order to misrepresent the true paternity of he child. Her initial step was to obtain sufficient information from nursing-sister da Silva of the pathology laboratory on how the paternity procedure worked. She falsely procured two additional tubes for blood samples under the pretext that the other two were broken." [Paragraphs 38 – 39]

"The first appellant took full control of the manner the blood samples were obtained … by falsely misrepresenting … that she had been authorised by the court to have the blood drawn … on an urgent basis and that the test tubes containing blood samples had to be left unmarked. She further misrepresented to the staff … that in terms of the *"court order"* she was the person authorised to transport and deliver the samples to the pathology laboratories …" [Paragraph 40]

"It is also noteworthy that the appellants failed to testify and chose to close their case. Basically there is nothing wrong with that approach as it is in line with Section 35 of the Constitution. It is trite law that the accused had no onus to prove his innocence. The state bears the onus of proof throughout the proceedings. … In the absence of evidence rebutting the state's version, I am unable to do otherwise than accepting its evidence which leads to one inference that the first appellant fraudulently interfered with the blood samples." [Paragraphs 45 – 46]

"The role played by the second appellant in the commission of the crime of fraud is not as clear cut compared to what the first appellant did. There are a number of indicators pointing towards complicity

on his part in that after paying maintenance for the child for a number of years, he suddenly stopped without any tangible reasons. He is the one who approached and persuaded Dr Le Roux to avail his rooms … to facilitate drawing of blood samples. He misrepresented the true state of affairs by advising … that the exercise was for private purposes and that there would be no legal consequences for himself or Medicross Clinic. The second appellant was in the company of the first appellant when the blood samples were transported to Dr Du Buisson's laboratory and as such present when the swapping of the blood occurred. The behaviour of the second appellant creates a strong suspicion that he was acting in concert with the first appellant. However, there is insufficient evidence to prove his guilt beyond a reasonable doubt and consequently his appeal succeeds."

The first appellant's appeal was dismissed, and the second appellant's appeal upheld.

## SELECTED JUDGMENTS

**HOHO V SPEAKER TO THE EASTERN CAPE LEGISLATURE: FIKILE XASA AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 492/2011 (EASTERN CAPE HIGH COURT, BISHO)**

**Case heard: 10 November 2011, Judgement delivered 17 November 2011**

Applicant sought an urgent interdict against the respondents, seeking inter alia to prevent them from proceeding with his disciplinary hearing in his absence or implementing its outcomes; compelling respondents to notify him of the charges, venue and time of the disciplinary hearing; and compelling the respondents to give him an opportunity to be heard. Applicant alleged that he had learnt about the disciplinary hearing against him from a fellow employee, and that when he went to the venue of the hearing, the respondents' legal advisors had not clarified the situation.

Majiki AJ held:

"The respondents … dispute that the applicant was not notified of the hearing. The respondents state that after attempts to serve the applicant, personally … failed, they posted the notice. The respondents have attached proof of registered posting of two letters to the applicant at his work postal address … The respondents also aver that the hearing sought to be interdicted was finalised. … The respondents state further that applicant was then informed by letter … about the finding of guilt and sanction together with his right to appeal the decision of the hearing. …" [Paragraphs 5 – 6]

Majiki AJ noted that it was common cause that: the disciplinary hearing had been finalised on the day that this application was filed; applicant had been advised of the outcome and findings of the hearing; applicant had appealed again the findings, the outcome of which was pending; and that the applicant had become aware of the hearing and was at the venue where it took place. Majiki AJ continued:

"… In insisting to seek to interdict the respondents not to implement the decision of the disciplinary hearing … even after he has validly lodged an appeal and without seeking to set aside the decision of the disciplinary hearing, the applicant is seeking to bypass the remedies available to him, in particular, in terms of the Labour Relations Act … In Sandu v Minister of Defence and others … CC … O'Regan J said that "where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard"." [Paragraph 9]

"… There is no longer urgency of the hearing taking place as it has already taken place. With regard to the urgency relating to the implementation of the findings, the applicant has acted on the findings, thereby identifying with the process. He has to await the outcome of the appeal. It would be unreasonable for this court to speculate on the outcome of the appeal. The respondents have made a decision, which is valid until set aside. In these proceedings the applicant does not have a right to stall the implementation of a decision that he has not sought to have set aside." [Paragraph 10]

"The applicant has already exercised a remedy. There is a legitimate process of appeal in place that the applicant has started. Even if the outcome of the appeal were not favourable to him, that would not be the end of legal remedies available to him. The applicant has not satisfied the requirements of the final interdict and his application has to be dismissed." [Paragraph 11]

**SIPHIWO W. MATEBESE AND AMANDA MAZWI V THE STATE, UNREPORTED JUDGMENT, CASE NO. CAR 26/2010 (EASTERN CAPE HIGH COURT, BISHO)**

**Case heard 11 February 2011, Judgment delivered 1 March 2011**

The appellants were convicted of robbery and murder by a Regional Court, and sentenced to 15 years imprisonment in respect of the robbery, and life imprisonment in respect of murder. The evidence suggested that prior to the murder, the deceased and the first appellant had been involved in a fight, due to the deceased kissing the second appellant. The deceased was later found dead, with possessions, including a cellular phone and money, missing.

Majiki AJ considered the evidence and held:

"The learned Magistrate erred in rejecting this evidence. He emphasised that the second appellant was not a submissive person, that she did not have adequate clothing, and therefore she could not have easily given in that her jacket to be burnt. The jacket was burnt because it had some blood stains after the fight. It is clear that ...she is poor and depends on lovers for her material needs. She said that the jacket was old. She had obtained it from exchanging bottles to get food and clothing. She articulated how she had and put up with the not so good treatment by the first appellant. In as far as she was concerned, kissing another man had the prospects of getting another caretaker, during the times when the first appellant failed to provide her with her needs. ... There is every reason to accept the evidence of the second appellant as reasonably possibly true. It cannot be said that she took the deceased's cellular phone and one hundred rand cash." [Paragraph 7]

"...the Court agrees with the Magistrate in the conviction of murder, however, only in respect of first appellant." [Paragraph 9]

"The Court has already said that the evidence of the second appellant is reasonably possibly true. Her appeal should succeed and her conviction and sentence should be set aside. The first appellant's appeal in respect of the conviction of robbery with aggravating circumstances should be upheld. He should have been convicted of theft. With regard to the first appellant's life sentence on murder charge, the court finds that the murder was not premeditated nor was it committed during the course of robbery. The provisions of section 51 of the Criminal Law Amendment Act ... therefore do not apply. The life sentence should be set aside." [Paragraph 10]

"The conviction as charged on the murder charge against the first appellant is altered to that of ordinary murder. His life sentence is set aside and substituted with 16 years' of imprisonment which ... is antedated ... The sentence of fifteen years on the robbery charge in respect of the first appellant is set aside and replaced with that of imprisonment for twelve ... months which is also antedated ... The two sentences are to run concurrently." [Paragraph 12]

(Dhlodhlo ADJP concurred).

**MONGEZI RAZI V MINISTER OF SAFTEY AND SECURITY, UNREPORTED JUDGMENT, CASE NO. CC 3927/2009 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)**

Plaintiff sued the Defendant for damages arising from an alleged unlawful arrest and detention, assault, and malicious prosecution.

Majiki AJ held:

"... [T]he plaintiff was arrested without a warrant of arrest at his home ... by police officers who at the time were acting within the course and scope of their duties with the defendant. In terms of the defendant's version, the plaintiff was arrested because the members of the SAPS suspected him of having committed offences of housebreaking ..." [Paragraph 2]

"The plaintiff claims that he was then assaulted and subsequently detained from the time of his arrest until he was released ... without appearing in Court." [Paragraph 3]

Majiki AJ dealt first with the claim for unlawful arrest, detention and assault:

"The court has to determine whether there was any basis for the police to believe or entertain a reasonable suspicion that the plaintiff had committed the offence/s..." [Paragraph 12]

"There is no evidence of the investigation conducted by the police. The plaintiff testified that he told the police, he did not commit the offence. They did not find the stolen goods and the Court has no indication as to why they continued to act as they did. ... [T]he police who bore the onus as to the lawfulness of the arrest did not testify. There were no arguments advanced on their behalf in this regard. The evidence of the plaintiff was no disputed. It was clear he did not contradict himself. The plaintiff is not a sophisticated person and he gave the Court no impression that he did not speak the truth. ..." [Paragraph 14]

"The evidence of the plaintiff is accepted. I find that the police did not have a reasonable suspicion that the plaintiff had committed the alleged offence and therefore, had no justification to arrest the plaintiff without a warrant of arrest and to detain him. Consequently, the arrest without a warrant, detention and all forms of assault on the plaintiff were unlawful." [Paragraph 16]

Majiki AJ then turned to deal with the claim for malicious prosecution, noting that it was common cause that the prosecutor had declined to prosecute the plaintiff. Majiki AJ set out the elements of a claim of malicious prosecution and continued:

"I have already found in the plaintiff's favour that the police did set the law in motion against the plaintiff without reasonable and probably cause to justify the arrest without a warrant. ... There is no evidence of whether the police believed that the plaintiff was probably guilty of the offence for which he was charged ... Similarly the plaintiff has not proved that the police acted maliciously. ..." [Paragraphs 23 - 24]

"...[T]her is no evidence before Court with regard to when the plaintiff was charged. What is clear is that he was released without appearing in Court. The plaintiff's averment that he was prosecuted in full view of the public is not supported by his evidence. ..."

Majiki AJ thus found that there had been no malicious prosecution, and turned to deal with the question of damages:

"The plaintiff suffered about one day ten hours of detention. In addition he suffered assaults that were brutal, without mercy and lasted for a long period. ... There is no evidence with regard to the time he lost in not being in a position to attend school, as a result of the injuries. The injuries were serious but they were not of a permanent nature. I am not convinced that the plaintiff was not in a position to continue with his studies ... I have also not been addressed about how he was progressing before the incident and how his academic potential was affected by the actions of the police on him." [Paragraph 29]

After considering case law, Majiki AJ awarded the plaintiff the sum of R90 000 in respect of wrongful arrest and detention, and R135 000 in respect of general damages for assault.

**NOMATHAMSANQA ELLA NTLEMEZA OBO ZANDILE NTLEMEZA V MEMBER OF THE EXECUTIVE COUNCIL DEPARTMENT OF HEALTH, EASTERN CAPE PROVINCIAL GOVERNMENT PROVINCE OF THE EASTERN CAPE AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. CC 3046/09 (EASTERN CAPE HIGH COURT, PORT ELIZABETH)**

This was an application for the review of a decision of the taxing mistress to disallow items on the applicant's bill of costs relating to attendances to obtain medical records and reports in terms of the Promotion of Access to Information Act, prior to launching an application to compel the respondents to furnish the records. The items were disallowed on the basis that they did not relate to the application, but were "a process to be followed in order to obtain documentation"; and the applicant had not needed to employ attorneys to request documents under the Act [Paragraphs 4 – 5].

Majiki AJ considered the High Court case of *Schoeman v Schoeman* as authority for the approach in dealing with reviews of rulings of the taxing master, and held:

"...[T]he processes which are in the items that are subject of the review were followed by the applicant's attorneys, it would have been impractical and unreasonable to expect the applicant to take over the file, and prepare the process... It is settled that the process is a prerequisite before launching the application to court." [Paragraphs 9 – 10]

"In my view, the necessary pre-litigation costs incurred by the applicant follow the costs of the application. ... Since the applicant's attorneys were already on record, ... it would not have been practicable for her attorneys to refer the matter back to the applicant to obtain the documentation ... Her attorneys on written requests had not been able to do so. ... I therefore cannot accept the taxing mistress's suggestion that the applicant would halt her legal representatives at that stage and take over the process herself. In particular, taking into account the attitude her attorneys had already received from the respondents." [Paragraphs 12 – 13]

"The costs incurred prior to the application are a direct result of the respondent's conduct, as is the application itself." [Paragraph 14]

"I am therefore of the opinion that the taxing mistress did not properly exercise her discretion in this regard. She disregarded the fact that the respondents created the circumstances they found themselves in. ..." [Paragraph 15]

The application thus succeeded.

**THE STATE V KHOLEKILE WITNESS HUNZI, UNREPORTED JUDGEMENT, REVIEW CASE NO.: A 1360/07 (TRANSKEI DIVISION)**

**Judgement delivered 4 July 2008**

The accused was charged with contravening the Domestic Violence Act, assault, and assault with intent to do grievous bodily harm. The accused pleaded guilty to the third count, and was convicted on the other two counts.

Majiki AJ (Pakade J concurring) held:

"The conviction and sentence in count 1 and 2 do seem to be in accordance with justice. The conviction in count 3 also seem to be in accordance with justice, even though there is reference to incorrect statutes the proceedings and findings of guilt in my view, seem to be consistent with the charge of assault with intent to do grievous bodily harm. The offence charged … was described in the charge sheet, not in the words of the wrong statute cited but in the words of the correct statute which should have been, but was not cited … The problem is cured by Section 84 (3) of the Criminal Procedure Act … It provides that the description of any statutory offence in the words of the law creating the offence or in similar words shall be sufficient to inform the accused of the allegations against him. The effect of this provision is to cause the words of the statute creating the offence to be an adequate statement of the charge which the accused has to meet (Ex parte Minister of Justice: In re R v Mason and Another 1940 AD75). This is so because an accused person has a right to be fully informed of the precise nature of the offence with which he is being charged. However, this section should not be used as a license by the state not to cie the relevant statute in the charge sheet. The Magistrate has also a duty to direct the state to a wrong citation of the statute in the charge sheet and not merely to rubber stamp it." [Paragraph 11]

"With regard to the sentence in count 3 the Magistrate has himself conceded to the omission of not holding the Section 4 (1) [of the Dangerous Weapons Act] enquiry. He also failed to record either that he weighed aggravating circumstances as against mitigating ones or which mitigating factors he took into account and also which factors outweigh the other. This is a gross irregularity which affects the sentence imposed in count 3." [Paragraph 12]

The convictions on all three counts were confirmed, as well as the sentence on the first two counts. The sentence on count 3 was set aside and the matter remitted to the Magistrate to hold a pre-sentence enquiry under s 4(1) of the Dangerous Weapons Act, and then impose sentence afresh.

## SELECTED JUDGMENTS

**DEVELOPMENT BANK OF SOUTHERN AFRICA V BLUE SERENITY INVESTMENTS (PTY) LTD T/A CITY ROYAL HOTEL AND 4 OTHERS, UNREPORTED JUDGEMENT, CASE NO: 4615/11 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)**

On 23 November the first respondent was placed under provisional liquidation and a rule nisi returnable on 26 January 2012, calling on any interested party to show cause why the first respondent should not be finally wound up. On 16 January 2012 the rule nisi was extended to 16 February 2012. This matter came before the Court on 16 February 2012 having been enrolled as an unopposed application.

Stretch AJ held:

"On that day Mr Padayachee for the first respondent prevailed upon me to receive an affidavit made by one of the first respondent's directors (Shabalala), … [The purpose of the affidavit, was to oppose the granting of a final order. Also before the Court was the legal representative of Muzi Mkhize ("Mkhize") seeking leave for Mkhize to be joined as an intervening party]. "[Paragraph 4]

"The rule nisi returnable on 16 February 2012 calls upon "any interested party" to show cause why the first respondent should not be finally wound up. …it goes without saying that Shabalala as one of the first respondent's directors), is an interested party. The question is whether he has shown cause why the first respondent should not be finally wound up." [Paragraphs 22-24]

"[Shabalala in support of his application for extension of the rule] states that the first respondent is factually solvent [this has been disputed by the applicant], a position which he says will be made plain should the first respondent be given an opportunity to do so. He avers that bona fide negotiations for the property to be sold for nine million to Mkhize, and for a significant portion of the first respondent's debt to be written off only reached a deadlock on the day before this matter came before me. " [Paragraph 25]

"What is not disputed is that there had been negotiations amongst the applicant's attorney, Shabalala and Mkhize regarding the sale of the property…Significantly the applicant avers that these negotiations went as far as its attorneys preparing a non-disclosure agreement and forwarding it to Mkhize…" [Paragraphs 27,29]

"It seems...., that the applicant has, through its agents … and its legal representative, continued these negotiations…" [Paragraph 30]

"[Reference was made in Shabalala's affidavit to an important meeting that took place on 22 November 2011 (the day before the interim order was granted)] According to Shabalala the upshot of this meeting was : [i] that the first respondent would not oppose the interim order as a token of its good faith in the negotiations process and to protect the applicant's rights; [ii] that the applicant was inclined to accept nine million rand in full and final settlement subject to certain conditions; [iii] that sufficient time would be allowed for these negotiations to be finalised to give effect to the good faith between the parties." [Paragraph 32]

"These discussions then continued and culminated in a stalemate situation ..." [Paragraph 33]

"Regard being had to what is presently before me, I am of the view that Shabalala's affidavit makes out a prima facie case demonstrating cause for the extension of the rule." [Paragraph 39]

"…I deem it prudent to warn the first respondent that this opportunity which it has been afforded to fully apprise this Court as to why it says it is factually solvent and why it has not dealt with this before, should not be lightly taken, not forgetting that the best interests of the company's creditors are paramount in an application of this nature." [Paragraph 52]

The Court proceeded to consider the position of Mkhize:

"Mkhize says that he has an interest in this matter and that his interest is necessary to enable him to purchase the property "on terms and conditions that are market related"… [He]prevails on this Court to "withhold" the granting of the final liquidation order ... "[Paragraph 57]

"In law, intervention is often treated as a particular facet of joinder ...]" [Paragraph 58]

"What has become clear through the cases is that in order to acquire a right to be joined, the decisive criteria is for the applicant to illustrate that he has a direct and substantial interest in the subject matter of the litigation (United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd …; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) ..." [Paragraph 60]

"An interest is more than a mere financial interest which can at best be described as an indirect interest in the litigation. It is a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgement of the Court (Standard Bank of SA Ltd v Swartland Municipality & Others 2011 (5) SA 257 (SCA)…" [Paragraph 61]

"This [Mkhize's financial interest in purchasing the property], and his belief that the applicant's attorneys have ulterior financial motives, is the sum total of the grounds upon which his application must stand or fall. " [Paragraph 66]

"At the very best the spes which he has in purchasing the property from the applicant shows that he has an interest in the property. This does not elevate him to a party who assumes locus standi in proceedings where the applicant is in the process of liquidating the first respondent whose main asset happens to be this property. Nor has he shown, either directly or indirectly, that he has any legal grounds for opposing a final winding up application." [Paragraphs 67-68]

"This does not mean that he is barred from deposing to an affidavit designed to assist the first respondent in resisting a final winding up order…" [Paragraph 70]

The application by Mr Mkhize to intervene/join as a party was dismissed with costs.

**MACICI V SASSA [2011] JOL27988 (ECM)**

**Case heard 10 June 2011, Judgment delivered 13 October 2011**

Appellant had applied, inter alia, for an order setting aside respondent's decision to terminate appellant's disability grant, and reinstating the grant. The High Court dismissed the application and directed the appellant's attorney to pay the respondent's costs de bonis propriis on the attorney and client scale. On appeal to a full bench of the High Court, the issues were whether the court a quo had correctly found that the respondent's agency had duly complied with the provisions of item 13 of the regulations under s 32 of the Social Assistance Act (dealing with the notification of the outcome of social grant applications);

and whether it has erred in finding that respondent had substantially complied with its undertaking in terms of the grant.

Stretch AJ (Dawood and Ebrahim JJ concurring) held:

“The appellant, in his grounds of appeal says that the court below ought to have found that the respondent failed to draw the appellant's attention to the contents of "MM1" [a document approving appellant’s application] when the appellant placed his thumbprint on this document on 1 December 2008.” [Paragraph 13]

“The purpose of regulation 13 is to ensure that the applicant is given notice (written notice suffices) of the nature of and the extent of the grant and to advise him of his options if aggrieved. The record being silent on whether the appellant only placed his thumbprint on the respondent's copy or whether he was also given his own notice, the court below did not err in any event in applying the pricniples laid down in Plascon-Evans Paints Limited v Van Riebeeck Paints … ” [Paragraphs 19 - 20]

“A proper application of these principles caused the court below to conclude (correctly in my view), that: … a copy of annexure "MM1" was hand-delivered to the appellant on 1 December 2008 as attested to by the respondent's representative; … the document (annexure "MM1") annexed to the respondent's affidavit is a duplicate of the document which was hand-delivered to the appellant; … the appellant acknowledged receipt and notification by hand delivery by affixing his thumbprint to the respondent's copy; … the respondent subsequently confirmed that the appellant had received "MM1" on 1 December 2008 and that the contents thereof was explained to him.” [Paragraph 21]

“In response to the appellant's attorney's threat of High Court litigation … the respondent, on 2 December 2009 not only advised the attorney that the appellant had been notified of the nature of and the extent of his grant when he applied on 1 December 2008, but also repeated this information, for the attorney's benefit. If the appellant indeed gained knowledge of the respondent’s decision for the first time on 2 December 2009, his remedy was to invoke the provisions of section 18 of the Act instead of approaching this Court directly for relief.” [Paragraphs 24 - 25]

“The appellant has, on either scenario, not only failed to exhaust his internal appeal remedies, but has prematurely approached this Court for final relief which relief this Court can only grant if the Minister of Social Welfare refuses to vary or set aside the respondent's decision, and then only if this Court finds that the Minster's refusal is clearly wrong. It goes without saying that the only other competent ground upon which the appellant may approach this Court is to request it to compel the Minster to entertain the appellant's internal appeal once evidence has been placed before this Court that the Minister has failed or refused to do so. But this is not the case.” [Paragraph 26]

Stretch AJ then turned to consider the issue of compliance with the grant.

“Again, applying the Plascon-Evans test together with the fact that the appellant has been most evasive as to how much money he was paid, when the payments were effected and the number of instalments, the court a quo correctly accepted the respondent's version that the 12 emoluments due were made and received as follows … The only other issue which was pursued but not with any serious intent, is the suggestion that because annexure "MM1" appears to contradict itself (it states that the application had been approved for a period of 12 months, but thereafter refers to the period being from December 2008 until December 2009 being 13 months), this Court should give the appellant the benefit of the doubt and direct retrospective reinstatement of the grant to terminate in December 2009.” [Paragraphs 27 - 28]

"At the risk of stating the obvious, this submission is frivolous and devoid of logical reasoning … " [Paragraph 29]

"This Court is not at liberty to direct the payment of any further emoluments. To do so would theoretically convert a temporary grant into a permanent one in the absence of any justification for doing so. In the premises I am satisfied that the court below did not misdirect itself in dismissing the application." [Paragraph 31]

"… I am of the view however that the court had sufficient information before it to support a *prima facie* view that *de bonis propriis* costs should be awarded against the appellant's attorney. … Having formulated this *prima facie* view, the court below thereafter should have afforded the attorney the opportunity to show cause why this costs order should not be made. … The failure … to afford the appellant's attorney this opportunity is, in my view, a misdirection which compels this Court to set aside and substitute the costs order with the usual order made on a party and party scale …" [Paragraphs 44 – 46]

"This does not of course mean that this Court is barred from formulating and expressing its own views regarding applications in matters of this nature. … In the matter of *Ngukela v SASSA* … the appellant was likewise represented by attorney Zono. … The relief which was sought in that application duplicates the relief which was sought in the matter before us. …What is cause for concern is that both applicants in their founding affidavits allege that the respondent is aware of the fact that they are destitute, unsophisticated and illiterate. Thereafter, both applicants in reply on oath, state that they are surprised that the respondent alleges that they acknowledged receipt of these documents by using their right hand thumbprints as they "can read and write". … It is highly improbable that two unrelated deponents in two separate applications would both describe themselves in two consecutive affidavits firstly as illiterate and then as literate. … It seems to me that the appellant's attorney at the very least in these two applications has embarked on a cut and paste exercise, the product of which has been a standard type affidavit which fails to cater for the independent merits of each case. This seems to have become a practice described by Wallis AJ (as he then was) as "indolent" in *Cele & others v SASSA* … This practice, if still in use, is an indictment on the legal profession and must cease forthwith." [Paragraphs 47 – 53]

The application was dismissed

**GAMA-MPANTSHA & OTHERS V MPANTSHA [2011] JOL 27970 (ECM)**

**Case heard 10 June 2011, Judgment delivered 18 August 2011**

Respondent succeeded with a vindicatory action in the court *a quo* for the return of ownership of an erf of land. Respondent was the second husband of the first appellant. They were married in community of property, and lived in a house situated on the property with the third appellant (first appellant's daughter) and first appellant's son from her first marriage. First appellant was subsequently appointed executor of her late first husband's estate, and during the same year issued summons for divorce against the respondent. The council of the erstwhile fifth respondent (Qaukeni Local Municipality) resolved to sell the property to the first appellant, and the erstwhile fourth respondent, as manager of the municipality, signed a power of attorney to effect the transfer. The transfer was duly effected.

On appeal to the full bench of the High Court, Stretch AJ (Dawood and Ebrahim JJ concurring) held:

"The respondent says that about a year after he married the first appellant he bought the property in question from … Arthur Homes … who then represented the municipality of Lusikisiki by virtue of the provisions of … the Municipalities Act ... His founding papers are supported by a deed of sale reflecting an agreement entered into between the Lusikisiki Municipality as represented by Arthur Homes and the respondent. This document also describes the marriage between the first appellant and the respondent as being in community of property." [Paragraphs 19 – 20]

"The first appellant disputes that the respondent acquired the property in question after her marriage to him or at all. … She says that she acquired the property in February 1997, after the demise of her first husband … and before she married the respondent. … She says that when she was appointed as the executor of Gama's deceased estate … she, believing that this property formed part of a joint estate which she had enjoyed with the deceased Gama, used her powers as the executor … to transfer the property to the second and third appellants. The certificate recording her marriage to Gama however, reflects a marriage out of community of property." [Paragraphs 27 – 29]

"… I am of the view that it is necessary at this point to comment on the adverse credibility findings made by the court *a quo* particularly with respect to the appellants. … " [Paragraph 37]

"In the absence of any evidence explaining these misdescriptions [on a power of attorney signed by the first appellant to transfer the property to the second and third appellants] (which coincidentally are also reflected not only in the deed of transfer in favour of the second and third appellants, but also in the power of attorney to pass transfer to the first appellant allegedly signed by the Municipal Manager of the Qaukeni Local Municipality, as well as in both the deeds of transfer in favour of the first appellant and the second and third appellants jointly), I am constrained to accept that not only did this false information emanate from the first appellant, but that the second and third appellants, having been aware that the information was false, nevertheless appended their signatures to the relevant documents without correcting or questioning these misdescriptions." [Paragraph 41]

"The court *a quo* … found that the Registrar of Deeds would have refused to register the transfer of the property firstly into the first appellant's name and secondly into the names of the second and third appellants, had it been brought to the Registrar's attention that the first appellant was at the time of registration of transfer, married to the respondent in community of property. We agree." [Paragraph 42]

"From the aforegoing it is clear is that the court *a quo* correctly and with sufficient cause had serious misgivings about the credibility of the appellants." [Paragraph 44]

Stretch AJ then dealt with an argument that the parties' marriage was not in community of property:

"[Counsel for the appellants] argues that although the marriage was entered into and solemnised in what is now known as KwaZulu-Natal, it is governed by … the Transkei Marriage Ac … of 1978." [Paragraph 49]

"… Section 8 of the Transkei Marriage Act does not apply to this marriage entered into on 19 March 1999, as it did to the first appellant's marriage to Gama in 1986. … By 1999 the Transkei had already been reintegrated back into South Africa and as such neither the respondent nor the first appellant were either citizens of the Transkei or domiciled in the Transkei (assuming for the moment that there is evidence of this before us, which there is not). … Neither does section 10 of the South African Marriage Act apply to the marriage between the parties. This section refers to a marriage solemnised in a country outside the Union. The marriage in question was solemnised in Port Shepstone which is part of South Africa, formerly known as the Union." [Paragraph 55]

“The marriage between this respondent and the first appellant was entered into outside of the former Republic of Transkei and there is no evidence before us that the parties intended the marriage to be anything other than a marriage in community of property. Indeed, Mr *Noxaka* has conceded that there is also no evidence that the respondent (or either of the parties for that matter), was domiciled in and a citizen of the former Republic of Transkei when the marriage was entered into ... This being the case, the court *a quo* correctly accepted that the marriage is in community of property.” [Paragraphs 69 – 70]

“Notwithstanding the differences in these three versions, in respect of all of them, the property … falls squarely into the community estate. … It is clear from the provisions of section 15(2) of the Matrimonial Property Act, that the first appellant is prohibited from alienating or from entering into any contract for the alienation of any immovable property forming part of the joint estate, without the written consent of the respondent.” [Paragraphs 75 – 76]

“I am of the view that these appellants … connived to prejudice the respondent's interest in the joint estate … Accordingly the court *a quo* did not err in making the orders resulting in the setting aside of the respective sales and in restoring the property to the joint estate. … The appellants have not challenged the remaining orders and I see no reason to interfere with them, save to amend the costs order to ensure that the joint estate is not mulcted with the costs order.” [Paragraphs 80 – 82]

“None of these rules [in the Practice Rule regarding heads of argument] have been complied with by the parties. On the contrary, there has been substantial non-compliance on the part of the appellants' legal representatives.” [Paragraph 87]

“The affidavits submitted on behalf of all the parties … exude emotion and are charged with irrelevant verbiage and sarcastic remarks. … I am constrained to express my disappointment and displeasure about the manner in which lawyers have failed this Court and their clients by burdening the record with this type of vitriol instead of confining the papers to the succinct issues before the court.” [Paragraphs 89 – 90]

“I am of the view that this shoddy presentation of the appeal record and the deliberate abuse of this Court's lack of knowledge of the existence of relevant documents which served before the court *a quo*, is a serious abuse of the position of trust which lawyers hold when they present their clients' respective cases.” [Paragraph 94]

The appeal was dismissed.

## SELECTED ARTICLES

**'AN EQUITABLE APPLICATION OF THE SHABALALA DICTUM', The Human Rights and Constitutional Law Journal of Southern Africa Volume 1 No 3 October 1996 Pages 10 - 13**

The article dealt with the issue of "docket privilege", in light of the decision of the Constitutional Court in Shabalala and Others v Attorney-General of the Transvaal and Another, and in the context of the abolition of the process of pre-trial preparatory examination.

"The preparatory examination as a pre-trial feature in the criminal justice system is today extinct. The procedure provides for the calling of material prosecution witnesses who could be challenged by the accused in open court. The accused person could testify at these proceedings. He/she was further entitled to any affidavits of any state witnesses who were not called by the prosecution."

"Forty-two years ago, without the benefit of a Constitution, our Appellate Division recognised that implicit in the notion of a fair trial, is the right of an accused person to viva voce prosecution evidence: alternatively, to witness statements for trial preparation. It is surprising therefore, that there has been such radical opposition to filling the lacuna which has remained as a result of the erasure of the preparatory examination. This has been the position in spite of the entrenchment of the accused person's right to a fair trial in section 25(3) of the 1993 Constitution Act and in the Bill of Rights introduced in Chapter 2 of the 1996 Constitution Act … " (Page 10)

"In sharp contrast [to decisions in other divisions], judges in the Transvaal provincial division continued to support the privileged principle [blanket docket privilege], holding that section 23 of the 1993 Constitution Act should be read subject to such privilege. This inevitably led to the referral of the matter to the Constitutional Court, resulting in the judgement of Mahomed DP … in Shabalala ….." (Page 11)

After setting out the findings in Shabalala, the article discussed benefits of the decision for the prosecution:

"A prosecutor is often confronted with the ethical dilemma of whether or not a contradiction between the viva voce testimony of a witness and that which is contained in the affidavit deposed to … is material in the sense that it warrants making the affidavit available to the defence for purposes of cross-examination. The prosecution is no longer burdened with this choice if the statement is made available to the defence in advance. … The presentation of formal State evidence which may be time consuming … may be disposed of by the making of the necessary admissions by the defence … if the accused is given adequate insight into the documents which the State intends using … An accused person who is guilty … may be encouraged to plead to this effect once the defence is made aware of the strength of the State's case … [T]he prosecution may be alerted to the weakness or potential weakness in the State's case if the prosecuting authority is present when the State witnesses are consulted. … By attending the consultation of the defence with the State witness, the prosecutor will no doubt be alerted to the potential of individual witnesses to deal adequately with pressing issues … The potential to isolate the crisp issues between the prosecution and the defence at this early opportunity is enormous and should not be overlooked. Unecessary delays in the trial itself may be effectively avoided … Particularly in the lower courts, however, the practical application of such pre-trial conference may prove to be impossible. …" (Pages 11 - 12)

"Perhaps the re-introduction of the preparatory examination in all serious cases is a long-term solution, but for the moment the lack of police training in the procurement of sufficiently detailed statements, together with the language problem, are two particularly serious factors hampering the prosecutor in the presentation of the State's case. … The second example illustrates the general lack of insight displayed by well-meaning but inadequately trained police officials in the taking of statements from rural, unsophisticated witnesses. … An over-zealous cross-examiner armed with affidavits such as the two illustrated above could conceivably exploit the inaccurate information to confuse and exhaust the honest witness into capitulation." (Page 12)

The article proceeded to list practical suggestions, namely that a police officer taking a witness statement under adverse conditions should attach his/her own affidavit dealing with issues such as conditions and the demeanour of the witness; that moves be made to employ at least one trained interpreter at every police station; that complainants in sexual offence cases should not have their statements recorded by interpreters of the same gender as the alleged offender; and that defence counsel should make an affidavit available to the court as soon as it is referred to in cross-examination, to allow the court to control relevance of the examination.

The article concluded with observations about bail and co-accused:

"The accused … has a right to information contained in the police dossier to enable him to properly prepare for trial. There is no authority or justification in law for the proposition that an accused person … arrested at a stage when the investigation is incomplete and the matter has not been set down for trial, is entitled to the contents of the police docket. The applicant is however at liberty to challenge the strength of the case against him by cross-examining the investigator and any other witnesses the State may elect to call at the bail hearing. …"

"… [T]he accused is entitled to have access to all information required to exercise his right to a fair trial. Such information may very well include statements by co-accused persons implicating the accused, or even more importantly, exculpating him or her. The State is of course… entitled to resist such a claim with proper justification. … " (Page 13)

## SELECTED JUDGMENTS

**TOPHAM V MEC: DEPARTMENT OF HEALTH, MPUMALANGA [2011] JOL 27900 (GSJ)**

**Case heard 12 September 2011, Judgment delivered 4 October 2011**

Upon being injured in a motor vehicle accident, the plaintiff was admitted to a hospital run by the defendant. She alleged that the medical personnel of the defendant misdiagnosed her hip dislocation, resulting in her suffering from a vascular necrosis of the right femur head. She sued the defendant for damages suffered due to the alleged negligent conduct of the defendant's employees.

Mabesele J held:

"Negligence occurs when a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The criterion adopted by our law in this regard is the objective standard of the reasonable person. Therefore, the person is negligent if the reasonable person in his position would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable." [Page 8]

"Despite inexperience on the part of Doctor Molete, he explored same tests suggested by both medical experts for the plaintiff, thereby, clearly, adhering to the standard of care required of him. In particular, the doctor moved around or pulled the affected thigh (which is connected to the pelvis where a hip is located) to detect possible abnormalities. Most importantly, he assessed the nerves and vessels to determine free flow of blood from where the thigh is connected to the pelvis through the entire leg. He always made certain that the limb was kept straight to determine a possible fracture. The doctor did not focus, only, on the painful areas pointed out to him by the patient. Instead, he examined the patient from head to toe... He was guided, also, by vitals which did not reveal abnormalities on the patient. The doctor did not examine the plaintiff's hip, specifically. He properly examined the thigh which was complained about and is connected to the pelvis where a hip is located. To my mind, therefore, thorough examination of the thigh through appropriate tests did cover pelvis and hip." [Page 9]

"In the present case, the medical practitioner misdiagnosed hip dislocation despite performing correct tests to determine the problem. He did not concentrate, only, on parts which the plaintiff complained about. Instead, he examined the plaintiff from head to toe, guided by vitals. In my view, therefore, the doctor took reasonable steps to guard against harm on the part of the plaintiff. Moreover, it should be borne in mind that medical practitioners cannot be expected to demonstrate impossible standards when they treat patients. What is clearly expected of them is adherence to standard of care." [Page 10]

The plaintiff's claim was dismissed.

**S V DE BRUYN (A172/2007) [2007] ZAFSHC 121 (1 NOVEMBER 2007)**

**Case heard 15 October 2007, Judgment delivered 1 November 2007**

The appellant was charged in the Regional Court on a count of corruption, alternatively theft, involving an amount of R180 476,80. He was convicted on the main charge of corruption and was subsequently sentenced to five years imprisonment. He appealed against his conviction and sentence.

Mabesele AJ (Mocumie AJ concurring) held:

"Mr. Viviers, who appeared on behalf of the appellant, argued that the complainant was a single witness and also a witness warned in terms of section 204 of the Criminal Procedure Act ... Therefore, the magistrate should have applied double cautionary rules, but she failed to do so. Mr. Viviers argued that the complainant was unreliable, untruthful and was evasive. He submitted that the magistrate could not have convicted the appellant of corruption due to the fact that the appellant had no power or authority to approve or secure contracts for the complainant." [Paragraph 10]

"Mr. Vivier's argument that the complainant was not impressive as a witness and could not answer questions directly should be looked at in context. One should be mindful of the fact that the complainant requested to testify in Afrikaans. Despite her request, the prosecutor and the magistrate questioned her in English without first establishing the extent of her understanding of English. It is evident from the record that the complainant struggled to understand English. …" [Paragraph 13]

"… [I]t cannot be said that the complainant was evasive and/or unreliable or untruthful. She did not understand English well." [Paragraph 14]

"Language plays an important role as a means of communication. It is a tool by means of which a person clearly expresses his or her ideas and in the manner in which he or she prefers such ideas to be expressed. In my view, such ideas can clearly be expressed in the language which is best preferred by a person from whom such ideas originate." [Paragraph 15]

"… The appellant was charged with a duty, inter alia, to evaluate contracts. Operating within the scope of his duties, the appellant and his superior altered the complaint's contract from labour hire into services. This, demonstrates clearly, in my view, that the appellant had been charged with a duty to deal with the contracts. Therefore, he was correctly convicted of corruption." [Paragraph 19]

"Corruption is a serious offence. It is rife in our society. It is a disease which should be rooted out through severe punishment, in deserving cases. The appellant, as correctly pointed out by the magistrate, could not even think of withdrawing from his conduct of accepting money from the complainant for a period of a year and nine months. His conduct, in my view, demonstrates clearly that this disease is circulating in his blood, even though he did not keep to the deal as promised. The magistrate took into account the personal circumstances of the appellant. In my view, the sentence imposed by the magistrate is appropriate." [Paragraph 21]

The appeal against conviction and sentence was dismissed.

**ERASMUS & OTHERS V EKURHULENI METROPOLITAN MUNICIPALITY & OTHERS [2006] JOL 17584 (T)**

**Case heard 9 May 2006, Judgment delivered 29 May 2006**

The plaintiffs were employees of the first defendant, having previously been in the employ of local authorities which were subsumed into the first defendant. Upon being subsumed, the posts in which the plaintiffs found themselves were a lower level than their previous posts. This led to the plaintiffs rejecting the new posts, and being made redundant. They sought payment of full severance benefits, contending that this was in keeping with their terms and conditions of employment. The defendants excepted to the particulars of claim, as lacking averments necessary to sustain a cause of action.

Mabesele AJ held:

"I agree with the submission made by Mr Sutherland that a party suing for specific performance must himself either perform or tender performance of his side of the bargain. However, where the circumstances beyond the control of the party that sues for performance, such as the plaintiffs whose posts are redundant, make it impossible for the party to perform, it cannot be said that the party cannot sue (the employer) for specific performance. Therefore it is not always the position that the party that sues for performance must himself perform. It is also not the position that an employee who seeks to be declared redundant and entitled to payment of severance benefits must allege and prove that he has actually worked or offered to work. He need only allege and prove that which is pertinent to redundancy and payment of severance benefits." [Page 5]

"If the plaintiffs are dissatisfied with the way in which the employer deals with them, they have an election to allege a material breach, cancel the contract and sue for damages. This exception is without merit, in my view, as demonstrated hereunder. The terms and conditions of employment of the plaintiffs, which the employer is bound to respect, provide, interalia, that in circumstances where specific jobs become redundant and the affected employees cannot be transferred to other posts or reject such transfer, such employees are redundant and therefore entitled to severance benefits. On the basis of their terms and conditions of employment the plaintiffs need not sue the first defendant on the basis of breach of contract of employment. Neither must they cancel the contract and sue for damages." [Page 6]

"The first defendant has a duty, as excipient, to satisfy the court that the particulars of claim are excipiable on any interpretation they can reasonably bear. Where the particulars of claim rely on an interpretation of a contract the excipient must satisfy the court that the contract cannot reasonably bear that interpretation." [Page 9]

"After I had considered all the issues raised … in support of the first defendant's case, I was not persuaded that the particulars of claim are excipiable on any interpretation which they can reasonably bear." [Page 10]

The exception was dismissed.

## SELECTED JUDGMENTS

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

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

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

Moshidi J held:

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

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

"On the evidence and pleadings, and as argued by the plaintiff, at best for the defendant, his defence suggests that he received about R37 million whilst an Executive Director of the plaintiff, as well as a category 1 employee under the MPS from the purchaser as remuneration for what he termed

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

The Court ordered the defendant to pay the amounts claimed.

**BLUMENOW V BLUMENOW [2008] JOL 21382 (W)**

**Case heard 20 November 2007, Judgment delivered 18 December 2007**

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

Moshidi J held:

"It is trite law that the interests of minor children are of paramount importance (see in this regard McCall v McCall 1994 (3) SA 201 (C) and F v F [2006] 1 All SA 571 (SCA)). A matter such as the current matter, where there is a need to remove uncertainty about the future, safety and well-being of minor children, will always be urgent (see Terblanche v Terblanche 1992 (1) SA 501 (W)). I therefore deemed it necessary to deal with this matter as one of urgency. The second point in limine, in my view, is equally based on shaky grounds. For the argument to succeed, the respondent bears the onus of proving that the pending matter in the Randburg Magistrate's Court is an action instituted; that the parties are the same; and that the cause of action is the same. In the matter in the Randburg Magistrate's Court, the cause of action is allegedly (the applicant contests the allegations) to prevent violence from being inflicted upon the respondent and/or the minor children ... Nowhere in the Act are the words "access" or "custody" defined. In the present application, the cause of action is clearly to reinstate custodial and access rights to the applicant and thereafter deal with the rights of the minor children, together with other ancillary relief which the Magistrate's Court is not enjoined to deal with. If the application in the Domestic Violence Court does remain in force, the respondent will be seeking an order of protection. He will not and cannot be seeking an order relating to custody and access, as the Magistrate's Court is not competent to grant such relief." [Paragraph 23]

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

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

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

**EX PARTE VAN DER MERWE [2008] JOL 21519 (W)**

**Case heard 1 February 2008, Judgment delivered 8 February 2008**

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

Moshidi J held:

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

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

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

"The facts in Ex parte Allwright 1946 TPD … are more relevant to the present application. At the time of his sequestration, the insolvent applicant was the registered owner of an undivided share in certain immovable property. The immovable property, which was clearly an asset in the applicant's insolvent estate, was not disclosed by the applicant to his trustee. The immovable property was subject to the life

usufruct of a third party ... The applicant's explanation for his failure to disclose the property was unsatisfactory. ... The Master was equally of the view that the applicant's explanation in this regard was unconvincing. The applicant sought an order for his rehabilitation together with an order authorising and sanctioning that he be reinvested with his interest in the immovable property and other relief… In that case, although the court found that the immovable property was still registered in the name of the applicant (as in the present application), it was, however, still vested in his trustee. Further, that there had since the applicant's insolvency been no other transaction in connection with the property (once more as in the present application). However, in spite of all that, the court nevertheless declined to grant an order reinvesting the immovable property in the name of the applicant on the basis of the provisions of section 58(1) of the Deeds Registries Act ... The court was, however, of the view that should a trustee refuse to transfer such property to the applicant, the latter might be entitled to an order compelling the trustee to pass such transfer. The court, however, granted an order rehabilitating the applicant. The facts in Ex parte Allwright … were however, clearly distinguishable from the present application in several respects. In the first place, in the present application, there is no application for rehabilitation, the applicant having been rehabilitated on 17 October 2006. Secondly, unlike the applicant in Ex parte Allwright, the present applicant made disclosure of the immovable property in question to his trustee. Furthermore, there is no opposition to the present application by the Master, or any other affected person." [Paragraph 17]

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

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

"I conclude therefore that the present application presents with unique and unprecedented circumstances where the insolvent acquired the immovable property prior to his sequestration. He disclosed the immovable property to his trustee. The trustee duly investigated the matter, but thereafter elected to abandon the asset and liquidation and distribution account. It is trite that where assets are acquired adverse to the trustee the court takes into consideration the potential prejudice the insolvent's creditors may suffer and seeks to prevent the mala fid applicant from secreting away his assets to the

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

The application succeeded.

**S V KHATHI [2008] JOL 21947 (W)**

**Case heard 9 June 2008, Judgment delivered 9 June 2008**

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

Moshidi J held:

"In the often difficult search for substantial and compelling circumstances, the court will take into account the factors traditionally considered in the sentencing process, with due regard to the principles of sentencing. The principles of sentencing are deterrence, rehabilitation, prevention and retribution, all of which are usually blended with a measure of mercy, depending on the circumstances of each case (see in this regard S v Rabie 1975 (4) SA 855 (A)). The traditional factors include the seriousness of the offence, the interest of society and the personal circumstances of the accused. The court is also enjoined to take into account any factor or factors closely connected with the commission of the crime, both mitigating and aggravating." [Paragraph 3]

"I consider the personal circumstances of the accused which are important in the determination of an appropriate sentence. His previous convictions have already been mentioned. From the evidence, his age is given as 27 years. He has been in custody since his arrest on 2 February 2007 in the present matter. This period is not, in the view of the court, as long as in the usual matters that come before the court. The accused did not testify in mitigation of sentence. However, his counsel informed the court that he was born on 21 December 1977, whilst his identity document, an exhibit in court, indicates that he was in fact born in 1980. He is not married but has a minor daughter of about 7 years whom he supports. Prior to his arrest, the accused was doing part-time gardening jobs and also selling loose cigarettes. He has a level of education of Sub B only. It was argued that the low level of education; the time spent in custody awaiting trial in this matter; as well as his obligation to support his daughter, all constitute substantial and compelling circumstances. The court disagrees. Close examination shows that there is in fact nothing extraordinary in the personal circumstances of the accused. On the other hand, the court cannot ignore

the evidence of the widow of the deceased … who testified today in aggravation of sentence. She was married to the deceased by customary union for approximately one year only at the time of the incident and they have one minor child, aged 2 years. The deceased was a traffic officer since July 2003. She is employed by the Gauteng Shared Services Centre and stayed together in Soweto with the deceased who was their main breadwinner. She testifies that her employment is insecure in that she is currently employed on contract basis and that since the death of her husband she has been responsible for the maintenance of the household. The deceased was also responsible to maintain his own extended family as a breadwinner. Mrs Jokazi was clearly emotional when she testified and appears to have been deeply affected by the death of her husband. She testifies that she attended counselling after the incident and was presently still attending counselling sessions, almost 1 year and 3 months after the incident. At the time of her evidence, Mrs Jokazi was 27 years old, and already rendered a widow by this incident. Her husband, the deceased, was also relatively young at age 32, when he was killed." [Paragraph 8]

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

The accused was sentenced to life imprisonment.

**S V COLLARD [2007] JOL 19865 (W)**

**Judgment delivered March 10, 2006**

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

Moshidi J (Jajbhay J concurring) held:

"The more pertinent question that needs resolution in this matter is whether this Court on review, may amend the conditions of the suspended sentences to ameliorate the situation of the complainant and in doing so, without any or further reference to the accused. Put differently, whether the accused will be

prejudiced by such amendment. Most cases on review deal with the situation of an accused and not that of a complainant in a criminal trial...” [Paragraph 9]

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

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

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

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

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

## SELECTED JUDGMENTS

**IN RE CONFIRMATION OF THREE SURROGATE MOTHERHOOD AGREEMENTS 2011 (6) SA 22 (GSJ)**

**Case heard 1 March 2011, Judgment delivered 16 August 2011**

Wepener J (Victor J concurring) held:

"… [T]hree applications to confirm surrogate motherhood agreements in terms of the Children's Act … were brought to the urgent court of this Division. Apart from the fact that no grounds for urgency were made out at all, the three applications were copied and pasted, and thus duplicated to a large extent in each instance. Each application stated that it relied on the founding affidavit of one BCB, and annexures thereto. BCB made no affidavit in the second and third matters, as he had no interest in them. These two applications consequently incorrectly refer to annexures which were not attached to them. All three applications seek an order that 'the provisions of section 297 (91) of the Children's Act 38 of 2005 will apply to the agreement…' There is no such section. All three applications seek an order that the 'Addendum of the Surrogate Motherhood Agreement…' be confirmed by the court. There are no addenda attached to the surrogate motherhood agreements." [Paragraph 2]

"Applications such as these under consideration have serious implications for all the applicants concerned and also for the children to be born. Practitioners who copy previous applications should take care to draft papers in a proper manner and not to just shoddily copy and paste other applications." [Paragraph 5]

"The conduct of Mr Thinane to reissue the three matters under different case numbers, and then to attempt to obtain the orders before three different judges, whilst knowing that they were pending before another judge, is reprehensible. The registrar is directed to make copies of the six court files and to forward same, together with this judgment, to the Law Society of the Northern Provinces." [Paragraph 13]

After setting out the relevant legislative provisions and provisions of the African Charter on the Rights and Welfare of the Child, Wepener J continued:

"… Judges are duty bound to ensure that the interests of the child, once born, are best served by the contents of the agreement, which we are requested to confirm. Much has been written regarding the pros and cons of surrogacy and I do not intend dealing with any of the social or ethical arguments regarding the practice of surrogacy." [Paragraph 16]

"As upper guardian one would expect to know in detail who the commissioning parents are, what their financial position is, what support systems, if any, they have in place, what their living conditions are and how the child will be taken care of. A good practice is also found regarding adoptions where expert assessment reports from social workers are required and in practice a police clearance is obtained in order to demonstrate the suitability of the adoptive parents. This can be applied to the commissioning parents with very good results. An expert report can also address the suitability of the surrogate mother." [Paragraph 17]

"There are numerous unconfirmed reports in the media indicating that monetary considerations are indeed a factor in many cases contrary to the provisions of section 301 of the Act. In order to address any abuse the parties are required to set out full facts regarding how any compensation for expenses

pursuant to the provisions of section 301(2)(a) and the loss of earnings pursuant to section 301(2)(b) will be made and precisely what amounts are to be paid pursuant to section 301(2)(c) of the Act. Full details of all payments pursuant to section 301(3) are to be disclosed to the court as these aspects affect the validity of the surrogacy agreement." [Paragraph 22]

"In matters where the interests of children are paramount I am of the view that the applicants must supply proper and full details regarding themselves. Unless this is done I am not in a position to determine whether the commissioning parents are indeed fit and proper to be entrusted with full parental responsibilities." [Paragraph 24]

"Save for the fact that the applications are shoddily drawn, they do not contain full and reliable facts which a court is required to consider prior surrogate motherhood agreements being confirmed. A court is not a rubberstamp for this purpose. …" [Paragraph 25]

The applications were postponed sine die in order for the applicants to correct and supplement their applications to properly comply with the provisions of the Act and to place sufficient information before the Court to enable it to consider the matters on their merits.

**JW V HW 2011 (6) SA 237 (GSJ)**

**Case heard 8 December 2010, Judgment delivered 10 December 2010**

The applicant sought to set aside a writ, alternatively to stay the execution of the writ, until a determination of the applicant's maintenance liability to the respondent by the maintenance court. Respondent had issued the writ pursuant to a divorce settlement agreement which had been made an order of court when issuing the order of divorce between the parties.

Wepener J held:

"The applicant correctly states that a writ can only follow upon a valid court order. He contends that a writ cannot be issued pursuant to a declaration issued by the court at the time of issuing the decree of divorce. In addition, it was argued that the settlement agreement was conditional upon an order of divorce being granted and the deed of settlement being made a court order. These two points go hand in hand. If the declaration is indeed an order of court, the condition was met and the writ can be issued based on the court order." [Paragraph 2]

"… [I]n Tshetlo v Tshetlo 2000 (4) SA 673 (W) Shongwe AJ (as he then was) disapproved of the Brandtner case and said …: '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 the marriage [and its dissolution, I may add] 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.'" [Paragraph 5]

"Also in Lebeloane v Leboloane … Wunsch J said …: '…With respect, an order setting aside the writ, such as the one granted in the Brandtner case, should not have been granted on a highly technical ground which was in conflict with the of the case. The Court in the Brandtner case said that the plaintiff had a

remedy under Rule 41(4)of the Uniform Rules of Court, which entitled her to apply to Court to have the settlement agreement made a judgment. But there is no reason why she should, on the basis that the wording of the order issued by the Registrar did not make the settlement agreement an order of Court, have been put to the cost and trouble of an application and why the Courts should now be faced with numerous applications which may arise in similar circumstances. Furthermore, there could be opposition and quite unnecessary litigation'." [Paragraph 6]

"That the parties also intended the agreement of settlement to operate as a court order, is also so in this matter, having regard to the fact that the agreement of settlement itself 'is conditional upon the order of divorce being granted and this deed of settlement being made an order of court'. I respectfully follow the decisions in this and the North Gauteng Division which held that the settlement agreement indeed forms part of the court order. I cannot find these judgments to be clearly wrong, and indeed am of the view that they set out the law correctly, and reject the applicant's contention that the applicant's obligation to pay maintenance was not imposed by an order of court." [Paragraph 7]

The application was dismissed with costs.

**OOSTHUIZEN V MIJS 2009 (6) SA 266 (W)**

**Case heard 21 February 2009, Judgment delivered 22 February 2009**

This was an urgent application for reconsideration of an order which had been granted against the applicant in his absence, brought in terms of rule 6(12)(c) of the Uniform Rules of Court. The Rule provided that: 'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

Wepener AJ held:

"The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order. Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto." [Page 267]

"I am of the view that a court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed in the matter." [Page 269]

"If a court had to reconsider the order granted on an urgent basis in the absence of a party, by limiting the hearing to permitting a party to supply additional argument and utilising the record of the original application only, a court would be closing its eyes to the facts placed before it that could have led to a

completely different result when the order was originally granted in the absence of the one party. I am consequently of the view that a court should consider all the permissible facts disclosed in the affidavits before it." [Page 270]

Wepener AJ found that there were disputes of fact about whether the applicant had knowledge of the set-down of the original application, and over an agreement between the parties. The application was successful and the issue of the agreement referred to oral evidence.

**BUTCHART V BUTCHART 1997 (4) SA 108 (W)**

**Case heard 19 November 1996, Judgment delivered 21 November 1996**

This full bench appeal considered whether a writ of execution should be set aside on the basis that it was not competent for the registrar to have issued it. The parties had divorced and entered into a settlement agreement, which included a clause specifying that the appellant would be liable for certain expenses (including medical and schooling expenses) incurred for the respondent and the three minor children. The respondent incurred such expenses, and applied for a writ, which was issued by the Registrar. The sheriff, being unable to attach movable property, rendered a nulla bona return and attached immovable property of the appellant. The appellant then applied to have the writ set aside.

Wepener AJ (Cameron J and Pretorius AJ concurring) held:

"The question is whether the portion of the order referred to is an obligation to pay money or an obligation to do something. Over a period of many years the Courts have held that, despite the fact that an order to pay maintenance would generally be regarded as an order obliging the judgment debtor to do something, it also operates as an order obliging the judgment debtor to pay a sum of money. Despite the possibility that such order may, on application, be varied, until it is varied, the amount of maintenance is easily ascertainable and a maintenance order is consequently one to pay an amount of money. Williams v Carrick 1938 TPD147 … Jeanes v Jeanes and Another 1977 (2) SA 703 (W) … Strime v Strime 1983(4) SA 850 (C) ..." [Page 111]

"… [I]t seems to me that such an order by its nature obliges the judgment debtor to make payment of a sum of money and is not in the sense the cases describe, an obligation to do something. The use of the words 'shall pay' in the clause itself fortifies me in this view. Once the affidavit is filed wherein the sum of money is stated, it is the stated sum of money that forms the subject-matter of the order." [Page 112]

"Mr Pincus, on behalf of the appellant, submitted that the amounts referred to in the order are uncertain and not liquid and therefore that the order is one to do something. The consequence of this argument is that no order which directs payment of an amount yet to be ascertained, however certain and liquid it might become once so ascertained, can form the basis of an order to pay, which in turn would prevent a judgment debtor from obtaining a writ in the event of non-compliance with the order. Such amounts, however, become sufficiently liquid when the affidavit is filed. Mr Pincus' argument therefore cannot be sustained." [Page 113]

"Mr Pincus also contended that the order implies an obligation to make payment to third parties and accordingly did not oblige the appellant to make payment to the respondent. …The contention … cannot

be supported. Wunsch J [in the court a quo] dealt with this issue as follows…: " … The nature of an obligation under a divorce order to pay, for example, medical expenses, is to reimburse the promisee for those expenses incurred by him or her. If there is an identifiable ascertainable sum payable by the promisee to a third party for which the promisor undertakes liability, it seems to me to be artificial and inaccurate to say that the promisee's claim for reimbursement ''would sound in damages'' or that the fact that it has that character disqualifies it from being the subject of a writ, which can in terms of Rule 45 be issued in execution of ''any judgment''. Presumably the characterisation of the claim as damages was directed at the fact that the amount was not a liquidated sum or that, this being the other basis for the applicant's attack against the writ, the amount of the writ cannot be ascertained from the judgment. There are many instances where a person who disburses an amount for the benefit of another or an amount for which another has undertaken to him or her to be responsible inter partes can recover that amount from the beneficiary or the promisor... If in terms of a judgment a lessee is liable to pay the rates and other charges for which the lessor is liable to the charging authority, without quantification of the amount, there seems to be no reason in practice or principle why a writ cannot be issued upon submission by the lessor of an affidavit giving particulars of the amount for which the lessee is in terms of the judgment liable. It was recognised in, for example, Manley v Manley … that the Registrar could, before issuing a writ, require, as he has done in this case, an affidavit from a judgment creditor setting forth the amount owing under the order of Court" [Pages 114 - 115]

"I consequently come to the conclusion that a writ may be validly issued based on an 'expenses clause' contained in a maintenance order on condition that the amount is easily ascertainable and is ascertained in an affidavit filed on behalf of the judgment creditor… In the present matter the respondent attained substantially the same result by annexing all the medical invoices from which all the particulars can be gleaned." [Page 115]

"A difficulty which may be envisaged in matters such as these is the fact that a judgment debtor may not be aware that substantial expenses have been incurred and are payable under the court order. He or she may then be faced with a writ without any prior knowledge. That difficulty does not arise in the present matter since the issuing of a writ is, in consequence of the wording of clause (e)(i), dependent upon a demand being first made upon the appellant. Further protection is afforded the judgment debtor. In terms of Rule 45 the risk in taking out the writ is with the person taking it out. In the event of a judgment creditor incorrectly or improperly taking out a writ, the judgment debtor will have suitable remedies... In the present matter the fact that the respondent made a separate demand upon the appellant is common cause. ... The writ would pro tanto be valid. According to the respondent she also regularly posted to the appellant letters setting out the amounts expended by her and attached copies of the invoices making up the amount. The appellant admits the practice but somewhat equivocally states that, save for the invoices he admits to have received, he denies having received others. No particulars of the invoices allegedly not received or those received, are supplied. Again, given that the version of the respondent is to be accepted, it must be concluded that demand was duly made upon the appellant." [Page 116]

The appeal was dismissed with costs.

## SELECTED JUDGMENTS

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

**Case heard 7 September 2010, Judgment delivered 6 June 2011**

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

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

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

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

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

“In Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) the court in considering when there ought to be a rescission of a judgment stated the following two requirements: (i) that the party seeking relief must

present a reasonable and acceptable explanation for his default; and (ii) that on the merits such a party has a bona fide defence, which, prima facie, carries some prospect of success." [Paragraph 27]

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

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

The appeal was dismissed with costs.

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

**Judgment delivered 11 March 2010**

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

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

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

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

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

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

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

The appeal was upheld.

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

**Judgment delivered 18 April 2008**

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

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

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

“In addition to what is stated above, in Sidumo & another v Rustenburg Platinum Mines Limited & others 2008(2) BCLR 158 (CC) … the Constitutional Court concluded that a commissioner conducting CCMA arbitration is performing an administrative function. This notwithstanding, the Constitutional Court has rejected the justifiability of an arbitration award in relation to reasons given for it as a ground of review

of CCMA awards. It held that CCMA awards can be reviewed on the ground of unreasonableness. It held that the test is whether the decision reached by the commissioner is one that a reasonable decision maker could not have reached. If it is one that a reasonable decision maker could have reached, such decision is reasonable. If it is not a decision that a reasonable decision maker could have reached, it is unreasonable and can be set aside on review on that ground. The Constitutional Court concluded that applying this standard would give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair." [Paragraph 40]

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

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

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

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

**Judgment delivered June 26, 2007**

There were a series of thefts at the appellant's store, and the third respondent was implicated and dismissed following a disciplinary hearing. The third respondent referred the dispute (of his dismissal) to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Case heard 18 February 2004, Judgement delivered 30 July 2004**

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

Jappie J held:

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

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

"… Julyan AJ came to the conclusion that the proceedings on 14 August 2003 amounted to a gross irregularity. In the judgment she sets out her reasons for this conclusion. She concluded that the second respondent had denied the applicant her right to be heard and this constituted a gross irregularity. The

second respondent, in her affidavit, has not challenged this conclusion; neither has counsel, acting on her behalf, submitted that the court issuing the rule *nisi* erred in this respect." [Page 52]

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

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

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

"…[T]he applicant was denied 'a fair public hearing' before a court. In my view, the second respondent's explanation for the situation does not show cause why she should not be ordered to pay the costs of these proceedings. I had considered awarding costs against the second respondent *de bonis propriis*. However, such an order is only called for if it can be said that the second respondent had acted *mala fide* or with manifest bias. I cannot make that finding on the facts as they appear before me. Nevertheless, it would be unjust for the applicant to be mulcted in costs in circumstances where she was simply

exercising her rights as a litigant and having been prevented from so doing by the unreasonable conduct of the second respondent." [Page 53]

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

## SELECTED JUDGMENTS

**INGONYAMA TRUST V RADEBE AND OTHERS [2012] 2 ALL SA 212 (KZP)**

Applicant, the registered holder of certain land for and on behalf of the members of various tribes and communities in KwaZulu-Natal, sought an order declaring that it was the only recognised and legal entity entitled to grant rights in respect of the ownership, occupation or use of land registered in its name in the province of KwaZulu-Natal. Applicant also sought to interdict first and second respondents from holding themselves out to be entitled to land registered in the name of the applicant, and from interfering with the lawful occupiers' use of such land. The applicant alleged that first and second respondents had "usurped jurisdiction" over certain land and given permission to individuals to occupy the land. Respondents claimed ownership of the land on the grounds that the grave of the first respondent's grandfather was situated in the disputed area, and that an application for restitution of the land had been lodged with the Land Claims Commissioner [paragraph 27].

Madondo J discussed the history of the reservation of land under the Black Land Act and Development Trust and Land Act, and held:

"The effect of the amendment [the KwaZulu-Natal Ingonyama Trust Amendment Act] was that the land which remained vested in and owned by the applicant fell into one of the two categories: The land which applicant owned and held in trust on behalf of the beneficiaries listed in the schedule to the Amendment Act, represented by various traditional authorities or leaders. ... The remainder of the land … not connected to any tribe or traditional authority fell under the sole and exclusive control and authority of the applicant." [Paragraph 14]

"The trust is obliged to exercise any of the incidents of ownership in respect of the trust land connected to a particular recognised tribe or traditional authority with the concurrence of the tribe or traditional authority concerned. Such a connection must in terms of section 3(4) of the [Development Trust and Land] Act be endorsed in the title deed of the trust land in question. … In the present case, the perusal of the title deeds … in respect of the disputed properties does not show any endorsement envisaged in section 3(4) of the Act. This provides sufficient proof that the land in question is not held in trust for the benefit of any tribe, community or residents. The land should, therefore, not be dealt with under customary law and traditions. See also Dodo v Sabasaba 1945 NAC (C&O) 62 … and Umvovo v Umvovo 1952 NAC 80 (5) … Where the land is registered in the name of the Trust in the Deeds Office and not connected to any tribe or traditional authority the Trust is entitled to deal with it under the common law and it has the sole and exclusive right to deal with such land." [Paragraphs 47 - 49]

"Since the applicant is not holding the land in question on behalf of any tribe or community or residents, it does not need a prior written approval of any traditional authority or community authority to deal with the land in question. It, therefore, follows that the Trust only enjoys the sole and exclusive right to deal with the land registered in its name and not apportioned to any particular tribe or community." [Paragraph 52]

"… [T]he Trust does not enjoy sole and exclusive control and authority over the land connected to a particular traditional authority or community or residents and as a consequence, it cannot be said to be

the only recognised and legal entity authorised and entitled to grant rights and allocations or permissions in respect of the ownership or occupation and use of land registered in its name throughout the Province of KwaZulu-Natal. … I, accordingly, come to the inevitable conclusion that the applicant has failed to show on the balance of probabilities that it is entitled to a declaratory it seeks … in such broad terms. … [T]he granting of the declaratory sought … will not only relate to the trust land registered in its name and not held for the benefit of a particular recognised tribe or traditional authority, but it will also affect the trust land connected to recognised tribes and traditional authorities. … " [Paragraphs 53 - 54]

"The granting of the order which tends to extend the applicant's exclusive right, control and jurisdiction in the trust land to trust land connected to recognised tribes will, in my view, impact negatively on the rights and powers of the traditional authorities or community authorities under the provisions of the Act. Further, it will detract from the powers and functions of Amakhosi and Izinduna under customary law and traditions to allot residential, arable and grazing land to members of their tribes and wards respectively. It, therefore, follows that the granting of the order sought in prayer 1.1 of the Notice of Motion in the proposed form will only serve to frustrate the administration, control and use of the trust land connected to recognised traditional authorities or community authorities under customary law and practice by such authorities to their prejudice. …" [Paragraph 55]

"… [T]he first and second respondents have not shown that any legislation or proclamation or any other law grants them the authority to deal with the land in question. However, Mr Choudree … strenuously argued that the presence of the graves of the forefathers of the first respondent on the disputed land strongly suggests that the respondents have some historical connection to the land in question. However, no such allegation is made in the respondents' papers. The respondents have glibly stated in their papers that the grave of the first respondent's grandfather lies on one of the pieces of land in question without providing any concrete proof thereof. Accordingly, the respondents have not sufficiently established that the land in question represents the link between the past, the present and the future of their tribe in that the ancestors of the members of the tribe including of the first respondent lie buried there and that the children of the members of the tribe and of the first respondent are and will be born on the land in question. " [Paragraphs 57 - 58]

Madondo J found further that there was no evidence the relevant land had been restored to the respondent and therefore that the respondents had not established any legal right to control or allot the land in question. Thus while the declaratory order was not granted, the interdict was confirmed.

**JAFFIT V GARLICKE AND BOUSFIELD INC (PFK (DURBAN) INCORPORATED AND OTHERS AS THIRD PARTIES) AND OTHER CASES [2012] 2 ALL SA95 (KZP)**

**Case heard 5 December 2011, Judgement delivered 27 January 2012**

Third parties (Robert and Nerak) joined to the main action by the defendant excepted to the defendant's third party notice. The plaintiffs in the main action sought to recover monies allegedly advanced in terms of loan agreements purportedly entered into with the defendant through one Cowan. Defendant denied concluding such agreements and denied the representative authority of Cowan. The basis of the

exception was that the facts alleged did not establish grounds on which any legal duty of care on the third parties could be established.

Madondo J held:

"The existence or otherwise of the legal duty is a conclusion of law which must be reached upon objective consideration of all relevant circumstances. It has been argued on behalf of the defendant that such a consideration entails policy decisions and value judgments and that is an exercise which must be carried out in accordance with the spirit, purpose and objects of the Bill of Rights. …" [Paragraph 33]

"In the present case it has been submitted that the relevant factors for consideration are, *inter alia*, the value to society of combating white-collar crime; the foreseeable of harm resulting to the defendant; the unusual characteristics of the manner in which Cowan conducted the operations in question; Nerak's status as an "authorised financial services provider" in terms of the Financial Advisory and Intermediary Services Act (FAIS) … and Roberts status as a "key individual" and a duly authorised representative of Nerak; the fact that reasonably practicable measure were available to Robert and Nerak to avert the loss; the fact that, had Robert and Nerak taken such measures, the loss would have been averted and the fact that no harm could have resulted to Robert or Nerak had either of them informed the defendant that Cowan was conducting the "operations" in question." [Paragraph 36]

After considering SCA case law, Madondo J continued:

"In the present case, the defendant's loss complained of can only arise in the event of the finding that the defendant was contractually liable to the plaintiff or is estopped from denying the representative authority of Cowan. Our law does not under those circumstances recognise a delictual duty towards a party such as in the position of the defendant. … If the defendant is held liable to the plaintiff, it seeks to recover from Robert and Nerak only in the event that the defendant is estopped from denying the authority of Cowan to represent it. In the circumstances, the defendants' liability arises not from contract but from estoppel. Where there is estoppel there could have been no consensus between the parties and therefore no contract. …" [Paragraphs 46 – 47]

"In the circumstances, Robert knew very well that the undertakings were not intended to protect investors but only to deceive them into believing that they had some kind of assurance in the event of anything went wrong in the operation of the finance bridging scheme. Therefore, it follows that Robert foresaw the possibility of Cowan's conduct causing the defendant economic loss in the event of claims by investors against the defendant arising out of such operations." [Paragraph 57]

"I now, turn to decide whether Robert and Nerak can be had liable under Aquilian action for pure economic loss sustained by defendant as a result of the irregular and unlawful operations of Cowan. ... I am not satisfied that a reasonable person in the position of Robert possessed the knowledge of irregularity and unlawfulness inherent in the operation of Cowan would have kept silent and continued participating in the operation of the scheme in question. Obviously, a reasonable person in the position of Robert will have taken steps to avert the loss occurring to the defendant. This would have been a simple matter had Robert complied with the statutory responsibilities imposed on him and Nerak by the provisions of FAIS. …" [Paragraph 58]

"The next question to decide is whether Robert's negligent and wrongful conduct is actionable. In *Woodcock Street Investments* (*Pty*) *Ltd v CAG* (*Pty*) *Ltd* (*formally Cardno Davies Australian* (*Pty*) *Ltd*) [2004] HCA 16, vulnerability to risk was held to be a critical issue in deciding whether Aquilian liability should be extended in a particular situation. In *Trustees, Two Oceans Aquarium Trust* case … it was held that the concept of vulnerability developed in Australian jurisprudence will only be satisfied where the plaintiff could not reasonably have avoided the risk by other means, for example, by obtaining a contractual warranty or cession of rights. In this case it was held that the Aquilian remedy should not be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means but who failed to do so. The facts of the present case show that there was no contractual nexus between the plaintiff and the defendant and that the defendant can only be held liable on the basis of estoppel. It, therefore, stands to reason that the defendant in the circumstances could not have avoided the harm by contractual means. The defendant did not know and was not aware of the irregularity and unlawfulness of the operations conducted by Cowan and it was in the circumstances, more vulnerable to risk. Accordingly, this case is distinguishable from the *Trustee, Two Oceans Aquarium Trust* case …" [Paragraph 60]

"Where necessary this Court has jurisdiction to develop the common law so to cover the present situation and to extend the Aquilian liability in order to afford the defendant a remedy. Section 39(2) of the Constitution provides how the common law should be developed; not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its paradigm." [Paragraph 63]

"I now turn to determine whether the conduct of Robert and Nerak was wrongful and actionable at the hands of the defendant. In *AB Ventures* …, it was held that such question is quintessentially decided on exception. The conduct of Cowan acting in concert with Robert exposed the defendant to the risk of pure economic loss. Since the defendant was not aware of the operations of Cowan it could not have protected itself from such risk. The social and legal policy as well as the legal convictions of the community in the circumstances of this case calls for the extension of Aquilian remedy for the protection of persons in the position of the defendant. ... This would, I feel, accord with the spirit and purport of the Constitution." [Paragraph 65]

The exception was dismissed.

**S V DLADLA 2011 (1) SACR 80 (KZP)**

**Case heard 25 May 2010, Judgment delivered 25 May 2010**

Appellant had been convicted on a charge of assault with intent to do grievous bodily harm, based on the evidence of single witness (the complainant), who was a mental patient.

Madondo J held:

"This court is called upon to decide two issues raised on behalf of the appellant: firstly, whether the complainant, suffering from mental illness and a schizophrenic, was a competent witness. Secondly,

whether the accused had any onus to discharge in order to be acquitted. ... [I]t is ... necessary to decide ... whether the acceptance of the complainant's evidence, and placing an onus on the accused, constituted an irregularity, having an effect of vitiating the proceedings." [Paragraph 2]

"... [B]efore he could finish his testimony, the complainant indicated to the court that he was tired ... and ... the proceedings were adjourned to another date. On the said date the complainant was not in attendance. The investigating officer ... informed the court that the complainant had, prior to the adjournment date, signed a withdrawal statement which was countersigned by the nurse on duty, and asked to be excused from further attendance at court. ..." [Paragraph 4]

"Six months after the last date of hearing, the complainant attended court to finish his testimony. Under cross-examination the complainant changed his earlier version ..." [Paragraph 5]

"Without hearing any medical evidence on the mental condition of the complainant, the learned magistrate ruled that the complainant was in a lucid interval and that he was therefore a competent witness. She based her decision on the note the doctor, who examined the complainant nine days after the alleged assault incident, had made ... that the complainant was at the time lucid, and she dismissed the defence's application for a discharge. However, the said doctor had not been called as a witness ..." [Paragraph 7]

"Mental illness may be of a permanent or temporary nature. Incompetence is relative and only lasts for so long as the mental illness lasts. The fact that a person suffers from a mental illness or defect is not itself sufficient to warrant a finding that he or she is not a competent witness. The mental illness or defect must have a certain effect on his or her abilities. The words 'while so afflicted' or 'disabled' [in s 194 of the Criminal Procedure Act] make it clear that a person is incompetent only while the mental affliction or disablement continues. What must be considered, with the words 'who is thereby deprived of the proper use of his reason', is the witness's ability to observe, to remember what he or she has observed and to convey this to the court" [Paragraph 13]

"Whether the witness was or is suffering from a mental illness or mental defect must be determined with the aid of psychiatric evidence. ... In the present case, the learned magistrate, without hearing any medical evidence as to the mental faculties of the complainant, both at the time of the commission of the alleged assault and at the time of testifying, held the complainant to be in a lucid interval, and such decision was merely based on the J88 form which was completed nine days after the alleged assault. However, the medical practitioner who completed the form was not called as a witness. As a result, it was not established whether the complainant at the time of the commission of the alleged assault was not afflicted with mental illness, and that he had sufficient ability to observe and to remember what he had allegedly observed. ... Without medical evidence it could not be established with certainty that the complainant was at the time of testifying not afflicted with mental illness, or not labouring under imbecility due to the medication he was then taking." [Paragraph 16]

"Since no medical evidence was tendered to prove the complainant's capacity at the time of the commission of the alleged assault and at the time of testifying, it could not be assumed from his behaviour in court that he was in a sane interval. A court would be undertaking an impossible and even dangerous task if it were to seek a general symptom which would enable it to identify a mental abnormality as a 'mental illness' or 'mental defect'. ..." [Paragraph 18]

"The learned magistrate in the present case held that the complainant was not suffering from any mental disorder. It is trite that a court cannot reach a decision that a witness is not suffering from mental illness without hearing evidence by a psychiatrist. ... Instead, in the present case the learned magistrate took it upon herself to define the medical phrases 'mental illness', 'mental retardation' and 'schizophrenia', and she also analysed medication given to the complainant nine days after the alleged assault incident, and the effect thereof. Obviously, she assumed the role of a medical expert witness." [Paragraph 19]

"Nor were the parties afforded an opportunity to question the complainant on his mental faculties. As a result, it was not psychiatrically established whether or not the complainant was suffering from mental illness or whether, at the time of the alleged assault incident, he was not afflicted by mental illness, and whether, when he testified, he had sufficient capacity to testify in a rational and intelligible manner." [Paragraph 20]

"Before a trial court can convict upon such evidence it is necessary that the trial court must fully appreciate the dangers inherent in the acceptance of such evidence, and, where there is a reason to suppose that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. ... [T]here is absolutely nothing, in the learned magistrate's reasons for judgment, from which it can be inferred that she appreciated the dangers inherent in the acceptance of the evidence of the complainant..." [Paragraph 22]

"With regard to the second question, whether the accused in criminal proceedings has an onus to discharge in order to be acquitted, it is a general principle of our law that in criminal proceedings the accused is not obliged to convince or persuade the trial court of anything, and the suggestion to that effect was misplaced. ..." [Paragraph 24]

The appeal was thus upheld and the conviction and sentence set aside (K Pillay J concurring).

**LE ROUX V MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009 (4) SA 491 (N)**

**Case heard 22 August 2008, Judgment delivered 17 March 2009**

This case was an appeal against the dismissal of the appellant's claim for damages for his alleged wrongful arrest and detention. The appellant had been questioned by the second respondent (an employee of SAPS) regarding allegations of reckless and negligent driving. Second respondent had initially chosen not to arrest the appellant, instead warning him to appear in court the following day, and to return to her office to be formally charged. Once the appellant reported to the second respondent's office, he was detained in holding cells pending his appearance in court [paragraphs 4 – 5]. The magistrate found that the arrest was lawful as the second respondent had complied with section 40 of the Criminal Procedure Act, and that her actions were not mala fide or unreasonable in the circumstances.

Madondo J held:

"This court has to decide whether due compliance with the provisions of s 40(1)(b) of the Act alone is sufficient to render an arrest and subsequent detention lawful and whether the second respondent's arrest of the appellant in the circumstances of this case was reasonably justifiable, and a genuine response to the situation." [Paragraph 8]

"At common law the infliction of bodily restraint forms part of the law of delict and gives rise to a claim for damages. Every interference with physical liberty is wrongful in the absence of a valid ground for justification. [Citation to Potgieter & Visser Law of Delict and Gellman v Minister of Safety and Security]" [Paragraph 16]

Madondo J examined the pre- and post-constitutional approach of South African courts, and continued:

"The mere compliance with s 40(1)(b) [of the Criminal Procedure Act] does not render an arrest lawful; more care and diligence are required of the arresting officer. ... R v Waterfield; R v Lynn [1964] ... is a leading English Court of Criminal Appeal decision establishing the common-law authority of a police officer to stop and detain individuals. This case produced what is known as the Waterfield test (also called the common-law 'ancillary power doctrine') to determine the limit of police authority to interfere with a person's liberty or property." [Paragraphs 20 - 21]

"While it is no doubt right to say in general terms that police officers have a duty to prevent crime and a duty ... to bring the offender to justice, it is also clear from the decided authorities that, when the execution of these general duties involves interference with the liberty of a person, the powers of the police officers are not unlimited. ..." [Paragraph 22]

"... [T]he arresting officer must have good and sufficient grounds for suspecting that a suspect is guilty of the offence for which he or she seeks to arrest him. He must analyse and assess the quality of the information at his disposal critically. ... It is only after an examination of this kind that he must allow himself to entertain a suspicion which will justify an arrest. ... However, this does not mean that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is guilty. ..." [Paragraph 24]

"In my view, since arrest is a drastic interference with an individual's rights to freedom of movement and to dignity, the court must look further than due compliance with the requirements of s 40(1)(b) of the Act to constitutional principles and the rights to dignity and to freedom as enshrined in the Constitution ... I fully subscribe to the view that the arrest must be justified according to the demands of the Bill of Rights. ... The State action must be such that it is capable of being analysed and justified rationally." [Paragraph 27]

"Prior to the advent of the Constitution our courts were duty-bound to give effect to the legislation even when it was destructive of liberty. Section 39(2) of the Constitution now permits our courts to ensure that all legislation is interpreted in such a way as to ensure that liberty is protected, except in the circumstances in which the Constitution sanctions its deprivation. ..." [Paragraph 29]

Madondo J then proceeded to analyse conflicting High Court decisions in *Louw v Minister of Safety and Security* and *Charles v Minister of Safety and Security*, as well as a SAPS Standing Order relating to arrests, before continuing:

"Although the drastic method of arrest could be necessary to procure the appellant's attendance before court, the second respondent on good grounds shown during the questioning of the suspect decided not to arrest the appellant, ... However, before the appellant could appear in court the second respondent decided to arrest and detain him in the police holding cells pending his appearance in court for fear of being accused by black members of the South African Police Service of being racially prejudiced in favour of the appellant, since he was also white. ... Such a change in the decision the second respondent had earlier taken, not to arrest the appellant, should, in my view, have been based on or actuated by a

constellation of objectively discernible facts giving the second respondent reasonable cause to believe that the appellant would evade justice if he were not to be arrested." [Paragraph 39]

"The detention of the appellant ... was not necessary to secure his attendance before the court or to protect the public, but to demonstrate to black members of the police service that she did not have racial prejudice in favour of the appellant. ... In the premises, there was no rational connection between the detention of the appellant and the purpose the second respondent intended to achieve. … The appellant's detention could therefore not be said to be lawful and a reasonable interference with his liberty and fundamental dignity. ..." [Paragraph 41]

"It is not sufficient, in my view, to determine whether the arrest has been made in circumstances falling within the provisions of s 40(1)*(b)* of the Act, and, if it did, to conclude that the arrest was lawful. There must be a just cause before the arresting officer derogates from the protection afforded by s 12 of the Constitution." [Paragraph 43]

"The 'just cause' ... boils down to whether a demonstrable rationale has been given which is sufficiently reasonable to have justified the detention. The notion of 'just cause' involves a compromise between the rights of the individual and the interests of the rest of the community. ..." [Paragraph 45]

"In my view, where the police officer has on reasonable grounds decided not to arrest the suspect, he or she cannot arbitrarily change such decision. He or she must establish reasonable and probable grounds justifying a change of the decision. The absence of the rational connection between the arrest and the purpose of arrest has the effect of rendering the arrest of the suspect, albeit falling within the purview of s 40(1)*(b)* ... arbitrary and without just cause. [citation to the Canadian case of *R v Hall*]" [Paragraph 46]

The appeal was thus upheld, and the matter referred back to the court *a quo* to "consider all relevant constitutional factors pertaining to the case ... and to deal with the matter to finality." (Msimang J concurred in the order and the reasons, and wrote a separate judgment giving further reasons).

## SELECTED JUDGMENTS

**GE SECURITY (AFRICA) V AIREY & OTHERS (2011) 32 ILJ 2078 (LAC)**

**Case heard 8 September 2010, Judgment delivered 28 April 2011**

This case was an appeal and cross-appeal against a judgment of the Labour Court, finding that the retrenchment of the first to third respondents was procedurally unfair because of the appellant's failure to follow an agreed selection criteria. The Labour Court awarded the employees compensation equal to five months' salary. On appeal, the issue was whether the appellant was obliged, in terms of an agreement regarding selection criteria, to consider the respondents for all positions to which they were eligible in its new structure, irrespective of whether they applied for any position or not. And if the appellant did breach the agreement, whether that rendered the dismissal substantively unfair, as submitted by the respondents in the cross-appeal, rather than procedurally unfair as found by the court a quo.

Waglay DJP (Mlambo JP and Davis JA concurring) held:

"There are two possible interpretations. Firstly, as contended for by the appellant, the respondents would only be considered for positions not filled through an application process: that is, for any remaining vacant positions. The other possible interpretation, as supported by the respondents, is that an employee who had failed in his application for a senior position, would automatically have to be considered for a junior one, even if he did not apply for it." [Paragraph 17]

"In my view the first interpretation is far more probable and makes common sense. If the respondents are correct in their interpretation it would mean that an employee who may have applied for a post and who was found suitable, could still not get the job simply because there was another employee that may be able to be fitted into the position, but who did not apply for it. Such a process would make no sense when viewed within the context of the express requirement that people should apply for posts. The interpretation sought by the respondents is also at odds with the wording of the s 189 notice, as well as what took place at the initial consultation meetings referred to earlier. The process contended for by the respondents would have led to manifest confusion. Ordinarily an employer is entitled to assume, in the context where this method of selection is agreed upon, that an employee who does not apply for a position is not interested in such position." [Paragraph 18]

"… [T]he respondents' contention is at odds with what was agreed to in the pretrial minute ... The pretrial minute belies the suggestion that if any of the respondents did not succeed in a senior position for which they had applied, the appellant would have an automatic obligation to consider them for a lower position even though they did not apply for it. In short, the pretrial minute made it clear: if an employee failed to apply for a vacancy, he or she would be placed in a pool from which appellant would try to place them in the event of any remaining vacancies. The key issue before this court had therefore been settled in the pretrial minute and the respondents were bound by the admission they made therein. See in this respect Filta-Matix (Pty) Ltd v Freudenberg & others 1998 (1) SA 606 (SCA) … and Shoredits Construction (Pty) Ltd v Pienaar NO & others(1995) 16 ILJ 390 (LAC); [1995] 4 BLLR 32 (LAC) ..." [Paragraph 20]

"In these circumstances, I find that the appellant, in terms of the agreed selection criteria, had no obligation to consider the respondents for positions for which they did not apply. In the circumstances the dismissal of the respondents was neither substantively nor procedurally unfair." [Paragraph 22]

The appeal was upheld with costs, the cross appeal was set aside with costs and the order of the court a quo was set aside and accordingly replaced.

**SA POLICE SERVICE v POLICE & PRISONS CIVIL RIGHTS UNION & ANOTHER (2010) 31 ILJ 2844 (LAC)**

**Judgment delivered 3 September 2010**

The SA Police Service (SAPS) had a staff complement of over 160 000, of which just over 130 000 were appointed under the SAPS Act, the remainder under the Public Service Act (PSA) and formed part of the broader public service. In 2007, employees in various sectors of the public service embarked on a general strike to secure their wage demands. After the strike commenced, the first respondent (POPCRU) called upon its members within SAPS to join the general strike. SAPS immediately applied to the Labour Court for a declaratory order to the effect that employees within the SAPS constituted essential services as contemplated by s 71(10) of the of the Labour Relations Act and as such, were prohibited from participating in a strike. POPCRU opposed the application on the basis that not all of its members employed within the SAPS were prohibited from participating in a strike because not all of them were part of the essential service. The Labour Court held that in terms of s71(10) of the LRA only those members of the SAPS staff who were employed under the SAPS Act formed part of the essential service and were prohibited from striking while the prohibition did not apply to the other SAPS employees. On appeal the court considered the concept of 'essential service' and the meaning of the word 'engaged' as used in s 65(1)(d) of the LRA to be crucial. Section 65(1)(d) provides that '[n]o person may take part in a strike or lock-out or any conduct in contemplation or furtherance of a strike or lock-out if ... that person is engaged in ... an essential service'.

Waglay DJP (Khampepe JA and Tlaletsi JA concurring) held:

“I raise the issue of the concept of essential service in relation to the word 'engaged' as set out in s 65(1)(d) of the LRA because, to my mind what this conveys is that when, for example, a body, organization or a name of a company is declared to be an essential service, it is the functions that that body, organization or company performs, is obliged to perform or required to perform, that constitute the essential service and it is the persons who are engaged in the performance of these functions who are not permitted to take part in a strike or any conduct in contemplation or furtherance of a strike. Therefore, when a body is declared an essential service, it is the actual service or functions performed by that body that need to be insulated from being interrupted by way of a strike by those who are engaged in providing that service or carrying out the functions. I say this because a body cannot constitute a service or function. It may represent a service but not constitute it.” [Paragraph 8]

“The function that the SAPS performs and is obliged to perform or required to perform is that of policing. In terms of the Constitution and the SAPS Act it is the prevention and investigation of any violation of the law, and the maintenance and enforcement of the law, which constitutes the policing function of the SAPS. These are the functions that form part of the security service of the Republic and these are the functions that would constitute the essential service as contemplated by s 71(10) of the LRA and referred to in s 65(1)(d) (i) of the LRA.” [Paragraph 12]

“… [I]t appears that, while the Constitution provides the framework of the responsibilities of the SAPS, s 13 of the SAPS Act provides the detail of the functions of the policing service. Included in the prevention, investigation, maintenance and enforcement of the law, are the functions of executing legal processes

and representing the state in lower courts. All the functions set out in s 13 of the SAPS Act can, in term of this section, only be performed by those employees of the SAPS who are members of the SAPS. Those who are not members do not have the powers, duties or obligations set out in s 13 of the SAPS Act and therefore cannot perform the policing functions that are set out in the SAPS Act. In the absence of being included as members SAPS staff employed under the PSA are not entitled to carry out the policing function which the SAPS is enjoined to provide in terms of the Constitution. The non-member employees therefore cannot be regarded as part of the 'police service' within the security service of the Republic as contemplated by s 199 of the Constitution." [Paragraph 15]

"… Where a service is validly designated to be an essential service the fact that some component of it can be outsourced cannot be used to sever that function from being an essential service. In the context of the present dispute, where personnel are appointed under two different and distinct contracts of employment with the functions of one differing from the other, it is unavoidable to conclude that the two categories of employees of the SAPS are separate and must be treated as such. The argument presented by the SAPS is that the functions performed by those employed under the PSA are indispensable for the proper functioning of the SAPS and the employees employed under the PSA must therefore also constitute personnel that are 'engaged in ... an essential service' as set out in s 65(1)(d) of the LRA. This argument is misconceived. The SAPS clearly is able to function uninterrupted without those employed under the PSA as its members will be able to perform the functions of the non-members, or personnel can be hired to render the support function without seriously compromising the service, this notwithstanding the fact that a particular function may be indispensable to the service that is designated an essential service does not make it an essential service. Unless a service is part of the designated essential service or is specifically designated as an essential service it cannot be an essential service as provided in the LRA. There is no automatic designation of a service as an essential service." [Paragraph 18]

"In the circumstances the essential service as contemplated by s 65(1)(d) of the LRA in relation to the SAPS is clearly the policing function as set out in the Constitution and spelled out in the SAPS Act. The term 'engaged' in the essential service in this section must therefore only apply to those employees employed under the SAPS Act and designated as members as well as those employees deemed to be members by ministerial decree in terms of s 29(1) and (2) of the SAPS Act. The members are the employees who constitute the SA Police Service that is part of the South African security service. While those employed under the PSA provide an important support and complementary function to the SAPS they do not form part of the SAPS that is contemplated by the Constitution and the SAPS Act and as such they are not part of the SAPS that is designated as an essential service by the LRA. These employees are therefore not engaged in the essential service as contemplated by s 65(1)(d) of the LRA and are not prohibited by the limitation on the right to strike as set out in s 65(1) of the LRA." [Paragraph 19]

"Finally I may add that s 23(2)(c) of the Constitution guarantees 'every worker' the right to strike subject to the limitation imposed in s 36. Where a limitation is placed on a right, especially one enshrined in a Bill of Rights of the Constitution, the courts must ensure that the limitation is restricted to the clear and unequivocal wording of the instrument that validly seeks to limit that right. In the present matter the SAPS argument that all of its employees, including those employed under the PSA, be included as personnel engaged in the essential service is neither justifiable nor reasonable. Giving the interpretation sought by the SAPS would in my view unjustifiably restrict the fundamental right enshrined in the Constitution more particularly where the minister is able to designate employees who are not members as deemed members." [Paragraph 20]

The appeal was dismissed with costs.

**ZWANE & OTHERS V ALERT FENCING CONTRACTORS CC (2010) 31 ILJ 2378 (LAC)**

**Case heard 27 May 2010, Judgment delivered 28 May 2010**

The appellants were dismissed by the respondent, claiming that it was necessitated by a severe drop in the amount of work it was able to secure and consequent inability to retain its then staff complement. The dispute was unresolved at conciliation and the appellants referred the matter to the Labour Court for adjudication. The Registrar enrolled the matter for a pretrial conference before a judge, and the respondent failed to appear. An order was made barring the respondent from further defending the matter and for the matter to be set down for default judgment. The matter was enrolled for default judgment and notice of set down was only forwarded to the appellants. The court heard the matter and granted the default judgment in favour of the appellants. When the respondent became aware of the judgment it applied to the Labour Court to remove the bar disallowing it from defending the matter, and to rescind the default judgment. Although the application was opposed, the Labour Court rescinded the default judgment and postponed the application relating to the barring of the respondent from defending the matter. The appellants appealed to the Labour Appeal Court against the judgment rescinding and setting aside the default judgment.

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

“It is clear that on 13 April 2005 the judge before whom the pretrial conference was convened in terms of rule 6(5)(b) and/or (c) decided to act in terms of rule 6(7) and barred the respondent from further defending the matter and ordered that the matter proceed as an unopposed claim. The judge made that order because the respondent failed to attend the pretrial conference. Having regard to rule 6(7) what was omitted in the order was the latter part of subrule (7) which effectively, I believe, requires that the respondent be informed that, if it is able to show 'good cause', it may be allowed to continue with its opposition. The Registrar of the Labour Court on receiving the order proceeded to enrol the matter for default judgment without notice to the respondent. The Labour Court entertained the matter and granted judgment in favour of the appellants in the absence of the respondent. It is also evident that respondent was not forwarded a copy of the order of 13 April 2005 advising it that it was barred from defending the matter.” [Paragraph 11]

“In the circumstances the judgment granted by the Labour Court on 25 May 2005 was erroneously sought and erroneously granted because the Registrar of the Labour Court was not permitted to enrol the matter without notice to the respondent nor was the Labour Court entitled to entertain the default judgment in the absence of respondent being notified thereof. Mr Maluleke, who appeared on behalf of the appellants, argued that where a party such as the appellants herein was entitled to a judgment in the absence of the other party the judgment so granted cannot be said to have been erroneously granted. In support of this submission he referred to the matter of Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) ... This argument is misconceived. The Lodhi matter is no support for the appellants herein as the default judgment granted in that matter was granted pursuant to a proper application of the Uniform Rules of Court and unlike in this matter where the rules were not complied with.” [Paragraph 13]

“Hence, although the reasons proffered by the Labour Court for rescinding the default judgment were based on the normal requirements for rescission, the order was indeed correct” [Paragraph 14]

“I have not dealt with the various grounds of appeal raised by the appellants because they were clearly based on their failure to appreciate the import and application of rule 6. Their grounds of appeal were in any event without merit because although the application for rescission was also not based on rule 6 the respondent did make out a case to rescind the judgment granted by the Labour Court on 25 May 2005. The respondent in its application demonstrated that it was not in wilful default and showed good cause to have the judgment rescinded. It also set out a bona fide defence to the appellants' claim, and a reasonable and acceptable explanation for its default.” [Paragraph 16]

“As both parties appeared to miss the crucial issue I am of the view that there should be no order of costs herein.” [Paragraph 17]

The appeal was accordingly dismissed.

**HARMSE V CITY OF CAPE TOWN (2003) 24 ILJ 1130 (LC)**

**Judgment delivered 9 May 2003**

The applicant referred a dispute with his employer, the respondent, to the court by way of a statement of claim, alleging that the decision of the Respondent not to shortlist him for any of the three posts to which he applied constituted unfair discrimination. This unfair discrimination, he said, is prohibited by s 6 of the Employment Equity Act. The applicant claimed that he was not shortlisted because he was a black person. The respondent raised an exception to the applicant's statement of claim on the grounds that it was vague and embarrassing; and that it lacked averments necessary to sustain the action. The respondent claimed that even if there was unfair discrimination as alleged, a party before the court must expressly state whether they allege direct or indirect discrimination.

Waglay J held:

“If one were to have regard only to s 6 of the Act then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. However, from a reading of the Act it appears that affirmative action is more than just a 'defence' in the hands of an employer and should not be confined to so limited a role in the elimination of unfair discrimination in the workplace. The definition of affirmative action in s 15 indicates a role for affirmative action that goes beyond the passivity of its status as a defence. Affirmative action measures include measures to 'eliminate employment barriers', to 'further diversity' in the workplace and to ensure 'equitable representation'. In these respects affirmative action involves more than just a defensive posture. It includes pro-activeness and self-activity on the part of the employer. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace.” [Paragraph 33]

“Employment equity is partly about providing equal opportunities and indeed preferential treatment to persons falling within the designated groups. Affirmative action measures may however only be taken in respect of 'suitably qualified' people from the designated groups. This much is apparent from the definition (description) of 'affirmative action measures' in s 15 of the Act. Section 4 of the Act provides

that 'except where chapter III otherwise provides, Chapter III of this Act applies only to designated employers and people from designated groups.'" [Paragraph 38]

"Section 20(1) does indeed provide that a designated employer must prepare and implement an employment equity plan. Section 20(2) elaborates the contents of such an employment equity plan. Section 20 as a whole, however, is concerned with more than just the preparation and implementation of an employment equity plan. Section 20(3)-(5) outlines factors to be taken into account in the determination of whether a person is 'suitably qualified'. Section 20(3) begins with the phrase: 'For the purposes of this Act'. The concept of 'suitably qualified' is not described nor defined elsewhere in the Act. Accordingly the concept of suitably qualified, as elaborated in s 20(3)-20(5) applies to the Act as whole and is not limited to chapter III. The prohibition against unfair discrimination solely on the grounds of a person's lack of relevant experience, as contained in s 20(5) of the Act, applies to all employers and is not limited to designated employers. Similarly, the taking of affirmative action measures is the duty of every employer and is not limited to designated employers. This conclusion is based on s 5 of the Act, which obliges every employer 'to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'." [Paragraph 39]

"The history of deliberate discrimination in our country provides a harrowing and almost limitless range of discriminatory policies and practices in employment and other spheres of our society. If an employer's conduct falls within this category of unfair discrimination (solely on the grounds of lack of relevant experience), what may the employee do? The employee may refer the instance of unfair discrimination to this court (whether or not one regards it as an independent prohibition). This would be consistent with one of the purposes of the Act, namely, 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination'. To hold otherwise would place a restriction on the jurisdiction of this court which is warranted neither by the express language of the Act nor by its purpose. Accordingly, the respondent's exception … is … liable to be dismissed." [Paragraph 42]

"One of the ways in which this issue has been posed by the respondent is that affirmative action may only serve as a defence. In part this is correct. The real answer however lies in the determination of who is making the claim of affirmative action. It may found a cause of action in the hands of one and defence in the hands of another. If one were to have regard only to s 6 of the Act then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. In this sense, it serves as a shield. However, having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace it also serves as a sword." [Paragraph 44]

"Affirmative action has its roots embedded firmly in the Constitution ... Under the Constitution equality is a fundamental human right. Section 9(2) of the Constitution provides that 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken'. In addition to this, s 9(4) of the Constitution provides that 'national legislation must be enacted to prevent or prohibit unfair discrimination'. The Employment Equity Act is borne of this constitutional imperative. The right to equality as elaborated in s 9 of the Constitution moves well beyond the mere formal equality. Our Constitution embraces and promotes the more thoroughgoing and challenging concept of substantive equality. In the absence of the full development of

the concept of substantive equality our society will continue to be characterized by deep-rooted inequality and injustice. …" [Paragraph 45]

"There is no doubt that an employer may not discriminate unfairly against an employee. This right not to be unfairly discriminated against is an integral part of the right to equality and a necessary condition of the inherent right to dignity in s 10 of the Constitution. This right not to be unfairly discriminated against is a right enjoyed by all employees whether or not they fall within any of the designated groups as identified in the Act. If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against. Similarly, if an employer discriminates against an employee in the non-designated group by preferring an employee from the designated group who is not 'suitably qualified' as contemplated in s 20(3)-20(5) of the Act, then the employer has violated the right of such an employee not to be discriminated against unfairly. In either case, the issue is whether the employer has violated an employee's right not to be discriminated against. To this extent, affirmative action can found a basis for a cause of action" [Paragraph 47]

The exception was dismissed with costs.

**WHITEHEAD V WOOLWORTHS (PTY) LTD (1999) 20 ILJ 2133 (LC)**

**Case heard 27 April 1999, Judgment delivered 28 May 1999**

The applicant alleged that she was offered a permanent position as a 'human resources generalist' with the respondent, which she accepted, and that subsequent to the conclusion of the agreement respondent repudiated the contract of employment thereby effecting a dismissal which dismissal was unfair. In the alternative applicant alleged that she was unfairly discriminated against as an applicant for employment on grounds of pregnancy, and that in the circumstances she was a victim of an unfair labour practice. The applicant therefore needed to show the court that she was an employee as contemplated by the Act and that she was dismissed.

Waglay AJ held:

"For purposes of this judgment I do not need to decide upon whether or not a contract of employment had in fact been concluded because even if I find that a proper contract had been concluded between the parties, applicant's argument that a breach of such contract amounted to a dismissal cannot be tenable. This is so because the applicant did not work for, nor was she entitled to receive any remuneration from, the respondent prior to 23 December 1997 being the date of the alleged breach." [Paragraph 10]

"Had the applicant prior to being informed that the offer was withdrawn (here I am relying purely on the testimony of the applicant despite such testimony being challenged by the respondent) tendered her services to the respondent and the respondent refused to accept such tender then perhaps the applicant may have had a claim for a dismissal because the word 'work' in the definition section of the Act is broad enough, I believe, to encompass a tender. The tender must however be made before a contract is repudiated for an applicant to succeed in her claim of being dismissed" [Paragraph 11]

“In this matter applicant made no tender prior to the repudiation of the contract, in fact she could not do so as her employment was only required to commence on 12 January 1998. In the circumstances applicant cannot claim to be dismissed as she failed to qualify as an employee as provided for in s 187(1)(e) of the Act.” [Paragraph 12]

“Turning then to applicant's alternative claim that she was a victim of an unfair labour practice as contemplated by item 2(1)(a) of schedule 7 to the Act in that she was discriminated against because of her pregnancy.” [Paragraph 15]

“The first issue that this court needs to determine is whether the condition of uninterrupted job continuity which obviously discriminates against pregnant women was based on an arbitrary ground. The test that the court must apply in making a determination is not what was the subjective opinion of the respondent based on the factual position with which it is confronted but taking into account the factual position could the condition placed by the respondent be objectively justifiable.” [Paragraph 23]

“In the matter before me to be satisfied that the requirement of uninterrupted job continuity to be valid and not to be based on an arbitrary ground, I need to be satisfied that the incumbent would, no matter what fate befalls him or her continue with his/her employment uninterrupted for at least 12 months. No employer can receive any guarantee that an incumbent will remain in its employ for an uninterrupted period of anytime. In the absence of such guarantee I am satisfied that to place such a requirement can be no more than a decision arrived at on an arbitrary ground” [Paragraph 25]

“We live in a constitutional state with an entrenched Bill of Rights and as such there is a duty upon this court to give effect to the rights enshrined in the Bill of Rights and as Seady AJ correctly pointed out in Dingler that item 2(1)(a) must be evaluated against the background of the South African Constitution.” [Paragraph 29]

“… [T]he Act only excuses discrimination based on 'an inherent requirement of the particular job'. This implies that the job itself must have some indispensable attribute. This indispensable attribute however must relate in an inescapable way to the performing of the job required. Getting a job done within a prescribed period could well be an inherent job requirement, but to succeed on this ground a party relying thereon must satisfy the court that time was of the essence. In this matter no evidence to this effect was led…” [Paragraph 34]

“In any event the concept of inherent job requirement implies that the indispensable attribute must be job related. To suggest that the requirement as in this case of uninterrupted job continuity is an inherent job requirement is to distort the very concept. If the job can be performed without the requirement, as it can in this case, then it cannot be said that the requirement is inherent and therefore protected under item 2(2)(c) of schedule 7 to the Act.” [Paragraph 37]

The respondent was fund to have committed an unfair labour practice as contemplated by item 2(1)(a) of schedule 7 to the Act and was ordered to pay the applicant compensation in the amount of R200 000 plus costs. The decision was overturned by the Labour Appeal Court in Woolworths (Pty) Ltd v Whitehead 2000 (12) BCLR 1340 (LAC).

## SELECTED JUDGMENTS

**LUCKY ROSELE AND AOBAKWE SHIMI MAKULA V THE STATE, UNREPORTED JUDGEMENT, CASE NO.: CA 100/2008 (NORTH WEST HIGH COURT, MAFIKENG)**

**Case heard 23 March 2012, Judgment delivered 3 April 2012**

This was an appeal against the conviction and sentence imposed on the first and second appellants, who had been convicted in the regional court on two counts of robbery with aggravating circumstances. In addition, the first appellant was convicted on a charge of escaping from lawful custody. At the trial, the first appellant elected to conduct his own defence, while the second appellant was legally represented. Counsel for the appellants argued that their convictions fell to be set aside on the grounds, that they had not received a fair trial in that the trial court should have made a mero motu decision to separate the trial of the appellants from that of the accused who had pleaded guilty and by not doing so, it had permitted the proceedings to become "contaminated"; and that guilt had not been proved beyond a reasonable doubt, primarily because the identification evidence of state witnesses was unreliable. Concerning sentence, it was argued that the sentences on the two counts of robbery should have been directed to run concurrently, as the offences were committed during the course of a single criminal enterprise.

Brenner AJ (Hendricks J concurring) held:

"In the instant case, neither the prosecution nor the accused applied for a separation. However, it is also competent for the court to mero motu order a separation so as to avoid prejudice. See S v Ndwandwe 1970(4) SA 502 (N)." [Paragraph 30]

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

"But this is not a peremptory requirement, and a failure to separate does not automatically result in the setting aside of a conviction where an appeal court is of the view that a reasonable court would have nevertheless convicted the accused. See R v Zonele and others 1959(3) SA 319 (A) ..." [Paragraph 32]

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

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

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

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

The appeal was upheld in part and dismissed in part.

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

**Case heard 23 March 2012, Judgment delivered 29 March 2012**

This was an appeal against the Magistrate's dismissal of a claim of damages for unlawful arrest and detention. The appellant (plaintiff in the court a quo) claimed payment of R25 000.00 in damages from the respondent arising from his unlawful arrest and detention for some four and a half hours in police holding cells.

Brenner AJ (Hendricks J concurring) held:

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

"The circumstances in casu fall instead within the purview of section 40(1)(a) of the CPA. This provides that a peace officer may without warrant, arrest any person who commits or attempts to commit any offence in his presence." [Paragraph 21]

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

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

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

"In the premises, the defendant failed to discharge its onus of proving the lawfulness of the plaintiff's arrest and the finding of the trial court on the merits falls to be set aside." [Paragraph 30]

"Apart from the bare modicum of inconvenience, there is little to aggravate the respondent's conduct vis a vis the appellant. Taking into account the age of the plaintiff, the circumstances of his arrest, including the fact that he was neither handcuffed or manhandled, the short duration of his detention (some four and a half hours), its limited publicity, the fact that no sinister motive was proved in his arrest, his vocation as a taxi-driver in the employ of another person, the fact that his livelihood was not

compromised in any way by his arrest, and awards made in comparable cases, a fair and appropriate award for damages in an amount of R7 500.00." [Paragraph 39]

The appeal was upheld with costs.

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

**Judgment delivered 28 February 2008**

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

Brenner AJ held:

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

"… [T]he claims for defamation should be viewed in the context of the parties' conduct. Neither party was beyond reproach. It is inexplicable why the plaintiff did not convey to the defendant his decision, when he made it, to hold the settlement sum in his trust account in the name of the estate. And to tell the defendant his reasons for doing so. The plaintiff should have stated his case in circumstances in which he had signed an agreement which expressly provided that the monies were jointly payable to the estate and the company. It would certainly appear that the plaintiff had a basis for believing that the business might not have been run by the company, and that, therefore, none of the settlement money belonged to it, but I am not enjoined to make a finding on this issue." [Paragraph 105]

"I refer to the first of the plaintiff's claims. The evidence established that, during the course of his investigation into the complaint laid by the defendant against the plaintiff, the contents of the defendant's affidavit were published to Emmenis and the essence repeated in the meeting between them in February 2006. In my view, the words used in the penultimate paragraph of the defendant's affidavit were per se defamatory, making the defendant's views quite plain: that the plaintiff had stolen money from Mystic Beverages (Pty) Ltd, thereby imputing dishonesty, and criminal and unprofessional conduct of the plaintiff." [Paragraph 112]

"I refer to the second claim. The plaintiff contended that the defendant's publication of an objection to his appointment as executor was defamatory in the secondary sense, carrying with it the innuendos that the plaintiff was not a fit and proper person to carry this office, and that he was untrustworthy and dishonest. I disagree. An objection on its own does not impute these innuendos. The evidence revealed

that the defendant had mentioned the criminal investigation and the Law Society complaint in his correspondence with the Master. This was not the case pleaded by the plaintiff. On the facts, I find that an objection was made by the defendant to the plaintiff's appointment as executor, despite the defendant's desperate attempts to prove otherwise. But the plaintiff failed to prove that the statement itself was defamatory, whether in the primary or secondary sense." [Paragraph 116]

"I refer to the third claim. It was the plaintiff's case that the statement in the complaint to the Law Society inferred that the plaintiff had misappropriated money from the company which he was obliged to retain in his trust account. I disagree. One cannot infer from the offending statement quoted … that the plaintiff allegedly misappropriated money from the company. The defendant simply asked the Law Society to establish the whereabouts of the money from the settlement agreement, and there was a basis for this enquiry. At the time of the complaint, the plaintiff had not gone on record to say that he was retaining the money in the name of the estate. The defendant's complaint did not extend to saying that the money had been stolen by the plaintiff. There was no defamation, whether in the primary or secondary sense. This claim must also fail." [Paragraph 117]

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

## SELECTED JUDGMENTS

**TERRA BRICKS AND ANOTHER V REGIONAL MANAGER, LIMPOPO DEPARTMENT OF MINERALS AND ENERGY AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 5246/05 (TRANSVAAL PROVINCIAL DIVISION, PRETORIA)**

**Judgment delivered 12 April 2007**

The applicants applied for judicial review of an order by the first and second respondents that the applicants immediately stop manufacturing bricks at the second respondent's factory near Polokwane. It was in limine contended on behalf of the respondents that the applicants' failure to follow the procedure laid down in rule 53 of the uniform rules of court was fatal.

Fourie AJ held:

"It is common cause that the applicants have not followed the procedure prescribed by rule 53. However, the primary purpose of the rule is to facilitate and regulate applications for review … The rule exists primarily in the interests of an applicant, who could waive the procedural right, as long as the election to disregard the provisions of the rule does not impinge upon the procedural rights of a respondent. Therefore the remaining provisions of this rule are not peremptory. … The complaint that no official record of the proceedings was made available, is in this particular instance not prejudicial to the case of the respondents. They are supposed to be in possession of such record and they could have made use thereof in these proceedings whenever it was necessary. For these reasons I am of the view that the point in limine is without any substance." [Page 3]

"If exceptional circumstances are present, a court may exempt such person from the obligation to exhaust any internal remedy, if the court deems it in the interest of justice. It has been pointed out by the applicants that certain departmental appeals have been noted by the applicants against the various steps taken already against them by the department. Apparently one has already been decided against the applicants by the fourth respondent but the others have not been decided as yet. The applicant's case in this regard is that it is necessary and in the interests of justice and the public interest that a court should pronounce on the main dispute which is in essence a legal dispute regarding the correct interpretation of certain relevant national statutes." [Page 4]

"… [A]s far as the grounds of review are concerned, it was argued on behalf of the respondents that the applicants have failed to identify the relevant provisions of PAJA, upon which they base their cause of action. Therefore, so it was argued, the applicants have failed to prove the alleged grounds of review. I do not agree with this submission. … Section 6 of PAJA deals with judicial review and administrative action. Subsection 2 provides that the court has power to judicially review an administrative action if the action was materially influenced by an error of law (subsection (d)) or if the action itself is not authorised by the empowering provision. (Subsection(f)). … For these reasons I am of the view that the application should be granted." [Pages 17-18]

The application was granted.

**NGOAKO FRANS MORIANA & 16 OTHERS V MINISTER OF DEFENCE & OTHERS, UNREPORTED JUDGEMENT, CASE NO: 31174/00 (TRANSVAAL PROVINCIAL DIVISION, PRETORIA)**

**Judgment delivered 29 May 2005**

This was an application for review of the proceedings and decision of the second and third respondents; and for a declaratory order in relation to a constitutional issue on the same subject. In a trial by ordinary court-martial the applicants were tried and convicted of mutiny, and sentenced to dismissal from the South African National Defence Force (SANDF). The council of review considered the facts of the case and set aside the dismissal, finding that mutiny had not been proved beyond reasonable doubt. The charge of mutiny was set aside and substituted for a charge of disobeying lawful commands or orders. The sentence of discharge from the SANDF was endorsed. In the application for review it was argued that the ordinary court-martial was obliged to sentence the applicants to a period of imprisonment instead of ordering their dismissal, and that there was a failure to explain fully the right to object to being tried by any member of the court-martial, and of the right to their own legal counsel.

Fourie AJ held:

"In terms of section 75 of the code read with rule 51, the president shall read to the accused the names of the members of the court who shall then be asked if he or she objects to be tried by any of them. It is only if there is an objection that the prescribed procedure must be followed. The record of proceedings clearly indicated that the president did read the names of the members of the court to the accused and that no objection was raised. In the absence of any allegation that the record of proceedings is not correct, I can see no reason why it cannot be accepted. Therefore I am of the view that this objection as a ground of review is without merit and that it should be rejected." [Page 7]

"I shall accept … that an accused would have been entitled to legal representation of his own choice and if such an accused is unrepresented, then a defending officer may be appointed to undertake his or her defence. … [E]ach accused confirmed that they understood their rights by signing a rule 10 certificate. These certificates are incorporated into the record of proceedings… The certificates indicate that already during September 1996 the applicants were informed about their rights to legal representation. It is then further explained in a confirmatory affidavit that two defending officers were appointed to represent all the accused (including the applicant) during the trial. Again in the absence of any allegation that the record of proceedings is not correct, this objection must also fail." [Page 8]

"… The way in which a defending counsel in consultation with his or her clients conducts their defence as it was also explained in this particular instance, does not necessarily amount to an irregularity. It is clear from the explanation which has been given that the applicants themselves had decided to make use of spokespersons and that their defence was conducted accordingly. Therefore I am not convinced that this objection qualifies as an irregularity in the proceedings and it is therefore rejected. " [Pages 9-10]

"… Where the applicants' defending counsel had opted for an argument in this regard without calling any of them to testify viva voce I can see no reason why this manner of conducting their defence should be regarded as irregular. There is no allegation that any of the applicants had indicated a desire then to testify and that such request was refused by the ordinary court-martial. For these reasons I am not convinced that this complaint carries any weight and therefore it is also rejected." [Page 10]

"… The constitutional validity of those proceedings only became an issue in this court when the applicants instituted this application during December 2000. This is after the commencement of the new

legislation which came into operation on 28 May 1999. Therefore the effect of this application is that the court must consider the constitutional validity of a system and certain sections in the code (and related rules) which are no longer operative. Bearing in mind all these circumstances, I am of the opinion that this is a matter where a court should "avoid the dislocation and inconvenience of undoing transactions, decisions or actions," taken under provisions of previous legislation which are no longer operative. One can only imagine what can happen in all those cases where people had been convicted in terms of the previous legislation if that legislation and the previous system which operated in terms thereof are now to be declared unconstitutional. Such situation will not be in the interests of justice and good government and therefore the administration of justice must take preference to the interests of individuals. This leads me to the conclusion that the application also on the constitutional issue cannot succeed." [Page 15]

The application was dismissed with costs.

**BREYTENBACH & ANOTHER V H VAN LOGGERENBERG & TREASURE TROVE DAY CARE CENTRE CC, UNREPORTED JUDGEMENT, CASE NO: 23189/2001 (TRANSVAAL PROVINCIAL DIVISION, PRETORIA)**

**Judgment delivered 24 April 2002**

The applicants were the trustees of the Breytenbach Trust. The Trust's business was essentially that of a nursery school. The first respondent was previously trained and employed by the Trust and was involved in the business of the second respondent, who also conducted the business of a nursery school. First respondent provided daycare to approximately fifteen children from her home, which was situated approximately three kilometres from where the applicants conducted their business. This was an application for an interdict to restrain the first respondent from running, being in control of or being involved in any pre-primary, nursery school, playgroup or similar entity within a ten kilometre radius of the applicant's premises for a period of two years from 30 November 2000.

Fourie AJ held:

"… [T]he first respondent relies on section 22 of the Constitution of the Republic of South Africa, I deem it necessary to decide, not only on the question of onus but also the effect of section 22." [Page 3]

"… [I]f one analyses the letter of appointment and the annexure thereto … it becomes clear that this document does not take away or limit the first respondent's right to choose any occupation, trade or profession. It only limits by agreement the first respondent's common law right to engage in a specific economic activity, and therefore I am of the view that the right referred to in section 22 does not exclude restraints of trade in principle, but only those which in effect deny a person the right to choose the trade or occupation in question. … [F]or these reasons I am satisfied that the rule on onus of proof … has not been affected by section 22 of the Constitution and that the first respondent's right to choose a trade or profession has not been violated by the restraint of trade provision." [Pages 4-5]

"The purpose of a restraint of trade is to restrict the common law right of one of the parties to engage in one or more specified commercial activities and to protect the commercial interests of the other party. The qualification that consent is not to be unreasonably refused is intended to safeguard the interests of the covenantor by preventing the convenantee from making an unreasonable use of that protection. … If

these principles are applied to the present case one has to bear in mind the nature of the agreement between the parties, the fact that the first respondent wanted to conduct a similar business in close proximity (approximately 3 kilometres) to that of the Trust and the fact that the first respondent was placed in a position to build a personal relationship with the parents of the children where she was employed. These are, generally speaking, normal considerations which are applicable when a restraint of trade is incorporated into an agreement. If this is not so, then it would mean that every request to conduct a similar business, even on a limited scale, will have to be complied with. This will refute the purpose of a restraint of trade. I am not satisfied that the first respondent has gone beyond these general considerations to prove that consent was unreasonably refused." [Pages 7-8]

The application succeeded.

## SELECTED JUDGMENTS

**EISENBERG & ASSOCIATES AND OTHERS V DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS AND OTHERS 2012 (3) SA 508 (WCC)**

**Case heard 16 November 2011, Judgment delivered 23 November 2011**

First and fifth applicants, immigration practitioners, sought to compel respondents to determine certain outstanding temporary residence permit applications, and/or review applications, and/or administrative correction applications, within 30 days; and to determine any subsequent applications which might arise relating to outstanding temporary residence permit applications. Applicants' central complaint related to respondents' alleged failure to determine such applications within a reasonable time, and a backlog of applications which had begun in May 2010.

Cloete AJ held:

"… [T]he present application was launched on 4 February 2011 … At that stage 425 applications … had not been determined by the respondents. On 21 February 2011 the state attorney wrote to the applicants on behalf of the respondents. The gist of this letter was that of the 425 applications, 113 had now been determined, 154 were missing completely, and 158, although 'reflected as captured', could also not be located. " [Paragraphs 39 - 40]

Cloete AJ set out the findings of an internal review of compliance with respondents' operating procedures (identifying inter alia problems of collusion between immigration practitioners and Department officials), and the actions taken to address these problems (including moving the adjudication of applications to "a centralised adjudication hub" in Pretoria).

"As at October 2011 Mr Mamabolo [the third respondent] claimed that, whilst it must be acknowledged that there were challenges in the permitting system 'before its centralisation, which created a backlog of approximately 54 000 applications', the DHA has taken concrete steps to ensure that the permitting system makes it easy for business and critically skilled people, students and tourists to be issued with relevant permits timeously. He claims that the applicants' contention, that the respondents have not complied with their duties under the Constitution and the Act, is unfounded. He says that '(t)hey pay no regard to the challenges which the Department faced in implementing the new centralised system; what has been achieved with limited resources; and the need for central regulation and control of the permitting system'." [Paragraph 68]

"... However ... there is no allegation by the respondents that the immigration practitioners whom they accuse of misconduct include the applicants. Secondly, it is difficult to understand when, in the knowledge that the DHA would be faced with the problems outlined … they nonetheless issued the media statements of 18 and 25 November 2010. Any reasonable member of the public reading those statements would be justified in concluding that: (a) the DHA had been provided with sufficient resources and expertise 'to ensure foreigners can contribute meaningfully to the development of our country without any

obstacles through the timeous issuance of permits to all concerned'; and (b) 'all foreigners seeking extensions to their individual permits . . . [shall] be granted such extensions within 48 hours. . . . '. Thirdly, the sorry tale of utter inefficiency over the period December 2010 to January 2011 … occurred within the first two months after the release of media statements expressly to the contrary. … [T]he fact of the matter is that the DHA simply did not fulfil its public promises. It is not disputed by the respondents that none of the applications in the present matter were ever attended to within the promised 48- hour turnaround time. … " [Paragraph 69]

"[Applying the Plascon-Evans rule] …. Having given careful consideration to the respective versions … the only reasonable conclusion which I can reach is that the applicants' version is inherently credible and the respondents' version is untenable to the extent that it must be rejected. … [T]he inescapable inference is that, irrespective of whether they have the best will in the world, they have dealt with the applications of the applicants' various clients in a manner which can only be described as 'administrative bungling'. …" [Paragraphs 70, 73]

"For a foreigner in South Africa these permits are the single most important documents that they can possess. It is the basis of their legal existence in this country. Every aspect of their lives — the ability to travel freely (s 21 of the Constitution); the ability to work and put food on the table for their families (a component of the right to dignity in s 10 of the Constitution, see Minister of Home Affairs and Others v Watchenuka and Another … (SCA) …; the ability to keep their children in school (ss 28 and 29 of the Constitution); and the basic right to liberty (s 21(1) of the Constitution) — is dependent on the physical possession of a valid permit." [Paragraph 75]

"The applicants have set out why 30 days is a reasonable deadline within which a temporary residence permit application should be finalised. The respondents concede that this is so. The respondents are clearly under a duty to take decisions on the undetermined applications. … The respondents argue that this relief sought by the applicants must fail on two grounds. The first has already been dealt with, namely that on the facts the respondents' version must be favoured over the applicants' version. The second … is that, since on the respondents' version only six applications have not been determined, this court should exercise its discretion to withhold granting the relief sought in accordance with the trite principle that, in proceedings for judicial review, a court has a discretion whether to grant or withhold the remedy …. However, since I have found that the applicants' version is inherently credible and that the respondent's version is clearly untenable, it follows that I find that there are still 105 applications which have not yet been determined by the respondents. .. In these circumstances the applicants are entitled to the relief sought by them under s 6 of PAJA." [Paragraphs 86 – 87]

"… I am satisfied that it would be just and equitable to order the respondents, in terms of s 8(1)*(a)*(ii) of PAJA, to determine within 30 working days from date of this order, the undetermined temporary residence permit applications and/or extension applications, and/or review applications, and/or administrative correction applications. …" [Paragraph 88]

Cloete AJ found that the relief sought by the applicants, that respondents be ordered to determine any subsequent applications which might arise from determining the unresolved

applications, was not competent as it did not relate to a "concrete controversy or actual infringement of rights" [paragraph 94]. The application was therefore successful in part.

**S V ALAM 2011 (2) SACR 553 (WCC)**

**Case heard 29 April 2011, Judgement delivered 13 May 2011**

The appellant had been convicted on one count of abduction and five counts of rape by a Regional Court. The Appellant had filed an application with the regional court for leave to appeal against his conviction and sentence, but there was no indication as to whether these applications had been heard by the Regional Court. Cloete AJ first considered whether the appeal was properly before the High Court:

"...[S]ince the amendment of 1 April 2010 [to s 309(1)(a) of the Criminal Procedure Act], all persons other than those who fall under s 84 of the Child Justice Act who wish to note an appeal against any conviction or against any resultant sentence or order of a lower court, have no option but to apply to that lower court for leave to appeal against that conviction, sentence or order." [Paragraph 7]

"The effect of the amendment … is thus that persons sentenced to life imprisonment by a regional court no longer have an automatic right of appeal unless, at the time of commission of the alleged offence, such person was (a) under the age of 16 years; or (b) 16 years or older but under the age of 18 years and sentenced to any form of imprisonment that was not wholly suspended." [Paragraph 9]

"...[T]he appellant was 20 years old at the time of commission of the alleged offences. He accordingly does not fall within the ambit of s 84 of the Child Justice Act. However, the appellant was ... convicted and sentenced after s 309(1)(a) of the CPA was amended by the Criminal Law (Sentencing) Amendment Act ... but before the amendment to s 309(1)(a) of the CPA by s 99(1) of the Child Justice Act (which came into effect on 1 April 2010). The amendment of 1 April 2010 is not retrospective and the appellant thus falls squarely within the "window period" in which a person sentenced to life imprisonment by a regional court was entitled to note an appeal against both conviction and sentence without having to apply for leave to appeal to the lower court which convicted and sentenced him." [Paragraph 10]

"Accordingly ... although there is no indication in the record of the proceedings in the regional court whether the appellant's applications for leave to appeal and for condonation for the late filing of his application ... were ever heard by that court, the appellant's appeal is properly before this Court." [Paragraph 11]

"The indications are that the removal of the automatic right of appeal of adults sentenced to life imprisonment by a regional court under the minimum sentencing legislation was inadvertent. If this be the case there is clearly a pressing need for legislative correction of this oversight." [Paragraph 12]

Cloete AJ then proceeded to deal with the merits of the appeal, considering the applicable law on the single evidence of competent witnesses, the cautionary rule in sexual assault

cases, the evidence of children, the evaluation of evidence in criminal cases, the circumstances under which a court of appeal was entitled to interfere in a sentence passed by another court, and the circumstances under which a court was entitled to depart from a prescribed minimum sentence.

"...[O]n a consideration of the evidence as a whole (including that of the investigating officer, the district surgeon, the DNA evidence and that of the appellant himself) the State succeeded in proving beyond a reasonable doubt that the appellant was one of the men who abducted the complainant, that he held her down whilst she was raped by accused no.2, and that the appellant himself raped her three times." [Paragraph 50]

"However ... the State failed to prove beyond a reasonable doubt that the appellant raped the complainant twice in the hut, regard being had to the evidence of the complainant herself..." [Paragraph 51]

"To my mind therefore the magistrate correctly convicted the appellant on counts 1,2,3,5 and 7 but incorrectly convicted him on count 8." [Paragraph 52]

"In my view the magistrate misdirected himself in attaching no weight at all to the appellant's personal circumstances and the fact that he was a first offender for rape. These, together with the appellant's youth, are clearly mitigating factors and, ... notwithstanding the seriousness of the offences, constitute substantial and compelling circumstances. The magistrate did not consider at all the possibility that the appellant could be rehabilitated. .. When one takes into account the mitigating factors the five sentences of life imprisonment imposed by the magistrate for the rapes were, in my view, disturbingly inappropriate." [Paragraph 56]

"...[T]aking all of the circumstances into account (including that the appellant was in custody for four years prior to his convictions) an effective sentence of 18 years imprisonment in respect of each of the four counts of rape is appropriate, subject to those sentences running concurrently." [Paragraph 58]

(Bozalek J concurred).

**SEA HARVEST CORPORATION (PTY) LTD V IRVIN & JOHNSON LTD & ANOTHER [2011] JOL 27152 (WCC)**

**Case heard 4 March 2011, Judgment delivered 17 March 2011.**

This was an urgent application in which the applicant claimed that the first respondent was unlawfully passing-off one of its range of products as being that of the applicant's. Applicant and first respondent were direct competitors in the fish industry.

"The first issue ... is whether the get- up of the first respondent's *Oven Crunch* product is such that there is a reasonable likelihood that members of the public may be confused into believing that this product of the first respondent is, or is connected with, the *Oven Crisp* product of the applicant." [Paragraph 15]

“The second issue relates to the second leg of the relief sought by the applicant, namely, whether it is entitled to an interdict against the first respondent from using any get-up which is confusingly or deceptively similar to the applicant's *Oven Crisp* get-up and trademark. ...” [Paragraph 16]

“... [T]he test whether a false representation amounts to passing-off is whether there is a reasonable likelihood that substantial members of the public may be confused into believing that the business or product of one trader is, or is connected with, that of another.” [Paragraph 21]

“The representation must be both false and unauthorised. The typical case of passing-off is when the competitor uses, adopts or imitates the trade name or get-up of the other's business, goods or services. The trade name, trade mark, get-up or service mark must be known in the market and the applicant's goods, business or services must have acquired a public reputation or have become distinctive from other similar goods, businesses or services. ...” [Paragraph 22]

“... [T]he applicant was criticised by the respondents for not placing any direct evidence before me that members of the public have actually been confused or deceived, since (so it was argued) this would have carried far more weight for the applicant. No doubt this would have been optimal for the applicant; however ... the applicant approached court on an urgent basis in order to attempt to prevent the very harm which such direct evidence would have confirmed. In the circumstances I do not think that the absence of such direct evidence should count against the applicant.” [Paragraph 35]

“...[T]he respondents have not placed any real dispute of fact before this Court to show that the manner and scale of use of the applicant's mark and get-up of its *Oven Crisp* product has not become recognised by a substantial section of the public as being distinctively that of the applicant's, and the applicant's version must be accepted. ...” [Paragraph 36]

“There is ... only one dispute on the papers that this Court, transporting itself into the marketplace as the notional consumer, needs to decide, and that is whether the mark and get-up of the first respondent's *Oven Crunch* product amounts to a passing-off (or, simply put, a false representation) of the applicant's *Oven Crisp* mark and get-up.” [Paragraph 38]

“...[T]he get-ups of the competing products ... have always been clearly distinguishable from each other, specifically through differences in font and colour. This must surely mean that the applicant and first respondent have always been mindful of the necessity to ensure that there is sufficient dissimilarity between their respective products, so as to avoid confusing members of the public into believing that a product of the one is, or is connected with, that of the other.” [Paragraph 40]

“In my view, there is no doubt that the first respondent's get-up and mark of its *Oven Crunch* product are deceptively similar to that of the applicant's *Oven Crisp* product, and there is thus a reasonable likelihood that members of the public may be confused into thinking that

the *Oven Crunch* product of the first respondent is that of the applicant's. This will clearly impact negatively on the applicant's goodwill, if not its reputation." [Paragraph 47]

"The second issue ... is whether the scope of the relief sought by the applicant is appropriate, namely whether, in addition to being interdicted and restrained from unlawfully competing with the applicant ..., the first respondent should further be interdicted and restrained from using any get-up which is confusingly or deceptively similar to the applicant's *Oven Crisp* get-up and trade mark ..." [Paragraph 49]

"... [A] a perusal of the various decided cases indicates that the secondary relief sought by the applicant is common practice. ...

Secondly, ... the respondents themselves had no difficulty as recently as 1 February 2011 in demanding precisely the same scope of relief from the applicant in respect of an unrelated passing-off dispute. ..." [Paragraphs 50 – 51]

Cloete AJ thus ordered that the first respondent be interdicted and restrained from unlawfully competing with the applicant by passing off its *Oven Crunch* product as being that of, or associated with, the applicant, or using any get-up which was confusingly or deceptively similar to the applicant's *Oven Crisp* get-up and trade mark.

**M V V (born N) [2011] JOL 27045 (WCC)**

**Case heard 18, 22 November 2010, Judgment delivered 23 November 2010**

"This is an application wherein the applicant seeks an order directing that he and the respondent are recognised as co-holders of parental responsibilities and rights in respect of M, a male minor child born on 23 May 2000. …" It was agreed between the parties that certain points would be dargued and decided in limine.

Cloete AJ held:

"On the issue of urgency, and after this court expressed the strong view that all matters concerning children are, by their very nature, urgent…" [Paragraph 7]

"… I have concluded that it is not necessary for me to make a 'blanket' finding as to whether the exclusionary provision of a 'parent' in section 1 of the Children's Act only has application where it is expressly stated in the Act (as contended by the applicant), or whether wherever the words 'parent' or 'parental' appear in the Act, a biological father of a child conceived through the rape of the child's mother is expressly excluded (as contended by the respondent)." [Paragraph 14]

"Our Courts are now required to interpret all legislation in the context of the provisions of the Constitution of the Republic of South Africa, and with due regard to the constitutional context in which such legislation is set." [Reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (CC)]. [Paragraph 22]

"This court must thus first have regard to the relevant provisions of the Constitution which, in this matter, are the following: [citation to ss 28(1), 28(2), 10 and 36 of the Constitution]" [Paragraph 23]

"Accordingly, what is required in the instant matter is to attempt to give effect to the competing rights of M, on the one hand, and the respondent on the other. In this regard, s 6(2) of the Constitution *(sic)* is instructive. It requires a court, in all proceedings concerning a child to, *inter alia*, '*respect, protect promote and fulfil the child's rights as set out in the Bill of Rights, the best interests of the child standard… and the rights and principles set out in this Act, subject to any lawful limitation*'." [Paragraph 24]

Citing to the interpretation of the 'best interests of the child' given in *J v J* 2008 (C) and *S v M* (Centre for Child Law as Amicus Curiae) 2008 (CC), Cloete AJ held "To my mind, and to the extent that it might be argued that the court in *J v J* supra did not go far enough, the answer to the '*balancing of rights'* argument advanced by respondent's counsel is to be found in the very authority to which he referred this court, namely *S v M (Centre for Child Law as Amicus Curiae) …* " [Paragraph 28]

"I agree wholeheartedly with the approach adopted by the Constitutional Court in the aforementioned case. It is my duty as upper guardian of M to consider the facts which are common cause in the instant matter in deciding whether it is in M's best interests for the applicant to be recognised as a co-holder of parental responsibilities and rights as envisaged in terms of s 21 of the [Children's] Act" [Paragraph 29]

"The fact that s 33 of the [Children's] Act was only implemented on 1 April 2010 (as was s 22) does not mean that s 33 has no application. Section 33 must be read in conjunction with s 21(4) which provides that *'This section applies regardless of whether the child was born before or after the commencement of this Act'.* It could never have been the intention of the legislature that s 21 applies regardless of whether the child was born before or after the commencement of the Act, but s 33 only applies with effect from the date of commencement thereof. This would defeat the very purpose of giving substantive effect to the provisions of s 21" [Paragraph 34]

Cloete AJ ordered: "The respondent is not entitled to rely on the exclusionary provision in regard to the definition of a 'parent' in section 1 of the Act." [Paragraph 41.1]

**SELECTED JUDGMENTS**

**S V NGCABO (A61/12) [2012] ZAWCHC 67**

**Judgment delivered 26 April 2012**

Appellant, who enjoyed legal representation throughout the trial, was convicted in the Regional Court on one count of pointing a firearm, one count of attempted murder and one count of robbery with aggravating circumstances. He was acquitted on another count of robbery as well as another count of pointing a firearm as no evidence was led on these charges. Appellant pleaded not guilty to all the charges, arguing that the complainants were mistaken regarding the identity of the offender. However, during his testimony in mitigation of sentence, he expressed remorse for his actions and admitted that he had committed the offences of which he had been found guilty. He could not explain why he did not plead guilty initially. The Appellant was sentenced to one year imprisonment on the first count of pointing a fire arm, five years imprisonment on the second count of attempted murder and twelve years imprisonment on count three of robbery with aggravating circumstances, the sentences to run concurrently. The Appellant was granted leave to appeal against conviction and sentence. His grounds of appeal against conviction were that the court a quo erred in accepting the evidence of the witnesses that the Appellant was the person who had attacked them. As regards sentence, he alleged that the court a quo misdirected itself by over emphasising the interests of the community and under emphasising his personal circumstances; erred in not fully taking into account the element of mercy that should have been afforded the Appellant; that a sentence of long term imprisonment would hinder his rehabilitation and integration back into society; erred in not properly taking into account the period the Appellant had spent in custody awaiting trial and consequently that the sentences imposed on him were shockingly inappropriate.

Dolamo AJ (Steyn J concurring) held:

“Whether the witnesses were able to make a reliable identification of the Appellant as the robber would depend on the reliability of their observations. As in S v Mtetwa 1972(3) SA 766 AD … this will depend on factors such as lighting, visibility and the eyesight of the witnesses, proximity of the witnesses, their opportunity for observation both as to time and situation.” [Paragraph 15]

“The evidence in this matter relating to lighting, opportunity to observe, proximity of the assailant, the fact that the assailant was well known and identified by both state witnesses, all contribute to a reliable identification by the witnesses. There was no suggestion that the witnesses fabricated or may have been mistaken in their identification. I am satisfied that the identification of the Appellant by the witnesses is reliable.” [Paragraph 16]

“It is evident from the record that the court a quo was mindful of the need to approach this type of evidence with caution and was alive to the pitfalls inherent therein. I am satisfied that such cautionary approach as required was indeed brought to bear on the evidence of the two state witnesses and was found to be reliable as to constitute proof beyond reasonable doubt that the Appellant was the robber. Any residual doubt was removed by the ex post facto admissions by the Appellant, during his testimony in mitigation of sentence, that he had committed the offences. I am therefore satisfied that the Appellant was properly identified as the attacker and robber.” [Paragraph 17]

"There is no doubt that the Appellant in the present matter went to the complainants' home with the intention to rob them. He armed himself with a fire-arm with the intention to use it to threaten them or to use it to incapacitate any of them, so as to facilitate the taking of their property, should they offer any resistance. He first threatened Ms Dumile by pointing at her with the fire-arm and asking where the money was, but hastily retreated when she raised an alarm. This however did not completely dissuade him to call off his intention to rob, because when Mr Pietersen appeared and attempted to ward him off by throwing a bottle at him, he shot him to incapacitate him. In my view the threatening of Dumile with the fire-arm and the shooting of Pietersen were done with a single intent and as part of a transaction to facilitate the appropriation of their property." [Paragraph 30]

"The Appellant in my view was correctly convicted of robbery with aggravating circumstances … but was incorrectly convicted of the attempted murder and the pointing of a fire-arm. The latter two convictions amounted to a duplication of convictions and ought to be set aside, in fairness to the accused in these circumstances." [Paragraph 31]

"I turn my attention to the question of sentence. The Appellant alleged that the learned magistrate committed a number of misdirections … and that this led to shockingly inappropriate sentences being imposed ... Ms Kloppers, who appeared for the Appellant focused mainly on the 12 years imprisonment imposed on the count of robbery with aggravating circumstances. This in my view was a correct approach given that the sentences on the other counts were ordered to run concurrently leaving the Appellant to serve an effective period of 12 years imprisonment. In any event the 1 year imprisonment for pointing a fire-arm and the 5 years imprisonment on the count of attempted murder will now fall away." [Paragraph 32]

"There is no merit in the submission regarding the alleged misdirection by the court a quo. In my view the learned Magistrate exercised his discretion properly and judicially to arrive at an appropriate sentence. The personal circumstances of the Appellant, his previous convictions, his struggles with drugs, the imperfect upbringing brought about by his abusive father, were all accorded appropriate weight. In addition the learned Magistrate found that the period Appellant had spent in custody awaiting trial amounted to substantial and compelling circumstances, justifying a departure from the imposition of the minimum prescribed sentence." [Paragraph 37]

The appeal succeeded in part.

**BLOOMBERG INVESTMENT HOLDINGS (PTY) LTD V REGISTRAR OF COMPANIES AND ANOTHER (22269/2010) [2012] ZAWCHC 75**

**Judgment delivered 19 March 2012**

This was an application for the review and setting aside of the First Respondent's decision directing the Applicant to change its name in terms of section 45(2) of the Companies Act of 1973.

Dolamo AJ held:

"The Applicant made the submission in its papers that it was unequivocally clear that the Applicant has been subjected to an administrative decision which is not just, right and fair according to the rules of natural justice, in that the Applicant was not afforded a hearing to which it was entitled and that the

principle of audi alteram partem rule was not adhered to. It was further submitted that the First Respondent failed to apply her mind to the matter insofar as she did not have regard to all the relevant information she was required to consider." [Paragraph 11]

"The Applicant is entitled to a just administrative action. There is no doubt, and so much was conceded by the Second Respondent, that the Applicant was entitled to the relief sought. The difference between the parties, however, was what happens after the First Respondent's decision is set aside. There appears to be a realisation now by the Applicant, as distinct from its original stance, that the matter has to be remitted back to the First Respondent for re-adjudication. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490 (CC) … to which Mr Sholto-Douglas who appeared for the Applicant referred in his heads of argument the Constitutional Court confirmed that the courts' power to review administrative action now ordinarily arises from PAJA, not from the common law as in the past. It is clear therefore that PAJA cannot be circumvented where it is applicable. It follows furthermore that Section 8 of PAJA which now fashions the remedies to which an applicant for review may be entitled is also applicable. This section provides in sub-section 8(1)(c)(ii) that remitting the matter for reconsideration by the administrator follows on the setting aside of the decision. Having regard to the scheme of this section an order of setting aside an administrative decision is coupled with one of remittance for reconsideration. Only in exceptional circumstances would the court substitute its order for that of the administrator. In my view the Second Respondent was correct in pointing out that the relief sought by the Applicant, in the circumstances, should incorporate an additional order of remittance for reconsideration." [Paragraph 20]

"As regards costs, Ms Joubert, who appeared for the Second Respondent, argued that even if the Applicant were to succeed in having the decision of the First Respondent set aside, the matter would have to be remitted back to her to be adjudicated properly. For this reason, if I understood his [sic] argument correctly, it was necessary for the Second Respondent to oppose the matter so as go point this out. Consequently the Applicant should not be entitled to a cost order because it rejected the suggestion that the mater be remitted back to the First Respondent when it was made early in this matter. In other words, the Second Respondent's opposition of the matter was justified in that it pointed out the correct procedure to be followed once the First Respondent's order is set aside. Mr Sholto-Douglas … argued that the Second Respondent's opposition of the matter in the face of a clear case that the First Respondent's decision was to be set aside was unnecessary and that it should be ordered to pay the costs including the costs of two counsel. The costs of two counsel, according to Mr Sholto-Douglas, were necessary because of the importance of the matter to the Applicant. He also argued that the Second Respondent mentioned the remittance of the matter to the First Respondent in the alternative, the main argument being that the Applicant was not entitled to bring a review of the First Respondent's decision under the common law but in terms of Section 48 of the Companies Act. In the circumstances the Second Respondent should be ordered to pay the costs, he argued." [Paragraph 22]

"I am of the view that there is merit in Ms Joubert's argument. The concession that in the event of the order of the First Respondent being set aside the matter should be remitted back to her … was made in the opposing affidavit and not for the first time in argument. I am satisfied that even if it was in the alternative it was incumbent upon the Applicant to consider it rather than to brush it aside in the terms in which it did … The argument that this was not the Second Respondent's main reason for opposing the application does not detract from the fact that the concession was made and should have been properly considered by the Applicant. The Second Respondent however should not have raised all the other

grounds of opposing the application. Both parties in my view had acted in haste in responding to the other party's case." [Paragraph 24]

The application succeeded.

**BMW FINANCIAL SERVICES SA (PTY) LTD V GELL AND ANOTHER (A409/11) [2011] ZAWCHC 504**

**Judgment delivered 2 December 2011**

This was an appeal by a credit provider, BMW Financial Services, against an order by the Magistrate Strand declaring the second respondent over indebted and rearranging her debt repayment obligations.

Dolamo AJ (Fourie J concurring) held:

"I deem it apposite to outline grounds upon which the appellant opposed the application in the court a quo as they are, in my view, applicable to the determination of this appeal. These grounds were; that the first respondent had failed to attach any documentation used to reach a determination that the second respondent was over-indebted; that he failed to attach any proof of the second respondent's alleged expenses; that the second respondent was not truthful with her income and expenditure when she applied for financing with the appellant, that the second respondent could have proceeded with legal action against her estranged husband to alleviate her alleged dire financial circumstances; that it would not be in the best interest of the appellant for the debt to be repaid over the extended period as suggested; and that the second respondent had not explored the possibility of voluntarily surrendering the vehicle to the appellant as provided for in Section 127 of the Act.."

"I, with respect to the learned magistrate, agree with … the appellant that a paucity of information was placed before the court a quo which and such will not have enabled the learned magistrate to properly determine the income and expenditure of the second respondent, her current circumstances and the circumstances that led to her current financial crises. By way of example, and certainly not exhaustive, no invoices, receipts or accounts were attached to the founding papers, only the bare allegations of income and expenditure were made that the applicant has to make out her case in her founding affidavit. He or she must set out facts necessary to establish a prima facie case in as complete a way as the circumstances demand"

"Lastly the order was attacked by the appellant on the basis that the restructured payment to the appellant will not lead to a full recovery of the debt due to it. To substantiate the point the appellant attached to its heads of argument a document setting out how the payments or the proposed payment will leave a balance of the sum or R23 956,24, as unrecovered. The effect of permitting the second respondent to evade the payment in full of her obligation is counter to the spirit of the Act and cannot be countenanced."

"I find no fault with the calculations of the appellant on this aspect and accept the document as proof that in terms of the restructuring proposal the second respondent will evade paying the debt in full."

The appeal was upheld.

## SELECTED JUDGMENTS

**ABRAHAMS AND ANOTHER V RK KOMPUTER SDN BHD AND OTHERS 2009 (4) SA 201 (C)**

**Case heard 4 December 2008, Judgment delivered 9 December 2008**

This was a review of an award by an arbitration appeal tribunal in terms of the Arbitration Act. The arbitration arose from a contractual dispute between first respondent and first applicant, relating to the exercise of a put option (claim A), and an agreement involving the first respondent's redemption of redeemable preference shares in the second applicant (claim B). The claim was dismissed by the arbitrator at first instance and by the two appeal arbitrators.

Gauntlett AJ held:

"… [T]he first applicant relies upon both misconduct and gross irregularity in the conduct of the arbitration proceedings. She invokes in this regard ss 33(1)(a) and (b) of the Act, respectively. In argument her counsel (dealing with his reliance on gross irregularity) acknowledged that mistakes of law or fact are not per se bases for setting aside an arbitration award. But his argument was that a gross or manifest mistake which establishes mala fides or partiality is enough to warrant interference" [Page 204]

"… [T]he argument amounts to these successive contentions: the appeal award was vitiated by irregularities; these were latent, not patent; they are to be detected in the reasons given in the award; these reasons are insufficiently supported by the evidence; from this disjunct a gross irregularity is to be construed. That alleged irregularity takes a somewhat different form … in the case of each of the two appeal arbitrators. The reliance on misconduct, in the alternative to gross irregularity, accepted that for its purposes, too, mistake is not enough. In current South African law a flawed award constitutes misconduct 'only if the mistake is of so gross and manifest a nature that it demonstrates moral turpitude in the sense of dishonesty, partiality or bad faith'. This, counsel said, was indeed his case. A third basis of review was advanced: a reasonable perception of bias." [Page 205]

"… On the first aspect [relating to claim A], the review attack was two-pronged. As regards the third respondent, it was that he 'failed to source his findings in the evidence [and that] his failure to do so leads to the conclusion that his findings was [sic] mala fide or motivated by an ulterior or improper purpose'. As regards the second respondent, the 'inference is irresistible that [he] uncritically and slavishly went along with the final award'. … [T]he preparation of the award was less usual in two respects. The first … is that instead of the usual joint award for the appeal tribunal, the award was presented as one written by the third respondent and concurred in by the second. The other is that the second respondent attached to his answering affidavit a first draft of the appeal award ... In handwritten notes on the draft prepared by the third respondent, the second respondent indicated that he disagreed in relation to the question as to whether an adverse effect - the first of the three sub-issues in respect of claim A, described above - was established on the facts." [Pages 205 - 206]

"In his own affidavit … the third respondent similarly testifies to the fact that the draft rested on his understanding of the evidence and argument; that he considered the initially contradictory views of the second respondent, debated these with him; that it was agreed that the third respondent was, after all, correct in his approach. This explanation was the subject of vigorous attack by the first applicant's counsel. … I disagree: indeed, the argument disregards the explanations offered under oath by the two appeal arbitrators ... When this was put to counsel, together with the application of the general rule in

motion proceedings the response was that their versions fell to be rejected, on motion, as so 'far-fetched or clearly untenable' … The submission is insupportable. Whether the award is right or wrong … it is detailed, considered and reasoned. As regards the attack on the second respondent, his explanation points to the very contrary conclusion: he held an initially contrary view … but was persuaded after debate that the contrary view, also documented and reasoned … was correct. That approach is hardly to be described as 'slavish and uncritical'. As regards the attack on the third respondent, it is not evident to me that his conclusions are not 'sourced in the evidence' to the extent they are required to be ... In my judgment, the attack is, in truth, obliquely but patently appellate: in substance it amounts to the contention that the award is not in all respects supported by the facts. The artificial bridge then contrived from appeal to review is that the appeal arbitrators did not consider all the facts, because these are not all rigorously iterated in the award. Even as an appeal test, that would have been misguided" [Pages 206 - 207]

"As regards the complicity issue – the second sub-issue in relation to claim A …The argument advanced on behalf of the first applicant in this regard … is … exactly that which was advanced first before the arbitrator, then before the appeal arbitrators … How untenable it is as a review ground is exemplified by the submission in argument … [which] again disregards the most basic principle and the clearest authority. … The attack is once more transparently appellate. … " [Pages 207 - 208]

After rejecting allegations of bias against the appeal arbitrators, Gauntlett AJ turned to consider the question of costs:

"The first respondent's counsel sought, in the event of the review application being dismissed, an order of costs de bonis propriis and on the attorney and client scale. There does not seem to me to be a proper basis to order costs to be paid personally by the first applicant's legal representatives. They have not made themselves personally guilty of such actions or statements … such as would warrant such an order … As regards the request that a punitive costs order should be made … such an order of costs should require exceptional circumstances. Simply because a party makes allegations … of inferred misconduct or irregularity, that would in my view not ordinarily make such an order appropriate, even if the allegations are rejected. But, in the present case, the position is different. The first applicant has repeatedly alleged in her affidavits dishonesty on the part of the third respondent. … [H]er counsel (in her presence) continued to press these conclusions in oral argument on her behalf to the very end.

I believe that the court in these circumstances is required to mark its particular disfavour towards an approach which impugns in this way the personal and professional integrity of practitioners selected by the parties to arbitrate their dispute. The accusations are far worse than those in *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another*, where at least imputations of dishonesty against a particularly distinguished arbitrator were expressly disavowed. …" [Pages 211 – 212]

The application was dismissed, and the first respondent ordered to pay the first respondent's costs on the attorney and client scale.

**OLPIN V ADMINISTRATOR, CAPE 1995 (4) SA 850 (C)**

**Case heard 21 – 24 March 1994, Judgement delivered 28 March 1994**

On 2 January 1990, plaintiff sustained injuries following a motorcycle accident, which took place when he lost control of his motorcycle on a road where road works were being carried out, resulting in irreversible paraplegia. Defendant filed a special plea. Plaintiff had initially withdrawn the summons due to non-compliance with a requirement of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, which required a 90-day period to elapse after notice had been served on the defendant. Plaintiff subsequently served a new summons on 26 March 1992, but defendant argued that this fell foul of provisions of the Act which provided that no legal proceedings could be instituted against the defendant after the lapse of 24 months from when the debt became due. In replication, plaintiff argued that he did not have knowledge, alternatively was unable to acquire knowledge, of the identity of the debtor and the facts from which the debt arose prior to 26 March 1990.

Gauntlett AJ held:

"… [E]ssentially two questions potentially require determination ... The first is whether the plaintiff had knowledge of the identity of the debtor and the facts from which the debt arose, before 26 March 1990. If the plaintiff fails to establish this, then it has to be ascertained whether the plaintiff, by the exercise of reasonable care, could have acquired such knowledge by that date. … Counsel for the defendant conceded that the plaintiff did not have knowledge of the identity of the debtor before 26 March 1990. He argued, however, that by the exercise of reasonable care the plaintiff could have ascertained the identity of the debtor by the critical date. He contended … that the plaintiff on the evidence, applying what counsel argued was the correct interpretation to be given to 'the facts from which the debt arose', did have the requisite knowledge ... Counsel for the plaintiff argued … that the plaintiff on the evidence could not, by the exercise of reasonable care, have acquired knowledge of the identity of the debtor by 26 March 1990. … [H]e resisted the defendant's interpretation of 'the facts from which the debt arose'. It was his case that not only did the plaintiff not have this knowledge by 26 March 1990 but that even with the exercise of the reasonable care contemplated by the statute, this could not have been acquired. …" [Page 854]

"The plaintiff … is not of course a detached intellect. He is, and was at the material time … 'a whole person', experiencing the maelstrom of emotional, familial and financial consequences of his injury. He was engaged in a busy rehabilitative programme … which clearly demanded his physical and mental time and energy. And to crown it all he suffered distracting and debilitating setbacks … Mr Van der Merwe [a social worker employed in the spinal unit where plaintiff was treated] testified that in the course of his work on occasions he acts as a 'facilitator' in providing injured patients … with a register of practising attorneys to enable them to seek legal advice. He did not do so in the present case because he, like the plaintiff, believed that no claim could lie without the involvement of another vehicle in the collision. I should add that it was my impression that the plaintiff was (as might be expected) guided in topics of discussion by the social welfare worker." [Pages 856 – 857]

"It was only by chance in March 1991 … that [plaintiff] discovered that his understanding of the law was wrong, and that he might well have a claim …" [Page 858]

"… [W]hat is intended [by the statutory scheme]is an initial notification such as to give this caste of defendants timeous opportunity to investigate the basic facts of the matter, and … to enable them to decide, before becoming locked in litigation, whether they wish to meet or settle or contest the claim. …" [Page 859]

"Counsel for the plaintiff argued … that prior to 26 March 1990 plaintiff could not give 'sufficient detail to defendant relating to the locality of the area of collision … [I]n the evidence given by the plaintiff's attorney she chose to go through the particulars of claim, pointing to certain details which could not have been specified prior to the plaintiff being able to visit the scene.

In my view this approach misconstrues the effect of the section. The 'facts from which the debt arose' does not in my view contemplate the provision to the defendant of an encompassing formulation of the plaintiff's claim. The facts must be such as to enable the defendant to proceed with an investigation. It is not a *sine qua non* that the claimant must know and disclose his 'cause of action' … The 'facts from which the debt arose' of which the claimant has knowledge may or may not be sufficient for the purposes of in fact fully *achieving* the statutory purpose of s 2(1)*(a)*. Thus a claimant may … not know where on a particular road a collision occurred or he may not immediately be able to specify which member of a municipal work force assaulted him. It does not seem to me that, regard being had to the statutory purpose … what is contemplated … is that prescription will not operate until the claimant is able to ascertain such facts as will *ensure* that the statutory purpose is accomplished, still less that his particulars of claim are capable of being issued. … For these reasons I conclude that the plaintiff did have knowledge of 'the facts from which the debt arose' by 26 March 1990." [Pages 859 – 860]

"… [I]t is common cause that the plaintiff did not have actual knowledge of the identity of the debtor before 26 March 1990. The remaining issue is whether the plaintiff could … have ascertained this before that date. …" [Page 860]

"Could he, a worker in a signage business, or his parents, a security guard and a nurse, .. have found out in this way [by making a telephonic enquiry] that it was in fact the defendant (and not a subcontractor or other authority) which was responsible for the road conditions which to his mind had caused his mishap? I do not consider that the defendant established this. In any event, … the defendant did not establish that, in all the circumstances, the failure of the plaintiff to cause such a telephonic enquiry to be made constituted a failure to exercise reasonable care … What constitutes such a failure cannot be considered *in abstracto*. I have already described the condition of the plaintiff as a 'whole person' before 26 March 1990. His body had been massively traumatised. He was held in an incapacitating apparatus … beset by illnesses and other setbacks, troubled by discomfort, and concerned with urgent, absorbing concerns from incontinence to the sale of his house. ... He shared, moreover, with even the experienced welfare worker the view that he had no claim. For this claimant not in these circumstances to take steps before 26 March 1990 to identify the body responsible for the road conditions in question does not seem to me to comprise a failure to exercise reasonable care such as would, in the intention of the lawgiver, impute such knowledge to him. …" [Pages 861 – 862]

The special plea was thus dismissed.

**JOHNSON V MINISTER OF TRANSPORT 1995 (3) SA 680 (C)**

**Case heard 15 February 1994, Judgement delivered 16 February 1994.**

This case dealt with the reviewability of the powers of the respondent to grant consent to litigants to sue the Motor Vehicle Accidents Fund for claims arising from hit-and-run collisions. Applicant's husband had been found dead on a road. Applicant alleged that he had been killed in a collision with an unidentified motor vehicle, and submitted a claim to the fund, which was rejected. The respondent refused to grant consent for the applicant to sue the fund, resulting in the review application.

Gauntlett AJ held:

"Counsel for the applicant initially submitted that there were two key issues: whether the respondent's decision was 'wrong', and whether that decision was the consequence of a reviewable illegality. That is clearly not correct, as in fact counsel ultimately conceded. The recognised ambit of judicial review has most recently been reiterated in *Hira and Another v Booysen and Another* ... In this passage Corbett CJ quoted the established test …. 'The enquiry for this Court is, shortly stated, not whether the respondent reached his decision correctly, but whether he did so duly, meaning generally that he properly applied his mind to the issues before him and J acted within his powers.' In fact, as I understood the argument for the applicant, the five attacks enumerated … are contended to represent essentially failures to duly apply the mind. …" [Pages 683 – 684]

After discussing the purpose behind the statutory scheme, Gauntlett AJ continued:

"Regulation 8(2)*(b)* is no model of clarity. It is clearly to be construed in its contextual setting and in particular in conjunction with reg 8(1)*(a)*. It contemplates in my view a further step which essentially entails a reconsideration by the respondent - he is not bound by the material put before the Fund - as to whether, in his discretion, the claimant should be granted 'consent to sue' the Fund. … [T]he respondent, in considering whether or not to grant his consent … would have to consider the requirements for liability by the Fund … Regulation 8(2)(*b*) does not spell this out in terms, but it seems to me that, on a sensible and contextual interpretation … that is clearly what is contemplated. …" [Pages 684 – 685]

"It appears … that the respondent interpreted his powers as involving two disjunctive enquiries. These are whether he was satisfied either that the Fund should have been satisfied in terms of reg 8(1)*(a)*(i) that the death of the deceased had been caused by the 'negligent or unlawful' driving of the unidentified motor vehicle; or that the respondent in any event was himself satisfied that the death arose in this manner. … [I]n the first respect the respondent misconceived his jurisdiction. … [H]is powers are not narrowly appellate in nature; he is required in the reconsideration contemplated by reg 8(2)*(b)* to form his own view of compliance with the elements set out in reg 8(1)*(a)*. ... Had the respondent only approached the matter in that way, his decision in my view could not stand. … It is, however, evident that the respondent considered the matter himself … and reached his conclusion after 'considering all the information placed before me'. The fact that the respondent appears in addition to have considered the matter on an untenable but separate basis does not appear to me in any way to vitiate his alternative approach ..." [Page 686]

"Both the Fund … and the Minister, if required to do so … are required, it seems to me, to bear in mind the overall statutory scheme: an enabling of claimants in appropriate hit-and-run cases to overcome the

difficulty created by their inability, despite due endeavours, to identify the vehicle in question. Their functions do not entail judicial determinations of the merits of the individual collisions … *and a generalised use of the language of onus* - without distinction moreover between the disparate provisions of reg 8(1)*(a)*(i) and (ii) on the one hand, and (iii) and (iv) on the other - appears to me, with respect, to be an unsatisfactory way of approaching the matter.

Then it was contended that the respondent's decision … amounts to a failure to take into account relevant considerations. This argument … is without merit. It is for the respondent, within the constraints imposed by his powers and his duty duly to apply his mind, to determine what he is to take into account and to weigh its relevance. It has to be stressed, of course, that this process is still one which is subject to judicial review and that the authority relied upon by respondent's counsel, namely *Minister of Law and Order and Another v Dempsey* … has been considerably qualified in the subsequent decision in *Jacobs en 'n Ander v Waks en Andere.* …" [Page 687]

"Finally it was contended that the respondent failed to apply his mind in the light of what was termed 'the principle in *Motor Vehicle Assurance Fund v Dubuzane* …(A)'. It was this 'principle' which underlies the repeated refrain in the correspondence to the Department that 'a person who was not negligent would surely have stopped'. In the *Dubuzane* matter a claim relating to a hit-and-run collision narrowly succeeded in the Appellate Division by a majority of 3:2. It did so on its own facts. The judgment does not purport to lay down any principle relating to hit-and-run collisions, ... The drawing of inferences is essentially a matter of logic …, and logic is not a matter for precedent.

The facts in the *Dubuzane* case from which the majority found themselves able to draw the necessary inferences differ, in my view, *toto caelo* from the present matter. ... None of these facts are present here. For all that is known … the deceased may have fallen off the back of a lorry or, in other circumstances not at all known, come to die on the road in question." [Page 688]

The application was dismissed.

**PENTOW MARINE (PTY) LTD V THE FUND BEING THE PROCEEDS OF THE SALE OF THE MV ARGOS (TRANSNET LTD t/a PORTNET OBJECTING) 1994 (2) SA 700 (C)**

**Case heard 17 February 1994, Judgement delivered 23 February 1994.**

The vessel MV Argos had been arrested at Cape Town harbour, and then sold by tender and the arrest discharged. A referee was appointed to receive, consider and report on the claims against the fund constituted from the proceeds of the sale, in terms of the Admiralty Jurisdiction Regulation Act. Applicant's claim was accepted as a maritime claim and ranked for payment. Applicant sought an order confirming the referee's report. Portnet opposed the report in relation to the ranking of its own claim. The Portnet claim comprised port dues, berth dues, craft assistance, pilotage, berthing services, additional charges and refuse removal. The claim was accepted but split into two components of port and pilotage dues, and the remainder. Portnet objected that the entire claim should have been ranked as a claim in respect of costs and expenses incurred to preserve the property or procure its sale, in terms of s 11(4)(a) of the Act.

Gauntlett AJ held:

"In his report … the referee reasons as follows as regards his ranking of Portnet's claim. Portnet's claim *prima facie* fell to be ranked … in terms of s 11(4)*(c)*(ii) and (v). Claims are not however in principle excluded from being ranked in terms of s 11(4)*(a)* merely because they are given a specific statutory ranking by the lawgiver in terms of s 11(4)*(c)*. ... In the present matter, the referee considered, '(sale), procurement and distribution of proceeds are irrelevant'. The remaining inquiry was accordingly whether, on the facts …, it could be said that the amounts constituting the Portnet claim constituted costs or expenses incurred in the preservation of the vessel. This did not appear to him to be so." [Page 704]

"Counsel for Portnet contended that … Portnet's total claim constitutes a cost or expense incurred to preserve the vessel or to procure its sale, and that the referee was wrong to have held the contrary. … [C]ounsel for the applicant contended, in the first instance, that the mere continued provision of a berth to the vessel by Portnet after the arrest could not be considered to constitute what he termed 'a preservatory act as contemplated by s 11(4)*(a)*'. … [I]n the second place, it could not be said that this continued provision of the berth was properly related to the procurement of the sale of the vessel, and, in the third place, that the Portnet claim in any event could not be said to constitute 'costs or expenses incurred' …" [Page 705]

"… The costs and expenses thus arising are expressly alleged to have been incurred on the tacit or implied authority of the Sheriff and on his behalf. … A reply filed on behalf of the applicant does not materially contradict the statement that the Portnet charges after the arrest were incurred on the authority of the Sheriff and on his behalf …" [Page 705]

"…Counsel for the applicant initially posited as the apposite test whether the costs or expenses in question could be said to have been incurred in saving the ship from some imminent danger. He subsequently moderated the submission to the contention that the costs or expenses must at least be related to the countering of 'some risk to the safety of the vessel'. … [B]oth approaches are inimical to that outlined in … the *National Iranian Oil Co* case... In the first place, they entail a restrictive interpretation of the ordinary wide meaning of the word 'preserve' ... In the second place, they equate the language of salvage with the preservation contemplated by s 11(4)*(a)* (and indeed the English authorities called in aid by counsel in this regard contemplate salvage situations). To do this is to ignore the explicit distinction drawn by the lawgiver in this regard ... In the third place, the approach pays insufficient regard to the statutory scheme and its underlying purpose. …" [Page 706]

"… [C]ounsel for the applicant then contended that the matter had to be approached on the basis that all that Portnet had done was to continue to provide a berth for the vessel. The costs were not sufficiently connected to preserving the vessel. … It seems to me not to be decisive … that what was done by the Sheriff was initially to continue to hold the vessel at an existing mooring … or that for all practical purposes he considered that he had no choice in the matter. … The fallacy in this argument … is its focus on the continuing physical situation, namely the berthing of the vessel. What changed … with the arrest of the vessel was that it passed *in custodiam legis*, and that the Sheriff found it expedient to continue the existing berthing in the exercise of his control and general supervision of the vessel. Costs and expenses so incurred were … plainly sufficiently connected … to preservation of the vessel …" [Pages 706 – 707]

"It remains … to be determined whether Portnet's claim constitutes 'costs or expenses' within the contemplation of s 11(4)*(a)*. Counsel for the applicant … sought to defend the reasoning of the referee … in which the referee appears to draw a distinction for the purpose of this provision between … a 'patrimonial loss' in an overall sense and a mere loss of revenue from a particular source. In his judgment

in the *Maharani case …* Hugo J … held that to limit the word 'expenses' to its narrower meaning of 'money out of pocket' would lead to unjust and indeed absurd results ... I respectfully agree. It is not persuasively apparent why the lawgiver should have been concerned to restrict the ambit of s 11(4)*(a)* to such a situation, and to exclude from its sweep a liability sufficiently related to the progression from arrest to sale and distribution of the fund. 'Costs and expenses' are … practical descriptions and not terms of art. The narrow interpretation for which the applicant contends appears to me once again to be at odds with the statutory scheme …" [Page 708]

The objection by Portnet was sustained, and the referee's report otherwise confirmed.

## SELECTED ARTICLES

**'THE SOUNDS OF SILENCE', TSAR 2011 2 PAGES 226 - 233**

Originally delivered as a plenary address at the Conference of the Society of Law Teachers of Southern Africa.

"… [W]hat I want to talk about today is a common malaise: a lack of critical faculty not merely in the faculty, but across the face of legal life in South Africa. My thesis is that, for all lawyers, there are disturbing developments about which we are insufficiently articulate and active. I have often thought that the trouble with political revolution … is that it gives rise to the same illusions as university graduation. There is the sense of attainment and finality, of a status achieved and no more to be learnt or done. I believe the converse is true. It is just a beginning. That is true of the commencement of constitutionalism in 1994…." (Page 226)

"… [I]t is time to end an approach which is insufficiently rigorous in its scrutiny of the judgments of courts, and how they function. I do not mean … that there should be anything less than professional respect for judges, and least of all that there should be the kind of attacks on courts, chiefly by political figures, which from time to time have been manifested. But … what probing critique has there been in the last five years of the work of the constitutional court? … Do you have nothing to say when the constitutional court, in the New Clicks case, produced 446 pages of judgments … Why have you not criticised the refusal by Sachs J in the Sidumo case to join Ngcobo J and others in determining whether the right in issue was a labour right or an administrative justice right, he urging a 'move away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability'? Do you share my inability to understand language like that, and the concern that it is inexact because the reasoning is not rigorous? … [A]s Lord Bingham has recently written …one of the first requisites for the rule of law is clarity in the law. The consequence, we have seen too often in recent years, has been decisions in which one battles to find a ratio, when there is a self-indulgent multiplicity of voices, and when, as Nugent JA stated in Makambi v MEC for Education, Eastern Cape, various constitutional court decisions on the same issue require the courts to go 'in diametrically opposed directions'." (Page 227)

The article then discusses disparities in funding between the Constitutional Court and the Supreme Court of Appeal and the High Courts, before dealing with judicial appointments:

"Another continuing concern is how we choose our judges. It is probably unnecessary for me in this regard to disclose the interest I have: that in the past my own nominations … have … been rejected. I do not speak with rancour … but equally I cannot avoid speaking. … I would hope that all of us are committed to the fundamental transformation of our legal system. By that I mean the betterment of the system, in all its attributes, so that it is both closely congruent with and an effective vehicle for the new constitutional dispensation … I am not a believer that addressing the makeup of the bench could await the slow evolution of passing years. But that does not prevent us from asking questions … fully six of the eleven members of the constitutional court had no judicial experience before joining the court, with the remaining five averaging four year's judicial experience each. Can it be said that certain of last year's appointments reflect a continuing disregard for discernible judicial excellence? ..." (Page 228)

"… [I]t seems set that the constitutional court is to become the apex court … for all matters. I have never understood how eleven judges, sitting en banc, could perform this task physically. … And if they cease to

sit en banc, one faces the prospect of inconsistent precedents, already a serious concern in the supreme court of appeal in recent years as its numbers have grown. Nor do I understand the rationale. A very deliberate policy choice was made in 1993 not to have complete integration of the courts, placing the constitutional court at the top but exclusively concerned with constitutional law. Some of us at the time believed … that this was a wrong turn … But the turn was taken in the road, and consequences follow. These include selection of judges over the past seventeen years on the basis that they would only adjudicate constitutional matters, and therefore their lack of involvement in prior professional life in wide areas of private law until now mattered less than it otherwise might. Now all must change for the highest court …"(Pages 228 - 229)

The article then discussed the suspension of the SADC tribunal, briefly mentioned the Legal Practice Bill, before concluding with remarks on legal education:

"… I do believe, strongly, that the predicament of those who train young legal practitioners as regards their educational deficiencies is not to be addressed by expecting universities to remedy basic educational deficiencies. The deficiencies … which haunt and cripple young practitioners, are the responsibility not of tertiary institutions but of basic education … The function of universities is the introduction of the intellectually qualified in the rigours of rational discourse. It is not to remedy the deficiencies of primary and then secondary education. It is also the duty of the organised legal profession, not universities, to teach professional skills and the adjectival law relevant to these." (Page 232)

## SELECTED JUDGMENTS

**IBUYILE DEVELOPMENT CONSORTIUM AND ANOTHER V THE PREMIER OF THE WESTERN CAPE AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 1204/12 (WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Judgment delivered 19 March 2012**

This was an application for an interim interdict restraining the first and second respondents from awarding two tenders for the construction of housing.

Koen AJ held:

"Counsel for the Government contended that the relief sought, although framed as interim, was final in effect. If this submission were to be correct it would be necessary for the Applicants to establish a clear right, an injury actually committed or reasonably apprehended, and absence of another adequate remedy. " [Paragraph 15]

"Whether or not an interdict is final or interim depends upon its effect on the issue in dispute. Interim interdicts are not intended finally to determine legal issues. They exist only to preserve the status quo, and to protect the rights of parties until their claims have been finally adjudicated. If the effect of an interdict is not to decide the issue, but to leave it open for later determination, then it is of an interim nature only." [Paragraph 19]

"… I have some difficulty in accepting the submission advanced by counsel for the Government that the effect of the order sought by the Applicants is final. It is true … that the practical consequence of the grant of the order … would be that the Government would be precluded from awarding the tenders in question. It is also true that such inconvenience would be irreversible. That, however, is the kind of irreversible inconvenience or prejudice to which Stegmann J referred in Knox D'Arcy Ltd and Others v Jamieson and Others … (WLD) … It is sanctioned in our law …" [Paragraph 20]

"If an interim interdict in the terms sought … is to be granted … the real issue between the parties, namely whether the Government has already given the rights to develop precincts 3 and 5 to Seakay or Ibuyile, will not have been decided. Those development rights will merely have been preserved for the benefit of whichever party is successful in the future action. .. [T]he relief sought is interim in nature, and not final, and the manner in which the facts must be determined is that applicable to interim, and not final, interdicts." [Paragraph 21]

On the facts, Koen AJ found that the applicants were not entitled to an interdict. The application was therefore dismissed.

**KULENKAMPFF AND ASSOCIATES V VOSLOO AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 18194/08 (18 FEBRUARY 2010)**

This was an application for the provisional sequestration of the first respondent.

Koen AJ held:

"In brief, section 10 of the Insolvency Act ... requires that Mrs Vosloo satisfy the court prima facie that she has a liquidated claim against Mr Vosloo; that Mr Vosloo has committed an act of insolvency or is actually insolvent; and that there is a reason to believe that it will be to the advantage of creditors that Mr Vosloo be sequestrated." [Paragraph 15]

"It is well established that applications for the provisional sequestration orders should not be used in order to recover debts which are bona fide disputed on reasonable grounds. This is so because the procedure for a provisional sequestration is not designed for the resolution of disputes as to the existence or otherwise of a debt... In Investec Bank Ltd v Lewis ... Griesel J held that these principles, enunciated in applications for the provisional winding up of companies, apply equally in applications for provisional sequestration. I respectfully agree. There is no logical reason why the rule, which is designed to deter creditors from collecting debts which are bona fide disputed ... by way of liquidation proceedings, should not apply equally in sequestration proceedings. Insolvency proceedings are plainly not appropriate where the existence of a debt, and thus the legal standing of the creditor, is the subject matter of a genuine dispute." [Paragraph 17]

"Where legal standing as a creditor is placed in dispute by the respondent opposing the grant of a provisional sequestration order the respondent attracts an onus to establish that the existence of the debt is bona fide disputed by him on reasonable grounds. If he discharges this onus then a provisional order will be made..." [Paragraph 18]

"In the result I find that Mrs Vosloo has established standing as a creditor in regard only to the four loan debts evidenced by cheque stubs ... and that it would be to the advantage of creditors if Mr Vosloo's estate were to be sequestrated. ..."[Paragraph 31]

"What remains for consideration is whether, notwithstanding that the requirements of section 10 have been proved, this Court should exercise the discretion vested in it to grant a provisional order of sequestration. It will be noted that I have observed that that the debts in respect of which Mrs Vosloo has obtained standing as a creditor ... have probably prescribed." [Paragraph 32]

Koen AJ analysed various High Court decisions, and concluded:

"...It seems to me to be undesirable to grant an order for the provisional sequestration of a debtor at the instance of a creditor who will, on the probabilities, be disqualified in participating in any *concursus creditorum*." [Paragraph 35]

The application was dismissed.

**TRANSNET LIMITED V ERF 154927 CAPE TOWN (PTY) LTD AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 2367/ 2007 (10 MAY 2010)**

Applicant sought an order evicting certain of the respondents from immovable property owned by it at Cape Town. It did so by exercising vindicatory rights, asserting that it was the owner of the property and that the respondents were in possession thereof. The eleventh respondent asserted that it was entitled to occupying the property in terms of an oral lease agreement allegedly concluded with the applicant.

Koen AJ held:

"Notwithstanding that it can adduce no admissible evidence to controvert Lombard's [a director of the eleventh respondent] account of the conclusion of an oral lease agreement Transnet contends that the facts put up in support of the alleged lease ... are insufficient ..." [Paragraph 6]

"Transnet's ownership of the immovable property in question is not disputed. What is in issue is Lorcom's right to occupy the immovable property in terms of the alleged oral lease. In this regard, a dispute of fact exists. ..." [Paragraph 7]

Koen AJ then set out the approach to disputes of fact in application proceedings, quoting from the decision of the SCA in *Fakie N. O. V CCII Systems (Pty) Ltd*, where it was held inter alia that 'fictitious' disputes of fact should not be allowed to delay the hearing of a matter, but that there must be a bona fide dispute of fact on a material matter. Furthermore, uncreditworthy denials include far-fetched or clearly untenable denials that could be rejected merely on the papers [Paragraph 8].

"To this needs only to be added that because these are motion proceedings questions of onus do not arise. The abovementioned principles, so eloquently summarised by the learned Appeal Court Judge, must be applied in order to resolve any disputes of fact notwithstanding that Lorcom bears an onus to establish the existence of the oral lease agreement allegedly entitling it to occupy the premises" [Paragraph 9]

Koen AJ then discussed the factual background of the alleged lease, and continued:

"What makes matters difficult for Transnet is that what Lombard says is not controverted, and the truthfulness of his evidence can be measured only against inherent contradictions therein and against the established facts. The scope for an analysis of probabilities in motion proceedings, if it exists at all, is extremely limited. Motion proceedings are not intended to enable a Court to weigh probabilities to determine where the balance lies in order to decide who is probably telling the truth." [Paragraph 27]

Koen AJ found that there were no inherent contradictions or material conflicts in Lombard's evidence, and nothing in his version which was far-fetched, palpably implausible or clearly untenable. Koen AJ then turned to consider Transnet's argument that any lease agreement was void for vagueness from the second year onwards, on the basis that the rent payable was uncertain.

"Discredited as it undoubtedly now is, it is a principle of our law that a term of an agreement of lease leaving the power to determine the rental entirely to the discretion of one of the parties renders the agreement invalid ... it is evident from a reading of *Benlou* that the principle was reluctantly accepted in that case because the Court considered itself to be bound by it notwithstanding that it is illogical, and that it does not accord with the position in other legal systems. I respectfully agree with the criticism of the principle, which seems to me to be illogical and contrary to common sense" [Paragraph 32]

"Notwithstanding the reluctance with which the principle confirmed in Benlou appears to have been accepted, and the criticism which has been directed at it, it is our law as expressed by the Supreme Court of Appeal and I am bound by it. ..." [Paragraph 34]

Koen AJ found that the agreement was nonetheless valid, and dismissed the application.

**RACEC ELECTRIFICATION (PTY) LTD V THE MEMBER OR THE EXECUTVE COUNCIL FOR TRANSPORT AND PUBLIC WORKS FOR THE PROVINCE OF THE WESTERN CAPE AND ANOTHER, UNREPORTED JUDGMENT (2009)**

The Province issued a tender directed at companies with a certain financial capability grading (8EE). The Province then amended its tender data, as authorised by the Construction Industry Development Board Regulations, and allowed for companies with a substantially lower financial capability (6EE) to tender. The tender was awarded to the second respondent, graded 6EE, a decision challenged by the applicant, an unsuccessful tenderer graded 8EE.

Koen AJ held:

"… Regulation 25 (7A) ameliorates the apparently inflexible position created by the peremptory terms of Regulation 25(1). … It has the effect, as I see it, of blurring the hard and fast lines existing between financial capability gradings, thus entitling an employer to evaluate and award a tender to a tenderer who might miss the mark by a "reasonable" margin." [Paragraph 11]

"The attack on the validity of the award of the tender to Adenco as presented in argument as essentially an invocation of the *ultra vires* doctrine. That this common law basis for challenging the validity of administrative action remains part of our post-constitutional law was … stated in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 … (CC) … [and] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 … (CC) …" [Paragraph 14]

"The argument highlights a curious feature of Regulation 25(1) when it is read with Regulation 25(7A). The invitation issued in terms of Regulation 25(1) must stipulate that only tenders received from qualifying tenderers "*may be evaluated*". Yet the Province was entitled, provided it properly exercised the discretion given to it by the provisions of Regulation 25(7A), to award a tender to a tenderer which tendered outside of its financial capability grading. In other words, notwithstanding the mandatory provisions of Regulation 25(1) indicating otherwise, tenders received from non-qualifying tenderers may also be evaluated." [Paragraph 16]

Referring to the *Bato Star Fishing* (CC) judgment, Koen AJ held: "… It is clear, then, that although the common law doctrine of *ultra vires* remains, the review of administrative action by a Court occurs under the Constitution and within the framework of the Promotion of Administrative Justice Act …" [Paragraph 17]

Koen AJ then examined under which conditions PAJA authorises a judicial review of an administrative action (*i.e.* when the administrative procedure is mandatory and material) and held "… The grading system introduced by the Act is central to process [*sic*] of evaluating ad awarding tenders. It is the means by which important objects of the Act are achieved. These are the standardization and improvement of

procurement by the public sector of construction work, and the reduction of the risk inherent in awarding tenders to contractors who do not have the capability or financial resources to perform the work properly. However, its inflexible nature has been diluted by the introduction of the discretion afforded to an employer by Regulation 25(7A). … The requirement that the invitation to tender must stipulate that only tenders received from qualifying tenderers may be evaluated is peculiar, and it does not accurately reflect what the Province may or may not do. Furthermore, I cannot see what purpose is served by requiring that the invitation to tender contain a statement that does not appear to be true. If the requirement is nonsensical, and serves no useful purpose, it cannot, in my view, be material." [Paragraph 15]

"The requirement set forth in regulation 25(1) … is not "*material*" in another respect. Non-compliance with the requirement has a very limited affect, if any, on the rights of competing tenderers. It cannot be gainsaid that the Province had the discretion, given to it by regulation 25(7A), to evaluate tenders from non-qualifying tenderers. How, then, are the rights of qualifying tenderers adversely effected if the tender pointed this out? They are, as I see it, in no worse a position simply because the invitation to tender made mention of the fact that the Province had a discretion to evaluate tenders from non-qualifying tenderers." [Paragraph 16]

"… Thus, in exercising its discretion under regulation 25(7A)(a) the Province was entitled not to have regard to the amount by which Adenco's tender exceeded its maximum tender value range, but to other factors dealt with in the tender evaluation report, such as its capacity and experience. I cannot agree that this is so. It is the "*margin*" by which a non-qualifying tenderer exceeds its maximum tender value range that requires consideration." [Paragraph 23]

"… In this regard the Board has issued "Guidelines", which indicate that a margin in excess of 20% is likely to be thought to be unreasonable. …" [Paragraph 24]

"Whether or not the amount by which Adenco's tender exceeded its maximum tender value range is reasonable is not a question I think should properly be determined in this matter. The issue was not even considered by the Province, and I cannot criticize a decision which has not been taken. It is for the Province, and not the court, to make a decision in this regard." [Paragraph 25]

"I therefore conclude that the Province did not comply with the provisions of regulation 25(7A) in evaluating and awarding tender to Adenco must be set aside." [Paragraph 26]

The decision to award the tender was set aside and referred back to the first respondent.

**CLUB MYKONOS LANGEBAAN LTD V LANGEBAAN COUNTRY ESTATE JOINT VENTURE AND OTHERS 2009 (3) SA 546 (C)**

**Case heard 17, 18 and 19 June 2008, Judgment delivered 24 July 2008**

The applicant and first respondent owned adjacent land. The respondent applied for its property to be rezoned and subdivided, which was granted upon certain conditions, including the mentioning of a link road that would traverse the respondent's property and allow for a better access of the applicant's property. However, all parties differed as to the interpretation of these conditions, and more specifically as to who held responsibilities regarding the road.

Koen AJ, referring to the applicant as “CML”, to the first respondent as “the developer” and the fourth respondent as “the Municipality”, held:

“… It is clear that the operation of s 28 does not inevitably lead to an automatic vesting. … Whether or not the link road was '... based on the normal need therefore arising from the said subdivision …' was not an issue pertinently addressed in the evidence placed before the court on affidavit in this matter, and to make a finding in this regard would involve an unacceptable measure of speculation. I should add that CML also contended that the structure plans amounted to a policy determined by the Administrator, but there was no evidence in the papers of there being such a policy and its contentions in this regard are without merit.” [Paragraph 35]

“I have some doubt whether a vesting of 'public streets and public places', which is the automatic legal consequence of the confirmation of a subdivision, can be equated to a condition requiring a 'cession of land' imposed under s 42(2) of the Land Use Planning Ordinance … (Western Cape) (LUPO)…. Sections 28 and 42(2) of LUPO are different in language and unrelated in purpose (see the analysis of the two sections in the minority judgment in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008… (SCA) …). … Section 28 envisages a situation, as I understand it, where the owner of the parent erf applying for subdivision (that is, before the application is considered by the council) contemplates that it will be necessary that part of the parent erf be used as public streets and public places and thus submits to the automatic legal consequence of vesting upon the confirmation of the subdivision. This is not the same, as I see it, as a condition imposed after the application has been considered by the council, which requires a cession of land to the municipality where all the different factors referred to in s 42(2) of LUPO, such as the needs of the community, public expenditure, the rates and levies paid in the past, or to be paid in the future, have been considered.” [Paragraph 37]

“Furthermore, the form in which this matter was brought does not facilitate a challenge to the validity of the conditions. In these proceedings there was no *lis* between the developer and the municipality. They are both respondents. Issues which may be relevant to the validity of the conditions have thus not been properly addressed in the evidence and, as I have already intimated, to make findings about the validity of the conditions, an exercise which involves examining whether the different requirements of s 28 and/or s 42(2) of LUPO have been complied with, will involve too large a degree of speculation for such findings to be reliable. It is plainly unwise to fish in a sea of evidence put before a court by the parties for the purpose of resolving one issue, in the hope of finding evidential material which answers another issue.” [Paragraph 40]

“Once they are imposed the conditions acquire the force of law, because s 39 of LUPO compels both the local authority and all other persons to comply with them (cf the separate assenting judgment of Centlivres CJ in *Estate Breet v Peri-Urban Areas Health Board* 1955 … (A) …). It is, as I see it, what was intended by the council that matters, not what was intended by the developer or by CML. … To this I must add that, because direct evidence of a party's own intention may not be had regard to, to have regard to what officials in the employ of the municipality now say they thought the conditions meant (to the extent that they may speak for the council) is not permissible. ” [Paragraph 43]

“In my view, then, Phase 1 condition (c) and Phase 2 condition (c), read with civil condition 11, required the subdivision plans to reflect the entire length of the link road. I think that one can arrive at this conclusion by having regard to the plain words employed by the framers of the condition without it being necessary to rely to any material degree J on other tools of interpretation. This interpretation may or may not have the result of vesting the road in the municipality in terms of s 28 or, perhaps, under s 42(2) of LUPO, depending on whether the requirements of those sections were fulfilled. However, these are

not questions which the court can decide in this matter, and, as I have said, I make no findings in this regard. What is clear is that the conditions, construed in this manner, have not been complied with." [Paragraph 46]

"… That the legislature intended that compliance with conditions imposed by a council when approving a rezoning or subdivision application is essential and imperative is underscored by the fact that a failure so to comply is a criminal offence in terms of s 41 of LUPO." [Paragraph 47]

"The real issue between the parties is what the conditions mean and it is to take too narrow a view of the court's function and powers in regard to the resolution of disputes, particularly where the exercise of public-law rights and the performance of public-law duties are in issue, to avoid that issue because the declaratory relief initially sought had been unwisely formulated. … It is therefore appropriate, in my view, that a declaratory order, coupled with an enforcement order, be made." [Paragraph 50]

"The decision of the municipality to initiate the process to have the road (possibly) constructed did not flow from its approval of the developer's rezoning and subdivision application. It was a decision independently taken and is unrelated to the conditions it imposed upon the developer. Whether or not the road is necessary, and in the interests of the community, is not a matter upon which a court can pronounce, and I am satisfied that it would not be correct for me to order compliance with these conditions, with a view, at least, that such compliance might eventuate in the link road being built. This should not be understood to mean that these conditions need not be complied with. It means simply that they are not sufficiently connected to the primary declaratory relief sought, for it to be necessary or desirable to order compliance with them in this application." [Paragraph 52]

"It is … within the power of the municipality to prevent the developer from transferring subdivided land until it has complied with all conditions imposed by the council, by not issuing clearance certificates until such conditions have been complied with. Indeed, it is its duty to do this. Plainly, the coercive measure afforded to the municipality is an effective and practical tool by which compliance with conditions imposed by the council must be enforced. It is a measure which has not been employed, with the result that, notwithstanding non-compliance by the developer with condition (c) of the Phase 1 and Phase 2 approvals, the Langebaan Country Estate, a significant housing development on the outskirts of Langebaan, now exists." [Paragraph 57]

The court found that conditions required the whole of the minor road to be reflected on the plans.

## SELECTED JUDGMENTS

**NOMATSHAKA SWARTBOOI V ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO: 20352/2008 (WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Judgment delivered 17 April 2012**

Plaintiff claimed damages for emotional shock arising from a motor vehicle accident which caused the death of plaintiff's son. The court was required to decide whether the claim was limited in terms of section 18 of the Road Accident Fund Act.

Mantame AJ held:

"… In my view Section 18 (1) was set to operate in a situation where the claim is for compensation of third parties, or losses resulting from bodily injuries or death of a person who was conveyed in an insured motor vehicle, i.e. a passenger. …" [Paragraph 16]

"… Damages … can be recovered if the emotional shock was: … reasonably foreseeable and of a sufficiently serious nature so as to affect the general health of the claimant and require treatment; … if a reasonable man in the position of the wrongdoer would foresee the detrimental consequences of the emotional shock. It is trite law that the abovementioned principle was recognized where a Plaintiff suffers a resulting detectable psychiatric injury where a person close to him or her dies as a result of an accident, the relationship between primary and secondary victim is not necessarily the prime consideration. … [T]he court will take into consideration such relationship, but it remains a question of legal policy, reasonableness, fairness and justice, and that reasonable foreseeability should also be a guide. In the event, the court upheld the action of a person engaged to the primary victim. See RAF v Sauls … see also Minister of Safety and Security v Sibili. … " [Paragraph 18]

"The answer to the legal question posed above is that the claim or liability should not be capped or limited in terms of section 18 of the Act. By enacting Section 18 the Legislature could not, and did not intend to limit the claim and thereby altering the common law position. According to the law of delict, loss is recoverable if it was reasonably foreseeable. The express mention of categories entitled to claim in Section 18 is a clear indication that the Legisalture … did not intend to include other categories of claimants. The express mention of the one is surely the exclusion of the other. As a matter of logic and robust common sense, there would be no basis whatsoever for limiting claims in all categories other than those particularly mentioned in Section 18. … Plaintiff is therefore entitled to whatever damages it can prove." [Paragraph 21]

"Judging from the medico-legal report compiled by … the psychiatrist, I have no doubt … that Plaintiff fits the test that has been applied in the cases mentioned … above, most importantly being:- … the severity of the shock and consequences thereof; the duration of such consequences; and … the extent to which the consequences would influence the claimant's future emotional well-being. … [I]t is untenable that Plaintiff's damages should be capped and limited … in a situation where the harm was reasonable foreseeable by the insured driver. The insured driver failed to take reasonable steps to guard against reasonable foreseeable harm. The question on whether a reasonable person would have taken steps to guard against reasonable foreseeable harm, involves a value judgment taking into account the degree or extent of the risk created and the gravity of the consequences. In my opinion, given the Plaintiff's personal circumstances she has gone through, it would be unreasonable to cap the damages. The

imposition of a cap would be demonstrably unnecessary, unjustifiable and unreasonably in the circumstances. …" [Paragraphs 22 - 23]

Mantame AJ thus ordered that the Plaintiff's claim be determined in terms of section 17 of the Act, and thus unlimited.

**THE NOORDHOEK ENVIRONMENTAL ACTION GROUP V WILEY N.O AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 27009/10 (WESTERN CAPE HIGH COURT)**

**Judgment delivered 13 December 2011**

Applicant sought declaratory relief, and an order that the continued failure by the first and second respondents to implement an order previously made by Davis J constituted contempt of court. The previous order had required first and second respondents to demolish and remove certain permanent structures. Respondents argued that the order had become academic as they had subsequently obtained approval from the Provincial Government.

Mantame AJ held:

"Applicant contends that the signage columns and the construction of the parking bays occurred without any permission being granted … The order of Davis J comprised a prohibitory and a mandatory element. It required that signage be removed and the parking bays be demolished to restore the structure to the condition it was before it was constructed. …" [Paragraph 10]

"It is trite law that once an order of court has been made by a court of competent jurisdiction it has to be complied with. No one can contest the contents of such judgment up until same has been appealed against or reviewed by a competent court of law. … In my view, an order of court cannot be evaded and or circumvented … by simply applying to the Premier in order to cure the defect that was already pointed out in Davis J's judgment. The said judgment still stands. There is no rule in our law that allows a court(other than a competent Appeal Court or Court of review) to disregard or to ignore or to set aside the order of the same or another court, in a matter that comes before it in respect of a claim for the same relief between the same parties. … [I]t is not permissible for the … Respondents to simply announce their approval that was received from the Premier without regard being had to the order of Davis J. Such conduct borders on contempt of court … It renders the order nugatory. No court, in my view, would allow itself to be reduced to a toothless bulldog. " [Paragraphs 22 - 23]

"… There is no doubt in casu that the Applicant has proved non-compliance with the court order of the First and Second Respondent's beyond reasonable doubt." [Paragraph 24]

"… First and Seond Respondents, complain about the correctness of the order that was made by Davis J. Whether the order was made rightly or wrongly, it is bound to be obeyed. … Besides their failed attempts to appeal this judgment, First and Second Respondents have not advised this court what else they have done in orderto remove this cause for complaint." [Paragraph 25]

Mantame AJ granted declaratory relief, and ordered First and Second Respondents to give effect to the order of Davis J within 90 days , and imposed a fine, suspended on condition of compliance. First and second respondents were ordered to pay costs on an attorney and client scale.

**NEDERBURG WINE FARMS V BESTER AND OTHERS, UNREPORTED JUDGMENT, CASE NO.: A777/2010 (10 AUGUST 2011)**

This case was an appeal against the refusal of an eviction order sought under the Prevention of Illegal Occupation from and Unlawful Occupation of Land Act (PIE). First to Third respondents had occupied a house on the Appellant's farm with their parents, who were workers on the farm, and continued their occupation after their parents' death.

Mantame AJ held:

"It is trite law that eviction should be regulated in a lawful, dignified and humane manner. As such there are pieces of legislation that are in place to give effect to such regulation. ..." [Paragraph 20]

"It is common cause fact that First to Third Respondents have lived in the house for the past 27 years. They have not mushroomed from nowhere as suggested in the aforementioned definition [of an "unlawful occupier" in terms of the PIE Act, as argued by the Appellant]. If one had to interpret this definition ... it does not fit the situation that the Respondents are on currently. I am inclined to agree with the First to Third Respondents' argument in the court a quo that they receive their protection in terms of Section 8(4) of ESTA [the Extension of Security of Tenure Act]. It was incumbent upon the Appellant to find a humane and dignified way of dealing with this eviction that fits squarely within the confines of UBUNTU. ..." [Paragraph 22]

"... The fact that they [the Respondents] are alleged in the court a quo that they received their protection in terms of Section 8(5) is an all encompassing situation. If one reads the provisions of that Section, one would come to the conclusion that they received their protection by virtue of their parents being "occupiers" in terms of ESTA. It is difficult to comprehend that after both parents died, Appellant still regard the fact that they were "long-term occupiers" as presumed." [Paragraph 24]

"The attitude of the Appellant in this case is unfortunate. Parliament in its wisdom enacted the provisions of ESTA in order to protect the rights and dignity of those who fall prey to eviction. For the Appellant not to have taken into account the standard of living of the First to Third Respondents and the fact that they have lived in the said Labourers House almost for the rest of their lives is unfortunate. In societies where people live in abject poverty, like in this instance, farm dwellers, it is not uncommon for the members of the family to live communally in one household, notwithstanding their age group and be depended on their parents up until, in certain instances, they receive an old age grant. ... " [Paragraph 25]

"Surely "dependents" of a person who had a valid title under the ESTA are entitled to eviction notices and protection under the ESTA. UBUNTU which is one of the principal pillars of our constitution requires that such "dependants" be treated with dignity and respect, particularly where they had lived for so long on the farm and where their parents died whilst employed on such farm. Accordingly, it is my judgment that Respondents are entitled to 12 months notice under ESTA." [Paragraph 26]

The appeal was dismissed (Hlophe JP concurring).

**HENDRICKS AND ANOTHER V CITY OF CAPE TOWN 2011 (6) SA 88 (WCC)**

**Case heard 12 April 2011, Judgment delivered 24 June 2011**

Applicants, informal business traders, sought to review a decision by the Respondent to direct them to remove their permanent business structures and rebuild them daily on their trading sites. The case centred on the notices served on the Applicants by the Respondent, asking them to change their trading process. Applicants argued that they had previously enjoyed a cordial relationship with the Respondent, and had complied with requests to move and tidy their trading structures.

Mantame AJ held:

"This court is therefore requested to determine whether the "notices" as they stand constitute a decision for the purposes of review in terms of PAJA." [Paragraph 25]

"Further, though there has been no record filed in terms of Rule 53, but only "notices" were dispatched to Applicants, determination has to be made whether there is a decision to be reviewed." [Paragraph 26]

"It is my view that the notice that has been sent by the Respondent to the Applicants to comply with the by-law qualifies as a decision within the meaning of PAJA, in that the notices is making a demand or a requirement to be complied with. In the notice itself there are obviously certain consequences if the demand by the Respondent is not met. The notices were issued and served on the Applicants after a decision was taken by the Respondent. Regard has to be made to the fact that Applicants should have been given an opportunity to reply to the decision as the Respondent will take action once they do not comply with the notice." [Paragraph 29]

"[Counsel for the Respondent] argued that the Applicants have no rights in which to base this application to have the "*notices*" to be reviewed set aside in terms of PAJA. I am unable to agree ... . Although the respondent does not challenge Applicants right to trade, but at the same time, it is threatened. Therefore Applicants correctly pointed out that their right to trade will be affected by these notices, as the said notices will introduce change in the way they are currently trading." [Paragraph 32]

"Section 22 of the Constitution guarantees Applicants a right to trade. I am not in agreement with Respondent's argument that Applicants have no rights on which to base this review application." [Paragraph 33]

"The practice of a trade, occupation or profession may be regulated by law but may not be regulated in such a way that it deprives one of such a right, as is the case in this matter. Section 33 of the Constitution, coupled with PAJA, apply to and bind the entire administration, at all levels of government. It provides a set of coherent rules and principles for the proper performance of all administrative action within its ambit, it requires the giving of reasons for administrative action: and it sets out the remedies that are available if these rules are not complied with. The principle of legality requires the exercise of administrative power to be authorised by law. In other words, a law must authorise the administrator. Administrative action must also comply with the general requirements of PAJA. ..." [Paragraph 36]

"While it is true that the right to chose a trade may be regulated by law, at least the Applicants can rely in that right in support of their application to have the "*notices*" reviewed and set aside. Their right is, as in

these proceedings, regulated by the law that Applicants are alleged to have contravened. It therefore depends on further argument, in this case there has been none, on whether a limitation is justifiable in terms of Section 36 of the Constitution." [Paragraph 37]

"In my view, this matter is an administrative action, since the "*notices*" that have been issued to the Applicants constitute a decision that is instructing and making a demand or a requirement as defined in Section 1 of PAJA. ..." [Paragraph 38]

"It is therefore the duty of the Respondent to afford the Applicants sufficient opportunity to make representation, as their decision affects the day to day running of Applicants business and their right to trade. ..." [Paragraph 39]

"The authorities that have been referred to by the Respondents counsel do not address the issue at hand, as outlined above, though they might have come closer." [Paragraph 40]

"Even if I am wrong in coming to the conclusion that the Respondent's decision adversely affected the Applicants' right to trade, nevertheless such decision affected the Applicants legitimate expectation. It is well recognised in our law that a decision affecting a party's expectation must be preceded by a fair hearing. ..." [Paragraph 41]

"In casu, the Applicants legitimate expectation is justified since First Applicant has been trading thereat for a period of some thirty years and Second Respondent has been trading thereat since 1998." [Paragraph 42]

The decision to compel the Applicants to remove and rebuild their business structures, and the notices served on the Applicants, were reviewed and set aside. The decision was overturned by the Supreme Court of Appeal in *City of Cape Town v Hendricks* (633/11) [2011] ZASCA 90 (31 May 2012).

**MABUTI MNQANTSHA AND VUYOLWETHU WITBOOI V THE STATE, UNREPORTED JUDGMENT, CASE NO: A355/2010 (3 MAY 2011)**

The Appellants were convicted by a Regional Court on charges of robbery with aggravating circumstances, unlawful possession of a firearm, unlawful possession of ammunition and assault with intent to do grievous bodily harm. The appellants were each sentenced to thirteen years direct imprisonment [although at paragraph 9 of the judgment the sentence is described as being one of eighteen years], and appealed against conviction and sentence, although the appeal against conviction was not pursued.

Mantame AJ held:

"It was common cause that the minimum sentence regime ... was applicable to the robbery counts and the act prescribed 15 years as a minimum sentence in respect of each count. The court *a quo*, correctly in my view, found that substantial and compelling circumstances existed allowing it to deviate from the prescribed minimum sentences . ..." [Paragraph 4]

Mantame AJ noted the arguments of appellants' counsel, who submitted that the court *a quo* had erred by not taking into account the cumulative effect of the sentence imposed; by failing to take into account the totality principle of the criminal behaviour; by imposing a disproportionate sentence in that the effect

of consecutive sentences negated the non-application of the minimum sentence; and by over-emphasising the interests of the community above the circumstances of the appellants.

"In my view, taking the facts of this case in its totality, this is not the matter whether the question of sentence need to be considered afresh. A sentence should only be altered if the discretion has not been judicially and properly exercised. The test is R v Mapumulo 1920 AD 56 and S v Rabie 1975 (4) SA 855 (A) was whether the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate or induces a sense of shock. This was not the case in this matter." [Paragraph 8]

"In my final analysis, the proper sentence is always the product of a balanced consideration of the personal circumstances, fairness to society and should be blended with a measure of mercy. In my view, the sentence of eighteen (18) years imprisonment for both Appellants is just in the circumstances of this matter." [Paragraph 9]

The appeal was therefore dismissed (Baartman J concurring).

## SELECTED JUDGMENTS

**SHELFPLETT 47 (PTY) LTD V MEC FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING AND ANOTHER 2012 (3) SA 441 (WCC)**

**Case heard 22 – 23 November 2011, Judgment delivered 28 February 2012**

Applicant was seeking to develop a retirement village, and submitted an application for the amendment of a Regional Structure Plan (RSP) to the MEC. The RSP designated the applicant's land in question for "recreation" use. Applicant sought to amend this to "township development" use. Although supported by the municipality, the MEC refused the application. Applicant sought to review and set aside the MEC's refusal.

Rogers AJ held:

"… [A]pplicant launched the present application wherein it sought the review and setting aside of the MEC's refusal on various grounds, including that he had based his decision on considerations that involved an impermissible intrusion into the Municipality's exclusive executive competence in respect of municipal planning. After receiving the MEC's record in terms of rule 53(l)(b) the applicant delivered supplementary papers and amended its notice of motion. In these supplementary papers the applicant asked for an order declaring that the KWP RSP was invalid because it was based upon and informed by race-based separate development planning principles. The applicant also added a further ground of review, namely that the MEC … did not have the RSP before him at the time of considering the I matter and was thus not in the position properly to have considered the application for the RSP's amendment." [Paragraph 4]

After describing the main legal instruments, Rogers AJ dealt with the alleged invalidity of the RSP:

"The RSP was prepared and approved in 1982/1983 at a time when the full panoply of apartheid legislation, including the Group Areas Act … was in force. The applicant's attack on the RSP's validity … is that it is a document rooted in the policy of apartheid. It contemplates and promotes the development of the KWP area from the perspective and to the benefit of the white group. It thus offends ss 9, 10, 21, 22, 24, 25 and 26 of the Constitution." [Paragraph 33]

"Residential segregation was described by Ngcobo J in Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another2001 (1) SA 500 (CC) … as 'the cornerstone of the apartheid policy' ... In Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others1999 (1) SA 374 (CC) … Kriegler J observed that '(t)he apartheid city, although fragmented along racial lines, integrated an urban economic logic that systemically favoured white urban areas at the cost of black urban and peri-urban areas' ... The reversal of this state of affairs is one of the visions of our constitutional democracy. Given the deeply hurtful and harmful nature of our history of racial discrimination in all spheres of life, among which divided spatial planning was prominent, there is every reason critically to examine any current law or policy which does or may contain remnants of such discrimination." [Paragraph 36]

Rogers AJ then considered the provisions of the RSP, and continued:

"… Apartheid thinking and its effects are apparent, at least explicitly, only where land use by humans is under discussion. One first encounters this in para 3.3 of ch 3 where the existing areas of human

habitation are identified by race. Paragraph 3.5 gives population statistics by race for the KWP area. The urban population of the area was said to be 20 698 in 1980, of whom 7238 were white, 11 221 coloured and 2239 black. Plettenberg Bay, the town with which this case is particularly concerned, was reported to have a population of 6610 comprising 41,1% whites, 51,7% coloureds and 7,2% blacks. Paragraph 3.6.1 referred to the popularity of the KWP area as a holiday destination. A significant proportion of dwellings occupied by white persons were said to be holiday houses … The absence of corresponding figures for coloured and black persons suggests that they were not regarded as owning holiday properties." [Paragraph 38]

"Accordingly, I cannot accept the argument for the MEC that map 11 and ch 6 themselves are largely free of offensive apartheid social planning. They are very much the product of that system. In laying down guidelines for the future spatial development of an area … the authors of the guide plan had to strike a balance between residential development and other uses. It is apparent that this is what the authors of the KWP RSP were trying to do. However, they struck this balance on assumptions regarding township development that were, as the applicant has alleged, rooted in apartheid policy." [Paragraph 45]

"I have no reason to doubt that subsequent to the repeal of the Group Areas Act applications for the amendment of the RSP have been decided without reference to racial considerations. I do not think that this is a sufficient ground for concluding that the racially based content of the RSP has disappeared. … The evidence suggests, rather, that there have merely been ad hoc applications for amendment brought by individual landowners for their own varying private purposes. … Many applicants for amendment would still be confronted, as was the applicant in this case, with demarcations for township development going back to 1983. … [T]he 1983 demarcation, a product inter alia of racial segregation, stands unless the applicant can persuade the decision-maker that it is desirable to change it. Unless the existing demarcation represents a lawful status quo arrived at on a basis that our law countenances, I do not see why a landowner should have to accept it as a valid demarcation and assume the burden of persuading the decision-maker that it should be altered. … It is the broad vision underlying the formulation of the KWP RSP in 1983 that was influenced by considerations that cannot be tolerated in our constitutional dispensation. … [N]obody in this case suggests that the RSP has ever been amended in order to give effect to a new vision in accordance with the values of the Constitution." [Paragraphs 49 - 50]

"The KWP RSP is thus in my opinion an instrument that violates the founding values of human dignity and non-racialism in s 1 of the Constitution and the fundamental rights of equality and dignity in ss 9 and 10 of the Constitution. It is not necessary to refer to case law on the subject of equality and discrimination. If past laws sanctioning racial segregation materially influenced the content of the RSP, as I find to be the case, inconsistency with the Constitution is manifest. Subject to the matters to be addressed … I consider that the RSP F should be declared invalid." [Paragraph 51]

Rogers AJ found that it was not necessary to decide whether the RSP constituted "law or conduct" under s 172(1) of the Constitution, and declined to suspend the operation of the order of invalidity. Rogers AJ acceded to the parties' request to consider the remaining grounds of review, in case the matter should be appealed, and found that, had the validity of the RSP been upheld, he would have dismissed the review application.

**INTERCAPE FERREIRA MAINLINER (PTY) LTD AND OTHERS V MINISTER OF HOME AFFAIRS AND OTHERS 2010 (5) SA 367**

**Case heard 8 - 9 June 2009, Judgment delivered 24 June 2009**

This case concerned an application brought by several companies who occupied office space nearby a refugee reception office run by the Department of Home Affairs (DoHA). The applicants contended that the use of the premises by the DoHA contravened the zoning scheme of the Municipality of Cape Town (City) and constituted common-law nuisance. The applicants contended that a number of refugees attempting to be served by the DoHA on a daily basis occupied the entire street in front of the refugee office and brought with them litter, intensive noisy transport, illegal vending activity and even crime.

Rogers AJ held:

"In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* ... 2001 ... (CC) Chaskalson P ... said that the question whether the legislation was binding on the State was one of importance and raised not only factual issues but a constitutional issue concerning the applicability of the common law presumption that the State is not bound by its own enactments except by express words or by necessary implication ... As far as I am aware the issue has not been judicially addressed at any level, though the presumption has in some instances been applied without attention to the question whether it is still applicable ..." [Paragraph 98]

"Under the Constitution a foundational value of our country is the supremacy of the Constitution and the rule of law ... The notion of a State which is not in general bound by legislation strikes one as antithetical to the rule of law. Even more anomalous is the proposition that the State in this country should, in its various manifestations under the Constitution, be assumed not to be bound by legislation merely because this was the position of the Crown developed over hundreds of years by the common law of England. ..." [Paragraph 100]

"However, as a judge of first instance I am hesitant to base my decision on a finding that the Constitution has altered the common law presumption, and I shall thus assume in the Ministers' favour that I must approach the question as laid down in *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1991 ... (A) ... Even on that basis I have come to the conclusion that the State is bound by LUPO." [Paragraph 102]

"... The purpose of town planning would, in my view, be frustrated if the State as a significant user of land were free to disregard zoning restrictions. Even if only a few pieces of land in a particular area were free to be used by the State contrary to the zoning for that area, the character of the area and the welfare of the members of the community in that area would be jeopardised and the planning objectives of the local authority (as approved by the province) frustrated." [Paragraph 105]

"...[I]n *Director of Public Prosecutions, Cape of Good Hope v Robinson* ... (CC) Yacoob J writing for a unanimous court held that the word "person" in s167(6) of the Constitution includes the State and he seemed to regard the contrary contention as involving a "narrow" interpretation of the word ..." [Paragraph 111]

"The fact that the [Urban Planning Committee (UPC)] was under a misapprehension that office use was permitted by the "Place of Assembly" definition and that such use is not in truth permitted in an industrial general zoning may mean that the UPC's decision was unlawful and substantively invalid but am I permitted so to find in these proceedings? I think not. ... [T]he principle which I extract from *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 ... (SCA) is that generally and in the interests of certainty the mere factual existence of a decision is a sufficient precondition for valid consequences unless and until the decision is set aside, the exception being those cases where coercive State powers are used against an accused or respondent on the strength of such decision. ..." [Paragraph 117]

"... I am of the view that the phrase "*as offices*" in the UPC's resolution … does not constitute an authorisation by the City for the Department to use the premises as a refugee office. ..." [Paragraph 123]

Rogers AJ also examined whether the "conditions of consent use" contained in the UPC's approval for the use of the premises by DoHA had been satisfied [Paragraph 124] and concluded that only two of the four conditions had not been met. [Paragraphs 130 and 133]

"In the context of the present case, the term "nuisance" connotes a species of delict arising from a wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference. Wrongfulness is assessed, as in other areas of our delictual law, by the criterion of objective reasonableness, where considerations of public policy are to the fore..." [Paragraph 142]

"The … Department has not alleged that the proper implementation of the Refugees Act inevitably involves the creation of a nuisance. The sacrificing of individual rights in the public interest should ordinarily be governed by statute, and in the absence of such legislation a court should not readily regard an interference with individual rights as justifiable by public welfare ... Where interference with private rights is contained in a law of general application its constitutionality can be tested and it is open to the State to attempt to justify any derogation from fundamental rights on the grounds set out in s36 of the Constitution. ... In an individual case such as the present one which arises under common law, the court is not well-placed to explore all the issues relevant to the balancing of governmental objectives and individual rights, and indeed neither side advanced the sort of evidence which could be expected if the constitutional validity of legislation were in issue." [Paragraph 166]

"However, and given the policy-based nature of the reasonableness criterion, I am willing to accept that the social utility of a respondent's conduct is one of the factors that can go into the scales, provided one guards against the temptation to use (or misuse) this factor so as to sanitise conduct which is otherwise clearly unreasonable and thereby effectively uphold a defence of statutory authority without properly examining the empowering legislation to ascertain whether the respondent has discharged the onus resting on it. … I accept that the activities of a refugee office have an important social utility, but in my view conditions … are so far in excess of what neighbours should have to bear that the social utility of the Department's conduct cannot neutralise the unreasonableness of its use of the premises. On the assumption that the Department's activities have a high social utility, the Government could be expected to apply the resources needed to conduct those activities in a way which does not materially disturb the lawful business activities of others. This might involve establishing a greater number of refugee offices, employing additional staff and locating the offices at more suitable sites." [Paragraph 167]

"In conclusion, I am satisfied that the extent and duration of the ongoing inconvenience which the applicants have been and are being made to suffer as a result of the Department's activities … are objectively unreasonable. ..." [Paragraph 168]

"The criticism of the Department implicit in my previous paragraph assumes that the Department has the resources and capacity to provide a service to asylum seekers in a way which does not infringe the rights of neighbours. The way this might conceivably be achieved is by having more refugee offices in the Cape Peninsula and/or locating the office (or offices) on larger sites .... I accept that this might require additional financial and human resources. Conceivably the Department is doing the best it can within the resources allocated to it. ... However, it is simply impossible for this court to assess matters of that kind in the current proceedings, nor is it the judicial function to tell the Department how to do its work. If the government concludes that it is not possible to comply with the country's obligations under the Refugees Act without creating conditions of the kind which now prevail … the resultant choices have to be made by the legislature or the executive, not the court. ... Legislation could notionally be passed which would curtail South Africa's obligations to asylum seekers or streamline and simplify the processes involved or which would sanction inroads on the rights of neighbouring land users. If such legislation were promulgated and challenged on constitutional grounds, that would be the occasion for the court to determine the extent of the inroads and to assess the justifiability thereof." [Paragraph 176]

"I am satisfied that I should not be swayed by the Ministers' assertion that the finding of alternative premises would take at least six months or even twelve months or more. If that is the usual period of time for procurement, the State will in this instance have to act with considerably greater alacrity. Procurement instruments ordinarily permit public bodies to depart from usual procurement policies in the public interest or on grounds of practicality." [Paragraph 185]

The order declared that the operation of the refugee office was unlawful because its use had not been approved by the Urban Planning Committee and that it constituted common-law nuisance. The DoHA was given just over three months to cease the said activities on the premises.

**STANDARD BANK OF SOUTH AFRICA V HUNKYDORY INVESTMENTS 188 (PTY) LTD AND OTHERS 2009 (4) ALL SA 448 (WCC).**

**Case heard 27 May 2009, Judgment delivered 1 June 2009**

Plaintiff sought summary judgment against the defendant on four mortgage bonds. The defendant raised an issue of the constitutionality of the National Credit Act (NCR) , which the High Court had rejected in a similar case, and for which leave to appeal had been refused by both the Supreme Court of Appeal and the Constitutional Court before this case was heard. Although the plaintiffs invited the defendants to abandon the constitutional challenge, the defendants declined to do so.

The defendant also raised the issue of whether s 228 of the Companies Act applied "to the registration of mortgage bonds over a company's main asset." [Paragraph 10]

Rogers AJ held:

"In short, to construe s228 as applying to mortgages is to extend its operation to cases where the transaction which could potentially result in the disposal of the company's assets is the borrowing of

money or the incurring of debt. But was it the legislature's intention to provide shareholders with that protection? If so, why stop at mortgages? … [A]ny transaction whereby debt is incurred equal to a greater part by value of the company's assets exposes the greater part of the company's assets to the risk of forced disposal, even if no security is given. The mortgage is not the component of the transaction which creates the risk of forced disposal; the mortgage merely determines who benefits first from the forced disposal. The mortgage has significance for the creditors, not the debtor company (which would, if it ran into financial difficulties, face a forced disposal in any event)." [Paragraph 17]

"Accordingly, and accepting for the moment that in certain contexts the words "*dispose of*" might be given a wide meaning that could include hypothecation, I see no warrant for adopting the wide meaning in the interpretation of s228(1). The meaning I favour is the one espoused by the learned authors of *Henochsberg on the Companies Act* ... It is supported by the *prima facie* view expressed by Basson AJ in *Advance Seed Company (Edms) Bpk v Marrok Plase (Edms) Bpk* 1974 ... (NC) …" [Paragraph 23]

"Finally, … the simple summons in this case alerted the defendant to s26 of the Constitution which accords to everyone the right to have access to adequate housing. The summons stated, further, that if the order for execution would allegedly infringe the defendant's rights under s26 the defendant should place information before the court in that regard. Jansen [alleged] that he and his family live in the house and that his brother and family also live there from time to time. He says that if summary judgment were to be granted he would lose his family home and his place of business." [Paragraph 29]

"While I do not wish to minimise the distress which Jansen and his family may suffer if they have to vacate the property, s26 of the Constitution enshrines a right of access to "*adequate"* housing, not a right to continue living in the house of one's choice even though one cannot afford it … In the absence of more detailed information, which the defendant has chosen not to proffer, it is quite impossible to say that the granting of summary judgment would violate anybody's constitutional rights. Furthermore, Jansen has not disclosed by what arrangement he and his family occupy a house belonging to a company of which two trusts are shareholders. If there is a valid lease with the company, a sale in execution will not necessarily result in Jansen having to vacate the dwelling. The Constitutional Court in *Jaftha v Schoeman* … set out … the sorts of considerations which would typically be relevant in assessing whether execution against immovable property would be an unjustified violation of the occupier's s26(1) rights. The defendant has not begun to make out a case with reference to these types of considerations. (I should add that in considering this question I have assumed in the defendant's favour that s26 is potentially applicable on the basis that I can look through the defendant company and through the trusts to the individuals who live in the house. Since counsel did not address this aspect in their submissions, I express no opinion on the applicability of s26 to juristic persons.)" [Paragraph 30]

"As to costs, Mr Budlender submitted that although the courts do not generally order costs against a litigant who has unsuccessfully asserted fundamental rights against the State, there is no inflexible rule to that effect. The courts will not condone the raising of dilatory constitutional challenges (see *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 … (CC) …). Mr Budlender submitted that the defendant's conduct in persisting with the constitutional challenge after the Constitutional Court had refused leave to appeal … was unreasonable. I agree and this will be reflected in my order." [Paragraph 31]

**IRVIN & JOHNSON LTD V TRAWLER & LINE FISHING UNION & OTHERS 2003 (24) ILJ 551 (LC)**

The applicant sought an order declaring that the voluntary and anonymous HIV testing it sought to offer to its employees was outside the ambit of s 7(2) of the Employment Equity Act, or alternatively that such testing was justifiable under s 7(2). The applicant would have access to the statistics resulting from the testing, but would not have access to the names of the employees who submitted themselves to testing, nor to the results of the test.

Rogers AJ held:

"Section 7 appears to contemplate that an employer may form and act on its own view as to whether medical testing for conditions other than HIV infection is justifiable, whereas the justifiability of testing for an employee's HIV status must be determined in advance by the Labour Court. … In Hoffmann v South African Airways … the Constitutional Court described people living with HIV/AIDS as "one of the most vulnerable groups in our society" ..., and the legislature's concern for this group is reflected inter alia in the more stringent requirements for HIV testing imposed by section 7(2)." [Paragraph 15]

"Section 7 forms part of a chapter dealing with the prohibition of unfair discrimination. One of the main purposes of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination ... In this context, the purpose of section 7 seems to me to be clear. An employer should not unfairly discriminate against an employee on the basis that the latter suffers from some or other medical condition. One of the ways of reducing the likelihood of such discrimination is to limit the circumstances in which an employer may ascertain the employee's medical condition through testing." [Paragraph 18]

"… [W]hen section 7(2) prohibits the "testing" of an employee to determine that employee's HIV status, what it is prohibiting is a test which is designed to enable, or which will have the effect of enabling, the employer to ascertain the HIV status of an employee. And it is clear from the language of section 7(2) itself that the testing will be prohibited only if the employer is thereby enabled to determine the HIV status of a particular employee (the expression used is "that employee's HIV status")… " [Paragraph 23]

"In the present case the testing does not have as its *purpose* to enable the applicant to ascertain the HIV status of any identifiable employees. Will this nevertheless be its *effect*? During argument I expressed to [counsel for the applicant] a concern that in certain of the job categories in the 16 to 25 age group the numbers were very small. In response, he stated that the applicant was willing to combine persons in the 16 to 35 age range in a single group for statistical purposes or alternatively to eliminate the distinction between shore-based and seagoing staff for purposes of receiving information on the age group 16 to 25. It seems to me that either of these adjustments would be sufficient to eliminate any reasonable possibility that an individual's HIV status could be deduced from the statistical information." [Paragraph 26]

"... By compulsory testing is meant, in this context, the imposition by the employer of a requirement that employees ... submit to testing on the pain of some or other sanction or disadvantage if they refuse consent. This is to be contrasted with voluntary testing, where it is entirely up to the employee to decide whether he wishes to be tested and where no disadvantage attaches to a decision by the employee not to submit to testing." [Paragraph 28]

"There is thus good reason to conclude that the legislature did not intend section 7 to apply to voluntary testing. ... Medical testing is not itself an act of discrimination. Section 7 is a preemptive measure designed to reduce the risk of discrimination on the grounds of a medical condition. Section 10, which deals with disputes concerning Chapter II of the Act, appears only to make provision for the referral to the CCMA of disputes concerning alleged unfair discrimination. … If the dispute remains unresolved it may be referred to the Labour Court ... In terms of section 50(2) this Court may order compensation or damages for unfair discrimination, but there is no jurisdiction to make such an award merely because a person has been medically tested. …" [Paragraph 33]

"I thus find that section 7 as a whole applies only to compulsory testing (in the sense described above) and does not apply to voluntary testing. Provided testing is truly voluntary, I do not believe it matters whether the initiative for testing comes from the employer or the employees. …" [Paragraph 36]

"I thus conclude that the anonymous and voluntary testing which the applicant wishes to arrange for its employees does not fall within the ambit of section 7(2) and that the applicant does not require the authority of this Court before allowing its employees to be tested." [Paragraph 42]

## SELECTED ARTICLES

### 'THE ACTION OF THE DISAPPOINTED BENEFICIARY' (1986) 103 SOUTH AFRICAN LAW JOURNAL 583

This article deals with the question of whether attorneys who prepare a will can be liable to a beneficiary of the will if, due to the attorney's negligence, the gift to the beneficiary is void. It notes two main categories of problems identified with the action of a disappointed beneficiary:

"First, there are certain perennial problems in the law of delict ... [including] issues relating to the recoverability of pure economic loss, liability for negligent advice and omissions, and the extent to which a party who is not privy to a contract may sue on the basis of an act which constitutes a breach of that contract.

Secondly, ... the loss complained of takes the form of a failure to obtain a benefit. ... [T]o establish his loss the disappointed beneficiary must prove that the testator intended to benefit him, and yet he must needs rely on something other than a valid will. ... And then there are the problems that have been thought to flow from the peculiar position of a potential beneficiary prior to the death of the testator, namely, that his interest is a mere spes successionis which ordinarily enjoys no protection from the law." [Page 584]

The article then examines case law from the United States, Canada, England, Australia, New Zealand and Germany, before concluding that "the action of the disappointed beneficiary has found favour in a number of foreign jurisdictions. The question that arises is whether this action could be accommodated in our law, where the matter is res nova." [Page 594]

The article considers and rejects the possibility that the contract between testator and attorney be treated as a stipulation alteri, before turning to consider a delictual action. It notes the importance of the decisions of the former Appellate Division in *Administrateur, Natal v Trust Bank van Afrika Bpk*, establishing that "a negligent misstatement causing pure economic loss is in principle actionable", and *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd*, confirming "that in cases of pure economic loss generally the wrongfulness of the defendant's conduct lies in the breach of a legal duty". [Page 595]. The article proceeds to analyse the elements of the action of the disappointed beneficiary, concentrating on the element of wrongfulness:

"The comparative survey ... has shown that the most controversial aspect of the disappointed beneficiary's action is the element of a duty of care ... In our law these are problems of wrongfulness, the issue being whether the attorney owes a legal duty to the potential beneficiary not negligently to frustrate his inheritance." [Page 596]

"...[I]t is important to bear in mind that wrongfulness will lie in the determination of whether an attorney owes a legal duty to the potential beneficiary not by negligence to frustrate his inheritance. If such a duty is found to exist, it will imply a correlative right enjoyed by the beneficiary, but the right need not be, in fact will not be, a subjective right. This fact is crucial to understanding why the fact that a beneficiary under an ambulatory will has a mere spes successionis is irrelevant to the question of wrongfulness. ... The right, if any, which the beneficiary has is not a vested right to an inheritance but the right not to have the prospect of an inheritance frustrated by professional negligence. Whether the infringement of this right has in fact resulted in any loss is a question of causation..." [Page 597]

The article then considers and rejects possible objections to the proposed action based on analogous case law, before considering the Appellate Division's decision in *Lillicrap* in further detail:

"In that case the defendants were civil engineers, but the court has expressly referred to cases concerning the delictual liability of attorneys as falling within the fresh ground the court was being asked to break. It is therefore probable that *Lillicrap's* case establishes in our law that an attorney's liability to his client is only in contract, and that there is no concurrent delictual action.

... [I]n [the English case of] *Ross v Caunters* the court attached some significance to ... an attorney's liability to his own client, and it was suggested that if this liability sounded only in contract, it would be odd to hold that the attorney could be under a duty in tort to a third party who was not his client. Whether this is so depends ... on the basis for excluding delictual liability to the client. If the exclusion of a delictual remedy is based solely on the ground that the relationship is already governed by contract, then the absence of a delictual remedy against the client with whom there is a contract is no reason to exclude delictual liability towards the third party with whom there is none. ..." [Page 600]

"... The reasoning of the court [the majority in *Lillicrap*] suggests that if a professional person ... provides some professional service without there being any contract with the recipient of the service ..., he is under no legal duty to act with care, at least not where the potential loss is of a purely financial nature. ... Does *Lillicrap* mean, ... as its reasoning apparently implies, that the disappointed beneficiary's action must fail because, there being no contract between him and the attorney, the attorney owes him no duty? It is submitted that it does not. The court's reasoning has been subjected to trenchant criticism. Certainly it is difficult to understand how it can be said at this stage in our legal development that a person who renders professional services to another cannot be liable to the latter in the absence of a contract. This was certainly not the attitude of Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk* nor of any of the judges in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*, ... If in *Lillicrap's* case there had in fact been no contract, and the action had been brought in delict, it is inconceivable that the action would have failed." [Page 601]

"Thus it is almost certain the ratio of *Lillicrap* will be restricted will be restricted to the proposition that where a relationship is governed by contract, a concurrent delictual action for the recovery of pure economic loss will not lie. ... This ... leaves the way open to recognise a duty in delict towards a third party whose relationship with the professional is not governed by contract. ... If the submissions made so far are correct, then the courts are free to give full consideration to the 'general criterion of reasonableness' in determining whether the attorney is under a legal duty to the beneficiary. This is primarily a matter of policy. ..." [Page 602]

The article then considered policy factors in favour of such liability, and rejected a possible objection that allowing the action would undermine the Wills Act [Pages 602 – 603].

"It is therefore submitted that, notwithstanding the caution which our courts have been enjoined to show in extending Aquilian liability to a new case, policy considerations justify the recognition of a legal duty resting on an attorney to a beneficiary to ensure, by the exercise of reasonable diligence and skill, that the beneficiary's inheritance is not frustrated by defective execution. Recognition of such a duty implies a correlative right enjoyed by a potential beneficiary not to have a potential inheritance frustrated by the attorney's negligence, ... this right is not to be confused either with the notion of a vested right to the inheritance itself or with the notion of a subjective right." [Page 604]

After examining the additional elements of delictual liability, the article concluded that "the Aquilian action can and should be extended to allow the disappointed beneficiary's claim." [Page 614]

## SELECTED JUDGMENTS

**NOBEL CREST CC V KADOMA TRADING 15 (PTY) LTD, UNREPORTED JUDGEMENT, CASE NO. 8609/2011 (WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Judgment delivered 24 April 2012**

Applicant sought the confirmation of a rule nisi, whilst respondent sought to have the rule set aside and the application dismissed. Respondent also sought a declaratory that various Sale and Franchise agreements were null and void. The applicant had been deregistered, but was restored the day before respondent gave notice demanding restitution of the contractual purchase price, due to applicant's deregistration. The issues were the validity of the two agreements entered into while the applicant was deregistered; whether the agreements were validated by the applicant's re-registration; and whether the respondent was entitled to repayment of the purchase price paid to the applicant.

Saba AJ held:

"Mr de Waal submitted that since the applicant had been deregistered at the time the two agreements in question were concluded, as a juristic person it had ceased to exist and could not conclude a contract. He contended that both the Sale and the Franchise Agreements were null and void ab initio. He submitted further that there is no indication in the Act that the re-registration of a close corporation has the effect of curing nullities committed during the non-registered phase of the Close Corporation, while it was not authorised to act within the provisions of the Act. …" [Paragraph 12]

"… In my view the facts in Sengol and Mouton … are distinguishable from those of the current case in that in both cases no agreements were entered into while the company or the close corporation was deregistered. … In terms of section 1 of the Act deregistration is defined as the cancellation of the registration of the founding statement of a close corporation. Henochsberg … states that the effect of deregistration of a corporation is that its existence as a legal person ceases." [Paragraphs 16 - 17]

"Section 26 of the Close Corporation Act makes provision for the enforcement of liabilities which were outstanding at the time the close corporation was deregistered. It is silent on the validity of the agreements concluded after deregistration but before the … registration is restored. In terms of section 73 (6) (b) of the Companies Act … of 1973 (currently section 83 of the new Companies Act…), the court ordering a restoration of a company to the register of companies is empowered to give directions which would safeguard or place the company or other persons in a position they would be if the company had not been deregistered/ Section 26 (7) does not empower the Registrar to give any directions with regard to the rights and obligations of a close corporation and/or other parties on restoration. The fact that there is no such provision does not mean the Legislature had intended to disregard the rights of innocent parties who concluded agreements in circumstances similar to … this case." [Paragraph 20]

"It is a well-known rule of construction that words used in a statute should be read in the light of their context. The best approach under these circumstances is to look at was the intention of the Legislature when it enacted section 26 … of the Act. [citation to the Appellate Division decision in Jaga v Donges N O] … In my view, the intention of the Legislature in incorporating the following wording in s 26 (7) of the Act – 'and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered', was to ensure that the obligations of a close corporation which could not be enforced because of deregistration are revived on restoration and can be enforced. Personal liability imposed on

members of the close corporation after deregistration in terms of section 26 (5) … is, in my view, another indication that the Legislature had intended to protect parties against any prejudice which could result as a result of deregistration. ” [Paragraphs 21 - 22]

“It is my considered view that the purpose and object of the deeming provision in section 26 (7) is to validate agreements concluded on behalf of a close corporation while it has been deregistered. I therefore conclude that the defect in the validity of the two agreements entered into on behalf of the applicant while it had been deregistered was cured by the later re-registration … Had that not been the case, the purpose of the deeming provision in section 26 (7) would be defeated. The argument that the two agreements are void ab initio should fail in the circumstances ” [Paragraph 23]

“In terms of clause 12… [T]he respondent could only exercise its right to cancel the agreement and claim restitution if the applicant had failed to remedy the breach within seven days after receiving a written notice calling it to do so. In casu, … the respondent failed to comply with caluse 12 … I am therefore persuaded … that the respondent is not entitled to claim full restitution in the circumstances as the contract was not validly cancelled. in the even the failure on the part of the applicant” [Paragraph 27]

The rule nisi was confirmed, and the counter-applications dismissed with costs.

**S V PHILLIPS 2012 (1) SACR 466 (WCC)**

**Case heard 20 May 2011, Judgment delivered 3 June 2011**

The appellant had pleaded guilty to driving a motor vehicle while under the influence of intoxicating liquor. He was convicted on his plea of guilty, and was sentenced to three years’ correctional supervision in terms of the Criminal Procedure Act. He appealed against his sentence.

Saba AJ found that the Magistrate had failed to give the accused’s counsel the opportunity to address the court on the contents of the probation and correctional officer’s reports before imposing sentence, and held further:

“Section 35(5) of the Constitution provides that, every person has a right to a fair trial which includes, inter alia, the right to legal representation and the right to adduce and challenge evidence. In S v Tshabalala ... Patel J ... stated the following:
’Section 35(3) of the Constitution forms the bedrock of the right to a fair trial. Inherent in that right is that criminal trial must be conducted in accordance ‘with the notions of basic fairness and justice’…” [Paragraph 8]

“...In casu Mr Mihalik did not expressly waive his client’s right to address the court on the reports of the probation officer and the correctional officer…..it can never be said that in such case the accused person had a fair hearing. This is because the right of the legal representative to address the court is not just a useless formality. Such right is so fundamental to the right to be heard fairly such that failure to accede to such a request is grossly irregular.” [Paragraph 10]

“... [I]n De Beer NO v North-Central Local Council and South-Central Local Council ... the Constitutional Court said the following about the purpose of the fair hearing component in section 34 of the

Constitution: 'A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair'" [Paragraph 14]

Saba AJ noted that the fact that the sentencing recommendations in the two reports were different would have given the appellant's counsel and opportunity to seek to persuade the court as to the appropriate sentence, and continued:

"The constitutional right of the accused to a fair hearing must be real and not illusory. The accused person has a right to a proper and effective hearing... Failure to allow Mr Mihalik an opportunity to address and or challenge what was contained in the reports before sentence was imposed was a serious irregularity which resulted in a failure of justice. It resulted in the magistrate not taking into account all the factors pertaining to sentence." [Paragraph 16]

The appeal was upheld. Saba AJ held that as the appellant had already undergone a thirteen week rehabilitation programme, he had "already served his sentence pursuant to the order of the court a quo and therefore, further punishment is unwarranted." [Paragraph 17] (Hlophe JP concurred).

**LEWIES V THE STATE, UNREPORTED JUDGMENT, CASE NO: A 659/2010 (1 APRIL 2011)**

The appellant was legally represented throughout the proceedings in the court a quo where he was convicted on two counts of fraud. He was sentenced to two years direct imprisonment, and appealed against the conviction and sentence. At the outset of the appeal, it was noted that the accused had pleaded not guilty to one main count of fraud, but that he had been convicted on two counts of fraud. Both parties agreed that this was an irregularity, and the appeal proceeded against the conviction on the main count, and against sentence.

Saba AJ held:

"This court is mindful that a trial court's findings of fact and credibility are presumed to be correct as the trial court has the advantage of seeing and hearing the witnesses and is in a far better position to determine their credibility…….in S v Hadebe 1997 (2) SACR 641 (SCA) ... the following was said:

> "in the absence of demonstrable and material misdirection by the trial court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong'" [Paragraph 12]

"The record shows that the magistrate considered the contradictions in the evidence of the state witnesses, especially in relation to the amounts given to the appellant, but found them not to be material. ..." [Paragraph 13]

Saba AJ considered Supreme Court of Appeal case law regarding discrepancies between a witnesses evidence and prior statements, and continued:

"...If one considers the level of the witnesses' education and sophistication ... their farms background, they would hardly be in a position to give the details of the amounts in the same manner as more

sophisticated witnesses. It is highly unlikely that such witnesses would also have made up all the details surrounding the payments of these amounts to the appellant. The record does not indicate any motive on their part to falsely implicate the appellant. ... Further, I am also satisfied the magistrate did not unduly descend into the arena ... According to the record, the magistrate asked questions clarify matters that were not clear from the testimony of the witnesses and that did not amount to cross-examination. From a careful perusal of the record, I am satisfied that the magistrate was justified in finding accepting the version of the State witnesses and rejecting the appellant's version as not being reasonably possibly true. The magistrate, however, was clearly wrong in convicting the appellant on two counts of fraud. ..." [Paragraph 15]

Saba AJ found that the magistrate's sentence had been lenient, and that there was no reason for interfering with it.

The magistrate's order was thus substituted with an order convicting the accused on the main count of fraud. The appeal against sentence was dismissed (Saldanha J concurred).

**MAYAMBELA AND ANOTHER V S, UNREPORTED JUDGMENT, CASE NO: A597/2010 (25 MAY 2011)**

In this case the appellants were convicted on one count of robbery with aggravating circumstances. The first appellant was sentence to eight years imprisonment and second appellant to twenty five years imprisonment. The appellants' unsuccessfully applied for leave to appeal against conviction and sentence in the court a quo. After a successful petition to the High Court, first appellant appealed against conviction and the second appellant against conviction and sentence.

Saba AJ held:

"It is trite that the evidence of an identifying witness must be approached with caution. The identifying witness evidence must not only be credible but must also be reliable…" [Paragraph 12]

"I am satisfied, having regard to all the evidence, that the appellants' versions cannot be reasonably possibly true and the state did prove its case beyond a reasonable doubt. It follows that the appeal against conviction cannot succeed." [Paragraph 16]

"With regard to sentence, the crime of robbery, where aggravating circumstances are found to be present, falls within the ambit of Part 11 of Schedule 2 of the Minimum Sentencing Legislation. ..." [Paragraph 16]

Saba AJ noted that the legislation prescribed, in such cases, a minimum sentence of 15 years in respect of a first offender and 20 years in respect of a second offender "of any such offence", and continued:

"It is not clear ... on what basis the magistrate decided to impose a sentence of twenty five years imprisonment on the second appellant. The second appellant has a list of previous convictions, i.e. three for theft, one for possession of firearms and ammunition and two for robbery. There is no indication that aggravating circumstances were found to be present on the previous convictions for robbery. The magistrate ... erred in treating the second appellant as a second offender ..." [Paragraph 17]

"This court is therefore at liberty to consider the sentence afresh. Having regard to the second appellant's circumstances, the magistrate was correct in finding that there were no compelling or

substantial circumstances justifying a deviation from a minimum sentence prescribed. ... In respect of the first appellant, I cannot find any grounds for interfering with the sentence of eight years imprisonment." [Paragraph 17]

The appeals against conviction were thus dismissed, and the second appellant's appeal against sentence upheld and substituted with a sentence of eight years imprisonment (Le Grange J concurring).

**S V KRUGER, UNREPORTED JUDGMENT, CASE NO: SS 31/ 2009 (JUDGMENT 20 FEBRUARY 2011)**

The accused was charged with attempt to commit a sexual offence, assault with intent to do grievous bodily harm, and murder.

Saba AJ held:

"The complainant is a single witness regarding what took place before and during the time she was in the toilet. Section 208 of the Criminal Procedure Act ... provides that an accused may be convicted of any offence on the single evidence of any competent witness. It goes without saying that the single witness must be credible. A trial court should, therefore, guard against inherent in accepting the evidence of a single witness. With this in mind, I evaluate the evidence tendered." (page 31 – paragraphs 10-15)

Saba AJ then considered the first count, of attempt to commit a sexual offence:

"The complainant gave a clear account of what took place at the accused's house, despite the fact that she had consumed liquor. Her version was consistent and corroborated to a large extent ... I find her to be a competent and credible witness ..." [Page 31 paragraph 20 – page 32 paragraph 5].

"From the evidence tendered, it is my respectful view that when the accused asked the complainant to take off her panty, he inspired the belief that sexual violation was going to take effect. I, therefore, find that the state has succeeded in proving the guilt of the accused on the second alternative count to count 1 and the accused is, therefore, found guilty of contravening section 5(2) of the Criminal Law Sexual Offences & Related Matters Amendment Act 32 of 2002, which is the second alternative to Count 1." [Page 34 paragraph 1 – 10]

Saba AJ then dealt with the charge of assault with intent to do grievous bodily harm.

"...It is so that the complainant's evidence is that the accused chased her with a panga. The accused did not do anything else beyond chasing the complainant. He did not inflict any injuries on the complainant ..." [Page 34 paragraph 15]

"...I am of the view that had the accused wanted to cause any grievous bodily harm on the complainant, he could have done so while they were locked in the toilet. I am, therefore, not satisfied that he had an intention to cause grievous bodily harm on the complainant when he chased her to the backyard of the house. I, therefore, find that he merely inspired the belief that an impairment of her bodily integrity was immediately going to take place. In the circumstances he is not found guilty of assault with intent to do grievous bodily harm, but guilty of assault common." [Page 35 paragraph 5 – 10].

Saba AJ turned finally to deal with the count of murder, noting that "there is no direct evidence before court. The state relies on circumstantial evidence." After citing Appellate Division authority on assessing circumstantial evidence, Saba AJ rejected the accused's evidence as "lies, improbable and irreconcilable":

"... I find that all the evidence points to the accused as the murderer. The only reasonable and possible inference this court can draw from the aforementioned facts is that it is the accused who killed the deceased ..." [Page 40 paragraph 5]

Saba AJ found that the murder was planned, and convicted the accused on the count of murder.

**S V KRUGER, UNREPORTED JUDGMENT, CASE NO: SS 31/ 2009 (SENTENCE 18 MARCH 2011-09-14)**

This is the sentencing judgment in respect of the case summarised above.

Saba AJ held:

"In determining an appropriate sentence this Court has to take into account the well-known triad ... consisting of the crime, the offender and the interests of society. These three elements must be judicially and equilaterally applied without over emphasizing one to the detriment of the other. The Court will not forget the aims of punishment which are retribution, prevention, deterrence and rehabilitation." [Pages 1 -2 paragraphs 20 – 5]

"I do not need to emphasise that the crimes the accused has been convicted of are very serious. They were committed on young and defenceless women, the accused used very dangerous weapons in executing these crimes. Both victims looked upon the accused as their father ..." [Page 6 paragraphs 1 – 5]

"Section 51 of the Criminal Law Amendment Act ... prescribes a life imprisonment if a High Court has convicted a person of an offence referred to in part 1 of schedule 2. In our case murder found to have been planned or premeditated and where the victim was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act ..., that is unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence" [Page 6, Paragraphs 10 – 15]

"Both victims ... were below 18 years during the commission of the offences. Section 28 (2) of the Constitution of the Republic of South Africa 1996 provides that a child's best interest is of paramount importance in every matter concerning a child. This right definitely has to be taken into consideration for purposes of sentence" [Page 11 – paragraph 20]

"In S v Di Blasi 1996 (1) SACR 1 (A) at page 10 e – g the following was stated:

> 'The requirements of society demand that a premeditated callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime, but also deter others from similar conduct.'" [Page 12, Paragraphs 5 – 10]

"Taking into account the abovementioned circumstances the health of the accused alone cannot serve as a substantial and compelling circumstance justifying a departure from the minimum sentence. ... [T]he aggravating factors outweigh the mitigating factors in this case. I could also not find any factors that could be relied upon as constituting substantial and compelling circumstances justifying the imposition of a lesser sentence that the life imprisonment for murder." [Page 12, paragraphs 15 -20]

The accused was thus sentenced to 3 years imprisonment on count 1 (incitement to commit a sexual offence), 12 months imprisonment on count 2 (common assault), and life imprisonment on count 3 (murder), the sentences imposed on counts 1 and 2 to run concurrently with the sentence on count 3.

## SELECTED JUDGMENTS

**S V JAGNE (A620/10) [2011] ZAWCHC 342 (8 SEPTEMBER 2011)**

**Case heard August 12, 2011, Judgment delivered September 8, 2011**

This was an appeal against sentence. The appellant had been charged with five counts of fraud. The State alleged that she misrepresented to the complainant, a director of Capcon Finance (Pty) Ltd, an entity which provides bridging finance to persons and companies, that she would be receiving funds from the United Kingdom pursuant to a sale of property which she owned there, and defrauded Capcon out of R720 000. The appellant pleaded not guilty to all the charges. She was convicted on all five counts, which were taken together for the purpose of sentence. She was sentenced to eight years' imprisonment, of which three years were suspended for five years on condition that she was not again convicted of fraud or theft committed during the period of suspension. The appellant sought leave to appeal against both the conviction and sentence. Leave to appeal against sentence only was granted. She was released on bail pending finalisation of the appeal. The grounds of appeal were that the court had erred in not granting the appellant an opportunity to place a correctional supervision report in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 before it; that it failed to adequately consider alternative sentence options other than direct imprisonment; that it over-emphasised the seriousness of the offence and the interests of the community and did not attach sufficient weight to the appellant's personal circumstances; and that it imposed a sentence which induced a sense of shock.

Schippers AJ (Binns-Ward J concurring) held:

“The essential enquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially. A mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with a sentence: it must be of such a nature, degree or seriousness that it shows that the trial court did not exercise its discretion at all or exercised it improperly or unreasonably. This approach has been affirmed by the Constitutional Court.” [Paragraph 5]

“In my view, this was not a misdirection for two reasons. First, correctional supervision under section 276(1)(h) of the Act can be imposed only for a fixed period of not more than three years; and it cannot be said that a custodial sentence in excess of three years is inappropriate in the circumstances of this case. There is precedent for the imposition of a custodial sentence on a first offender for fraud. In Sinden, the appellant, a 26 year old married woman with two young children and a first offender, pleaded guilty to and was convicted of 43 counts of fraud involving R138 000. After considering a correctional supervision report, she was sentenced by a regional magistrate to six years' imprisonment, of which two were conditionally suspended for four years. The Appellate Division confirmed the sentence, holding that the magistrate could not be faulted in finding that the interests of society outweighed the accused's personal circumstances because of the seriousness of the offence. Likewise, in De Sousa the Supreme Court of Appeal … imposed a sentence of 4'/2 years' imprisonment on a first offender on 13 counts of fraud involving some R1 million, in circumstances where the appellant had shown remorse and repaid in full the benefit she received under the fraudulent scheme. Secondly, the sentence imposed reflects a balanced approach to the factors which the Magistrate was required to take into account in the imposition of sentence, namely the seriousness of the crimes, the interests of society and the appellant's personal circumstances.” [Paragraph 7]

“As regards the nature and seriousness of the crimes, the Magistrate, rightly in my view, found that fraud is a serious crime which is highly prevalent in our society; and that the crimes were not committed on impulse, but calculated and well-planned. The appellant carefully devised a scheme in terms of which she fraudulently induced Capcon to advance her a total sum of R720 000. On 5 February 2008 she signed a cession of the proceeds of the sale of property in Constantia, which she was going to renovate and sell, in favour of Capcon. As consideration for the cession, the appellant received R200 000 on signature thereof. The deed of cession records that upon receipt of the proceeds of the sale of the Constantia property, Capcon would pay the appellant the proceeds of the sale, less the sum of R200 000 and certain other amounts. The deed also states that it was subject to proof of funds of R900 000 to be received from the UK.” [Paragraph 8]

“As to the interests of society, the Magistrate held that fraud is highly prevalent and that the appellant did not commit the crimes on impulse. She had falsified more than one document and the fact that she was a professional was an aggravating factor. In addition, she forced the State to present the evidence of Mr. Wallworth, who had to travel from London to testify (these expenses were paid by the complainant), despite the fact that the appellant throughout knew that the letters were fake and that she had crafted them. Even then, she was not frank in admitting that the forgery was to obtain further funds. Instead, she testified that she forged a letter because she wanted the complainant, as she put it, "to be comfortable" and "to give him assurance" regarding her business dealings with him. The appellant did not commit the crimes out of need. She earned a substantial income - R45 000 per month. Her husband's income is R38 000 per month. Despite this, she somehow obtained legal aid.” [Paragraph 11]

“Moreover, the amount involved is substantial and was not repaid to the complainant. The Magistrate considered that the objectives of punishment and deterrence had to take precedence. In this regard, he referred to Sadler, in which the SCA held that the notion that prison is reserved for those who commit crimes of violence and that it is not a place for people with respectable backgrounds even if their dishonesty caused substantial loss, is groundless. This dictum, the Magistrate found, was particularly apposite because it was a recurrent theme throughout the trial that the appellant is not a criminal in the true sense of the word and therefore should not be committed to prison. The Magistrate concluded that imprisonment was the only appropriate sentence. This finding cannot be faulted. Recently, the SCA has reiterated that there is a need to impose appropriate sentences with a deterrent effect, particularly in the case of fraud which is endemic in our society.” [Paragraph 12]

The appeal was dismissed.

**CITY OF CAPE TOWN V DANIELS AND OTHERS (5090/2011) [2011] ZAWCHC 340 (25 AUGUST 2011)**

**Case heard 27 July, 5 August, 12 August 2011, Judgment delivered 25 August 2011**

The applicant, a metropolitan municipality, sought an order to evict the respondents from premises in terms of section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("the Act"), or the common law. The grounds relied on were that the first respondent was in arrears with her rental in the sum of R24 501.98 as at January 2011; and that the occupants were dealing in methamphetamine (commonly known as "tik") and dagga from the property.

Schippers AJ held:

“There is no direct evidence to show that the first respondent is dealing in drugs from the property. The question then arises whether the applicant has proved its case by circumstantial evidence. It is settled law that in finding facts or making inferences in a civil case, one may, by balancing probabilities select a conclusion which is plausible or acceptable from amongst several conceivable ones, even though that conclusion is not the only reasonable one.” [Paragraph 15]

“The proved facts are these. In 2006 illegal activities were conducted on the property and the first respondent informed the applicant that this problem had been sorted out. During various operations conducted by the police between 8 July 2009 and 6 August 2010, 207 dagga sticks; 13 tik lollies; one parcel of dagga; and 500 tik packets were found on the property. These operations were carried out late at night and the early hours of the morning. On virtually every raid by the police there were persons found on the property in possession of dagga. The tik lollies and packets and dagga were found in the rooms of the property. The first respondent saw her boyfriend Mr. Anthony, handling dagga in her bedroom. The property is frequented by persons using dagga. The most plausible and acceptable inference to be drawn from these facts, in my view, is that drug dealing is taking place on the property with the knowledge and acquiescence of the first respondent.” [Paragraph 16]

“The respondents plainly are unlawful occupiers as contemplated in section 1 of the Act. The applicant contends that this application falls to be determined under section 4(6) of the Act because the respondents have been in unlawful occupation for less than six months when these proceedings were instituted. This is not correct. The applicant's case is that since the death of Mr. Daniels, no tenancy, nor consent has been given to any other person to occupy the property; and to the extent that the respondents seek to rely on consent, it was revoked in the letter of 28 January 2011 by the applicant's attorneys. Section 4(7) of the Act therefore applies and the Court must decide whether it is just and equitable to grant an eviction order, having regard to the relevant circumstances listed in that provision. In deciding this question, the court has to balance the right of ownership and the plight of occupiers in need of occupation.” [Paragraph 19]

“In my view, the reasons advanced by the applicant why an eviction order is just and equitable in the circumstances, are sound. It is notorious that drug addiction and in particular, addiction to tik, is a scourge in the Western Cape. It must be rooted out. It destroys its users and wreaks havoc in their families and society at large. The founding papers state that Ocean View is infested with drug peddling; that more and more young people are becoming dependent on drugs; that they are turning to all sorts of crimes to feed their habit; and that the drug lords are getting rich fast. Therefore the message that must be sent to drug dealers who are tenants in council houses must be clear and unequivocal: you will be evicted.” [Paragraph 21]

“In addition, it is a well-known fact that there is a dire shortage of low-cost housing in this country. There are 400 000 families on the applicant's waiting list for council houses, many of whom have been on the list for years. The founding affidavit states that very few houses become available from the applicant's housing stock because of the high demand for council houses. In these circumstances, it is right and proper, in my view, that in a case where a tenant uses a council house to conduct illegal activities, the house be given to the next person on the waiting list. Apart from this, the first respondent has no defence to the claim for arrear rental. In fact, she admits that as at January 2011, the arrears in respect of rental amounted to R24 501.98. In the circumstances, it is unconscionable that the applicant should continue to suffer a loss of revenue, ultimately borne by taxpayers.” [Paragraph 22]

The application was granted.

**YIBA AND OTHERS V AFRICAN GOSPEL CHURCH 1999 (2) SA 949 (C)**

**Case heard 5 August 1998, Judgment delivered 1 December 1998**

The appellants had all been pastors of the African Gospel Church (the respondent), a religious body in terms of its constitution. Article IXE of the respondent's constitution provided that the moderator shall be a minister and that he shall be elected every five years by the members of the annual conference. The present moderator had assumed that office after a member had received a divine revelation that he was to be moderator. He had then been 'presented' to the annual conference, who had prayed for guidance, and he thereafter became moderator. The appellants had convened a meeting which purported to be a meeting of the Cape District Conference, where a resolution was adopted in terms of which the Cape District Conference declared itself 'autonomous'. The conduct of the appellants, and in particular the purported holding of the Cape district conference at which the declaration of autonomy had been adopted, warranted disciplinary proceedings being taken against them. The appellants were suspended by the moderator in terms of art XXX of the constitution and informed that the matter would be dealt with by way of disciplinary proceedings. The appellants were summoned to appear before the executive committee and central executive committee, but they failed to attend and the disciplinary hearing was held in their absence. They were then informed that a decision had been taken by the executive committee and the central executive committee to excommunicate them and to expel them from the church. The respondent, authorised by a joint sitting of the executive committee and the central executive committee, brought an application for and was granted an interdict against the appellants, evicting the appellants from the church's property and restraining them from conducting services or administering the funds of the church. In an appeal against that decision, the grounds of appeal were (1) that the Court a quo had no jurisdiction over the second and third appellants (who were outside the area of jurisdiction of the Court); (2) that the application to the Court a quo had not been properly authorised in terms of the respondent’s constitution inasmuch as the Annual Conference was the only body empowered to institute or authorise legal proceedings on behalf of the church; (3) that the moderator had not been elected in accordance with the provisions of the constitution, and that his decision to expel the appellants was thus incompetent; (4) that the body which expelled the appellants from membership had not been authorised to do so and, moreover, that the procedural requirements for their expulsion mandated by the constitution had not been complied with.

Schippers AJ (Van Zyl and Van Deventer JJ concurring) held:

“The relief sought against the appellants is in essence an order that they be evicted from the church’s property and an interdict restraining them from conducting services or administering the funds of the church. The basis for the relief sought is that the appellants were expelled from membership mainly as a result of their actions at the purported meeting of the Cape district conference held on 3 August 1996 and the purported declaration of autonomy. The appellants concede that this Court has jurisdiction over the first, fourth and fifth appellants. Consequently it also has jurisdiction over the second and third appellants who have been joined as parties to that application. I agree … that this is not a matter where the disciplinary action taken against the appellants was based on different facts and circumstances in respect of each of them. For these reasons … the Court a quo was correct in its finding that it had jurisdiction over the second and third appellants.” [Page 957]

“The Court below found that, inasmuch as the central executive committee was empowered by art VIIIB(12) of the constitution to 'supervise and administer funds, lands and properties of the church', the power to institute legal proceedings was incidental to the express powers contained in art VIIIB(12) and was necessary for the due carrying out of the express objects of the church. The institution of proceedings was therefore properly authorised. I respectfully disagree. It is true that the central executive committee is vested with the power to supervise and administer funds, lands and properties of the church and that the institution of legal proceedings is implicit in this express power. Significantly, an identical power is reposed in the annual conference by art XIIB(4)of the constitution. However, the purported authorisation was not granted by the central executive committee of the church but by the executive committee and the central executive committee, sitting jointly. That much is clear from the extract of the minutes of the meeting of these two committees held at Mdantsane on 19 December 1996. The executive committee, which was a party to the 'authorisation' of the proceedings against the appellants, is not vested with any powers to supervise and administer funds, lands and properties of the church. I am therefore of the view that only the annual conference, the district conference (insofar as the proceedings are necessary for the government of the church as contemplated by art XI of the constitution), or the central executive committee could, in the circumstances, properly have authorised the proceedings. It follows that on this ground alone, the appeal should succeed.” [Page 958]

“The appellants were entitled to challenge their suspension or the decision to expel them on the basis that the decision to suspend them was taken by a moderator who was not properly elected in terms of the constitution or that a person not properly elected in terms of the constitution participated in the decision to expel them. The finding that, if Rev Gigaba is not the moderator of the church, then there is no moderator contrary to its constitution, begs the question. Whether or not the moderator was properly elected cannot be determined by reference to the consequences for the church if it has no moderator. In my view, the only question is whether the moderator was elected in accordance with the provisions of the constitution.” [Page 959]

“The constitution is silent on the meaning of the word 'elect' and the manner in which the moderator is to be elected. The appellants are therefore quite wrong in their contention that the moderator is required to be elected by secret ballot. The question is what is envisaged by the constitution when it requires the moderator to be elected. The word 'elect' is defined in The New Shorter Oxford English Dictionary … inter alia as follows: ‘Chosen for an office or position; . . . picked out, chosen; select, choice ... a person chosen for an office or position, esp a Bishopric. . . . Pick out, select (a person or thing), usu for a particular purpose. . . . Choose (a person) by vote for an office of position. . . .' Likewise in The Reader's Digest Universal Dictionary … it means, inter alia: '. . . to select by vote for an office, usu. by majority over other candidates . . . to choose; decide in favour of. . . . Chosen deliberately; singled out. ‘Having regard to the ordinary meaning of the word 'elect', it is clear that the moderator was picked out, selected or chosen by the annual conference to be the moderator of the church. The fact that he was not selected by vote does not detract from this in any way - there were no other candidates. It appears from the appellants' version of the facts that the majority of the members of the annual conference decided in favour of the Rev Gigaba; hence the absence of any opposition to his election. Moreover, aside from the convenient challenge to the election of the moderator when disciplinary proceedings were instituted against members of the church, there has been no serious challenge to his election. Accordingly, I am satisfied that the moderator has been properly elected in accordance with the provisions of art IXE of the constitution.” [Pages 959 - 960]

“In view of the aforegoing, the appellants' expulsion from membership was ultra vires the provisions of the constitution of the church. More specifically, the body which expelled them was not authorised to do so and the procedural requirements for their expulsion were not complied with.” [Page 964]

The appeal succeeded with costs.