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

31 MARCH 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 its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, monitoring and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for the September 2009, October 2010, April 2011 and October 2011 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. This report applies the same basic principles as our previous reports. We set out summaries of the candidate's 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 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 candidates' 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 the Supreme Court of Appeal and Judge Presidents' 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 OCTOBER 2011 INTERVIEWS

12. We briefly recap our position regarding the considerations which, we believe, should inform the interview process. As we have previously noted, we are of the view that an "ideal South African judge" is one who can be said to be a fit and proper, and appropriately qualified, person.
13. We have suggested that a fit and proper candidate is one who shows a commitment to constitutional values; independence of mind; a disposition to act fairly and impartially; high standards of ethics and honesty; and a judicial temperament. We have further suggested that whether a candidate is appropriately qualified may be assessed with regard to factors such as formal qualifications, experience, and potential.
14. We also note that the JSC is required by the Constitution to consider the need for the judiciary to reflect broadly both the racial and gender composition of the South African population.

15. We have on previous occasions discussed in some detail our thoughts on the questioning of candidates by the JSC.[2] We do not intend to re-canvass all these issues here, but we do wish to take the opportunity to comment on some matters that arose during the interviews in October 2011.

Transformation

16. We have been encouraged, as have other commentators,[3] by some of the recent developments in the JSC's interviews in relation to transformation. We have previously argued that, whilst racial and gender composition of the judiciary is important in and of itself, there is a deeper value to transformation, in that a diverse bench will bring a wide range of insights to its work, which can be expected to improve the quality of decision making by ensuring that a wide variety of perspectives are brought to bear on the judicial function. Indications from the October 2011 interviews, as well as from the Chief Justice's address at the first annual Advocates for Transformation lecture, suggest that the JSC is alive to the importance of a broad understanding of transformation.
17. There was a discernible pattern of questions being asked about candidates briefing patterns, and whether and to what extent they had briefed junior black and female advocates to ensure that such advocates gained access to lucrative areas of practice that may otherwise have remained closed to them.
18. We recognise that tailoring questions to address adequately the complex issues around transformation is a difficult task. We wish to make a couple of observations regarding this line of questioning.
19. Although this is not the place to debate the issue fully, it might be questioned whether this questioning will really show what it seeks to. One would not, for instance, want to see a situation where a senior counsel briefs black or female juniors to pay lip service to transformational principles, without allowing such junior counsel to make meaningful contributions to a case. Or, the senior may be prepared to work with candidates of a different race and yet hold attitudes about gender (or any other constitutionally-protected subject) which are hard to reconcile with the Constitution.
20. Therefore, we suggest that questioning about briefing patterns ought not to be the be-all and end-all of a candidate's attitude to transformation. It ought to be considered alongside other aspects of their track record (including, as discussed below, the judgments they have written).
21. Assuming that the questioning is a reliable indicator of attitudes to transformation, we submit that it needs to be asked consistently of all candidates – which was not always the case in the October 2011 interviews.

[2] See our reports at http://www.dgru.uct.ac.za/research/researchreports/

[3] See Serjeant at the Bar, "JSC begins to grasp the meaning of a non-racial judiciary" *Mail & Guardian*, 29 October 2011. Available at http://mg.co.za/article/2011-10-29-jsc-begins-to-grasp-the-meaning-of-a-nonracial-judiciary/

The JSC's September 2010 criteria

22. Allowing for appropriate flexibility and a degree of latitude, questioning ought to be directed towards the criteria and should be reasonably clearly articulated as such. This will ensure that a reasonable observer will understand how the interview relates to the criteria.
23. Not all of the criteria appear to have been invoked by the questions asked during the October 2011 interviews. Of course, the interviews are not the only aspect of the JSC's process and we do not know the extent to which the publically announced criteria play a role in deliberations. But if no questions are asked about criteria which ostensibly inform the appointments process, the credibility of the interviewing process may be negatively affected.
24. We therefore encourage the JSC to continue to work on updating and giving content to the criteria for recommending appointments. This will have clear benefits for the openness, transparency and legitimacy of the appointments process.

Deference and the Separation of Powers

25. Another clear trend in questioning that was evident in the October 2011 interviews was for candidates to be asked about their understanding of the separation of powers and the importance of judicial deference and restraint.
26. In considering these issues, it is impossible not to be mindful of the political environment, where comments by high profile members of government and the ruling party about the appropriate role of the courts have received much attention. Similarly, concerns have been raised about the pending review of the jurisprudence of the Constitutional Court and Supreme Court of Appeal, with some commentators suggesting that this may have a negative impact on judicial independence.
27. We will not attempt to address these issues here. We will merely comment on a couple of aspects that relate to the JSC interview process.
28. It cannot be denied that questions as to a candidate's understanding of principles of deference, the separation of powers and judicial independence are appropriate, and indeed fundamental, subject matter for questions to assess the suitability of a candidate for judicial office. These issues go to understanding a candidate's judicial philosophy, and are important indicators of a candidate's understanding of the constitutional dispensation within which the judiciary operates.
29. Having said this, this line of questioning should not be seen as a means to overlook candidates who demonstrate independent-mindedness, any more than it should be used to appoint overly activist judges with no regard for the constitutional role of other branches of government.
30. It is worth recalling certain provisions of the Constitution. Section 2 provides that the Constitution is the supreme law of the country, and that any law or conduct inconsistent with it is invalid. The obligations imposed by the Constitution must be fulfilled. Section 172(1)(a) provides that, when deciding a constitutional matter, a court must declare any law or conduct that is inconsistent with the Constitution invalid, to the extent of its inconsistency.

31. The courts thus do not have a discretion as to whether or not to defer to other branches of government, if legislation or actions are found to be unconstitutional. They are mandated, by the supreme law of the country, to make a finding of constitutional invalidity, and it is, therefore, imperative that candidates are appointed with the aptitude and intellectual resilience required to bestow his or her judicial role with the degree of independence necessary.
32. Of course, issues of deference do arise in determining whether a law or conduct is constitutionally invalid, and exploring candidates' understanding of how such a determination is to be made is a relevant and important line of questioning. But candidates who assert the role of the courts which the Constitution demands ought not to be disadvantaged for doing so.

Discussion of candidates' judgments

33. Our impression of the October 2011 interviews in general was that there was a surprising lack of discussion of judgments that candidates had written. We believe that this should be a central focus of the JSC's questioning, as it should ensure that the JSC will explore core judicial skills. It is also important because candidates' judgments may reveal their attitudes on other issues and values which the JSC is anxious to examine. We suggest that discussing aspects of judgments to explore candidates' attitudes could be a more effective interviewing technique than asking broad questions that elicit vague and general assertions of principle.
34. In conclusion, we wish to re-emphasise the importance of the JSC interviewing candidates with questioning that is principled, consistent, and enables the JSC to assess whether candidates posses the attributes for appointment required by the Constitution. The JSC's role in this regard is of fundamental importance to the scheme of our constitutional democracy, and hence it is vital that the JSC approach its task with the necessary information at its disposal, and a shared understanding of what it is trying to achieve.

ACKNOWLEDGMENTS

35. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was carried out by Chris Oxtoby and Tabeth Masengu, researcher officers of the DGRU.

DGRU

31 March 2012

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SELECTED JUDGMENTS

EXDEV (PTY) LTD AND ANOTHER V PEKUDEI INVESTMENTS (PTY) LTD 2011 (2) SA 282 (SCA)

Case heard 16 November 2010, Judgment delivered 1 December 2010

An appeal against a judgment by a member of the JSC (Ntsebeza AJ), relating to a deed of sale in terms of the Alienation of Land Act, was dismissed by the SCA (Leach JA, Heher and Cachalia JJA concurring). At the conclusion of the majority judgment, remarks were made about "at first blush, wholly unacceptable" delays in delivering the judgment by the court *a quo* [paragraphs 23 – 25].

R Pillay AJA and Ebrahim AJA, whilst concurring with the order of the majority, wrote separate judgments dealing with the question of delay. Ebrahim AJA held:

"On the matter extraneous to the merits, that of 'undue delays that have afflicted the progress of this matter (d)espite the simplicity of the issues raised', while I agree, in general, that a delay in handing down a judgment expeditiously is likely to create in the minds of litigants, and the public at large, the perception of a dereliction of duty and responsibility on the part of the judge concerned, whomever he or she happens to be, I am firmly of the view that, in the present matter, such criticism is unwarranted. The simple state of affairs in this case is that we do not have before us an explanation for the delay from the judge concerned, so that, in the absence thereof, a critical exposé in the judgment, of a failure to act timeously, leads unnecessarily and unfairly to the creation of the public mindset already referred to, concerning the judge seized with this matter in the court a quo. I think such criticism is undue, and should not be encouraged. To that end, I dissociate myself from the critical comments in paras [23], [24] and [25] of the judgment." [Paragraph 30]

S V NDUNA 2011 (1) SACR 115 (SCA)

Case heard 13 September 2010, Judgment delivered 30 September 2010.

This appeal concerned the probative value of fingerprint evidence which had formed the basis of appellant's conviction on two counts of armed robbery.

Ebrahim AJA (Lewis and Boselio JJA concurring) held:

"Counsel for the appellant argued that the inference of guilt was not the only possible inference to be drawn from the circumstantial evidence presented in the case ... The enquiry before us then is whether the court a quo, on the evidence before it, could reasonably have come to the conclusion that it was indeed the appellant who perpetrated the robberies in question. This involves a determination of whether the two cardinal rules of logic in *Blom* had been invoked: first, the inference that the appellant committed the robberies must be consistent with all the proved facts. If it is not, that inference cannot be drawn. Second, the proved facts should be such that they exclude every reasonable inference from them, save that it was the appellant who was the perpetrator." [Paragraph 14]

"The first leg of the enquiry is clearly met: the inference that the appellant was one of the robbers is consistent with the fingerprint evidence. The answer to the second depends upon the probative value to be accorded to the appellant's thumb and palm prints found on the Venture and the Isuzu bakkie. ..." [Paragraph 15]

"The thrust of counsel's argument was threefold. First, eight years had passed between the date of the first robbery and the date of the appellant's testimony. The lack of explanation for the presence of his thumb print on the Venture was equally consonant with an innocent explanation as with a guilty one, as was his explanation for his palm print on the Isuzu bakkie. Second, because the State had not led any evidence during the trial as to the apparent age of the appellant's thumb print and palm print ... the probative value of the fingerprint evidence had been diminished. Third, the High Court had erred in using the evidence led on the one count in order to prove the other count ..." [Paragraph 16]

"It is settled law that, whilst similar fact evidence is admissible to prove the identity of an accused person as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself. ...
However, the application of the rule is not to be confused with the situation where the rule is invoked to establish the cogency of the evidence of a systematic course of wrongful conduct, in order to render it more probable that the offender committed each of the offences ... The appellant's argument, if it were to be accepted, would be tantamount to excluding evidence of the modus operandi of the appellant, merely because he had been charged with more than one count of robbery. ... [citation to *S v Gokool* 1965 (3) SA 461 (N)] The ultimate test is ... the relevance of such similar fact evidence as the foundation for its admissibility against the accused ..." [Paragraphs 17 – 18]

"Thus evidence of a modus operandi can be used to prove the commission of an offence, provided the relevance of that evidence has been established. In my view the evidence relating to the modus operandi on the two counts, supported by the fingerprint evidence, is relevant and admissible. Each offence has been established independently, but the cumulative effect of evidence of similar conduct on both counts must weigh heavily against the appellant." [Paragraph 19]

"It is highly unlikely that two robberies, committed in the same fashion ... where the fingerprints of one are found on the different vehicles, would be entirely unconnected. Even though so far apart in time, the coincidence, especially when regard is had to the fact that the fingerprints of the appellant were lifted in each case from a vehicle proven to have been involved in each robbery, is explicable only on the basis that the appellant participated in each robbery." [Paragraph 21]

The appeal was dismissed.

DE BEERS CONSOLIDATED MINES V THE REGIONAL MANAGER, MINERAL REGULATION FREE STATE REGION: DEPARTMENT OF MINERALS AND ENERGY AND OTHERS [2009] JOL 23667 (O)

Case heard 17 March 2008; Judgment delivered 15 May 2008.

Applicant sought judicial review of a decision to refuse to convert a prospecting permit granted under the Minerals Act, which it required to enable it to continue its prospecting operations lawfully under the Mineral & Petroleum Resources Development Act ("MPRDA"). Applicant further sought a declaratory order that its "old order" prospecting rights remained in force for 2 years following the commencement of the MPRDA.

"Moreover PAJA gives effect to section 33 of the Constitution. ... In a codification of the constitutional right ... PAJA cannot be found to have been excluded by the MPRDA, unless such exclusion was expressly authorised in a constitutionally permissible manner. ... Under the respondents' interpretation of section 96(3) and (4) of the MPRDA section 96(4) excludes the competence of the court to grant exemption and, in such cases, the power of the court to hear the review application. Such an interpretation should be avoided if at all possible; indeed there is a long-standing presumption against the ousting of the jurisdiction of courts of law." (page 26).

The decision to refuse to convert the applicant's old order prospecting permit was thus reviewed and set aside (Cillié J concurring).

VAN SCHALKWYK & OTHERS V MKIVA N.O. & OTHERS (2009) 30 ILJ 1266 (O)

Applicants, employees of the Free State Provincial Government, had their salaries upgraded during a restructuring process. The increases were approved and made retroactive by the then-MEC for Finance (Dingane). A subsequent audit revealed that the retrospective payments of the salary increases contravened Public Service Regulations, and the Department took steps to reverse and reclaim the retrospective payments. Applicants sought to interdict the department from deducting the monies wrongly paid to them.

"It is trite that a public authority taking administrative action must be authorized to do so. If there is no authorization for the action in some or other way the action taken will be unlawful. ... Consequently, not only must a functionary exercise powers/take administrative action which he is expressly authorized to take but he must also only take such action within the limits provided for in that source of authority. ... Unfortunately ... in authorizing the increases to operate with retrospective effect, he [Dingane] embarked on a course falling outside the boundaries prescribed by the said regulations and his actions were clearly unlawful and invalid and fell foul of the constitutional requirement of just administrative action ..." [Pages 1271 – 1272].

"As authority for the proposition that Dingane's invalid administrative act could only be set aside by a court of law in proceedings for judicial review as he was functus officio, Mr *Daffue* , who appeared for the applicants, referred me to the decision in *Oudekraal Estate (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA). It is necessary to give a synopsis of the facts of this case in order that they may be clearly distinguished from those of the present case. The issue in the *Oudekraal* case was whether and in what circumstances an unlawful administrative act might simply be ignored and on what basis the law might give recognition to such an act. ... In deciding that his approval was unlawful and invalid at the outset for reasons not necessary to set out here, the court held that until such approval, and any consequences flowing therefrom, was set aside by court in proceedings for judicial review, it existed in fact and it had legally valid consequences which could not simply be overlooked and ignored. These would continue to operate as long as the unlawful and invalid act was not set aside." [Pages 1272-1273]

"In the present case there can be no debate about the fact that Dingane on making the salary increases retrospective in operation became functus officio. ... The issue at hand is therefore a completely different one [to the *Oudekraal* case]. It is whether the department was entitled to use a lawful measure in the form of enacted legislation to recover monies incorrectly paid as a result of the functionary's unlawful and invalid act. This legislation was enacted to deal with precisely the kind of invalid administrative action

complained of. ... One can only imagine the chaos which would result in the every day discharge of duties in state departments where quite naturally errors can and do occur ... if on each occasion the error could only be rectified by a court of law in review proceedings. ... The applicants have clearly misconceived the decision in *Oudekraal* as authority for the proposition that every invalid administrative act can only be set aside in proceedings for judicial review. That is certainly not the ratio of that decision." [Pages 1273-1274]

The application was dismissed.

LAMBERTUS HENDRIK NIENABER V MINISTER OF SAFTEY AND SECURITY, CASE NO. 5347/2005, 27 NOVEMBER 2008 (UNREPORTED)

Case heard 20 November 2008, Judgment delivered 27 November 2008.

Plaintiff sued the defendant for damages for unlawful arrest and unlawful detention (a claim for malicious prosecution was abandoned during argument). Plaintiff had been accused of abduction and rape by a 15 year old girl, but the charges against him were subsequently withdrawn.

"[T]he right to and protection of every citizen's individual liberty is so fundamental that the police should not likely arrest without a warrant. The requirement of wrongfulness as an element of unlawfulness must be infused with the protections guaranteed by the Bill of Rights."

"However, in doing so, one must consider the conspectus of the evidence as a whole in each case in deciding the crucial question as to whether the conduct complained of gives rise to reasonable suspicion in the mind of the arresting officer that the arrestee has committed an offence."

"Section 40 of the Criminal Procedure Act ... remains on the statute book. Until it has been amended to bring it in line with the reasoning in support of protecting individual liberty at the expense of an arrest forthwith where the arresting officer believes on reasonable grounds that a schedule 1 offence has been committed, such an arrest will be lawful." [Paragraph 13].

The claim was dismissed.

S v RADEBE 2006 (2) SACR 604 (O)

Case heard 8 May 2006, Judgment delivered 29 June 2006.

The appellant had been convicted by the Regional Court of culpable homicide and violations of the Arms and Ammunition and General Law Amendment Acts for possession of a firearm and ammunition. On appeal, the appellant conceded that there was no merit in the appeal against the convictions of culpable homicide and under the Arms and Ammunition Act; and the State conceded that the conviction under the General Law Amendment Act was incompetent, as it duplicated the convictions under the Arms and Ammunition Act.

"The substantial issue in this appeal is whether such a duplication has occurred with regard to counts 2, 3 and 4. The rule against a duplication of convictions is a salutary one and it is the court's duty to guard

against such duplication where an accused person is charged with multiple charges supported by the same facts." [Paragraph 3]

"The rule against a duplication of convictions is a rule primarily aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused person in the form of double jeopardy, that is, being convicted and punished twice for the same offence when in fact he or she has only committed one offence." [Paragraph 5]

Ebrahim J found that there had been no improper duplication of convictions, and that the state had proved its case on the charge of contravening the General Law Amendment Act beyond a reasonable doubt. Ebrahim J reduced the sentence imposed as the regional court had misdirected itself in imposing a minimum sentence where none was applicable.

PHENITHI V MINISTER OF EDUCATION & OTHERS (2005) 26 ILJ 1231 (O)

The case dealt with a constitutional review of a deeming provision in the Employment of Educators Act. Applicant sought to review respondents' decision to dismiss her under the Act, arguing that her rights to fair labour practice and lawful and fair administrative action had been infringed.

Ebrahim J held:

"The provisions of s 14(1) and 14(2) give the employer a discretion in each case whether or not to hold a hearing. ... The fact that the employer chooses not to avail himself of the discretion in favour of the employee cannot be used to impute the statute with constitutional invalidity. The statute itself makes provision for the rights of the employee to be respected by way of the exercise of a discretion. The question then becomes whether or not the employer exercised that discretion in a manner that is unconstitutional. Whether the exercise of the discretion is obligatory or not, in my view does not alter the position that the statute does not blatantly ignore the right of the employee to be heard. Where the exercise of a discretion has implications to the rights of the employee, it is in any event difficult to regard the exercise of that discretion as optional.""

"While the statute may promote selectivity, in my view it cannot for that reason alone be struck down as being unconstitutional as ignoring the rights to fair labour practice and administrative justice. It may be that in the circumstances of the particular case the exercise of the discretion on the part of the employer not to grant a hearing amounts to an unfair labour practice or unjust administrative action, but that would only be an incorrect exercise of the discretion afforded the employer in terms of the statute. It does not in my view taint the constitutional validity of the statute itself." [Paragraph 4]

"To my mind the applicant's conduct smacks of a blatant disregard of her responsibilities. Such responsibilities involving as they did, the education of young children must be taken extremely seriously and her absence caused a major disruption in the life of the young learners in her charge. I find that it was in the circumstances quite natural for the respondents to form the belief and the opinion that she had deserted her post and that in the circumstances no further invitation was necessary to the applicant to make representations prior to being dismissed. Moreover, in these circumstances I can find no reason why the first respondent should repeat the invitation to make representations, make any further attempt to establish the whereabouts of the applicant or exercise his discretion in terms of s 14(1) (a) in favour of the applicant" [Paragraph 5]

"In the present circumstances I find established on the probabilities, that the applicant deliberately absented herself from duty with the intention not to return and for reasons best known to herself changed her mind thereafter. I am of the view that the applicant deserted her post and I find therefore that her dismissal was substantively fair" [Paragraph 6]

"The correct approach seems to be that where adequate warning is given of the consequences of extended absence without an explanation, the employer is relieved of the obligation to hold a hearing" [Paragraph 7]

Ebrahim J thus dismissed the application. The decision was upheld by the SCA on appeal: Phenithi v Minister of Education & Others (2006) 27 ILJ 477 (SCA)

SELECTED JUDGMENTS

NETSHITUKA V NETSHITUKA AND OTHERS 2011 (5) SA 453 (SCA)

Case heard 10 May 2011, Judgment delivered 20 July 2011

This case dealt with the validity of a civil marriage which had been entered into while a spouse was a partner in an existing customary union. The appellant had sought an order declaring the marriage between the first respondent and the late Mr Netshituka null and void ab initio, and that the last will and testament of Mr Netshituka was invalid. The first applicant (respondent) averred that she had been married to Mr Netshituka by customary rites. It appeared that Mr Netshituka had been married to three other women, including one Martha, by customary rites. None of these marriages were registered with the Department of Home Affairs.

Petse AJA, for a unanimous court (Mpati P, Bosielo, Tshiqi and Seriti JJA concurring) held:

"It was ... contended on [the first respondent's] behalf that when she married the deceased ... the latter was not a partner 'to a valid existing customary union' in that any customary union to which the deceased may previously have been a partner 'was terminated by force of law ... when he married Martha by civil rites'. ..." [Paragraph 7]

"A number of academic writers and commentators hold the view that the effect of Nkambula [the SCA decision in Nkambula v Linda 1951 (1) SA 377 (A)] was that where one partner in a customary union contracted a civil marriage with someone else other than his or her partner in the union the civil marriage automatically terminated the customary union. ..." [Paragraph 10]

"It appears to have been common cause before the court below that in the instant matter the customary law wives of the deceased never left him after he had married Martha by civil rites, but continued with their roles as his customary law wives. The question to be answered in these circumstances is: What was the status of the relationship between the deceased and his 'deserted' customary law wives after his civil marriage to Martha was terminated by divorce?" [Paragraph 11]

"In customary law, where a husband has deserted his wife, his offence is not irreparable and does not give her the right to refuse to return to him when he comes to phuthuma [Footnote: "The husband is obliged to phutuma (fetch) his wife who has left him, whether through his fault or hers, unless he intends to abandon her"]her. ... But on the authority of Nkambula a customary law wife who has left her husband as a result of his having contracted a civil marriage with another woman would be entitled to refuse to return to him when he goes to phuthuma her. She would be entitled to assert that he had terminated the union between them. It seems to me, however, that nothing would prevent her from returning to him if she were prepared to do so. ..." [Paragraph 12]

"In the present matter the deceased did not have to phuthuma his customary law wives because they never left him after he had married Martha. His continued cohabitation with them after the divorce was clear evidence of a husband who had reconciled with his 'previously deserted' wives. And in his last will and testament ... the deceased refers to Tshinakaho, Diana and the first respondent as his first, second and third wives respectively. What is important ... is the intention of the parties, which can be inferred from their conduct of simply continuing with their relationships and roles as partners in customary unions with the deceased after the divorce. Their conduct clearly indicated that to the extent that the

deceased's civil marriage to Martha may have terminated his unions with his customary law wives, those unions were revived after the divorce." [Paragraph 13]

Petse AJA then found that there was no evidence that the deceased had been mentally incapacitated when he attested to his will. The appeal was upheld in part, with the court a quo's decision to reject the application to declare the marriage between the deceased and the first respondent invalid being overturned.

EEDENPROP (PTY) LTD V KOUGA MUNICIPALITY [2011] 4 ALL SA 121 (SCA)

This case dealt with the validity and enforceability of an agreement concluded between the appellant and the Jeffreys Bay Transitional Local Council, the predecessor-in-title of the respondent. In terms of the agreement, the appellant had undertaken to develop a retirement village. An application for re-zoning and subdivision was approved by the Western District Council, subject to conditions. The sub-divided portion of land was incorporated into the area of jurisdiction under the control of the respondent. As a result, ownership of the infrastructure built on the land by the appellant became vested in the respondent, as per the agreement.

Respondent began making payment to the appellant in terms of a formula established in the agreement, before questioning the lawfulness of the payments on the basis that the agreement was unenforceable. The respondent relied on three grounds: that the appellant had not complied with the conditions of subdivision and re-zoning; that the formula in the agreement effectively meant that the appellant was receiving a share in taxes collected by an organ of State; and that there had been non-compliance with provisions of Cape Municipal Ordinance 20 of 1974.

Petse AJA, for a unanimous court (Cloete, Heher, Maya and Snyders JJA concurring), held that:

"[Regarding non-compliance with the conditions] There is a potential conflict between Clause 1.5 and Chapter VII on the one hand and Chapter VI on the other: The first two provisions contemplate an absolute obligation on the appellant as contemplated in section 42(2) of LUPO to pay for the cost of services, but the latter obliges the respondent to pay for this. The obvious way to resolve the potential conflict is to interpret the former provisions as imposing a temporary obligation on the appellant to pay for the costs of the services in full and, once this has been completed, to the satisfaction of the respondent, an obligation on the respondent to reimburse the appellant according to the provisions of Chapter VI." [Paragraph 12]

"The respondent's counsel submitted that such an interpretation would require a waiver or an amendment by the respondent of conditions imposed by the Western District Council, which would be void for want of compliance with section 42(3) and (4) of LUPO in as much as there had been no publication of an intention to waive the condition ... The argument is without merit. In terms of subsection (3), before a council may waive or amend a condition ... it must consider objections in terms of subsection (4) and consult with the owner of the land concerned. The owner ... was the appellant. The respondent obviously consulted with him. And there was no other person who had any interest in land as contemplated in subsection (4). There was therefore no necessity to advertise." [Paragraph 13]

"[Regarding the share in local government taxes] It was ... contended that the real effect of the agreement is that the respondent's power to determine rates payable by the owners within the

development is compromised, because a large proportion of such rates is allocated to the appellant thereby advancing the appellant's commercial interests.

This argument cannot be upheld. That it is the respondent alone that determines the rates and collects them (albeit through the agency of the Homeowners Association), is beyond doubt. The fact that the respondent employs funds generated through rates, which after all are a major source of revenue for a municipality, does not, in my view, detract from this. The agreement benefits both parties. ..." [Paragraphs 14 – 15]

"[Regarding the applicability of the Ordinance] ... [S]ection 172(1) enjoins a (municipal) council to invite tenders by notice published in the press before entering into any contract which is for the execution of any work for the supply or sale of any goods or material to the council which exceeds or is likely to exceed an amount as determined from time to time ... The court *a quo* found that these legislative prescripts were not complied with and consequently held that such non-compliance rendered the agreement unlawful and of no force and effect. In reaching this conclusion it relied on a host of judgments of, *inter alia*, this court. ..." [Paragraph 17]

"To my mind, the court *a quo* was incorrect in finding that section 172(1) was relevant to the determination of the dispute .... The terms of Chapter VI of the agreement clearly fell outside the purview of section 172 as they were neither "for the execution of any work" nor "for the supply or sale of any goods or materials to the council." ... The court *a quo* also found that the respondent was obliged to comply with section 173(4) of the Municipal Ordinance ... This conclusion by the court *a quo* was misconceived because the reference in section 173(4) to a "contract" is, as was submitted by counsel for the appellant, a reference to contracts with other local authorities or with any other "person for the exercise or performance ... of any power, duty or function whatsoever which the council is from time to time by law authorised or required to exercise or perform." The contract between the parties was not such a contract ..." [Paragraphs 18 – 19]

The appeal was upheld with costs, and the agreement declared to be of full force and effect.

S V ROMER 2011 (2) SACR 153 (SCA)

Case heard 25 February 2011, Judgement delivered 30 March 2011

The respondent had been convicted on one count of murder and two of attempted murder by the High Court. The High Court found that he was in a state of diminished responsibility, though not acting as an automaton, at the time of the offences. The respondent was sentenced to 10 years imprisonment, wholly suspended for five years, and to three years correctional supervision. The State appealed against the sentence.

After rejecting an application by the respondent to adduce further evidence, Petse AJA (Lewis and Bosielo JJA concurring) held:

"Romer's bizarre conduct on the day when he shot three strangers, randomly and at different places, was attributed by his expert witnesses to an intake of anti-depressant medication that had been prescribed for him by various doctors (including psychiatrists), as well as over-the-counter medication. He had

consulted doctors about his emotional upheaval triggered by the disintegration of his marriage. ..." [Paragraph 14]

"... [T]he High Court found that, although Romer had suffered from diminished responsibility, he had not acted in a state of sane automatism when shooting. The court accepted the evidence ... that Romer had been able to direct his actions: he had driven some distance, in peak traffic, in unfamiliar areas and through traffic circles and lights; he had, for the most part, obeyed traffic rules; he had deliberately tried to evade police vehicles, driving at speed to escape them. Accordingly, he was not acting as an automaton when he shot his three victims." [Paragraph 18]

"But the court, in imposing sentence, did place great emphasis on Romer's condition, induced by drugs. Of course, Romer's conduct and its consequences are horrific. ..." [Paragraph 19]

Petse AJA found that the approach of the court *a quo* in considering the factors which would inform a suitable sentence was "unassailable", and continued:

"... [H]ad I sat as the court of first instance, I would in all probability have imposed a direct custodial sentence with a portion suspended on suitable conditions, given that Romer acted with diminished responsibility. But we are a court of appeal.
It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal have been shown to exist. ..." [Paragraphs 21 – 22]

"... [T]he common thread running through [the various grounds of appeal relied on by the State] is that the trial court over-emphasised the personal circumstances of Romer at the expense of the gravity of the crimes committed, the interests of society and the interests of the victims." [Paragraph 24]

"... [T]he term of 10 years' imprisonment, albeit wholly suspended, is in itself punishment.
More than a decade ago this court recognised the utility of a sentence of correctional supervision. In *S v R* Kriegler AJA was at pains to point out that the statutory dispensation introduced by s 276(1)*(h)* of the Criminal Procedure Act (viz correctional supervision) was intended to distinguish between two types of offender, namely those who ought to be removed from society and imprisoned, and those who, although deserving of punishment, should not be removed from society. ..." [Paragraphs 26 - 27]

"I am thus not persuaded that the court a quo committed any misdirection in imposing the sentence it did, or that such sentence is disturbingly inappropriate. I am satisfied, after much anxious consideration, that deterrence of Romer or others is not an overriding consideration, regard being had to 'the concatenation of circumstances' which were of a highly unusual, if not bizarre, nature and which are unlikely to recur." [Paragraph 31]

The appeal was dismissed.

MAMLAMBO CONSTRUCTION CC V PORT ST JOHNS MUNICIPALITY & OTHERS [2010] JOL 26063 (ECM)
Case heard 29 January 2010, Judgment delivered 24 June 2010

This case the validity of a tender awarded by the first respondent to the second respondent. Applicant, who had submitted a tender, argued that there was no logical basis for the award, and that on the available information the tender should have been awarded to the applicant. Applicant argued that the award of the tender to the second respondent was not explicable on any rational basis, other than that the decision had been made arbitrarily and capriciously.

Petse ADJP considered an argument that the applicant had failed to exhaust internal remedies, and after considering academic authority and Supreme Court of Appeal case law, held:

"I have to say that on my reading and understanding of the *ratio decidendi* of the *Nichol* judgment [*Nichol & another v Registrar of Pension Funds & others* [2006] 1 All SA 589 (SCA)] it offers no support that is tenable for the proposition advanced ... All it says is that if the right to appeal in terms of the appellate regime established in terms of section 62(1) of the Municipal Act exists, the aggrieved party is ordinarily obliged to exhaust his or her internal remedies before approaching the court save when exceptional circumstances exist justifying a direct resort to the courts of the land. ... If there exists no right to appeal because such right has ... been extinguished by lapse of time ... it has for whatever reason not been asserted within the period stipulated in terms of the relevant Act the question may well be asked – why should it then still be necessary to seek exemption from "complying" with an obligation that in reality does not exist. It is illogical and incongruous to expect an aggrieved party to seek to be absolved from an obligation that does not in any event exist. Thus all what the *Nichol* judgment says ... in my view, is that if the internal appeal remedy was available at the time the review proceedings were launched but was for no good reason not invoked it cannot be an answer for the aggrieved party to say ... that its internal appeal remedy has since been lost due to lapse of time. ..." [Paragraph 31]

"...Whilst it is so that in both *Nichol*'s case and in *hoc casu* the applicants had not even thought of or been aware of the need to exhaust internal remedies it is, however, important to bear in mind that in *hoc casu* the applicant had no effective and/or adequate appeal remedy for at least two reasons. First there would have been no virtue in applicant appealing against the award of the tender to the second respondent when it was evident that the respondent had evinced a determination to commence with the works through the second respondent. This situation was further exacerbated by the fact that the respondent had steadfastly refused to give the undertaking sought that it would not carry on with the works until the applicant's review application had been determined ..." [Paragraph 32]

Turning to the merits of the application, Petse ADJP held:

"I now turn to consider whether in the context of the circumstances ... it can be said that the award of the tender ... bears close and intense scrutiny. ... [I]t is my judgment that the answer to this question taking an objective and dispassionate view of the facts must be a "no".
... I should perhaps digress to mention that I do not for one moment believe that I have strayed outside the parameters set by judicial precedent which enjoin the courts to "take care not to usurp the functions of administrative agencies". On the contrary it is my conviction that in coming to the decision that I have reached in *hoc casu* I have done no more than "to ensure that the decisions taken by administrative

agencies fall within the bounds of reasonableness as required by the Constitution"...” [Paragraphs 41 – 42]

“I have taken cognisance of the fact that, in my view, the phrase "relevant considerations were not considered" contained in section 6(2)(e)(iii) of PAJA should not be construed to mean that relevant considerations were not considered at all but ought also to be understood to mean that such relevant considerations were not, when being considered, given sufficient weight ... to hold otherwise ... would then mean that even paying mere lip service to the prescripts of the provisions of section 6(2)(e)(iii) of PAJA would pass constitutional muster, something that would not be consistent with the values, as I understand them, permeating the Constitution.” [Paragraph 46]

“... [T]he applicant seeks an order awarding the tender to it on the grounds that the applicant is unlikely to receive a "fair hearing" if the matter were to be referred back to the respondent for reconsideration. However, faced with the reality that a period of almost 18 months has elapsed since the award of the tender ... counsel for the applicant, soon realised ... that given this significant lapse of time it would be ill-advised of this Court to accede to this prayer even if it were otherwise disposed to grant it. ...” [Paragraph 48]

The award of the tender to the second respondent was declared invalid and set aside, and the tender referred back to the first respondent for reconsideration.

SELECTED JUDGMENTS

EXDEV (PTY) LTD AND ANOTHER V PEKUDEI INVESTMENTS (PTY) LTD 2011 (2) SA 282 (SCA)

Case heard 16 November 2010, Judgment delivered 1 December 2010

An appeal against a judgment delivered by a member of the JSC (Ntsebeza AJ) was dismissed by the SCA (Leach JA, Heher and Cachalia JJA concurring). At the conclusion of the majority judgment, remarks were made about "at first blush, wholly unacceptable" delays in delivering the judgment by the court *a quo* [paragraphs 23 – 25].

R Pillay AJA and Ebrahim AJA, whilst concurring with the order of the majority, wrote separate judgments dealing with the question of delay. R Pillay AJA held:

" ... I can hardly quarrel with the proposition that justice delayed is justice denied. While stopping short of criticising the trial judge for such delays as may have been occasioned in the matter, [Leach JA] nonetheless expresses some disquiet about those delays. As regrettable as these delays might be, it is apparent from his judgment, that we clearly do not know what the true causes of the delay in this instance were — hence his comment that the delay is 'at first blush . . . unacceptable' (para [24]). The delay is either acceptable or it is not. Whether it is, depends on all of the facts, which, as Leach JA appears to accept, we simply do not have. Consequently, it would be wrong for us to speculate as to such causes, and apportion blame to the trial judge, absent a proper factual foundation to do so. Sitting as a court of appeal, and being bound by the record, we should be slow to have I regard to what may be contained in documents or reports that do not constitute part of that record. While what the Chief Justice may have stated — if accurately reported — is to be lauded, it is unclear to me on what basis we can have regard to what he reportedly may have said in holding the trial judge responsible for the delays. I would thus prefer not to associate myself with the observations expressed in paras [23], [24] and [25] of Leach JA's judgment." [Paragraph 28]

ETHEKWINI MUNICIPALITY V COMBINED TRANSPORT SERVICES (115/110) ZASCA 158 (1 DECEMBER 2010)

Case heard 15 November 2010, 1 December 2010.

This was an appeal against the judgment of the High Court, reviewing and setting a decision by the Department of Transport, KwaZulu Natal to award the eight respondent the remainder of a contract relating to the offering of bus services. By the time the appeal was heard, the contract had run its full course. Respondents argued that the validity of the agreement had therefore become moot, and that as a decision on the merits of the appeal would have no practical effect, the appeal should be dismissed.

Pillay AJA, for a unanimous court (Mpati P, Heher, Maya and Snyders JJA concurring) held:

"Where the relief sought on appeal is moot and would be of academic interest only, the merits of the appeal will not be entertained and the appeal will be dismissed on that ground alone. ..." [Paragraph 11]

"Counsel ... contended on behalf of all the appellants that the appeal was not moot because the question of the validity of the contract is a live issue and could have the following consequences viz (a) the appellants may be sued for damages by the respondents; (b) there may be outstanding amounts due to

the eighth respondent for services rendered in terms of the contract, and (c) the matter subsidies might have to be assessed." [Paragraph 12]

"Section 21A however confers a discretion on this court to deal with the merits of the appeal. This would be done where an appeal involves a question of law and which is likely to arise again. ..." [Paragraph 13]

"It is clear that the contract in question no longer exists and its validity or otherwise is therefore no longer a live issue. Consequently, deciding that issue will have no practical effect or result.

The factors raised behalf of the appellants are all speculative. There is no evidence that similar matters, based on similar facts, will arise in future. ..." [Paragraphs 14 - 15]

"In any event the Transport Transition act has since been repealed and the wording of the equivalent section in the National Land Transport Act ... is different. Consequently there is no likelihood of the circumstances in this case being repeated." [Paragraph 16]

The appeal was thus dismissed.

ATB CHARTERED ACCOUNTANTS V EDNA BONFLIGLIO [2010] ZASCA 124 (30 SEPTEMBER 2010)

Case heard 27 August 2010, Judgment delivered 30 September 2010

This case turned on whether the court *a quo* had correctly dismissed the appellant's special plea of prescription. Respondent had sued appellant for damages arising from appellant's alleged failure to properly carry out a contractual mandate. Appellant had been retained to find a buyer for a close corporation of which respondent was the sole member. A Mr Raath was introduced as a potential buyer, but failed to make scheduled payments. Respondent instituted action against Raath on 19 March 2003 for the balance of the purchase price. On 3 April 2003, Raath's attorney wrote to respondent advising that Raath was unable to make payment, and that corporation had been liquidated. Summary judgment was obtained on 22 May 2003, a warrant of execution against Raath's property issued on 26 June 2003, and a *nulla bona* return was filed by the sheriff on 7 July 2003. Respondent then instituted action against the appellant.

Pillay AJA, for a unanimous court (Nugent and Cloete JJA and Bertelsmann and Ebrahim AJJA concurring) held:

"... [ATB] asserted that prescription in relation to the respondent's claim commenced to run ... when she entered into the agreement of sale ... Alternatively, at best for the respondent ... the debt became due when her attorney informed it by letter dated 7 August 2002, that she intended to hold it liable for any losses that she may have suffered as a result of entering into the agreement of sale on its advice." [Paragraph 9]

"... [T]he respondent denied that prescription commenced to run on 5 April 2002 or at any time before 7 July 2003 when a nulla bona return was filed. She contended that she only then became aware that the debt as against ATB had become due." [Paragraph 10]

"It was submitted on behalf of the appellant that the respondent's debt became due when ATB breached the contract with the respondent when the latter concluded the sale agreement on the alleged negligent

advice of ATB. It was submitted ... that it was then that the wrong occurred and that the respondent sustained the loss although it was not yet apparent.

There is support for that submission in various cases cited in R H Christie: *The Law of Contract in South Africa*. ...” [Paragraphs 15 – 16]

“... I do not think it is necessary to decide in this case precisely when the right of action arose. I have pointed out that s 12(3) of the Act delays the running of prescription until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises ... The purchase price of the corporation ... was to be paid from the profits that it made but on 3 April 2003, the respondent was advised not only that Raath had been unable to make payment, but also that that company had been placed in liquidation. There can be no doubt that at least by that time the prospect of receiving the purchase price was minimal, if it existed at all. ... I think it must follow that by no later than that date the respondent’s right of action has indeed accrued, and that she had knowledge of all the facts which gave rise to that right of action.” [Paragraph 18]

“Thus in my view prescription had commenced to run from no later than 3 April 2003 and the claim prescribed no later than three years thereafter ie on 2 April 2006. The summons was issued ... on 30 June 2006 – and the special plea ought to have been upheld.” [Paragraph 19]

MANONG & ASSOCIATES (PTY) LTD V DEPARTMENT OF ROADS AND TRANSPORT, ESTERN CAPE, AND ANOTHER (NO 1) 2008 (6) SA 423 (EQC)

Case heard 13 June 2007, Judgment delivered 18 October 2007

This case was a review of the decision to disqualify the Applicant’s tender. Applicant argued that the procurement procedure followed by the respondents was not fair, transparent or cost-effective, and was inconsistent with the Constitution as it did not promote equality.

Pillay J held:

“In the light of the respondents' approach, it is clear that if they succeed in their contention that this court lacked jurisdiction to entertain what is essentially an application to review the administrative decision of the respondents and/or that this court lacked the jurisdiction to decide on issues of constitutionality, then the matter will end at that point ... If they do not succeed, then the merits, which stand uncontested, will have to be dealt with. In the circumstances, it would be convenient to deal with the jurisdictional issue(s) first.” [Page 427]

“The equality court is a special court born out of very crucial constitutional notions like equality, equity, social progress, justice, dignity, fairness and democratic values. It is created in terms of the Constitution by an Act of Parliament which creates and sets out the powers of equality courts.
...
Section 21(1) of the Act empowers the equality court to determine whether unfair discrimination, hate speech or harassment has taken place. It is clearly restricted to dealing with these aspects. ...

Section 169 of the Constitution clearly empowers the High court to deal with certain matters involving constitutional matters, including any such matters not assigned to another court by an Act of Parliament. The Act does not directly make provision for the equality court to decide on constitutional matters.
...
What is quite apparent is that, in order to determine whether the effect of the proper application of the rules in question amounts to discrimination or not, it is necessary to delve into the essence of the rules. This would entail the unavoidable exercise of determining whether these rules strain the Constitution or not because, inevitably, if they are unconstitutional they are likely to be discriminatory (and perhaps vice versa). Consequently, on the face of it, this issue would then fall within the powers of the equality court. Strictly speaking, however, the equality court does not seem to be empowered with the jurisdiction to review, correct or set the Bid Rules aside.
The equality court has furthermore not been empowered to review decisions of the kind in question. ..." [Pages 429 – 430]

"In my view, therefore, even if the complaint was one which could be dealt with by review, it should be dealt with in terms of Rule 53 [of the Uniform Rules of Court]. Consequently, this is an application with which the equality court cannot deal for lack of jurisdiction.
If regard is had to s 21 of the Act and s 169 of the Constitution, then it is clear that only the High Court has the power to deal with constitutional matters and the equality court has not been empowered to do so either by the Constitution or the Act itself.
...
...[W]hile there will be cases in which double jurisdiction would be apparent and capable of being dealt with in either of the courts ... it is necessary to generally be mindful of the fundamental difference(s) between the two courts lest it be clouded by convenience." [Pages 432 – 433]

"...[T]here are clear issues which involve the questions of constitutionality of the Bid Rules and the review of the decision. In my view, the equality court is not empowered to pronounce on either. ...
... [E]ven if this court did have the power to review as envisaged in this application, the application would, in my view, still fail both in terms of common law and constitutionally. This is because, even if I thought that the conclusion was one which I would not have arrived at, I would not be permitted to interfere therewith, absent any irregularity or illegality by the respondent, and in particular by the tender committee in the exercise of its duties.
...
Mindful of the fact that the conduct of the tender committee in applying the rules is not the source of complaint in this application, it would seem to me, insofar as it is necessary to comment thereon, that the application must fail in this respect also." [Page 433]

The application was thus dismissed. The decision was reversed by the SCA on appeal: **2009 (6) SA 574 (SCA)**.

S V CHARLES 2002 (2) SACR 492 (E)

Case heard 21 May 2002, Judgment delivered 30 May 2002.

The appellant appealed against his conviction on counts of robbery and indecent assault, *inter alia* on the ground that he had not received a fair trial as his legal representative had not consulted with him about his defence before the trial began.

Pillay J held:

"The attorney who appeared for the appellant put certain propositions to the State witnesses. Some of these propositions placed the appellant on the scene of the alleged offences while at the same time raising a lack of *mens rea* because the appellant was intoxicated during the alleged commission of these crimes.
When the appellant testified in his defence, his version seemed to disclose an alibi and in complete contradiction to what was put to the State witnesses by his legal representative. ..." [Page 494]

"The right to a fair trial as envisaged by s 35(3)*(g)* of the Act [the Constitution] embraces the right to legal representation by a person who has placed himself or herself in a position to present the client's case as instructed. The failure to place himself or herself in such a position obviously defeats the purpose of s 35(3) ..., s 35(3)*(g)* in particular.
In the present case, the position is far worse. The attorney representing the accused did not consult with the appellant and, at best, relied on notes he found in the file and, as appears to be suggested, from memory of information obtained from a consultation he had with the appellant in preparation for a bail application some time before the trial.
The attorney himself did not properly consult, if at all, with the appellant in preparation for this trial. The consequences of his conduct is obvious from the record and is quite unacceptable by any standards of legal practice. ...
Suffice to say that it adversely affects the appellant's right to a fair trial.
The magistrate's conduct in the trial after this revelation clearly contributed to a breach of appellant's fundamental right to a fair trial. Firstly, he continued with the trial despite being made aware of the problem and after having heard some of the evidence ... The expected discrepancies in the appellant's version should have alerted him to the possibility of being compromised as presiding officer. When that possibility arose he should immediately have recused himself and thereby stop the proceedings for the matter to be further dealt with in terms of the Criminal Procedure Act ...
What is more, he allowed the matter to continue and entertained the cross-examination of the appellant by the prosecutor *en route* to discrediting the appellant and referring to the aforementioned discrepancies doing so. Indeed, the appellant was eventually found to have been an unimpressive witness who had changed his version. This finding was specifically based on the discrepancies which were caused by the failure of the attorney to consult with the appellant in preparation for the trial." [Page 497]

"I find the conduct of the appellant's defence very disturbing. It seems that the attorney who appeared on behalf of the appellant was handed the file by his principal that very morning. The attorney was not aware that the trial was to proceed. He had not consulted directly with the appellant to prepare for the trial. He, nonetheless, continued with the trial on that basis.

There is no obvious reason for not requesting an adjournment so as to consult with the appellant. It is to be hoped that this type of practice is the exception rather than the rule. However, it is sufficiently serious, in my view, to warrant the attention of the Law Society. This is especially so because of the serious consequences which resulted." [Page 498]

The appeal was thus upheld and the conviction and sentence set aside (Maqubela AJ concurring).

SELECTED JUDGMENTS

EHRLICH v MINISTER OF CORRECTIONAL SERVICES AND ANOTHER 2009 (2) SA 373 (E)

Case heard 24 April 2008, Judgment delivered 5 May 2008

The applicant, a sentenced prisoner, brought an application for the review and setting-aside of the decision of the second respondent, the head of Mdantsane prison, to deny medium category offenders supervised access to the gymnasium in the maximum security section of the prison for the purposes of development programmes. The essence of the applicant's case was that he had been denied his right to participate in a development programme as envisaged in s 41 of the Correctional Services Act, in circumstances that were unfair, unreasonable and amounted to unequal treatment.

Plasket J held:

"... [I]n *Goldberg and Others v Minister of Prisons and Others*, Corbett JA said in a dissenting judgment: 'It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. ...'" [Paragraph 5]

"Section 195(1) of the Constitution binds those who, like the second respondent, are public administrators, to 'the democratic values and principles enshrined in the Constitution', including the provision of services 'impartially, fairly, equitably and without bias'." [Paragraph 9]

"The Correctional Services Act contains a number of provisions that are important for present purposes. ... One of its objects ... is to provide for 'the custody of all prisoners under conditions of human dignity'. Section 2*(b)* defines one of the purposes of the Act as being the detention of prisoners 'in safe custody whilst ensuring their human dignity', and s 2*(c)* speaks of its purpose of 'promoting the social responsibility and human development of all prisoners and persons subject to community corrections'." [Paragraph 10]

"... [T]he applicant is a sentenced prisoner. He is also a qualified karate instructor. Karate, he says, is one of the prescribed development programmes for purposes of s 41 of the Act, in terms of the department's sport, recreation, arts and culture policy. I accept this to be the case because, if it were not, I am sure that the second respondent would have denied the applicant's averment." [Paragraph 18]

"In July 2005 the applicant submitted a proposal for the introduction of karate as a development programme at the prison. He received no response to the proposal but the programme was eventually implemented in December 2005 after the applicant had obtained an order from this court directing the department to do so. ... Prisoners from other sections of the prison who were part of the karate development programme, including the applicant, were brought to A-Section to attend classes and other activities of the programme. ... On [the 8th of October] ... the applicant was refused access to the gymnasium to teach a karate class. He took the matter up with the second respondent who informed him that he had decided that no medium category prisoners were to be allowed into A-Section because it was now a maximum category section." [Paragraphs 19, 22 – 23]

Plasket J noted that the respondents had applied (unsuccessfully) for and order that the applicant provide security of R20 000 for costs, and commented that this "reflected poorly on the respondents' sense of fairness, and on their obligation to 'respect, protect, promote and fulfil' the fundamental rights" [paragraphs 25 -26], and continued:

"... [T]he second respondent never denied the applicant's detailed averments ... that from September 2007 onwards 'numerous mediums have been allowed unsupervised daily access to A-Section with the express knowledge and permission of the second respondent'. ..." [Paragraph 35]

"... [T]he applicant has represented himself throughout these proceedings. While the legal basis upon which the relief is sought should ordinarily be identified by the applicant, this rule cannot be applied rigidly and certainly not when a lay litigant represents himself or herself. [citation to the judgment of O'Regan J in *Bato Star Fishing*] ..." [Paragraph 36]

"In this case the decision taken by the second respondent is an administrative decision. It was the exercise of a public power taken during the course of administering the prison in terms of the Correctional Services Act, it affected the rights of the applicant and others to take part in a development programme, as envisaged by s 41(5) of the Act; and, as it put a stop to the karate development programme, it had a direct, external legal effect. While the applicant has not mentioned PAJA it is clear that it applies. After all, it is intended to 'cover the field' – to provide the mechanism to review administrative action, the grounds of review and the remedies appropriate to each case. He has, however, identified the source of the right that he seeks to vindicate. That is the right to participate in a development programme vested in sentenced prisoners by s 41(5) of the Act. ..." [Paragraphs 37 – 38]

"Section 3(1) of PAJA provides that when administrative action 'materially and adversely affects the rights or legitimate expectations of any person', it must, in order to be valid, have been taken in a procedurally fair manner. If not, it may be set aside ... It is not in dispute that the applicant, like everyone else involved, had a statutory right to participate in the karate development programme. That right was materially affected ... He was also, obviously, adversely affected. As he was not given any notice, or afforded any other aspect of a procedurally fair process prior to the decision being taken, it must be set aside. ..." [Paragraph 39]

"In my view the second respondent's decision falls foul of the fundamental right to lawful administrative action as well because it was based on an error of law: the second respondent erred in interpreting his powers. ... The second respondent appears to have taken the view that he had no choice but to enforce segregation soon after maximum category prisoners were moved into A-Section. He erred materially in believing that he had no discretion when in fact he had discretion. This error was material in that it resulted in him not applying his mind properly to the matter. On this account the decision must be set aside." [Paragraph 40]

Plasket J further found that the second respondent's decision was unreasonable [paragraphs 41 – 44], and set aside the decision to deny medium category prisoners supervised access to the gymnasium to take part in the karate development programme. Second respondent was ordered to file and affidavit confirming that he had acted in accordance with the order.

POLICE AND PRISONS CIVIL RIGHTS UNION AND OTHERS v MINISTER OF CORRECTIONAL SERVICES AND OTHERS (No1) 2008 (3) SA 91(E)

Case heard 1 December 2005, Judgment delivered 12 January 2006

The applicants (a trade union and a number of its members who had been employees of the Department of Correctional Services) applied for an order reviewing and setting aside the dismissal of the second to 76th applicants. The dismissed applicants had been summarily dismissed for gross insubordination after a disciplinary procedure had been conducted. It appeared from the affidavits before the court that the

procedure followed in the disciplinary process and the subsequent appeal had not followed the prescribed procedure in a disciplinary code and disciplinary procedure set out in a collective agreement, which was, in terms of s 23 of the Labour Relations Act, binding on the department.

Plasket J held:

"The first set of grounds of review relates to the lawfulness of the administrative action taken against the applicants. At its most basic, and in general terms, the right to lawful administrative action means that 'administrative actions and decisions must be duly authorised by law, and that any statutory requirements and preconditions that attach to the exercise of power must be complied with'. Administrators may only exercise powers that have been lawfully reposed in them, and when they exercise such powers they are required to stay within the four corners of their empowerment. They have no free hand to stray outside of the boundaries of their empowerment. The fifth respondent [who had conducted the disciplinary process] only had power to discipline in terms of the prescribed procedure. He had no power to abandon it and discipline employees in terms of an ad hoc procedure that he decided was expedient in the circumstances. By doing so he violated the fundamental rights of the applicants to lawful" [Paragraph 66]

"... [I]n order to be able lawfully ... to take disciplinary action against the applicants, the fifth respondent was required to comply with the procedure agreed to between the parties and embodied in the binding collective agreement. He failed to do this, not even attempting to comply substantially with the terms of the disciplinary procedure. ... His failure to comply with this procedural precondition of the power to discipline the applicants constituted a violation of their right to lawful administrative action, rendering the fifth Respondent's decision to dismiss a nullity. ..." [Paragraph 68]

"The same is true of the appeal procedure. The sixth respondent, as chairperson of the appeal hearing, was robbed of jurisdiction to hear the appeal because the preconditions for his jurisdiction were absent: a valid disciplinary hearing at first instance had not been held and for this reason no record of the evidence existed on which an appeal could be based. Indeed, he then compounded the irregularity by allowing evidence to be led by the initiator to create a record, when he had no jurisdiction to allow such a procedure. If the purpose of the leading of evidence was to attempt to justify the abandonment of the prescribed procedure at first instance, he had no jurisdiction to condone that. His decision in the appeal was vitiated by these material irregularities ..." [Paragraph 69]

"The conduct of the first applicant ... reflects an arrogant and disgraceful contempt for the courts empowered by the Constitution, the law that acquired its force from the Constitution, the democratic order that was created by the Constitution, the public interest that the Constitution was designed to further and the Constitution itself. ..." [Paragraph 79]

"It strikes me as ironic that the applicants, who have displayed a lack of respect for the Constitution and its democratic processes and institutions - and who, indeed, actively engaged in undermining those processes and institutions - called in aid, when their lawless conduct resulted in their dismissal, the selfsame Constitution that their behaviour suggests they hold in contempt." [Paragraph 80]

"The respondents, however, are far from blameless. They acted with no regard for the disciplinary code and procedure that they were bound to apply. In so doing they acted cynically and in bad faith ..." [Paragraph 82]

"But for the fact that the respondents displayed a cynical disregard for the Constitution and the law similar to that displayed by the applicants, a disregard that cannot be tolerated in a constitutional State, I would have considered withholding any remedy to which the applicants would otherwise have been entitled. The applicants and the respondents all have dirty hands. On the one hand, I consider it necessary in order to vindicate the Constitution to grant the bulk of the relief sought by the applicants. On the other, in order to mark the court's displeasure at the conduct of the applicants, I intend to deprived the applicants of the costs that would otherwise have followed the result." [Paragraph 83]

Plasket J thus set aside the convictions and summary dismissals of the applicants, and directed the respondents to reinstate the applicants.

NTAME v MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE AND TWO SIMILAR CASES 2005 (6) SA 248 (E)

Case heard 4 December 2004, Judgement delivered 11 January 2005

The applicants sought orders reviewing administrative action by the Department of Social Development of the Eastern Cape Province. In the first application ('the *Ntame* case') the applicant had been in receipt of a disability grant for 11 years until it was stopped in December 1996 without notice to her. In June 1999 it was reinstated and she was given an amount of R1 100 as 'back pay'. She applied for an order setting aside the suspension of her grant and an order directing the respondent to pay the amount of R13 460 that was owed to her. In the second and third matters ('the *Mnyaka* cases') the applicant had applied in June 1997 for a maintenance grant in respect of her two children. By the time that maintenance grants were phased out in April 2001 she had still not had a response to her application. Ms Mnyaka applied for an order directing that the respondent's failure to consider the application be declared unlawful.

Plasket J held:

"The main issues to be decided in the three applications ... are: whether claims for the payment of a disability grant, in the first case, and for the payment of maintenance grants, in the second and third cases, have prescribed; whether a court can raise prescription *mero motu*; whether, if so, this renders what I would term the primary relief sought – the review of a decision to stop paying the disability grant, and the failure to decide on the applications for maintenance grants – moot; and whether, if not, the applicants' delays in launching proceedings are unreasonable and, if so, whether they should, nonetheless, be condoned." [Paragraph 1]

"It will be noticed that the debts that are central to each case – the disability grant that was not paid for a period, and the maintenance grants that would have been paid had decisions favourable to the applicant been taken – related to precisely defined periods, with precisely defined end-points... In all three cases the debt, to use the terminology of the Prescription Act ... would have prescribed three years after the dates mentioned above, if the respondent had opposed and taken this point in answering papers. That would, ordinarily, have rendered the relief claimed in these matters moot because, while the applicants seek the review of the administrative action and inaction concerned, their purpose in doing so is, understandably, to force the respondent to pay them what was unlawfully withheld: if the underlying debts could not be enforced, then the exercise of pronouncing the administrative action and inaction concerned to have been invalid, would have had no practical effect and would have been academic." [Paragraphs 8 – 9]

After finding that the common law rule of delay, rather than the relevant provisions of PAJA, applied, Plasket J held:

"the conclusion is inescapable, in my view, that the delays from the time of the causes of action arising to the launching of all three of these applications, when viewed objectively, are unreasonably long, even though, once the applicants were placed in contact with attorneys who could advise them and represent them, the steps that followed were taken with reasonable haste. I have, in the exercise of my discretion, decided to condone the unreasonable delays for the reasons that follow." [Paragraph 24]

"... [T]he issue of condonation must be addressed mindful of the fact that s 34 of the Constitution enshrines a fundamental right of access to court and that s 39(2) enjoins a court either interpreting legislation or developing the common law or customary law to 'promote the spirit, purport and objects of the Bill of Rights' of which s 34 is part. ..." [Paragraph 25]

"The applicants are unsophisticated people with little formal education. When this is taken together with their poverty, their access to court is severely hampered and a more lenient approach to the time they took to find attorneys to advise them is warranted. ... Didcott J's comments in *Mohlomi v Minister of Defence* on the relationship between poverty and access to justice is apposite to these cases. He described South Africa as 'a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these..." [Paragraph 26]

"As Ms Ntame was not afforded a hearing prior to the stopping of her disability grant, the administrative act of stopping it was performed in a procedurally unfair manner. It was, accordingly, invalid and a nullity. ... Ms Mnyaka's complaint is not that decisions adverse to her were taken but rather that no decisions were taken when they should have been. The principle is a simple one: it is that 'where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised'. A failure to exercise a discretion when a duty is cast on an administrative decision-maker to do so constitutes a violation of the fundamental right to lawful administrative action." [Paragraphs 35 – 36]

"In order to strike effectively at the violation of Ms Ntame's fundamental rights to just administrative action and of access to social assistance, it is necessary, in my view, to do more than simply declare the administrative act of stopping her disability grant to be inconsistent with the Constitution. It would be just, equitable and appropriate to order the respondent to rectify the violation by paying what should never have been withheld and to pay interest on that debt. ..." [Paragraph 41]

"In respect of the applications brought by Ms Mnyaka, I am likewise of the view that a mere declaratory order will not be an effective remedy. It will also be necessary to grant relief that compels the respondent to take the decisions that should have been taken a long time ago, ... if the applicant is found to have qualified for the maintenance grants, she must be paid what she would have been entitled to, together with interest. ..." [Paragraph 43]

ENGELBRECHT v MERRY HILL (PTY) LTD AND OTHERS 2006 (3) SA 238 (E)

Case heard 29 November 2005, Judgment delivered 11 January 2006

This was an urgent application for an interim interdict to restrain the first respondent from transferring two erven to the second respondent and the third respondent, pending an application for a final order. The relief was premised on the existence of a contract of sale by instalments of the properties entered into between the applicant as purchaser and the first respondent as seller. The point in issue was whether, when the first respondent purported to cancel the sale of the properties to the applicant, he complied with s 19(2)(c) of the Alienation of Land Act. The section requires a seller of immovable property who decides to take action consequent upon a breach of contract by the purchaser to furnish, in the notice required by s 19, 'an indication of the steps the seller intends to take if the alleged breach of contract is not rectified'.

Plasket J held:

"... [O]n 16 October 2003 the applicant and the first respondent concluded an agreement of sale by instalments in terms of which the properties at Cintsa were sold by the first respondent to the applicant. Paragraph 9 of the agreement dealt with breach and cancellation. ... The Act mentioned in para 9 of the agreement is the Alienation of Land Act. The applicant paid a certain amount of the instalments due, but later fell into arrears. His explanation is that an employee of his was to blame for failing to make the required payments as and when they fell due. Be that as it may, he accepted that he was in breach of the agreement at the relevant time. He only became aware of the breach and, more importantly, of the fact that notice had been given, purportedly in terms of para 9 of the agreement, in October 2005, when he discovered a letter dated 8 August 2005. ..." [Paragraphs 5 – 7]

"This letter was written by Mr J E Bax, the attorney acting for the first respondent. Having set out the nature and extent of the breach of agreement, Mr Bax proceeded to write:

'In accordance with clause 9.1 of the deed of sale we have been instructed by the seller to demand from you, as we hereby do, payment in the sum of R22 534 at our offices at the above address within 32 days of the date of this letter. Should payment not be made as aforesaid then and in that event, the seller shall be entitled to claim immediate payment of the full balance of the purchase price and interest as due by you, as well as all costs and collection commission; or alternatively shall be entitled to cancel this contract.'" [Paragraph 8]

"... [T]he only issue in dispute is whether the first respondent's notice to the applicant complied with s 19(2) of the Act in the sense that the first respondent indicated the steps that he intended taking against the applicant in the event of a failure on the applicant's part to rectify the breach. It is argued that the notice was defective in two respects. These are: first, that the notice did not give an indication of the steps the first respondent intended taking, but rather contained a statement of what the first respondent was entitled to do in the event of a breach of the agreement on the part of the applicant; and, secondly, that the first respondent was required ... to elect which of the steps available to him, in terms of the agreement, he intended to follow, and that he was not entitled to set out his remedies in the alternative as he did." [Paragraphs 13 – 14]

"In order to deal with these issues, it is necessary to consider the nature and purpose of the requirements of s 19(1) and (2) of the Act. Two points bear mention in this respect. The first is that 'the section, like its predecessor, is peremptory in its terms'. Secondly, the purpose of the section is to protect the purchaser. Both of these purposes are stated in clear terms by Grosskopf J in *Oakley v Bestconstructo (Pty) Ltd*. ..." [Paragraph 15]

"... I can see no difficulty in requiring unequivocal conduct on the part of the seller when he or she gives notice in terms of s 19: first, as a general proposition, when a person gives notice of his or her intention to cancel a contract, that notice is required to be 'clear and unequivocal'. Section 19(2)(c) requires little more. Secondly, if, as the courts have held, the intention of s 19(2) is to protect the purchaser, that self-same unequivocal conduct on the part of the seller is the least that one could require of him or her to give effect to the intention of the Legislature. Thirdly, it seems to me that it is also an inevitable consequence of affording the purchaser a reasonable measure of protection that the seller has to make an election at an early stage, but clearly it is not a final and binding election because all he or she has to do is to 'give an indication' of what he or she intends to do about the breach ...."[Paragraph 20]

"For much the same reason mentioned in *Miller* [*v Hall 1984 (1) SA 355 (D)*], by informing the purchaser of the choices available to the first respondent in terms of clause 9 of the contract, Mr Bax cannot be said to have given an indication of what steps the first respondent intended to take: in effect, all he did was to remind the applicant of what the contract said of the possible consequences of breach on the part of the applicant. To hold that this would suffice for compliance with s 19(2)(c) would dilute the section to such an extent as to make it a meaningless formality and it would provide no protection, reasonable or otherwise, to a purchaser, as intended by the Legislature. In *Miller*, Page J held that the requirement that the seller must give an indication of what he or she intended to do, meant more, in context, than the giving of a mere hint or suggestion. ..." [Paragraphs 22 – 23]

"The second point taken on the invalidity of the notice was that it did not disclose an election but rather mentioned the steps that were possible in terms of the applicable provision of the contract. ... I am in respectful agreement with the interpretation of the section in both *Miller* and *Oakley* ... When that interpretation is applied to the facts of this case, the conclusion I have reached is that no indication was given to the applicants of the steps that the first respondent intended to take pursuant to the applicant's breach of their contract, as required by s 19(2) *(C)* of the Act, and that, as a result, the notice was invalid. ..." [Paragraphs 24 – 25]

The decision was overturned on appeal by the SCA: Merry Hill (Pty) Ltd v Engelbrecht 2008 (2) SA 544 (SCA).

SELECTED ARTICLES

''ADMINISTRATIVE JUSTICE AND SOCIAL ASSISTANCE' (2003) 120 South African Law Journal 494

"Despite the fact that South Africa is now a democratic state that respects human rights, there are immense problems in the system of social assistance, resulting in hardship and privation for many of the most vulnerable and marginalized members of society. One of the major causes of these problems is the fact that the system of social assistance was fragmented by apartheid, so that after 27 April 1994 the new national and provincial governments had to integrate these different systems into one system for each of the nine provinces. The hardships that this process has visited on many poor people, as well as corruption, gross inefficiency and often appallingly callous attitude on the part of officials to those who require social assistance, has meant that social assistance issues have become something of a focal point for those lawyers and human rights activists who are interested in seeing that proper is given to the socio-economic rights that form an important part of the Bill of Rights." [Page 495]

"... The principle difference for administrative law between the state of affairs prior to and after 1994 is this: prior to 27 April 1994, administrative law was constrained by the doctrine of parliamentary sovereignty that allowed ... an ... unrepresentative executive hostile to human rights, and the judiciary, drawn exclusively (until close to the dawn of democracy) from the ranks of the white elite, failed to develop significant legal controls over administrative power and at times, even appeared to facilitate the executive's increasingly draconian conduct ..." (Pages 495 - 496)

The article then considered the application of administrative law principles in social assistance cases.

"A number of cases have dealt with the lawfulness of the actions, and of the inaction, of welfare officials in the exercise of their powers. The first case was Bacela v MEC for Welfare (Eastern Cape Provincial Government).The applicant had qualified for an old age pension ... She returned each pension payday for the following five months but on each occasion she was told that there was no money for her. ... The respondent [had] issued a circular to all regional directors ... instructing them to stop paying arrears to successful applicants ... This decision was apparently motivated by 'serious budgetary constraints' ... Mpati J held that the respondent was not authorised by law to suspend payment of arrears to successful applicants for pensions; she was, he held, 'bound in her administrative capacity to act in terms of the Social Assistance Regulations and to make the payments for which the Regulations provide'. The result was that 'the respondent's decision not to backdate pension payments to the date on which such pension payments accrued is unlawful and of no force or effect'. ... Maluleke v MEC, Health and Welfare, Northern Province illustrates the problems of rationalising the disparate systems of social assistance that existed in the country before 27 April 1994. ... Ms Maluleke brought an application in which she purported to act on her own behalf, as well as for everyone else in apposition similar to hers, for orders declaring that the suspension of her old age pension, and of the grants of everyone else in a similar position, were invalid, and directing the respondents to pay interest on the amounts withheld. Southwood J held that the suspension of the applicant's pension because she had been identified as a 'suspect beneficiary' whose particulars needed to be checked was unlawful, as the enabling statute ... did not authorize suspension for such purpose." (Pages 497 - 499)

"The Supreme Court of Appeal has questioned the correctness of Leach J's approach [in *Mahambehlala v MEC for Welfare, Eastern Cape and another* and *Mbanga v MEC for Welfare, Eastern Cape and another*], in the matter of *Jayiya v MEC for Welfare, Eastern Cape and another*. Conradie JA held that now that the

Promotion of Administrative Justice Act is of application, any remedy ... must be one contemplated by s 8 of the Act. ... Conradie JA appears to suggest that the type of relief that Leach J granted would not be possible in terms of the Act. This is based on a narrow and incorrect interpretation of s 8: it fails to give effect to its constitutional pedigree ... the specific remedies mentioned in s 8(1) do not constitute a closed list as Conradie JA appears to suggest." (Page 504)

"... [T]he concept of procedural fairness is a universal feature of systems of administrative law based on the rule of law or a similar doctrine. In administrative law, procedural fairness is an important part of the various mechanisms and techniques courts use to control the exercises of power by administrative functionaries. The essence of the concept is that those who are affected by official decisions are entitled, prior to any decision being taken, to be heard by an unbiased decision-maker. ... In Rangani v Superintendent General, Department of Health and Welfare, Northern Province, Kirk-Cohen J held that pensioners were entitled to a hearing before a decision was taken to suspend their pensions. He held that [the applicant] ... had a legitimate expectation to a prior hearing before her pension was terminated or suspended. Procedurally fair administrative action in casu includes the right to be heard prior to any deprivation. ..." (Pages 504 - 506)

After considering further cases dealing with procedural fairness in social assistance cases, the article proceeds to deal with the issue of reasonableness:

"... In order for an administrative act to be reasonable, it must not be taken in bad faith, it must not be arbitrary or capricious, it must not be tainted by irrelevant considerations having been taken into account or relevant considerations having been ignored or having been given undue weight, it must be justifiable or rational, it must not result in inequality or uncertainty and must not be oppressive in the sense of having an unnecessarily onerous impact on those affected or be excessive or disproportionate in its impact. The essence of reasonable administrative action therefore, is that it is rational and proportional. There appear to be two obvious aspects of the administration of the Social Assistance Act that are vulnerable to challenge on the basis of the right to reasonable administrative action. The first is the decision as to whether an applicant for a disability grant is ... disabled for purposes of the Act. The second is the decision to categorize a disabled person as either permanently ... or temporarily disabled." (Page 508)

The article also deals with the requirement of giving reasons for decisions, and issues surrounding standing, deceased estates, failures to comply with orders and administrative inefficiency, before concluding:

"It may be tempting to view the cases discussed ... as a limited number of isolated claims by individuals ... Such a view would ignore that fact that each applicant's problem is replicated over and over ... [E]ach case in this field – and not only those in which extended standing was recognised – has either had an impact on a significant number of people, or will positively affect a large number of people when the administration either complies with judgments or is forced to do so..." (Pages 522 - 523)

"Secondly, it is significant that it is in the field of social assistance that the extended standing provisions of the Constitution have been given life ... [T]he cases dealing with standing may be seen as cases that vindicate and extend the rule of law and constitutionalism. ... Thirdly, the cases illustrate the vitality and importance of administrative law as a means of ensuring that official action complies with the Constitution, its commitment to the rule of law, and the values of accountability, responsiveness and openness. ... " (Page 523)

SELECTED JUDGMENTS

MOETJIE V THE STATE AND ANOTHER 2009 (1) SACR 95 (T)

Case heard 7 January 2008, Judgment delivered 7 January 2008

This was an application for special review under section 304(4) of the Criminal Procedure Act. The Regional Court had confirmed a sentence of imprisonment for an indefinite period on the accused. The accused had been convicted of rape in June 1995, and declared a dangerous criminal and sentenced to indefinite imprisonment under s 286 of the Criminal Procedure Act. The sentence was reviewed and confirmed 10 years later – this review and confirmation was the subject of the special review by the High Court.

Southwood J (Van Der Merwe J concurring) held:

"It is clear therefore that the new evidence bearing on the accused's continued dangerousness is of vital importance in the enquiry in terms of s 286B(4). The potential advantage to the accused is that there may be an amelioration of his sentence or he may even be released - see S v T1997 (1) SACR 496 (SCA) ... There is no indication that the new evidence in the reports referred to was carefully considered or analysed by the regional magistrate." [Paragraph 7]

"The proceedings in terms of s 286B were part of the accused's trial ... and s 35(3) of the Constitution was therefore applicable: ie the accused was entitled to a fair trial. As an unrepresented accused with limited education and insight into the proceedings ... he should have been advised to obtain legal representation or, at the very least, of what was required of him at the hearing. ... The presiding magistrate did not explain to the accused what his rights were and what the purpose of the proceedings was. Nor did he explain what the important case law said about the section. ... [T]he accused did not read or even have access to the crucial documents on which the regional magistrate based his finding. In these circumstances the proceedings ... were not fair and the magistrate's order must be set aside " [Paragraph 8]

"A second, and equally important shortcoming, is that the proceedings did not take place in accordance with the provisions of s 286B. Clearly the proceedings did not take place pursuant to s 286B(3). They took place in terms of s 286B(2). ... [T]he regional magistrate who sentenced the accused on 13 June 1995, was not available and Mr Gericke took his place. Mr Gericke clearly did not have access to the evidence recorded or even the judgment and reasons for sentence. ... The subsection clearly envisages that the judicial officer who convicted and sentenced the accused must reconsider his sentence but, failing that, that the judicial officer who reconsiders the sentence must be placed as far as possible in the position of the judicial officer who convicts the accused. This did not happen." [Paragraph 9]

"A further shortcoming is that the regional court did not have at its disposal a report from the Correctional Supervision and Parole Board ... The failure to obtain and consider recommendations made ... before making a finding is therefore a fatal flaw in the proceedings, which also requires that the finding and order of the regional court be set aside." [Paragraph 10]

"The proceedings ... were therefore fatally flawed and substantial justice was not done to the accused. The order made on 13 September 2006 will therefore be set aside and the matter remitted to the ... regional court for the accused's sentence to be reconsidered ... The accused has now served an indefinite prison sentence of about 12 years without his sentence being reconsidered as required ... It is therefore

vital that there be no further unwarranted delay in the proper reconsideration of his sentence. It will be ordered that this be done within two months of this order." [Paragraphs 11 - 12]

THE SOUTH AFRICAN APARTHEID MUSEUM AT FREEDOM PARK V STAINBANK AND ANOTHER 2009 BIP 46 (T)

Case heard 17 July 2003, Judgment delivered 17 July 2003

Applicant sought an order rectifying the register of trademarks by expunging first respondent's trademark "THE APARTHEID MUSEUM".

Southwood J held:

"In 1990, in the course of developing the concept of an Apartheid Museum the first respondent decided to register the trademark. The trademark THE APARTHEID MUSEUM was registered in part B of the register kept in terms of the old Act. In September 1998 the first respondent published a brochure containing details of the Apartheid Museum which the first respondent had conceived ... According to the first respondent the primary purpose of the brochure was to market, create awareness, educate and create a national consciousness around the concept THE APARTHEID MUSEUM and to promote the trademark THE APARTHEID MUSEUM. ..." [Page 48]

Southwood J considered the applicant's attack on the trademark under s 27(1)(b) of the new Act:

"These provisions cast upon the registered proprietor an onus to rebut an allegation of non-use of his trademark ... The registered proprietor must therefore prove trademark use, whether by him, qua proprietor, or by any person permitted by him to use the trademark ... Section 27 grants to the court a general or residual discretion to refuse to expunge a trademark from the register even where it has been shown that the statutory grounds for expungement have been satisfied [citation to decisions by the former Appellate Division] ... However, unless the circumstances are exceptional, once the statutory requirements have been met, the mark will be removed ...

The first respondent disputes that the applicant has *locus standi* to seek relief. ... In my view, the applicant is clearly an interested person for the purposes of s 27 of the new Act. The registration of the first respondents trademark narrows the field into which the applicant may enter and limits the applicants ability to choose an apt name for the applicants own museum. ..." [Page 49]

Southwood J then dealt with the requirements for avoiding expungement:

"Usually a court will not consider use to be bona fide unless it is real commercial use of a substantial scale ... The requirement of real commercial use was emphasised by the court in B *Arjo Wiggins Ltd v Idem (Pty) Ltd and Another* ... In considering whether the first respondent has used his trademark THE APARTHEID MUSEUM as contemplated by the authorities referred to it is important to bear in mind that the services for which the trademark is registered are 'education and entertainment. ..." [Pages 50 – 51]

"... [T]he first respondents counsel attempted to build an argument on 'publication of books and magazines. ... He ... contended that during the period 1998 to the present the first respondent produced, distributed and made available for sale the brochure 'New Landscapes New Images in which the trademark is used seventy five times. ... The basis of this argument is flawed. The specification of services

in respect of which the trade mark is registered is simply 'education and entertainment ... There is no basis for extending it to include the services referred to in the first respondents affidavit." [Page 51]

"These words must bear their ordinary meanings. The appropriate meanings can be ascertained by reference to authoritative dictionaries. ... Neither meaning [of 'education' and 'entertainment'] includes the publication or publishing of books. ..." [Page 52]

"... In the founding affidavit the applicants deponent alleges that there has been no bona fide use for a period of five years or more by the first respondent of the trademark THE APARTHEID MUSEUM. In his answering affidavit the first respondent sets out the ways in which he contends THE APARTHEID MUSEUM has been used. It is clear ... that the first respondent has not yet fulfilled his dream of opening the Apartheid Museum. ... [T]he body which is to manage the museum has not yet been registered and has not yet commenced any activities. It is also clear from the first respondents answering affidavit that the first respondent and his company, Stainbank and Associates, have not yet rendered any educational and entertainment services under the name 'The Apartheid Museum. All that has happened thus far is that steps have been taken by the first respondent and his company to obtain funds with which to set up the Apartheid Museum which the first respondent conceived. In my view, that does not constitute bona fide use of the trademark in relation to the services in respect of which it is registered. This is so even if the trademark has been mentioned many times in the brochures and other written documents which have been used for the purposes of soliciting the funds.

The applicant is therefore entitled to relief in terms of s 27(1)*(b)* ..." [Page 53]

PRICE WATERHOUSE COOPERS INC AND OTHERS V NATIONAL POTATO CO-OPERATIVE LTD 2004 (6) SA 66 (SCA)
Case heard 11 May 2004, Judgment delivered 1 June 2004.

The issue in this case was whether the appellants could rely on an alleged champertous agreement [an agreement whereby an outsider provides finance to enable a party to litigate in return for a share of the proceeds, or any agreement whereby the party was said to speculate in litigation] between the respondent and a third party to finance the respondent's action, as a defence to the respondent's claim. The respondent had experienced difficulty in funding the litigation, and had initially sold the claim to Farmers Indemnity Fund (Pty) Ltd ('FIF'). However, after obtaining legal advice that the sale agreement was against public policy and invalid, the agreement was cancelled and a new agreement was entered into, whereby FIF would finance the litigation in exchange for 50% of the proceeds of the litigation.

Southwood AJA, for a unanimous court (Harms, Cameron, Conradie and Lewis JJA concurring), held:

"... [W]hen a court finds that an agreement is contrary to public policy it should not hesitate to say so and refuse to enforce it. However, the court should exercise this power only in cases where the impropriety of the transaction and the element of public harm are manifest. It is an important consideration that there be certainty about the validity of agreements and that this certainty could be undermined by an arbitrary and indiscriminate use of the power to declare agreements contrary to public policy ..." [Paragraph 23]

"Since the advent of the Constitution public policy is rooted in the Constitution and the fundamental values it enshrines ... The fundamental values enshrined in the Constitution and the interests of the

community or the public are accordingly of the utmost importance in relation to the concept of public policy. Therefore an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values, or the interests of the community, whether it be contrary to law or morality or runs counter to social or economic expedience ..." [Paragraph 24]

"... FIF undertook to provide the Co-operative with funds to enable the Co-operative to prosecute its case against Price Waterhouse in return for 45% of the proceeds. Such agreements ... were known to Roman and Roman-Dutch law and have been looked upon with disfavour ... The reason for this was that they were considered to encourage speculative litigation and consequently amounted to an abuse of the legal process ... From the 19th century our law has often referred to such a contract as 'maintenance and champerty' and adopted some of the rules of English law without attempting to reconcile these rules with the principles of Roman-Dutch law. ... A number of cases decided ... in the last years of the 19th and the early part of the 20th century show that the courts took an uncompromising view if agreements which I shall call champertous ... However, it is clear that the Courts acknowledged one exception. It was accepted that if anyone, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void ... This was early recognition that in a case where an injustice would be done if a litigant were not given financial assistance to conduct his case, a champertous agreement would not be contrary to public policy." [Paragraphs 25 -27]

"The reasons for champertous agreements being considered to be contrary to public policy have not, so far, been reconsidered or tested by the courts in the light of changed circumstances and, in particular, in the light of the Constitution. It is instructive to have regard first to the position in English law." [Paragraph 29]

"These developments in English law are mirrored in South African law. The judiciary is independent. Its independence is guaranteed by the Constitution. The civil justice system is regulated by the State and has the necessary mechanisms to withstand the abuses perceived to flow from champertous agreements. There are trained and disciplined legal professionals who are subject to strong ethical codes. And there are pre-trial procedures such as discovery to ensure that evidence is not fabricated or suppressed. There is also the trial itself where the veracity of the evidence can be properly tested. There is also the cost of losing. This is a great disincentive to the dishonest litigant." [Paragraph 39]

Southwood AJA then noted that contingency fees were permitted in south Africa since the passing of the Contingency Fees Act of 1997, and as a result that the Legislature had made "speculative litigation" possible [paragraph 41], and continued:
"In my view this approach is consistent with the right enshrined in s 34 of the Constitution: 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. On a number of occasions the Constitutional Court has emphasised the importance of this right [citation to Constitutional Court decisions] ... [U]pholding agreements between a litigant and a third party who finances the litigation for reward is also consistent with the constitutional values underlining freedom of contract. ..." [Paragraphs 43 - 44]

"... Accordingly it must be held that an agreement in terms of which a stranger to a lawsuit advances funds to a litigant on condition that his remuneration, in case the litigant wins the action, is to be part of

the proceeds of the suit, is not contrary to public policy. Price Waterhouse are therefore not entitled to base a defence on the assistance agreement." [Paragraph 46]

"Price Waterhouse referred .. to cases decided in South Africa where courts had non-suited plaintiffs because they were being assisted in the litigation pursuant to a champertous agreement ... However, none of these cases explained how the fact that the agreement between the third party and the plaintiff was illegal could be a defence to the plaintiff's claim against the defendant, or where the Court derived the power to dismiss or refuse to entertain a plaintiff's action on this ground. In my view there was no basis for finding that the illegal agreements were a defence or a ground for refusing to entertain the actions. These cases were accordingly incorrectly decided. ..." [Paragraph 49]

Southwood AJA found that there was no suggestion that the Respondent's claim was not *bona fide* [paragraph 51], and dismissed the appeal.

"Unfortunately it is necessary to comment on the Co-operative's attorney's attempts to supplement the record. ... Neither party was free to disregard the agreements and attempt to place before this Court documents which had not been placed before the trial Court. Mr Buitendag apparently thought that he was entitled to do so. Not only did he attempt to have other documents included in the record but he also filed affidavits dealing with these documents and what had been given to Price Waterhouse's legal representatives. The result is another seven volumes of record, largely irrelevant, and of no use to this Court. This is due to Mr Buitendag's obstinate adherence to a clearly erroneous view." [Paragraphs 54, 62]

"The additional seven volumes have imposed upon the members of this Court a considerable and unnecessary burden. It is appropriate that the Co-operative bear the costs associated with these volumes. In addition, and as a mark of the Court's displeasure at the conduct of Mr Buitendag, it will be ordered that he is not to receive a fee for perusing the record." [Paragraph 63]

NATIONAL DIRECTOR OF PUBLCI PROSECUTIONS V KYRIACOU 2004 (1) SA 379 (SCA)
Case heard 18 August 2003, Judgment delivered 26 September 2003.

Respondent had been convicted in the High Court on 102 counts of receiving stolen property to the value of approximately R4,5 million. Upon conviction, the judge had ordered that the property be returned to its rightful owners in terms of the Criminal Procedure Act. The following day, the judge commenced an enquiry to determine whether a confiscation order should be made in terms of the Prevention of Organised Crime Act (POCA). Before the enquiry was concluded, another High Court judge made a provisional restraint order in terms of POCA, which was set aside on the return day. The appellant appealed against the setting aside of the provisional restraint order.

Writing for the majority, Mlambo AJA (Howie P, Brand and Nugent JJA concurring) held that the fact that the accused had been relieved of the property by order of the trial court had no bearing on the existence of the jurisdictional fact necessary for the making of a confiscation order. Once it had found that the respondent received a benefit from the crimes, the Court had a discretion to order the confiscation of benefits he had received, not only from that criminal activity but also from related criminal activity [paragraph 12]. Mlambo AJA held that the question was whether there were reasonable grounds for

believing that the trial court may order confiscation of the property placed under restraint, and found that there were indeed reasonable grounds for such a belief. The appeal was accordingly upheld.

Southwood AJA dissented:

"Section 26(1) of the Act provides for the appellant to apply by way of an *ex parte* application ... for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates. The purpose of such a restraint order is the preservation of the property so that any confiscation order ... will be effective." [Paragraph 22]

Southwood AJA analysed the statutory scheme further, and continued:

"The clear purpose of these provisions is to ensure that the defendant does not continue to enjoy the benefit of the proceeds of the unlawful activities in which he is or was involved. ... The provisions of s 18 make it clear that these are specific unlawful activities and not simply suspected unlawful activities. ... The court can make this finding only if it knows what other criminal activity is involved. Section 18(2) expressly limits the amount which the court may order the defendant to pay to the State ... to the value of the defendant's proceeds of the offences or related criminal activities ..." [Paragraph 27]

"The appellant ... failed to establish on a balance of probabilities that the respondent was involved in any other criminal activity related to the offences of which he was convicted." [Paragraph 36]

"Even if it is accepted (even though it is not alleged) that the respondent has again received stolen property to the value of approximately R300 000, it is common cause that the SAPS have attached and removed and (apparently) are still in possession of that property. This property is the only benefit that the respondent could have derived from the unlawful activity and he has been deprived of that benefit. ... While it is correct that the respondent has benefitted from unlawful activities as contemplated in s 12(3) of the Act ... I cannot agree that the fact that the respondent has been deprived of the property by an order in terms of ... the Criminal Procedure Act ... has no bearing on whether the court may make a confiscation order. ..." [Paragraphs 37 – 38]

"The position is that the respondent has not continued to enjoy the proceeds of the 102 offences of which he has been convicted or the allegedly stolen property that was attached and removed ... There is therefore no reasonable ground for believing that a confiscation order will be made ... I do not agree with Mlambo AJA that the position is altered by the presumptions contained in ss 22(1) and 22(3) of the Act" [Paragraphs 39 – 40]

Brand JA (Howie P, Nugent JA and Mlambo AJA concurring) wrote a separate judgment:

"... I concur in the judgment of Mlambo AJA ... I find myself in respectful disagreement with Southwood AJA.
The difference in the diverging judgments seems to pertain, not so much to the interpretation of the relevant provisions of the Act, but to the application of these provisions to the facts of the case. Broadly stated, Southwood AJA is of the view that the jurisdictional requirements ... have not been met in that

there appear to be no 'reasonable grounds for believing that a confiscation order may be made against' the respondent. I cannot agree. ...” [Paragraphs 47 – 48]

“... I believe that there is a real possibility of the trial Court concluding that a confiscation order is warranted on the basis that the respondent had derived substantial benefits from offences sufficiently related to those of which he had been convicted. Southwood AJA seems to be of the view that a restraint order can only be based on benefits derived from related criminal activities if the appellant can establish the respondent's involvement in such activities on a balance of probabilities ... I do not agree. All s 25(1)*(a)*(ii) requires are reasonable grounds for the belief that the trial Court may (not will) conclude that respondent benefited from related criminal activities.” [Paragraph 49]

VAN ROOYEN AND OTHERS V THE STATE AND OTHERS 2001 (4) SA 396 (T)
Case heard 14, 15 February 2001, Judgment delivered 5 June 2001

In this case, the constitutionality of certain provisions of the Magistrates Act, the Magistrates' Courts Act, and regulations made under the Magistrates Act, was challenged. One of the issues concerned the role of the Magistrates Commission.

Southwood J considered the question of the independence of the courts:

“The Constitution provides expressly ... that all courts constituted in terms of the Constitution are to be independent. ... In addition to the express provisions contained in s 165, the Constitution contains other provisions which require that the courts must be independent. Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic State founded on, *inter alia*, the supremacy of the Constitution and the rule of law. The rule of law, which is one of the founding values of our democratic State ... itself requires that the Judiciary be independent ... [citations to South African and foreign academic authority, and Constitutional Court jurisprudence]. The separation of powers also requires that there be an independent Judiciary ... The Constitution does not define the word 'independent' nor does it say what is meant by the independence of the courts. The meaning must be derived from the basic tenets of a Constitution in a democratic State founded, *inter alia*, on the supremacy of the Constitution and the rule of law and the provisions of the Constitution.” [Pages 428 – 429]

“These statements clearly require an effective separation between the Legislature and the Executive on the one hand, and the Judiciary on the other, to ensure that there be no actual or perceived, direct or indirect interference with the Judiciary. A system of courts which is controlled by the Executive would at the very least give rise to a perception that there is indirect interference with the liberty of the individual judicial officers to decide the cases which come before them.” [Page 431]

Southwood J then identified the test for the independence of the courts as being “whether an informed and reasonable person would perceive the tribunal as independent” or “whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence” [page 433].

"Despite the fact that the Magistrates Commission as originally constituted was independent of the Executive and the Legislature, it is doubtful that it could achieve its primary object of ensuring that the appointment, promotion, transfer or discharge of, or disciplinary steps against, magistrates take place without favour or prejudice and that the applicable laws and administrative directions in connection with such action be applied uniformly and correctly. The reason for this was that the Magistrates Commission was given no substantive powers in respect of any of these matters. The Minister retained the power to appoint magistrates. Although he was obliged to consult with the Commission he was not required to obtain the concurrence of the Commission. The Minister determined the conditions of service of magistrates. The Minister was empowered to do this by means of regulations ..." [Page 446]

Southwood J then proceeded to discuss the composition of the Magistrates Commission:

"The Magistrates Commission now consists of 27 members. ... [T]he party having a majority of members in Parliament and constituting the Executive authority appoints or designates 20 members of the Commission. ... Seventeen members are designated 'after consultation with' the relevant designating authorities and five members are appointed 'in consultation with' the relevant designating authority. However, these five members are appointed by the President in consultation with the cabinet. ... The perception of the objective, reasonable and informed person will be that the executive authority is in effective control of the Magistrates Commission and can use it for its own purposes. To all intents and purposes the Magistrates Commission is an organ of State [citation to High Court judgments] ...It is obviously no longer the autonomous body it was intended to be.
This view is reinforced by the provisions of s 3(2) of the Magistrates Act, which makes it possible for the executive and legislative authority to withdraw any appointment or designation made by it ..." [Page 453]

"It is no longer necessary for the President or the Minister to consult with the organised professions (or any of the other clearly defined professional organisations or peer groups). How or with whom the President and the Minister now consult is a mystery. ... [T]he objective, reasonable and informed person would not accept ...that the Magistrates Commission is in essence independent and cannot be manipulated at the whim of a particular Minister ... The objective, reasonable and informed person would conclude that the composition of the Magistrates Commission was altered in this way for the purpose of giving the Executive and the Legislature control of the Magistrates Commission and through it the magistracy.
Insofar as the Magistrates Commission has any role to play in taking decisions, making its views known to the Minister or making recommendations to the Minister, either in terms of the Act or the regulations, it is unlikely to take any decisions, express any views or make recommendations which do not find favour with the Minister. As a member of the Magistrates Commission the Minister will probably play a decisive role when the Magistrates Commission takes a decision on any contentious issue." [Page 454]

"The conclusion is inescapable that the magistrates' courts and the magistracy remain the personal fiefdom of the Minister of Justice. Magistrates are now part of a system created, organised and controlled by the Minister of Justice. ... The Magistrates Commission as presently constituted will be perceived by the objective, reasonable and informed person to be in conflict with or undermining of the independence of the magistracy. The section is therefore inconsistent with the requirement that the magistrates' courts be independent. It is also inconsistent with s 174(7) of the Constitution. As presently constituted the Magistrates Commission cannot ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates take place without favour or prejudice." [Page 455]

Southwood J went on to find several specific provisions of the Magistrates Act, Magistrates' Courts Act, and regulations to be unconstitutional. The Constitutional Court confirmed the findings of constitutional invalidity in respect of certain provisions, but declined to confirm in respect of the remaining provisions. The Constitutional Court held that the Magistrates Commission was not, and could not reasonably be perceived to be, an executive structure and not independent. **Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening) 2002 (5) SA 246 (CC)**.

SELECTED JUDGMENTS

S V NDZUZO [2009] JOL 23962 (TK)

Judgement delivered 21 June 2006

The accused had pleaded guilty to theft in the Magistrates' Court, having been accused of stealing meat to the value of R17.50 from a supermarket. The accused had conducted his own defence. The matter came before the High Court on review in terms of section 304 of the Criminal Procedure Act.

Conjwa AJ (Miller J concurring) held:

"The magistrate ... proceeded to sentence the accused to undergo 6 months' direct imprisonment. It is evident ... that the magistrate invoked the provisions of section 112(1)(a) of the [Criminal Procedure] Act. ..." [Page 3]

"The section certainly did not allow the magistrate to impose a sentence of direct imprisonment. The section allows the magistrate to impose a sentence of imprisonment that must be coupled with an option of a fine which, in the circumstances, would not exceed R1 500. The sentence was in the circumstance improperly imposed (see S v Sharp 2002 (1) SACR 360 (Ck) at 370i).The fact that the magistrate convicted the accused merely on a plea of guilty shows that she regarded the offence as minor. The sentence that the magistrate imposed is unduly harsh and disproportionate ... especially when one takes into account the alleged value of the stolen item. The magistrate does not seem to have considered other sentencing options which the Act avails to her before she imposed the sentence ... She does not seem to have considered requesting a probation officer to investigate the personal circumstances of the accused, which would have assisted her in sentencing. ..." [Page 4]

"I am concerned about the way the public prosecutor tendered into evidence the information relating to accused's previous conviction. The previous conviction against the accused was not proved as provided for in the provisions of section 271 of the Act. The accused was not afforded an opportunity to deny or confirm same. Although it does not appear ex facie the record of the proceedings that the court took the previous conviction into consideration in reaching sentence, it does however seem to have tainted her mind hence the sentence. " [Pages 4 - 5]

The conviction was confirmed, but the sentence was set aside and replaced with a fine of R300 or 30 days imprisonment suspended for 2 years.

SIPHAMANDLA XOLI V THE STATE, UNREPORTED JUDGMENT, CASE NO: CA & R213/10 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

The appellant was convicted in the Regional Court on counts of pointing a firearm, unlawful possession of a firearm and malicious injury to property. He was sentenced to 4 years imprisonment (half of which was conditionally suspended for 5 years); a fine of R6 000 or 4 years imprisonment; and a fine of R500 or 6 months imprisonment respectively. All the sentences were ordered to run concurrently. The appeal was against the sentence only.

Conjwa AJ held:

"It is trite that a court on appeal does not have a free reign to interfere with the sentencing discretion of a trial court. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. ...Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question afresh. In doing so, it assess sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. ..." [Paragraph 5]

"The sentence imposed ... raises a question ... whether it was competent for the Magistrate to have ordered that a sentence consisting of a fine with an alternative of imprisonment should run concurrently with another sentence. ..." [Paragraph 6]

"This question has, over the years, been dealt with by the various courts and divergent views have emerged therefrom. ..." [Paragraph 8]

Conjwa AJ surveyed High court decisions, and continued:

"A reading of section 280(2) seems ... to lend itself to an interpretation that a court is empowered to order a concurrent running of sentence when the sentence imposed consists of imprisonment only. The section is framed in such a way that it makes express mention of sentences of imprisonment which shall be ordered to run concurrently. No mention is made ... of a sentence of a fine. There is no authority in this section to direct punishment of a fine to run concurrently with a punishment consisting of imprisonment. It is difficult to understand how a sentence of a fine can be said to run. Time does not enter into the consideration of punishment in the case of a fine and therefore fines cannot appropriately be said to run, let alone run concurrently." [Paragraph 10]

"To hold otherwise would offend the express provisions of this section and would lead to an absurd result in that ... if the accused were to pay the fine, he would be left in the same position as if he had not paid, for he would still be required to undergo imprisonment. ... There is an added difficulty in this matter in that, it is not clear which of the three sentences ... the learned Magistrate intended to order that it run concurrently with the others ... It would appear further that, with the order as it stands the accused might, with the payment of one of the fines be able to escape liability in respect of the other." [Paragraphs 11 - 12]

Conjwa AJ thus held that the magistrate had committed a material misdirection [paragraph 13]. In considering sentence, she found that the personal circumstances of the accused were "far out-weighed" by the nature and seriousness of the offence and the interests of society, and hence that a custodial sentence was unavoidable [paragraph 17]. The accused was sentenced to 2 years imprisonment on count 1, 2 years imprisonment on count 2 and 3 months imprisonment on count 3, the sentences imposed on counts 2 and 3 to run concurrently with that imposed on count 1. The sentence was backdated.

MINISTER OF SAFETY AND SECURITY V THEMBA TOKOTA, UNREPORTED JUDGMENT, CASE NO: CA 108/2010 (EASTERN CAPE HIGH COURT, GRAHAMSTOWN)

Case heard 12 November 2010, Judgment delivered March 2011.

Respondent was awarded damages for injuries sustained while in custody of the SAPS, having been stabbed with a knife by another detainee while being detained in holding cells.

On appeal, Conjwa AJ held:

"The only real issue that this court is called upon to decide is whether ... the magistrate erred in his finding that the appellant had a duty of care to ensure, within reasonable limits, the safety of the respondent and had neglected to do so." [Paragraph 11]

"The determination as to whether a negligent act or omission is a cause of a certain result is a factual enquiry. The test to be applied has been restated in a number of decided cases. [citation to Moses v Minister of Safety and Security 2000 (3) SA 106 (C)] ..." [Paragraph 12]

"The knife used to stab the deceased was described as being approximately 22cms long. It was by no means a small knife which could easily be hidden. Had the police officers conducted a proper search of the detainees in their care, they would have discovered a knife of that size. ..." [Paragraph 14]

"... The appellant's members were, by reason of the relationship between themselves and the detainees, under a duty to have taken reasonable steps to protect the detainees including the respondent from such foreseeable harm by conducting a thorough search of the detainees. It was as a result of the negligence of the appellant's employees, by failing to thoroughly search the detainees that the knife in question found its way into the cells leading to the stabbing of the respondent. The appellant is in law liable for the injuries suffered by the respondent." [Paragraph 15]

The appeal was dismissed with costs (Revelas J concurring).

SELECTED JUDGMENTS

AVUSA PUBLISHING EASTERN CAPE (PTY) LTD V QOBOSHIYANE NO AND OTHERS 2012 (1) SA 158 (ECP)

Case heard 1 September 2011, Judgment delivered 20 October 2011

This was an application in terms of the Promotion of Access to Information Act (PAIA) to obtain a forensic investigation report prepared by Kabuso CC and held by first, second and third respondents. The predecessor of the first respondent had received a letter from the mayor of the fourth respondent, alleging maladministration. Acting in terms of the Local Government: Municipal Systems Act, the predecessor of the first respondent appointed Kabuso CC to investigate and report on the allegations. Applicant then lodged a request for access to the Kabuso report, which was refused. An internal appeal confirmed the refusal.

Dukada AJ held:

"In interpreting the said s 44(1) [of PAIA], it is essential to take into account not only ... s 32 of the Constitution, but also s 195 ... which deals with the basic values and principles which must govern public administration ..." [Paragraph 14]

"... [T]hose provisions of PAIA which provide for the refusal of access to information must be strictly and narrowly construed so that the broadest effect may properly be given to ss 32 and 195 of the Constitution. Where a public body seeks to rely upon a ground of refusal as provided in Ch 4 of PAIA, the onus rests on it to establish that its refusal of access to the record is justified in terms of the provisions of PAIA." [Paragraphs 17 - 18]

"Turning now to the reasons given for the refusal of access which the second respondent gave ... Section 44(1)(a)(i) provides that the information officer of a public body may refuse a request for access to a record of a public body — if the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or taking a decision in the exercise of a power or performance of a duty conferred or imposed by law. The section does not at all provide for a refusal of access to a record of a public body on the ground that 'it contains privileged information'. ..." [Paragraph 19]

"In a country like ours which is now enriched with a 'culture of justification' ... in matters of this nature, the aforementioned replies by the second and first respondents cannot be described as having complied with the said culture. [Citation to Nugent JA in President of the Republic of South Africa v M&G Media, quoting Etienne Mureinik] ... [I]t seems to me that second and first respondents in the spirit of the 'culture of justification' were obliged to give adequate reasons for their refusal. In my view, their ... replies fall short of adequate reasons" [Paragraph 21 - 22]

Dukada AJ noted the first respondent's argument that release of the entire report would tend to undermine an ongoing process in relation to the concerns of maladministration, and that the fourth respondent needed to be given an opportunity to respond to the issues raised by the report. Dukada AJ accepted that the report had been obtained for the purpose of assisting the first respondent in deciding whether to act in terms of s 139(1) of the Constitution, and that the refusal of access was justified in terms of s 44(1)(a) and (b) of PAIA.

"This matter, however, does not end there as Mr Goosen SC argued that the mandatory or compulsory disclosure of a record in the public interest in terms of s 46 of PAIA applies in the circumstances of this case. He argued that the first respondent is obliged in terms of s 46 of PAIA to demonstrate the adverse effect or the harm which might arise from the disclosure of a record which falls within the ambit of s 44 ... outweighs the public interest in the disclosure of evidence of serious contraventions of the law. ..." [Paragraphs 34 - 35]

"While I agree ... that the deliberative process of the first, third and fourth respondents ought to be protected in terms of s 44(1)(b) of the Act, there is, however, a disturbing factor in this matter, which is the apparent lack of appreciation of the essence of time ..." [Paragraph 39]

Dukada AJ set out the timeline of how the report had been dealt with since it was delivered to the first respondent's predecessor, and continued:

"From the above outline of events and times it is clear that the 'process' between the first respondent and the fourth respondent has been going on as from 3 May 2011 and as at the date of hearing of this application it was still going on. That covers a period of about four months. To complicate matters this Kabuso report has been with the predecessor of the first respondent as from February 2010." [Paragraph 40]

"To me it seems that even the said time taken by the first respondent in obtaining legal opinions and consolidating them and the report, cannot be described as a reasonable one." [Paragraph 42]

"Section 195(1)*(g)* of the Constitution provides that: 'Transparency must be fostered by providing the public with *timely*, accessible and accurate information.' (My emphasis.) In my view, this section makes time of the essence in matters of this nature; but unfortunately the way in which the fourth respondent has dealt with the Kabuso report does not reflect an appreciation of that aspect." [Paragraph 44]

"The response by the fourth respondent to the issues raised in the Kabuso report has been outstanding for an unreasonable time. It seems to me the disclosure of the Kabuso report would reveal a substantial contravention of, or a failure to comply with, the law. I fully agree with Mr *Goosen SC* that the attitude of the first respondent ... seems to be rather paternalistic and appears to reflect a distrust of the public. The right to timely, accessible and accurate information so aptly described by Ngcobo J in the *Brummer* case supra the Constitution demands that it be fostered." [Paragraph 46]

"In my view, to withhold access ... any further will be against public interest that will be served by revealing the Kabuso report which evidences a substantial contravention of the law, and such public interest clearly outweighs the harm to the interest protected by s 44(1)*(a)* and *(b)* of the Act." [Paragraph 47]

The decisions of the first to third respondents to refuse applicant access to the report were set aside, and the first and third respondents were ordered to deliver the complete report to the applicant.

PACKAGING AND STAPLING CC V FROMM SYSTEMS AFRICA (PTY) AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 966/2010

Case heard 9 September 2010, Judgment delivered 23 November 2010

Applicant sought to interdict and restrain the Respondents from communicating, marketing, offering for sale, quoting to, soliciting business from, or in any other manner contacting and/ or doing business with clients of the Applicant; and from communicating with the employees of the Applicant to entice them to take up employment with the First Respondent. Applicant also sought to compel respondents to deliver and delete various client and other records.

Dukada AJ held:

"... In the circumstances the relief sought by the Applicant can only be granted if such relief would be justified on the basis of the facts alleged by the Second Respondent and those facts alleged by the Applicant which have not been genuinely or bona fide disputed by the Respondent. [citation to the Appellate Division decision in the Plascon Evans case]" [Paragraph 15]

"The test of confidentiality is an objective one as stated by ROOS, J in VAN CASTRICUM'S case, ... quoting with approval the following extract from MARAIS, J in COOLAIR VENTILATOR CO. (SA) (PTY) LTD v LIEBENBERG AND ANOTHER 1967 (1) SA 686 W...: " The difficult question in each case would be to decide what information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential or general knowledge and what items are confidential or secret. The dividing line may move from case to case, according to what is general practice or convention in the category of trade or manufacture in which the plaintiff falls, with the particular reference to existing or potential competitors of his. If, however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e to gain an advantage is prima facie confidential as between an employee and third parties and that disclosure would be a breach of the service contract. If use has in fact been made of it, in an effort to harm the business interest of the Plaintiff the presumption would be even stronger that the employee, who would in the course of his employment obtain knowledge of it., intended to be treated as confidential information not to be divulged to third parties."" [Paragraph 27]

Dukada AJ then considered the LexisNexis Close Corporation Service and an article by a Professor Delport regarding the transfer of a member's interest, and then considered further academic authority:

"The question now that arises is what does transfer of a member's interest constitute or mean? ... Delport ... says:- "A member's interest can be described as incorporeal movable property conferring certain rights (iura in personan) on the holder of the interest. Since a member's interest in essence embodies a personal right against the corporation, it can be transferred by cession, namely an agreement between the transferor and the transferee whereby the rights vesting in the former are transferred to the latter."" [Paragraph 52]

"I fully agree with the analysis and conclusions made by Prof Delport ..." [Paragraph 53]

"It is trite law that one of the requisites for both a final interdict and an interim interdict is the absence of similar protection by any other ordinary remedy. ... However such alternative remedy must be adequate

in the circumstances, ordinary and reasonable, a legal remedy and grant similar protection. [Citation to High Court decisions]" [Paragraph 67]

"The Learned Judge in PARAGON BUSINESS (PTY) Ltd case, ... goes on to say ...:-"What is clear from the authorities however, is that the party relying on duress bears the onus of showing that he was induced thereby to conclude the agreement- see for example, SAVVIDES v SAVVIDES AND OTHERS 1986 (2) SA 325 (T) at 329-30. Put another way, the party bearing the onus must show that he would not have concluded the agreement had it not been for the duress." ... [T]he learned Judge goes on to say:- " A court is of course not bound to accept a respondent's allegations in opposed motion proceedings and is entitled to reject allegations made by a respondent if they are too far fetched or clearly untenable". I agree with this reasoning and this is the approach I intend adopting in considering this issue." [Paragraph 87]

The order was granted against the second respondent.

XOLANI MAQHUNYANA V MINISTER OF SAFETY & SECURITY & OTHERS, UNREPORTED JUDGMENT, CASE NO: 2265/2009

Case heard 26 August 2010, Judgment delivered 27 January 2011

The applicant launched an application seeking to have the search, seizure and continued detention of the applicant's motor vehicle declared unlawful. Two issues were raised – the validity of the authorisation of for the police road block, and the lawfulness of the search, seizure and detention of the vehicle.

Dukada AJ held:

"The most relevant portion of Section 13(8) [of the South African Police Service Act] for the purposes of this matter is the following:- "The National or Provincial Commissioner may, where it is reasonable in the circumstances in the order to exercise a power or perform a function referred to in Section 215 of the Constitution, in writing authorize a member under his command, to set up a roadblock or roadblocks on any public roads in a particular area"" [Paragraph 15]

"I, too, could not find case law dealing with the phrase "where it is reasonable in the circumstances" in the above quoted portion of Section 13(8) ... [I]t seems to me that the word 'reasonable' is a fluctuating term, the meaning varying with the context. It seems to me one has to apply the primary rule of interpretation which aptly put as follows by SCHREINER JA in JAGA v Donges NO 1950 (4) SA 653 AD ...:- 'Certainly no less important that the often repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context'. Applying the said primary rule of interpretation, it seems to me that it is more accurate to say that the phrase 'where it is reasonable in the circumstances' refers to circumstances or situation existing on the ground or spot where the roadblock is to be conducted, for instance where the spot is on a blind curve of a road which is such that to conduct a roadblock there would be potentially a source of danger not only to the motorists but also to the police officials conducting the roadblock. In such circumstances, I am of the view that it cannot be said it is reasonable in those circumstances to authorize that a roadblock be conducted..." [Paragraph 27]

"I am mindful of the fact that the impact of Section 13(8) on the fundamental individual rights and constitutional values should be taken into consideration. Where it infringes upon or make inroads into the constitutional rights of the individual, it must be restrictively interpreted..." [Paragraph 20]

However, Dukada AJ found that the applicant had failed to disclose the facts on which it was alleged that there were no jurisdictional factors to authorise the setting up of the road block. Dukada AJ also found that the vehicle was an item liable to be seized in terms of the Criminal Procedure Act. The application was thus dismissed.

COLLEN V TIRY, UNREPORTED JUDGMENT, CASE NO: 12409/2008

Case heard 7 September 2010, Judgment delivered 23 November 2010

The defendant had sought to compel the plaintiff to deliver a reply to the defendant's request of particulars for the trial. In the event of the plaintiff failing to deliver the said reply, the defendant asked to be granted leave to supplement the papers to the extent necessary, seeking a dismissal of the plaintiff's action plus costs. Plaintiff then launched a counter-application seeking an order for leave to withdraw the main action. Defendant did not oppose the counter-application and withdrew its application to compel the reply. The only issue remaining to be decided was that of costs.

Dukada AJ held:

"... Publication is one of the essential elements to be proved in a claim for defamation. ... This has now become trite law." [Paragraph 24]

"That being the position in our law, I am of the opinion that for a litigant who intends to institute a defamation action, it is of paramount importance to secure evidence to prove publication of a defamatory statement as early as the time of finally deciding to institute a defamation action. With due respect, I cannot understand how Plaintiff could progress with the action so far without securing the availability of the proof of the publication" [Paragraph 25]

Dukada AJ endorsed the decision in *Gemishuis v Douglas Besproeiingsraad 1* 1973 (NC), where it was held that "very sound reasons" must exist for a defendant not to be entitled to costs when a litigant withdraws an action, and continued:

"... I am not convinced with the reasons advanced by Plaintiff to institute and pursue this action up to this stage without having secured the availability of an essential piece of evidence ..." [Paragraph 27]

The Defendant was thus awarded costs for the application for leave to withdraw the main action and the main action itself.

SELECTED JUDGMENTS

MALEFANE V CUBA & OTHERS

Case heard 16 October 2003, Judgment delivered 30 October 2003

The four defendants raised an exception to plaintiff's summons, arguing that the particulars of claim did not disclose any cause of action, and that the prayers on claims A and B were vague and embarrassing.

Gqiba AJ held:

"When considering an application for an exception, the court has to look at the pleadings as they stand and not as amplified by plaintiff. For an excipient to succeed he has to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed." [Paragraph 9]

Gqiba AJ cited the judgment in *Kings Transport v Viljoen* 1954 (1) SA 133 (C) for the meaning of the phrase "cause of action", and continued:

"Even though the defendants have excepted in the alternative that the particulars of claim are vague and embarrassing, they have not complied with the rule that notice first has to be given to the plaintiff to remove the cause of the complaint within 15 days. As a rule before an exception can be filed on the basis that a pleading is vague and embarrassing an opponent has to be given notice of the intended exception in terms of rule 23." [Paragraph 11]

Gqiba AJ then ruled on the exception:

"The exception relating to paragraph 1 of plaintiff's particulars of claim ... is found not to be excipiable. The fact that no averment as to the date when first defendant started to collect money that was not banked in the trust account of plaintiff cannot on its own cause the said paragraph to be regarded as not having disclosed a cause of action." [Paragraph 12(a)]

"Paragraph 12 is alleged to be contradictory to paragraph 8. In paragraph 8 fraud by first defendant is alleged to have continued up until May 2001. In paragraph 12, first defendant is alleged to have continued stealing until January 2003. I fail to see the contradiction because in claim A only first defendant is found liable of misappropriating a sum of R44 314,28. This she is said to have done between April 2000 and May 2001. In paragraph 12 first defendant, together third and fourth defendants joined hands in misappropriating plaintiff's trust money from June 2001 until January 2003. So in as far as it relates to first defendant no contradiction has been found." [Paragraph 12(b)]

"The objection to paragraph 9 being vague for not stating how the amount of R44 314,28 has been arrived at also cannot stand. A case has been made out that between a specific period of time first defendant stole a specific sum of money. The details of how the money was taken misappropriated may relate to the facta probantia. The lack of particularity in this instance does not amount to vagueness. For a statement to be regarded as vague it should either be meaningless or be capable of bearing more than one meaning. This cannot be said of paragraph 9." [Paragraph 12(c)]

"Paragraph 11 combines the three defendants that is first, third and fourth defendants in the act of stealing money from plaintiff without any clear particularity as to the period of their involvement. ... This paragraph is found to be vague and embarrassing" [Paragraph 12(d)]

"Paragraph 13 has been found to be vague and embarrassing in that there is no distribution made to accommodate the departure of third defendant in June 2002 with regard to the amount stolen. It is especially vague in the sense that third defendant is deemed liable for the actions of first and fourth defendants even for the period after he left the employ of plaintiff. ..." [Paragraph 12(f)]

"The second defendant has been joined in these proceedings purely because he happens to be the husband of first defendant. In essence plaintiff is holding second defendant liable for a delict that has been committed by the first defendant. No allegations are directed to him of any wrongdoing, but in her prayer, the plaintiff on claim A holds him liable jointly and severally for the theft allegedly committed by first defendant. There has been no liability ascribed to the second defendant by the plaintiff. I find that he has been unnecessarily dragged into these proceedings." [Paragraph 12(g)]

SIYIKILI & OTHERS V S [2004] JOL 12792 (TK)

Case heard 16 October 2003, Judgment delivered 13 November 2003.

The three appellants appealed against the refusal of bail by a Magistrate. Gqiba AJ held:

"... [A]ppellants were charged with (1) murder, (2) possession of a firearm without a licence, (3) possession of ammunition without a licence. The murder charge put them within the ambit of the Schedule 6 offences. As a consequence thereof, the provisions of section 60(11)(a) of the Criminal Procedure Act ... became applicable. In terms of this section, any person who is detained on suspicion of having committed offences listed in Schedule 6, has to establish exceptional circumstances that justify the granting of bail before they can be released on bail. This casts an onus on the accused, which must be discharged on a balance of probabilities." [Paragraph 3]

"It is common cause that when a magistrate holds a bail enquiry, it is not important at that stage to establish the question of guilt on the part of the accused. The court has to concern itself with the question of possible guilt only to the extent that it may bear on the interests of justice, in other words whether the interests of justice permit the release of the accused pending trial. The provisions of section 60(4)–(9) contain guidelines to assist the presiding officer in performing his/her adjudicative function of establishing as to whether or not the interests of justice permit the release from detention of an accused person. ..." [Paragraph 9]

"What the court now needs to establish is whether after consideration of all the submissions for and against the appellant, it can be said that the magistrate in the court *a quo* misdirected himself in finding that exceptional circumstances were not satisfactorily established by the three appellants." [Paragraph 12]

Gqiba AJ then considered the factors considered by the Magistrate. These included the alleged roles of the accused in committing the offence; the proximity of two of the accused to the crime scene on the day in question; evidence that one of the accused had disappeared after the commission of the offence; and the fact that the deceased had been shot in the presence of her family, who were to become State witnesses and would probably be known to the accused.

Gqiba AJ then held:

“Bearing in mind that the objective of the appellant's detention is that they must stand trial and be punished if convicted, I have balanced the interests of justice against their right to personal freedom and concluded that the refusal of bail by the magistrate was justified in the circumstances.” [Paragraph 14]

“I am also not satisfied that the appellants discharged the onus of establishing exceptional circumstances which in the interests of justice permit the grant of bail.” [Paragraph 15]

SELECTED JUDGMENTS

S V NADIMBA, UNREPORTED JUDGMENT, CASE NO: 38/2010

Case heard 21 February 2011, Judgment delivered 31 March 2011

The accused pleaded guilty to two charges of rape.

Kahla AJ held:

"In enacting Sec 51 of the Criminal Law Amendment Act ... the legislature aimed at severe, standardised and consistent sentences for certain categories of crimes. So it is no longer 'business as usual' as it was stated in the case of S v Malgas ... However, subsection (3) (a) of the same section, provides that where substantial and compelling circumstances exist the court may impose a lesser sentence than that prescribed, provided that it shall enter those circumstances on record of the proceedings. This section clearly shows that although the legislature aimed at severe standardized and consistent sentences the court's discretion in sentencing has not been limited." [Paragraph 19]

"... The only difference is that when the minimum sentence is sanctioned, the prescribed sentence must be regarded as appropriate, and should not be deviated from without weighty justification therefore, as Kroon J stated in the unreported judgment of Masixole Sobhanga v The State ... Kroon J stated that 'where on a conspectus of all the relevant circumstances, the court considers that the imposition of the prescribed sentence would work an injustice it is entitled to categorize the circumstances as substantial and compelling sufficient to justify the imposition of a lesser sentence." [Paragraph 20]

"It is trite that, substantial and compelling circumstances, need not be exceptional, but are the personal circumstances of the accused which cumulatively considered, would constitute substantial and compelling circumstances, which justify the imposition of a lesser sentence than the one prescribed in section 51" [Paragraph 21]

Kahla AJ considered the personal circumstances of the accused, and the aggravating circumstances of the offences, and continued:

"I do not agree with Counsel for the accused that the rapes of the victims do not fall within the worst kinds of rape. Rape on its own is appalling, and the victims had to endure those experiences several times during the years mentioned as a result of the repeated rapes by the accused. Their childhood stage having been destroyed by the accused, to get to the next stage in their lives they will need a lot of courage, perseverance and determination than their peers. I cannot imagine anything worse than that in their lives ..." [Paragraph 29]

"When looking at the manner in which the incidents of rape were perpetrated, the duration of the rapes ..., the terrible ordeal that the victims had to endure, and after having considered personal circumstances of the accused including the following that, he is relatively young, is from a poor background, did not benefit from parental guidance of his father, pleaded guilty, in so doing, showing that he is remorseful. He had not committed rape before I consider these circumstances to constitute substantial and compelling circumstances which justify deviation from the prescribed minimum sentence." [Paragraph 32]

"However, rape remains a very serious offence and is very prevalent in this country. The victims of rape were very young girls aged eleven and ten years respectively. The court has a duty to send a loud and clear message that crimes of this nature will not be tolerated." [Paragraph 33]

The accused was sentenced to 25 years imprisonment on each count, the sentences to run concurrently.

BULELANI MPOMANE AND ANOTHER V THE STATE, UNREPORTED JUDGMENT, CASE NO. CA&R 222/2010

Case heard 16 February 2011, Judgment delivered 3 March 2011

The appellants had been convicted by a regional court on charges of robbery with aggravating circumstances and kidnapping, and sentenced to 15 years imprisonment, with both counts treated as one for the purposes of sentence. On appeal, one of the issues raised was the identification of the accused.

Kahla AJ held:

"The identification of any physical features that are peculiar to the appellants is important for identification purposes especially when they are not known, or strangers to the complainants. It is imperative that the complainants should identify them by their features…" [Paragraph 17]

"It is trite that the onus is on the state to prove guilt of the appellants beyond reasonable doubt. In this case the identification of the accused is in issue, and the State had to prove beyond reasonable doubt the identification of the appellants. … There are other factors to be considered, and some of these factors were listed in S v Mthehwa 1972 (3) SA 766 (A)….." [Paragraph 19]

"It is trite that the evidence of identification is to be treated with caution because of the dangers inherent in convicting on the obscure evidence of identification ..." [Paragraph 20]

"In S v Sithole 1999 (1) SACR 585 (W) ... it was stated that there must be no reasonable doubt that the witness is not mistaken, and that will require something more than a mere assertion by the witness that he had correctly identified the culprit, if the inherent risk of error is to be guarded against. Mr Gosani merely said he had identified the appellants, there are certainly no identifying features by which he identified the appellants." [Paragraph 21]

"In light of the shortcomings in the evidence of identification, I am, of the respectful view that the State has failed to prove its case beyond reasonable doubt, and that the finding of the magistrate ... was a misdirection on his part." [Paragraph 22]

The appeal was thus upheld and the conviction and sentence set aside (Pakade ADJP concurring).

SELECTED JUDGMENTS

SOLVISTA INVESTMENTS (PTY) LTD V SASOL FIBRES (PTY) LTD [2011] JOL 27039 (KZP)

Case heard 19 November 2010, Judgment delivered 28 February 2011

This was an appeal to a full bench of the High Court. The parties had entered a written sale agreement, and the appellant had taken occupation of the property on 1 October 2003. However, transfer was only effected in June 2004. Prior to transfer, the appellant was required to pay occupational interest as rental. Respondent alleged that appellant failed to pay occupational rental from January to May 2004. The appellant admitted it was liable to pay occupational interest, but disputed the amount. It further alleged that, in terms of the written agreement, the respondent was liable for all expenses in respect of the property. The court a quo found for the respondent. The crucial portion of the agreement provided that "liability to pay all rates, taxes and other outgoings, shall pass to the purchaser on the date of transfer." [Paragraph 23]

Madondo J held:

"... [T]he only issue the court a quo had to determine was whether the expenses the appellant incurred in respect of security, gardening, general cleaning, fire protection and maintenance services constituted "other outgoings" within the meaning of clause 5.2 of the written agreement. " [Paragraph 15]

"The principle of interpretation laid down in Van der Merwe v Jumper Deep Ltd 1902 TS 210 is that the intention of the parties to a contract should be gathered solely from the language used by them. The main object is to ascertain what the parties intended. ... [E]ffect should, as far as possible, be given to every word and phrase which has a sensible meaning." [Paragraph 20]

"It is also a firmly established rule that where the persons have entered into a formal written agreement, their intention must be deduced from the writing, and from that alone, if the language used is clear and unambiguous effect must be given to it. It must be presumed that the parties knew the meaning of the words used ... [T]he court must give effect to the grammatical and ordinary meaning of the words used therein" [Paragraphs 21 - 22]

"In the circumstances, it is reasonable to conclude that the seller and the purchaser of the commercial property would contemplate the expenses which were incurred regularly in respect of the property. The arrangements would then be made for the payment thereof until the registration of transfer of the property. This, in my view, provides sufficient proof that it was also the intention of the parties to provide for the payments of other expenses than rates and taxes." [Paragraph 26]

"The words "rates" and "taxes" are not understood in the widest possible sense to cover all other expenditures relating to property. ..." [Paragraph 28]

Madondo J considered dictionary definitions of words forming part of the clause under consideration, and continued:

"The use of the word "other" in conjunction with the word "outgoings" in the clause under consideration imports that the outgoings contemplated were not ejusdem generis with specific words "rates" and "taxes" referred to in the clause." [Paragraph 33]

“In the second sentence of the clause, the parties omitted the inclusion of the word "outgoings" and that, in my view, is an indication that the parties did not intend the word to form part of the preceding words "rates" and "taxes".” [Paragraph 34]

“In addition, only "current rates and taxes" could be adjustable on a pro rata basis between the parties on the date of transfer. This puts it beyond doubt that "other outgoings" did not form part of the words "rates and taxes" specifically mentioned in the first and second sentences of the clause.” [Paragraph 34]

“The word “outgoings” originated from English Law. ... In South African the word “outgoings” has not been the subject of much judicial controversy. The only decided authority in point is *Consolidated Company Bultfontein Limited v De Beers Consolidated Mines Limited* ... Since in this case the court did not determine the meaning of the word "outgoings" and the extent of its application, for the ascertainment of its true meaning, the extent of its application and for its proper construction recourse must be had to the well-known authoritative English dictionaries and English decided authorities in point.” [Paragraphs 36 – 38]

Madondo J considered the English authorities, and noted that the key question was whether services paid for by the appellant fell within the description of “other outgoings” [paragraph 48]. After noting that the golden rule of interpretation applied [i.e. that the language in the document be given its ordinary grammatical meaning unless an absurdity or repugnancy would result], Madondo J continued:

“The weight of English decided authorities has shown that the word "outgoing" is a word of wide ambit and that it must be widely construed to include not merely rates, taxes and assessments imposed on the property but also insurance premiums, mortgage instalment repayments, repairs, utilities housekeeping and household expense ... All this demonstrates that the word "outgoing" is larger than the words "rates, taxes" specifically referred to in the clause under consideration. When a word of general import is used the doctrine of *ejusdem generis* does not apply...” [Paragraphs 53 – 54]

“The expression "and other outgoings" immediately follow the specific words "rates, taxes" and this shows that the parties intended to use it in its widest possible sense ... to make it clear that the clause was intended to exclude rates, taxes and any other charges of any kind which would become payable after the transfer of the property.” [Paragraphs 58 – 59]

“The expenses relating to security, gardening, general cleaning, maintenance and protection of the property may not fairly come within the meaning of rates, taxes, assessments or impositions payable by the owner or the occupier in respect of the property.” [Paragraph 63]

The appeal was upheld, and the respondent was ordered to repay to the appellant the amounts paid by the respondent in relation to security, gardening, general cleaning, fire protection and maintenance (Murugasen and Seegobin JJ concurred).

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).

FINO MARITIME SA V SHIPPING CORPORATION OF INDIE LTD AND ANOTHER [2008] 3 ALL SA 285 (D)

The High Court had previously granted an order for the arrest of the second respondent vessel, to obtain security for a claim for $476 495,88 which the applicant had instituted against Fertilizers and Chemicals Travancore Ltd (FACT) of India. The vessel was arrested on the basis that it was an associated ship of FACT. The claim was later settled, with FACT paying $75 000,00 to the applicant in full settlement, including of FACT's counterclaim. First respondent then applied to have the arrest set aside.

Madondo J noted that the issue between the parties was whether the applicant had demonstrated a genuine and reasonable need for the security sought [paragraphs 13 and 19]. Madondo J held:

"The applicant has to satisfy this Court on the balance of probabilities that it was entitled to the original order. The first question for decision is whether there was a need for security for the applicant's claim. ... [I]t must first establish whether FACT was at the time of arrest of the second respondent vessel able to pay its debt. ..." [Paragraph 21]

Madondo J analysed conflicting expert evidence from two Indian chartered accountants, and continued:

"This Court has to decide whether FACT was at the time of the arrest of the second respondent ship in a precarious financial position in that it could be said that it would not be able to satisfy an award which might be issued against it, in the pending arbitration proceedings, in India. ..." [Paragraph 48]

"... [I]t could reasonably be inferred from the settlement agreement reached between the applicant and FACT, and in terms of which FACT paid a sum of US$75 000 to the applicant in full and final settlement of its claim including a counterclaim, that FACT had a bona fide defence to the applicant's claim. In the premises, it cannot be true and correct to attribute FACT's failure to pay its debt to the applicant to its payment incapability." [Paragraph 50]

"It is ... apparent from the papers that ... Subramanian, an advocate of record of the applicant, in assessing the financial situation of FACT placed undue reliance on insufficient information, irrelevant facts and on unsubstantiated newspaper reports and concluded that FACT was in financial crisis. Subramanian lost sight of the fact that although FACT had suffered profit losses over a period of time, its assets had at all times relevant hereto exceeded its liabilities. ..." [Paragraph 54]

"Subramanian placed an undue weight on a report which appeared in the newspaper, The Hindu ... that FACT was heading towards a financial crisis. ... Subramanian ... wrongly concluded that FACT was indeed in financial crisis and that by the time the applicant obtained an award and sought to execute it against FACT for the recovery of its claim, FACT might not be in a position to pay. ... Since the source of the information contained in the newspaper reports was not disclosed and the authenticity thereof, was not proved, such reports are hearsay, therefore lack probative value and as a result, no weight could be attached to them in assessing the financial situation of FACT. " [Paragraphs 55 - 56]

"On the examination of very limited facts and documentation available to him, KSS [one of the chartered accountants] concluded that FACT was not financially sound so to be able to pay the applicant's claim. On his own version KSS only studied the audited accounts of FACT for the financial year ended 31 March 2003 as contained in FACT's 59th Annual Report ... KSS did not consider the 60th Annual Report which was the then latest date available about FACT. ... KSS did not also base his opinion on the audited financial accounts for the financial year 2003-2004 but on 2002-2003 instead, despite the fact that such accounts were published before the date of his opinion. ... " [Paragraphs 58 - 59]

"In, my view, KSS has not laid sufficient basis for his opinion that FACT is not a financially sound company. Owing to the paucity of the information KSS examined prior to giving his opinion and a misdirection on his part as to the relevance of all documentation which was at the time before him, I am not convinced that such an opinion is a true and correct reflection of the financial condition of FACT." [Paragraph 60]

"In judging the financial health of the company the current market value of the assets and the future prospects of the business of the company are also necessary and relevant considerations. The audited financial accounts of the company alone, cannot sufficiently judge its financial soundness. ... [T]he company's financial accounts for the financial year 2004-2005 and 2005-2006 show an increase in its sales and it made a profit. In order for the applicant to succeed in its claim that there was a need for

security, it must prove on the balance of probabilities that FACT was unable to pay its potential liability during the course of its normal operation. Since all the relevant material and facts were not considered when judging the financial state of affairs of FACT, I am not satisfied that the assessment by Subramanian as well as the opinion by KSS is a true and fair reflection of the financial position of FACT." [Paragraph 62]

"... [T]he allegation that FACT was facing financial crisis and that as a result it was then winding down its operation, was unfounded. Looked in retrospect as proof of financial stability, to date, FACT still carries on its trade and business without interruption. ... In the circumstances, I am not satisfied that the applicant has succeeded to establish the existence of the need for security for its claim." [Paragraph 65]

"In, my view, the acceptance of similar fact evidence contained in the affidavit of Subramanian will be fallacious and not justified. Firstly, the alleged similarity between the cases referred to in the affidavit and the present case does not relate to previous or similar cases in which FACT itself had been involved but rather to cases the other Indian public companies had been involved. Secondly, such evidence does not have any probative value and is, therefore, irrelevant. Lastly, the prejudice the introduction of such evidence may cause is too great, having regard to its value. For the first respondent to be able to deal with it effectively, it must conduct an exhaustive inquiry into all cases involving more than 110 Indian public companies and the outcomes thereof. ... The mere fact that arbitration proceedings were delayed in few of the cases in which the Indian public companies had been involved, would not by itself assist the applicant in establishing even by reference that it would also suffer the same fate." [Paragraph 69]

"Hosbet Suresh, a former Judge of the High Court of Judicative Bombay, is of the opinion that since in the present case the arbitration proceedings had already commenced, it would have been appropriate if the applicant had moved for the security of the amount in dispute in the Indian court. It therefore, necessarily follows that the applicant could have utilised the procedure available under the Act to get security without the need for an arrest in South Africa. ... [T]he similar fact contained in the affidavit as proof of delays or inconvenience in proceedings involving Indian public companies is rejected as being irrelevant and prejudicial." [Paragraph 70]

"In *Katagum Wholesale Commodities Co Ltd* ... it was stated that the applicant for a security arrest should explain why he cannot get security elsewhere less drastically or more conveniently. He should show that no alternative and less disruptive opportunity for obtaining such security has or is likely to become available to him. The applicant has not satisfied these requirements. ... There is no meaningful explanation why security was not sought in India instead of against the second respondent ship. In any event, it has not been explained why security for the claim was reasonably necessary against FACT which is not an indigent debtor in regard to whom there is a real risk of its inability to pay the claim should it be awarded. ... I am not satisfied that the applicant has shown a genuine and reasonable need for the security which it has sought to establish in these proceedings..." [Paragraph 72]

The arrest was set aside.

SELECTED JUDGMENTS

WILSON & ANOTHER V WILSON [2011] JOL 27436 (KZD)

Judgment delivered 16 March 2011

The first applicant sought confirmation of an interim order obtained against the respondent, to whom she had been previously married. The applicants also sought an order declaring the respondent to be in contempt of a protection order and that the respondent be committed to jail for such contempt.

Mokgohloa J held:

"... The respondent became aware that the first applicant and second applicant have become romantically involved with each other. The respondent started to harass the applicants and sought to interrogate the children in order to obtain intimate details of the first applicant. This made the first applicant approach the Durban Magistrate's Court for a protection order. On 11 December 2008, the rule in this protection order was confirmed. Unfortunately, this did not give much relief to the first applicant as the respondent continued to stalk both applicants." [Paragraphs 3]

"On 19 December 2008, Balton J granted an order that the Respondent be interdicted and restrained, whether verbally or physically, from threatening, harassing, assaulting or stalking the First and Second Applicants. The order also required that the Respondent be interdicted and restrained from contacting or in any manner communicating with the First and Second Applicants or from coming within 500 metres of them and 3 named properties ... On 11 November 2008 an interim protection order was granted in the Durban Magistrate's Court in terms whereof the respondent was ordered not to physically and verbally abuse the first applicant, not to harass and stalk her, not to enlist the help of another person to do so, not to enter her residence, not to enter her place of employment and not to communicate with her except contacting her in regard to the children. The relief the first applicant seeks against the respondent in this application is the same as that which was granted to her in terms of the interim protection order by the Magistrate's Court, save for that ... which asks the respondent not to come within 500m of the first applicant. On 11 December 2008 a final protection order was granted in the Durban Magistrate's Court. On 20 December, a day after the present application was brought, the respondent was arrested for breach of that protection order. He appeared in court on 22 December 2008 and charges against him were withdrawn on the same day" [Paragraphs 4 - 7]

"In order to succeed in an application for a final interdict, the applicant must satisfy the court that she has a clear right; that there is an injury actually committed or reasonably apprehended; and that she has no other satisfactory remedy. This application was launched after the final protection order was granted on 11 December 2008. In my view, the matter is res judicata in that there is a previous judgment granted in an application by a competent court (Magistrate's Court), between the same parties, based on the same cause of action, and with respect to the same subject-matter. Furthermore, I find that there will be no unfairness to the first applicant if this Court does not grant her the relief she seeks as it is still open to her to apply to the Magistrate's Court to vary her protection order in terms of section 10 of the Domestic Violence Act ... In Bafokeng Tribe v Impala Platinum Ltd & others 1999 (3) SA 517 (B) ... Friedman JP stated that ' court must have regard to the object of the exception res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions...'" [Paragraphs 8 - 11]

"The proceedings by the second applicant cannot be said to be res judicata as he was not a party to the protection order application and the final order offers him no protection against the respondent. It was argued on behalf of the respondent that the second applicant's involvement in this application arises through his romantic relationship with the first applicant. They stay together and he in a way rides on the first applicant's coat tails. Therefore, there was no reason for the second applicant to co-launch this application. The basis on which a court can entertain an application in terms of the Domestic Violence Act ... is that there has to have been a domestic relationship between the applicant and the respondent in that particular matter. Section 1 of the Act defines domestic relationship as a relationship between a complainant and a respondent many ways, which include marriage. The complainant is defined as:"any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant." It is clear from the above definitions that the second applicant cannot be a complainant in the domestic violence application. He has or had no domestic relationship with the respondent. Therefore he has locus standi in his personal capacity to seek the relief." [Paragraphs 12 - 15]

"It is clear ... that the relief that the second applicant seeks appears to have been predicated by the respondent's driving his motor vehicle up and down along the second applicant's property and even parking his vehicle next to the property. As against the background of this application, I find the respondent's conduct provocative and amounts to stalking. I am satisfied that these are injurious acts which infringe upon the second applicant's privacy for which he has no other remedy. Therefore the rule in respect of second applicant has to be confirmed. In regards the respondent's argument that he had not been in contempt, contempt of court has been defined as a crime unlawfully and intentionally to disobey a court order (S v Beyer 1968 (3) SA 70 (A)). In Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) ... the Court held that the applicant had to prove the requisite of contempt ... beyond reasonable doubt. But, once the applicant had proved the order, service or notice and non-compliance, the respondent bore an evidentiary burden in relation to wilfulness and mala fides. The respondent has acted in complete disregard of the court order and is therefore in contempt ... The respondent is committed to prison for a period of 30 days, which committal is suspended for a period of 1 year on condition that the respondent does not contravene the order of this Court dated 19 December 2008 during the period of suspension." [Paragraphs 15, 19, 21]

SMITH & OTHERS v UMHLATHUZE MUNICIPALITY [2011] JOL 27433 (KZD)

Judgement delivered 8 May 2011

The applicants were employees of the respondent municipality. They sought an order directing the respondent to comply with its obligations in respect of the individual contracts concluded between it and each of the applicants, and to continue to pay the subsidy it agreed it would pay under the 12-year Incremental Interest Housing Scheme to the relevant financial institutions on the applicants' behalf.

Mokgohloa J held:

"The old Richards Bay Council (the rights and obligations of which have been subsumed by the respondent) had seen a period of rapid growth and sought to provide accommodation to its employees. As maintenance costs and costs of subsidised accommodation escalated, the respondent devised a scheme to encourage employees who had been renting houses to accept a subsidised home purchase

scheme. This scheme would enable employees to acquire ownership of the relevant housing units and in consequence take over the maintenance responsibility. The 12-year Incremental Interest Housing Scheme ("the scheme") was introduced on 1 May 1998. The Scheme was structured in such a way that employees who qualified were entitled to obtain a housing loan equal in value to the property that was purchased. It was the terms of the scheme that the respondent would contract to bind itself as surety to the financial institution advancing the funds for an amount equal to 10% of the price and the respondent would contract to subsidise the interest payable on the loan on the basis set out in the scheme document. The contracting employees (including the applicants), and the respondent bound themselves for a period of 12 years. Participants in this contract were required to expressly confirm when making an application that they regarded the provisions of the scheme as legally binding on him or her. The term of the contract was to run until the year 2014." [Paragraphs 2-6]

"During March 2008 the respondent sent e-mails to the applicants informing them of its intention to terminate the scheme from 1 July 2008. This was subsequently confirmed by the respondent's letter dated 18 March 2008 sent to the applicants. The applicants submitted that the reason behind the respondent's repudiation of its contractual obligations is that the respondent is a party to the South African Local Government Bargaining Council. A collective agreement was negotiated in that Council and the following was recorded: ' The Homeowners' Allowance shall be extended to all employees subject to the to the requirements of the Scheme which provides for a subsidy in respect of a mortgage bond a maximum amount of R85 000.00" 'All existing conditions of service referred to herein that are more favourable to employees than those provided in terms of this agreement shall continue in force until 31 December 2005 and shall terminate on that date.' The applicants, having contractual rights that they sought to enforce, refused to sign an acknowledgement that the obligations of the respondent would terminate on 30 June 2008." [Paragraphs 7-9]

"The respondent raised a point *in limine* challenging the jurisdiction of the High Court to decide the dispute. The parties then agreed that this issue be dealt with first and separately from other issues. Mr *Singh* SC, on behalf of the respondent, argued that the question of jurisdiction is one that falls to be determined by examining what is the real dispute between the parties and not what is the form of the dispute. According to Mr *Singh*, the applicants rely on their contracts; admit the collective agreements and argue that the collective agreements do not affect the terms of the contracts relating to the incremental interest subsidy; rely upon the negotiations that preceded the conclusion of the collective agreements and the issues that were before the Bargaining Council for contending that the collective agreements did not intend to cover the 12-year Incremental Interest Scheme. Mr *Singh* argued further that the applicants rely upon the effect upon third parties' rights to contend that the collective agreements could not affect the 12-year Incremental Interest Scheme. They sought exemption in terms of the collective agreements, which is a remedy pursuant to the collective agreements and one in terms of the Labour Relations Act ... When they did not obtain further exemption they brought proceedings in the High Court for relief." [Paragraphs 11-12]

"Mr *Singh* argued further that once the litigant has invoked remedies under the LRA he cannot abandon that course and adopt alternative remedies in a different forum. Mr *Pillemer* SC on the other hand submitted that the applicants' claim is contractual. He submitted that the applicants' claim is to enforce the terms of their contract. The starting point is therefore to look into the nature of the claim and determine whether the applicants' claim is contractual or a labour dispute. In *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA), the court stated that the nature of the claim is determined by the particulars of the claim in an action and in motion proceedings, by the notice of motion and supporting

affidavits. The court stated further ... that: "Before turning to that explanation there are two observations that I need to make. The first is that the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact. The second observation is that a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of the language. This proposition was approved by the Constitutional Court in *Gcaba v Minister for Safety & Security & others* 2010 (1) SA 238 (CC) at 263D – F when the court stated:"In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor." [Paragraphs 12 – 14]

"*In casu*, is clear from the notice of motion that the applicants are seeking an order directing the respondent to comply with its obligations in respect of the individual contracts entered into between the respondent and each of the applicants. The founding affidavit states that it is the respondent who sought an exemption from the collective agreement, the granting of which conditional upon the applicants was signing an acknowledgment that the respondent's obligations would terminate on 30 June 2008. The applicants refused to sign the said acknowledgment as they sought to enforce their contractual rights. They then brought this application to enforce their contractual rights. This is their claim. To try to convert the claim into a claim of another kind, will be denying the applicants their right to assert it. Therefore the applicants' claim to enforce their contractual right is within the ordinary powers of the High Court." [Paragraph 19]

The point *in limine* was thus dismissed.

KHAN v INDUSTRIAL DEVELOPMENT CORPORATION OF SA LTD & OTHERS

[2011] JOL 27434 (KZP)

Heard: 8th June 2009, Judgement: 14th January 2010

Respondent, the execution creditor in this matter, obtained judgment against the first execution debtor, in the amount of R1 522 209,39 together with interest and costs. In execution of such judgment, the execution creditor attached the first execution debtor's right, title and interest in the action against a third party (an insurance company).The claimant sued out an interpleader summons claiming the right, title and interest of the first execution debtor. He claimed that the said right, title and interest was ceded to him by the first execution debtor on 20 February 2004 under a valid cession agreement.

Mokgohloa J held

"Industrial Development Corporation of South Africa Limited, the execution creditor, obtained judgment against Mocassin Footwear CC, the first execution debtor ... In execution of such judgment, the execution creditor attached the first execution debtor's right, title and interest in the action against Mutual & Federal Insurance Company Limited instituted under case number 5126/03. The claimant, Faezel Khan, sued out an interpleader summons claiming the right, title and interest of the first execution debtor. ... He stated that the first execution debtor is run by his friend, Yusuf Essa, and his wife, Shireen Sookgreep. During the years 2001 and 2002, the claimant lent money amounting to R300 00 [sic] to Essa and his wife Shireen. Towards the end of 2003, the claimant approached Essa and Shireen and requested them to make arrangements to pay him. They told him they do not have money to pay him because their factory

(the first execution debtor) has burnt down and they are awaiting their claim from Mutual & Federal to be paid. During 2004, Essa and Shireen agreed to cede the policy against Mutual & Federal to him." [Paragraphs 1-3]

"According to the claimant, he knew that the first execution debtor's claim against Mutual & Federal was ± R4 000 000. He knew further that the first execution debtor owed the execution creditor an amount of ±R1 200 000. The parties agreed that the claimant will have the R4 000 000 from Mutual & Federal's claim, minus the money owed to the execution creditor. Under cross-examination, the claimant stated that he operates a security company business. The money he loaned to Essa and Shireen was not recorded in the books of his company. He recorded these monies on pieces of paper which he had since lost. Monies were loaned on different dates and places. The money became due during February 2003 and that is when Essa and Shireen suggested ceding their claim against Mutual & Federal to him. The claimant submitted that the money which the first execution debtor owed him became due and payable on February 2003. This was when the first execution debtor then suggested to cede the claim against Mutual & Federal to him. Indeed summons against Mutual & Federal was issued on 29 September 2003." [Paragraph 4-6]

"Mr *Pretorius*, for the execution creditor, argued that the Cession Agreement entered into between the claimant and the first execution debtor is not valid as it was entered into and signed not on 20 February 2004, but after judgment had been obtained by the execution creditor against the first execution debtor and the writ of attachment had been issued. It should be noted that if indeed the first execution debtor ceded its right, title and interest against Mutual & Federal to Khan, then this will mean that Khan took the cession before *litis contestatio*. The effect of this would be that the first execution debtor cannot proceed with the claim against Mutual & Federal, but Khan should. Khan is the one who has *locus standi* to proceed with the claim against Mutual & Federal (*African Cons Agencies v Siemens Nixdorf Info Systems* 1992 (2) SA 739 (C)). Another disturbing factor is that the Cession Agreement refers to the first execution debtor as Mocassin Footwear CC & Sureties. In the Mutual & Federal case, the plaintiff is described as Mocassin Footwear CC. In the Industrial Development Corporation's case, the first defendant is referred to as Mocassin Footwear CC. It is only in the court order dated 26 February 2007 where the first defendant is referred to as Mocassin Footwear CC & Sureties." [Paragraph 7-9]

"The evidence of Khan is not short of improbabilities. He lent money amounting to R300 000 to the second and third execution debtors, but he has no record of that loan. The money was not recorded in his business books. It is not clear who between the second and third execution debtor is the cedent. Furthermore, the execution debtors have lost all they had in a fire. Their claim against Mutual & Federal is R5 000 000. They decided to cede to Khan all what will be left of them, minus the debt to the execution creditor. I find this to be inconceivable. The above having being stated, I am persuaded to agree with Mr *Pretorius* that the Cession Agreement was not entered into on 20 February 2004 but on a later date after judgment was granted against the first execution debtor and a writ of attachment was issued. I am therefore of the view that the claimant has failed to prove his claim on a balance of probabilities and that his claim has to be dismissed." [Paragraph 10-11]

OKUDO v MINISTER OF SAFETY AND SECURITY [2011] JOL 27880 (KZD)

Case heard 11 August 2011, Judgment delivered 3 October 2011

The plaintiff sued the defendant for damages suffered by him when he was arrested, assaulted, and detained by the police.

Mokgohloa J, held:

"It is not in dispute that the plaintiff was arrested, detained and that charges against him were subsequently withdrawn. It is further not in dispute that the plaintiff suffered injuries certain whilst in the police custody and that this led him to be taken to Addington Hospital where he was detained for eight days and also kept under police guard. What is in dispute is, who assaulted the plaintiff; whether Ngcobo and Shanmugan [the police officers in question] acted unlawfully in arresting and detaining the plaintiff; and whether Ngcobo and Shanmugan acted wrongfully and malicious in setting the law in motion by laying a charges of possession of drugs against the plaintiff." [Paragraph 12]

Mokgohloa J then set out the requirements for an arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act, and the requirements for an arrestor acting under that provision as established in the Appellate Division case of *Duncan v Minister of Law and* Order, and continued:

"The requirement that the suspicion must rest on reasonable grounds, is objectively justifiable. The test to be applied is not whether a police officer believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. ..." [Paragraph 15]

"... Shanmugan's testimony is that he noticed the plaintiff walking ... The plaintiff changed his direction and walked away from the police. According to Shanmugan, this made him form a suspicion which made him ...stop the plaintiff and search him ... The question therefore is can a reasonable police officer with 12 years' experience arrest a person without a warrant only because that person changed his path of direction upon noticing the police?

I do not think that, this is reasonable suspicion. Furthermore Shanmugan contradicted himself in his testimony regarding who found the alleged cocaine on the plaintiff. ... I find this to be a material contradiction which makes his evidence to be unreliable and untrustworthy. Therefore I find that the defendant failed to discharge the onus of justifying the lawfulness of the arrest." [Paragraph 16]

Mokgohloa J then turned to deal with the issue of assault:

"The plaintiff gave a detailed testimony as to where and how he was assaulted by Ngcobo and Shanmugan. Shanmugan on the other hand denied that he and Ngcobo assaulted the plaintiff at all. According to him, the plaintiff was handed in at the Point Police Station free of any injuries." [Paragraph 17]

Mokgohloa J noted that these two versions were mutually destructive of one another, and proceeded to discuss case law on which to accept and which to reject, before continuing:

"The burden of proof is always on the plaintiff to prove his case on a balance of probabilities. In evaluating the plaintiff's evidence, I find him to be credible. His evidence was straightforward. He testified in detailed terms how he was arrested, assaulted, detained and later taken to the Addington Hospital. ... The evidence of Shanmugan on the other hand is riddled with contradictions. He testified

that it was Ngcobo who found drugs on the plaintiff and later changed and stated that it was him who found those drugs. His explanation of taking the plaintiff to CR Swart building before taking him to the police station is unconvincing and far-fetched. Instead I am satisfied that the reason for taking the plaintiff to CR Swart building was to assault him as they did." [Paragraph 20]

The defendant was ordered to make payment of damages to the plaintiff in the amount of R131 000.

SELECTED JUDGMENTS

SOBSON COAL MINING SERVICES AND EXPLORATIONS CC AND 2 OTHERS V S AND R CONNEXION MINING AND PROJECTS AND 2 OTHERS, UNREPORTED JUDGMENT, CASE NUMBER 227/2011 (NORTHERN CAPE HIGH COURT)

Case heard 27 June 2011, Judgment delivered 19 August 2011

Applicants sought an order compelling the First and Second Respondents to cede, transfer and make over their rights and interests to various prospecting licenses.

Erasmus AJ held:

"The relief sought ... is based on a written agreement, the memorandum of understanding ('the MOU'). ... It was entered into by the First and Second Applicants and the First and Second Respondents ..." [Paragraph 8]

"Clause 10 of the MOU contains an arbitration clause. It is formulated to make provision for any dispute, of whatsoever nature, which arise out of or in connection with the MOU, which has not been resolved by way of mediation, to be submitted for arbitration ... The only exception pertains to ... approaching a court ... for interim relief on an urgent basis, pending the decision of an arbitrator." [Paragraph 10]

"The arbitration clause ... does not deprive the court of its jurisdiction ... Should a party institute proceedings in a competent court, in spite of the arbitration agreement, the respondent or defendant has the option apply [sic] for a stay of the proceedings. ... A stay of proceedings for purposes of arbitration should not be granted unless there is a genuinely triable issue between the parties."" [Paragraph 10.1]

"... The Applicants should ... have referred the issues arising from the MOU for arbitration. Given the facts and circumstances of this application ... I am of the view that there are no genuinely triable issues for arbitration and that the matter should be dealt without further delay ..." [Paragraph 10.2]

"The authority of the deponents of the founding and confirmatory affidavits, to represent the Applicants ... was challenged from the onset and denied in the opposing affidavit." [Paragraph 11]

"... [T]he general approach ... in the face of disputes of fact in motion proceedings where final relief is sought, is that the case must be decided on the versions of the Respondents and those averments by the Applicants which were not disputed by the Respondents. The founding papers of the Applicants do not contain any resolutions to the effect that they were authorised ... and the Applicants have not filed replying papers addressing these issues. The denial by the Respondents did not constitute a blunt denial. This issue must therefore be decided on the version of the Respondents. I find that ... Gijana ... and ... Mazomba ... were not authorised to institute proceedings ... and that the Application falls to be dismissed on those grounds." [Paragraphs 11.1 – 11.3]

"Should I not be correct ... the application also falls to be dismissed if I should find that the Third Applicant does not exist. ... In terms of ... the MOU, the parties agreed that a special purpose vehicle ('SPV') would be set up in the form of a company through which the project would be conducted. The SPV would be named Sannas Mineral Resources (Pty) Limited." [Paragraphs 12 - 12.1]

"There are no documents supporting any of the allegations pertaining to the registration of Sannas Mineral Resources (Pty) Limited ... [I]t must then be concluded that the Third Applicant does not exist. If the Third Applicant does not exist, I fail to understand how the cession and/or transfer of the prospecting rights and/or interest therein to Sannas ... can take place." [Paragraphs 12.7, 12.9]

The application was dismissed. First and Second Applicants were ordered to pay costs on the attorney and client scale, on the grounds that the application had been based on misleading and/or untruthful allegations; the founding papers contained numerous duplications and irrelevant documents; applicants had approached the court in motion proceedings despite being aware of factual disputes; and the dispute should have been resolved by mediation or arbitration [paragraphs 16.1 – 16.4]

ZWELINZIMA OLIPHANT V THE STATE, UNREPORTED JUDGMENT, CASE NUMBER CA&R 10/2011 (NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case heard 6 June 2011, Judgment delivered 1 July 2011.

The appellant had been convicted in the Regional Court on a charge of murder, and sentenced to 8 years imprisonment. He appealed against his conviction only.

Erasmus AJ held:

"The appellant contends that the court *a quo* erred in finding that the contradictions in the respondent's case were not material and that she misdirected herself by concluding that the respondent proved its case beyond reasonable doubt ..." [Paragraph 7]

"The principles pertaining to the approach of the court of appeal has been set out in detail by the Supreme Court of Appeal. The trail [sic] Court's conclusion on the evidence is presumed to be correct in the absence of misdirection by trial Court. It is for the appellant to convince the Court of appeal, on adequate grounds, that the trial Court's acceptance of the witnesses' evidence is wrong. It is not sufficient to say that there was a reasonable doubt that the trial court was correct. ... In determining whether the trial Court's findings of fact were clearly wrong, it is useful to break the body of evidence down into components, but, in doing so, the court of appeal must guard against a tendency to focus too intently upon separate and individual parts ... The evidence must ultimately be assessed as a whole." [Paragraph 16]

"... It is sufficient for the State to produce evidence by means of which such high degree of probability is raised, that a reasonable man can conclude that no reasonable doubt exists that the accused committed the crime ... Any benefit of the doubt must rest upon a reasonable and solid foundation, created by positive evidence or reasonable inference." [Paragraph 17]

"I am satisfied that the court *a quo* has given due consideration to the contradictions in the evidence of the witnesses of the respondent and those of the appellant. I am further satisfied that she considered the probabilities ... and did not misdirect herself in any material respect. I agree ... that the version of the appellant ... is highly improbable." [Paragraph 19]

The appeal was dismissed (Phatshoane J concurring).

THE STATE V SULEIMAN HARDIEN, UNREPORTED JUDGMENT, CASE NUMBER KS 28/10 (NORTHERN CAPE HIGH COURT)

Case heard 13 – 15 June 2011, Judgment delivered 22 June 2011.

The accused, a 35 year old male, was convicted of robbery with aggravating circumstances and murder. It was found that the murder was pre-meditated, and that the accused had acted with *dolus directus*.

Erasmus AJ delivered judgment on sentence:

"Sentencing the accused is the most difficult part of the criminal proceedings. When imposing sentence, the objectives of punishment, namely deterrence, prevention (which includes the reformation of the accused) and retribution must be taken into account [citation to S v Rabie 1975 (4) SA 855 (A) and S v Khumalo and Others 1984 (3) SA 327 (A)]. In South Africa today, in view of the violence and serious crime, the objectives of retribution and deterrence are accentuated." [Paragraph 3]

"... [T]he sentence must fit the offender and the crime as well as serve the interests of society. Anything that affects the accused as a direct result of the crime must be considered when deciding on a suitable sentence. Ingrained traits and habits of the accused cannot be ignored ... When considering the interests of the community, it should be taken into account that the community must be able to sense that the Courts are striving to maintain peaceful and safe living conditions. ..." [Paragraph 4]

"With regard to the personal circumstances of the accused ... The accused is 35 years old. He attended school until Grade 11. He is not married, but had two children ... Both children have passed away. He is the youngest of four children. His father is currently in an old age home. He has a continuous work record up until 2008, after which he did not work. ... The accused has one previous conviction for assault with intent to do grievous bodily harm. ... The accused is not considered to be a first offender ... This crime was committed at the time the accused started using drugs. ..." [Paragraph 5]

"... The accused was well-known to the family and friends of the deceased. I accept that the death of the deceased impacted heavily on the family of the deceased. ... The implications of drug abuse and the consequences of using it, the influence it has on the commission of other crimes cannot be underestimated and the community should take note of that. The community has an interest in that sentences imposed should act as a deterrent to members of the community ..." [Paragraphs 6 – 7]

"The accused committed a callous murder. The degree of violence used by the accused is shocking. ... He sold the deceased's property and misled the friends of the deceased, by pretending that he was still alive and having conversations with him. ... The accused's conduct after the crime speaks of a lack of compassion and greed." [Paragraph 8]

"The accused had a suspended sentence hanging over his head. It did not however deter him from committing violence against the deceased ... I have already found that the murder was pre-meditated. The provisions of section 51(1) of Act 105 of 1997 therefore apply. A sentence of life imprisonment should ordinarily be imposed unless substantial and compelling circumstances exist that justify the imposition of a lesser sentence." [Paragraphs 9 – 10]

"The accused's personal circumstances are taken into account as a mitigating factor. I also take into account the fact that the accused was addicted to 'Tik' and that he used drugs before the murder. I take into account his inhibitions and judgment might have been affected as a result of this addiction and use

of 'Tik'. I find, in favour of the appellant, that these constitute substantial and compelling circumstances that justify the imposition of a lesser sentence and that I am therefore not compelled to impose a sentence of life imprisonment on the charge of murder." [Paragraph 10 pages 6 – 7]

The accused was sentenced to 15 years imprisonment on the count of robbery and 21 years imprisonment on the count of murder, both sentences to run concurrently. The accused was declared to remain unfit to possess a firearm.

SELECTED JUDGMENTS

THE STATE V MOLUSI DANIEL LITSILI, UNREPORTED JUDGMENT, CASE NO: L/S 6/11 (17 NOVEMBER 2011) (NORTHERN CAPE HIGH COURT, KIMBERLEY)

The accused with charged with one count of murder, one count of rape alternatively sexual acts with a corpse, and one count of theft. The victim was the mother of the accused.

Pakati AJ held:

"That the deceased was murdered is common cause. The crisp issue to be determined is the identity of the perpetrator. The accused pleads an alibi and maintains that he was not present when his mother was murdered. ..." [Paragraph 25]

"The accused could not explain how deceased's blood landed on his shoes and the blue jeans he wore ... He could also not explain his shoe print similar on the blood-soaked or liquid-smeared bedroom floor. He said that when he left his shoes they were clean. This implies that someone wore his shoes and his blue jeans, killed his mother, raped her and walked around the house. He stated that it was possible that the perpetrator spilt blood on his clothing and shoes to set him up. The accused's explanation is not only false but it is also laughable." [Paragraph 30]

"The accused first testified that when his statement was taken he was not intoxicated and made it freely and voluntarily. He later claimed to have been intimidated and threatened to make the statement because Captain Louwrens tightened the handcuffs to pinch him and assaulted him on his private parts." [Paragraph 31]

"What is surprising about this version is that a medical note (J88) completed by the doctor who examined the accused only noted 1cm laceration on the left wrist and the laceration was 48 hours old. This finding was consistent with the fact that the accused was handcuffed from Randburg on the 28 October 2010 until 29 October 2010 when he was examined. The fact that he was assaulted ... was never put to Captain Louwrens when he testified." [Paragraph 32]

After noting that as there were no witnesses and the evidence was therefore circumstantial, Pakati AJ cited *S v Reddy and Others* 1996 (2) SACR 1 (A) as authority for assessing circumstantial evidence, and continued:

"I am satisfied that the perpetrator who killed and had sexual intercourse with the deceased is the accused. This explains how the deceased's blood came onto his blue jeans and shoes. The accused was unable to give an acceptable explanation ..." [Paragraph 37]

"Notably large amount of force was used ... The severity of the head injuries sustained by the deceased was to the extent that the deceased could not have survived because of blood found in the airspaces. It is not possible that the accused left the deceased alive as he wants the court to believe. What is clear is that the accused continued to assault the deceased after her heart had stopped beating. This is evident from the medical evidence ... The sexual act was also committed post mortem. The deceased was an elderly woman of 61 years and defenceless. The accused wanted this court to believe that she was armed with a spade when he disarmed her ...the assault on her was vicious and gruesome resulting in injuries ... which led to her death. ..." [Paragraph 40]

"The manner in which the deceased met her demise with specific reference to the injuries found during the post-mortem examination and her cause of death, satisfy me that the only reasonable inference that can be drawn is that the accused assaulted the deceased with the direct intention to kill her." [Paragraph 41]

JACOB CASPER KRUGER DU TOIT V RUBEN ROODT AND 2 OTHERS, UNREPORTED JUDGMENT, CASE NO: 458/2011 (NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case heard 12 August 2011, Judgment delivered 11 November 2011

Applicant and first respondent were directors of the second respondent (Saamwerk Soutwerke Ltd). First respondent owned 12% of the shares in Saamwerk, and held a 26% interest in the third respondent, Kalkpoort CC. Applicant was the majority shareholder in Saamwerk, and a majority member in Kalkpoort. An association agreement was entered into between applicant and first respondent, but their relationship soured.

On the return day of a *rule nisi*, Pakati AJ held:

"In his answering affidavit Roodt failed to respond to material allegations made by Du Toit ... A respondent's answering affidavit is required to deal pertinently with the allegations contained in an applicant's founding affidavit. If a respondent fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit the Court will, for the purposes of the application, accept the applicant's allegations as correct. [citation to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)]" [Paragraph 19]

"Both Du Toit and Roodt, as directors of the company, have to exercise their powers and carry out their duties *bona fide* and for the benefit of the company. Apart from the duties imposed on a director in terms of the Act, 61 of 1973 (now repealed by Act 71 of 2008), a director is at common law subject to fiduciary duty requiring him to exercise his powers *bona fide* and for the benefit of the company and to display reasonable skill in carrying out his office. ... [citation to academic authority and the judgment in *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A)]" [Paragraph 20]

"The overwhelming evidence shows that Roodt was busy destroying the good name and reputation of Saamwerk Ltd and Kalkpoort CC. He breached his duty as a director. ..." [Paragraph 21]

"Roodt has shown no interest in the prosperity of Saamwerk Ltd and Kalkpoort CC. He has already indicated that he wished out of the two businesses. The Act allows Du Toit to institute a derivative action against Roodt based on the fact that he is in breach of an obligation pertaining to his fiduciary duties towards the corporation. [citation to academic authority]" [Paragraph 23]

"... Roodt acted in bad faith by consulting outsiders and soliciting their help to prejudice the businesses in their good name and goodwill. Roodt has essentially made bare denials. I am satisfied that the applicant ... has established a proper case for a final interdict ..." [Paragraph 25]

KHAULI & ANOTHER V S [2011] JOL 26779 (GNP)

Judgment delivered: 10 December 2010

Appellant and another accused had been convicted of robbery and murder and sentenced to 15 years and life imprisonment in respect of each count. Immediately after sentence, on 30 August 2002, an application for leave to appeal was dismissed by the trial judge.

Pakati AJ (Webster and Ranchod JJ concurring) held:

"On 5 February, 2007, the appellant brought another application for leave to appeal before Shongwe DJP (as he then was). Leave to appeal was only granted on sentence." [Paragraph 3]

"The question is whether Shongwe DJP was competent to entertain the appellant's second application after leave had been refused by the trial court against both conviction and sentence." [Paragraph 4]

"... The application for leave to appeal entertained by Shongwe AJA (sic) was clearly contrary to the express provisions of [Section 316(8)(a)(ii) of the Criminal Procedure Act]. It was improperly before him as he had no power, with respect, to entertain it. ..." [Paragraph 5]

"It is clear that Shongwe DJP was not made aware that the appellant had already exhausted his appeal remedies in the High Court. The application was not supposed to have been entertained because the High Court was *officio*. The appellant's remedy was to seek leave to appeal from the President of the Supreme Court of Appeal by way of petition. This Court, sitting as a court of appeal, may therefore not entertain the appeal. … [citation to the decision in *S v Fourie* 2001 (2) SACR 118 (SCA)]" [Paragraph 6]

"In my view, there is no appeal before us to uphold or dismiss. In my view, the proper order is to strike the matter from the roll." [Paragraph 8]

MTHEMBU & OTHERS V S [2011] JOL 26758 (GNP)

Case heard 25 November 2010, Judgment delivered 2 December 2010

Appellants had been convicted in the Regional Court of robbery with aggravating circumstances, and illegal possession of a firearm. Second appellant was also convicted of illegal possession of ammunition. The counts were taken together for purposes of sentencing, and each appellant was sentenced to 15 years imprisonment.

On appeal against the sentence, Pakati AJ (Tlhapi J concurring) held:

"The magistrate stressed that robbery with aggravating circumstances is a serious offence and for that reason the Legislature has prescribed minimum sentences. He indicated that the court has a duty to protect the members of the community against gangs who waylay law-abiding citizens when they alight from taxis and rob them of their property. He was satisfied that there were no substantial and compelling circumstances in their personal circumstances." [Paragraph 8]

Pakati AJ referred to the case of *S v Kibido* 1998 (2) SACR 213 (SCA) regarding the approach to sentencing on appeal, and continued:

"In the present case it is clear that the trial court overlooked the period spent in custody by the appellants awaiting trial. This is a factor that should have been taken into account. It should also be noted that the evidence shows that the two cell phones were recovered even though one of them did not have its sim card anymore. Another factor that had to be taken account by the trial court was that the value of the money taken ... was not particularly huge (R260)." [Paragraph 13]

"The trial court misdirected itself in not finding that there existed substantial and compelling circumstances constituted by an aggregate of all the factors considered cumulatively." [Paragraph 14]

The appeal was upheld, and the sentences of 15 years set aside and replaced by sentences of 8 years' imprisonment, antedated.

S V JIMMY MOKGOSI, UNREPORTED JUDGMENT KS65/09 (20 MAY 2010)

In this murder case, the admissibility of hearsay evidence in terms of the Law of Evidence Amendment Act was dealt with briefly.

Pakati AJ held:

"The above Act must as far as possible be read in light of section 35(3) of the Constitution which guarantees a right to a fair trial to an accused person. It is true that Courts warned that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused unless there are compelling reasons for doing so. ..." [Paragraph 9]

SELECTED JUDGMENTS

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

Case heard 9 September 2009, Judgment delivered 11 September 2009

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

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

"Clear [sic] from what has been quoted above that, a credit provider will not be entitled in terms of paragraph (b)(i) of section 129(1) to commence any legal proceedings to enforce the agreement before first providing notice to the consumer, as contemplated in paragraph (a) of section 129(1) and meeting any further requirements set out in section 130." [Page 2]

"The issue that worried me was whether the letter ... addressed to the consumer, that is, the defendant, complied with the provisions of section 129(1)(a). ... The notice in terms of section 129 as I see it is intended to ... draw the default to the attention of the consumer, ... to propose to the consumer to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, [and] to draw the consumer's attention that such a referral is with the intention that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date. ... In two respects, I am not satisfied that there has been full compliance with the requirements of the notice. ... Firstly, the portion of the letter of the notice quoted earlier in this judgment, makes no reference to alternative dispute resolution agent as an option to which the credit agreement might be referred. I do not see this omission as a minor omission. It could be that a consumer may never have heard of debt counsellor, consumer court or ombudsman, but it could be that an alternative dispute resolution agent is well known to a consumer ... Secondly, the whole idea of referral should clearly be spelled out to a consumer. You do not make a referral without a purpose. It is not each and every consumer that is told to go to a debt counsellor, consumer court or ombudsman that will know the purpose thereof. ... Having not been satisfied that there has been a compliance with the provisions of section 129, the application for a summary judgment is destined to be dismissed." [Pages 3 - 4]

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

CHAIRPERSON ASSOCIATION V MINISTER OF ARTS & CULTURE [2007] JOL 19077 (T)

Heard:19th August 2005, Judgement: 8th September 2005

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

Legodi J held:

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

"After the objections were lodged the first respondent gave his reasons for the rejection of the objection as set out in his letter ... In this letter, the first respondent alluded to the fact that he rejected the objection after careful consideration of the objection and all other information brought to his attention. In his answering affidavit he stated that he considered the objections very carefully, but that he was persuaded. The court will always be reluctant to invalidate administrative action on procedural grounds and has in this context frequently indicated the importance of not impeding the efficacy of government… In the present case, however, the first respondent did not only consider the suitability of the name Makhado town, but also considered the concerns raised by other parties. His decision in this regard was not only based on the objections lodged with him, but with the knowledge of the process which was followed by the third respondent as conveyed to him through submissions or documents. I am therefore not satisfied that the applicant is entitled to the relief sought. Accordingly, application was dismissed with costs." [Paragraphs 30.2,37]

The decision was overturned on appeal: **2007 (5) SA 236 (SCA)**

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

Judgement delivered 2 March 2005

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

Legodi J held:

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

"I need to pose and emphasise that whilst the Commissioner of Correctional Services is entitled to determine the security measures applicable at different prisons … the plaintiff as a prisoner was entitled to all his personal rights and personal dignity not temporarily taken away by law…The keeping of the plaintiff in solitary confinement for 23 hours per day, in my view, did not accord with the principle of

decency and may have infringed the plaintiff's fundamental rights to be treated like any other citizen except those rights taken by law expressly or by implication or those necessarily inconsistent with the circumstances in which the plaintiff as a prisoner was held." [Paragraphs 36–37]

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

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

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

Legodi J held:

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

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

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

SELECTED JUDGMENTS

S V LIBAZI AND ANOTHER 2010 (2) SACR 233 (SCA)

Case heard 5 May 2010, Judgment delivered 1 June 2010

Appellants had been convicted by the High Court of conspiracy to commit murder and on three and two counts of attempted murder respectively. Another accused, Shasha, was convicted of murder and theft, and two other accused were acquitted of all charges. Appellants were sentenced to effective terms of imprisonment of 13 and 12 years respectively. In convicting the appellants, the High Court relied *inter alia* on an extra-curial statement signed by Shasha and given to a magistrate.

Mlambo JA (Mthiyane and Shongwe JJA concurring) held:

"Shasha, who was legally represented, did not contest the State's application for the admission of the statement into evidence and to it being used against him. Nor did he contest that the statement was given by him freely and voluntarily. The appellants, however, resisted the State's application to have the same admitted in evidence against them C in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act ... The High Court ruled that the statement was admissible hearsay evidence ..." [Paragraph 5]

"... [I]t was argued that the statement ... amounted to a confession and as such was inadmissible against anyone else, other than its maker, in terms of ...s 217 of the Criminal Procedure Act ... An alternative argument was that, if it were found that the statement was not a confession, but an admission, that it was similarly not admissible against the appellants ... [W]e were invited to revisit the reasoning and conclusion of this court in *S v Ndhlovu and Others*, where statements by two co-accused ... were treated as hearsay evidence ... and were ruled to be admissible against the co-accused ..." [Paragraph 7]

"... [I]n my view, Shasha's statement was not a confession, but one admitting a number of facts pointing to his complicity in the planning of criminal conduct ... In this regard a confession is generally described as 'an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law'. On the other hand, an admission is referred to as 'a statement or conduct adverse to the person from whom it emanates'. These definitions were approved by the Constitutional Court in *S v Molimi*." [Paragraph 8]

"In *Ndhlovu* this court upheld a ruling ... that, in terms of s 3(1)*(c)*, verbal and written statements by certain accused, which incriminated other accused, were admissible hearsay evidence against those accused who made them, as well as against those accused they incriminated. ... [T]he court in *Ndhlovu* rejected the argument against admissibility, on the basis that the Bill of Rights did not guarantee the right to challenge all evidence through cross-examination ... this court essentially narrowed the ambit of the right to challenge hearsay evidence tendered in terms of s 3 if the requirements for admission in that section were satisfied, and... if the interests of justice required it. Were this to be the rule in all instances, I have my reservations regarding the justifiability thereof ... Furthermore, this court in *S v Molimi* was, for different reasons, of the view that what was crafted in *Ndhlovu* was not meant to be an 'inflexible rule'." [Paragraphs 9 – 10]

"Our Constitution requires rights to be construed generously to ensure the widest protection possible. Rights ought not be cut down by reading implicit restrictions into them. Inroads into the protection that the right affords should in all instances be justified. The right to challenge adverse evidence is a

foundational component of the fair trial rights regime decreed by our Constitution in s 35(3). Cross-examination is integral in the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him. ...” [Paragraph 11]

“An even more compelling consideration militating against the wholesale application of the rule in *Ndhlovu* is rooted in the injunction to courts to treat co-accused or accomplice evidence with caution. ... [V]arious cautionary rules operate to make the probative value of the co-accused statement very low. ... [I]t is a widely acknowledged rule that the evidence of an accomplice should be treated with extreme caution ...” [Paragraph 14]

“... I do not regard the *Ndhlovu* approach as all-encompassing. The matter at hand is a case of the classical 'absent witness', as opposed to *Ndhlovu* and *Molimi* where the makers of the statements testified disavowing the statements attributed to them. In our case, Shasha was clearly an accomplice and did not testify. This effectively emasculated the court from evaluating the evidence in the statement and applying the necessary cautionary rules. This, in my view, clearly militated against the admission of the statement as hearsay evidence against the appellants. ...” [Paragraph 16]

Mlambo JA went on to find that, having expunged the role of Shasha’s statement, the appellants’ conviction for conspiracy could not be sustained on the remaining evidence. However, the convictions for attempted murder were upheld.

S V LE ROUX AND OTHERS 2010 (2) SACR 11 (SCA)

Case heard 9 September 2009, Judgment delivered 5 March 2010

The case concerned appeals from convictions for public violence. In the course of the judgment on appeal, Mlambo JA dealt with the delay between the offence and the Supreme Court of Appeal hearing the matter.

“It is so that in the case before us a total of 13 years has elapsed since the commission of the offence. The appellants endured six years during which they attended the trial until they were convicted and sentenced. I have already stated that the refusal of a postponement for purposes of sourcing pre-sentence reports did not prejudice the appellants, as all relevant facts were placed before the trial court. Another period of seven years has now elapsed from the time the appellants applied for leave to appeal from the trial court to the court a quo, and eventually to this court. The appeal from the trial court to the court a quo took five years to be heard, but remarkably there is nothing in the record before us to account for this delay. This was also not dealt with in argument before us. I mention this because we have no idea if there are any new facts, exceptional or otherwise, that could require consideration in deciding whether the matter should be referred back for a fresh consideration of sentence. It is not the appellants' case that the six-year duration of the trial infringed their right to a fair trial. As regards the period of the delay in finalising the appeal, that also, in my view, cannot found a basis to refer the matter back unless we can conclude that the right to a fair trial was infringed. In S v Pennington and Another ... the issue of appeal delays was considered by the Constitutional Court in the context whether this infringed the fair trial rights of the applicants in that matter.” [Paragraph 38]

“On the authority of S v Pennington the delay in finalising the appeal by itself did not infringe the appellants' fair trial rights. In the absence of any exceptional circumstances impacting on the sentences

that were imposed we are not at large to set aside the sentences. There is also no basis to refer the matter back. I conclude therefore that there is no basis upon which we can set aside the sentences imposed in this matter and to refer the matter back to the trial court for the reconsideration of the sentence." [Paragraph 39]

S V MIA AND ANOTHER 2009 (1) SACR 330 (SCA)

Case heard 19 August 2008, Judgment delivered 26 September 2008

In this case the Supreme Court of Appeal upheld the first appellant's appeal on a charge of theft, and rejected the second appellant's appeal. At the conclusion of his judgment, Mlambo JA (Heher and Maya JJA concurring) remarked on delays in finalising the case:

"I should express my disquiet at the delay implicit in this matter. The offence was committed in October 1990 and it took nearly three years for the trial to start, against both appellants, in May 1993. That trial was concluded in January 1999 nearly six years later. The subsequent appeal to the Johannesburg High Court was concluded on 22 June 2007, eight years later. The matter has to date taken some 18 years to finalise. This is an indictment on the criminal justice system and the two appellants must take a lion's share of the blame for this state of affairs. They have, as would be expected, not been prejudiced by the delay as they have been on bail since the inception of the trial which was extended when they were convicted in 1999. One hopes that the dilatory manner in which this matter has been handled will not be repeated in other matters." [Paragraph 17]

GORDON V DEPARTMENT OF HEALTH, KWAZULU – NATAL 2008 (6) SA 522 (SCA)

Case heard 16 May 2008, Judgment delivered 17 September 2008

This was an appeal against the judgment of the Labour Appeal Court. The respondent had advertised a position for which the appellant, a white male, and a Mr Mkongwa, a black male, had applied. The selection panel had recommended that the appellant be promoted to the position. The recommendation was endorsed by the head of the Department, but the Provincial Public Service Commission did not accept the recommendation, directing that Mr Mkongwa be appointed instead, *inter alia* because of "the constitutional imperative to promote representivity in the public service." The appellant challenged his non-appointment. The Labour Court found that there had been no unfair discrimination. The Labour Appeal Court found that Mr Mkongwa had an interest in the proceedings, and that the failure to join him was fatal to the appeal.

On appeal to the SCA, Mlambo JA, for a unanimous court (Scott, Cloete, Maya JJA and Leach AJA concurring) began by considering the question of non-joinder. After considering the SCA decisions in *Du Preez v Truth and Reconciliation Commission* and *Traube and Others v Administrator, Transvaal and Others*, Mlambo JA held:

"The *Du Preez* and *Traub* decisions had nothing to do with non-joinder, a fact acknowledged by the LAC. They were concerned primarily with the *audi alteram* principle in circumstances where a public body had failed to afford certain individuals a hearing ... The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which

may be affected prejudicially by the judgment of the court in the proceedings concerned. ...” [Paragraph 9]

“All the cases I have referred to also illustrate the point that the order or judgment of the court is relevant to the question whether a party has a direct and substantial interest in the subject-matter of any proceedings. It is so that in the course of its reasoning a court makes findings and expresses views which do not form part of its judgment or order. An example ... in the employment arena concerns a potential finding by a court that a successful appointee was not suitable for appointment. The 'unsuitable' appointee has no legal interest in the matter if the order will be directed at the employer (the author of the unsuitable appointment) to compensate the 'suitable' but unsuccessful applicant. Of course the successful but 'unsuitable' appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. ... Once the employer selects from amongst them it is up to the employer to defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.” [Paragraph 10]

“... [T]he relief sought in this matter and in *Public Servants Administration v Minister of Justice* ... was not directed at the setting-aside of the Department’s decisions and the reversal of the appointment. The LAC was thus incorrect in finding that the facts in the *Amalgamated Engineering Union* case were analogous to those in the *Public Servants* case. ... The LAC further erred in finding that the relief sought was irrelevant in considering whether a party had a direct and substantial interest in a matter. The cases referred to by the LAC do not support this conclusion ... they dealt with a completely separate and unrelated principle. In the circumstances the LAC's decision that Mr Mkongwa had a direct and substantial interest in the matter and that the failure to join him was fatal to the appellant's case must be reversed.” [Paragraph 12]

Mlambo JA then turned to deal with the appellant’s claim of discrimination:

“The question ... is whether the appointment of Mr Mkongwa, a black candidate, instead of the appellant, a white candidate, found more suitable by the selection panel, is immunised from judicial scrutiny by the respondent's *ipse dixit*, without more, that it was an affirmative action appointment in furtherance of the constitutional imperative of promoting equality.” [Paragraph 14]

“...It can hardly be contested that the appellant was discriminated against on the basis of his colour and race. The issue is whether this was unfair and therefore not countenanced by s 8 [of the Constitution]. ... The section ... makes provision for measures designed for the advancement of persons and groups disadvantaged by past racial discrimination. This, in essence, permits unequal treatment where the objective is to promote equality. This has been found to contemplate the substantive form of equality as opposed to the formal type. See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) ...” [Paragraph 16]

"... The resolution of this question involves an investigation whether the appointment in itself was designed to achieve the constitutional imperative of promoting equality. ... It has been found that measures that are found to be inherently arbitrary and/or irrational cannot be said to have been designed to achieve the objective of the constitutional imperative of equality. ..." [Paragraphs 17 – 18]

Mlambo JA analysed the High Court decisions in *Motala v University of Natal*, *Stoman v Minister of Safety and Security*, and *Public Servants Association of South Africa and Others v Minister of Justice and Another*, and continued:
"It cannot be disputed that in the cases referred to ... what was at issue were plans, policies and/or programmes envisaging a pattern of conduct whose objective was to promote equality. Those measures that survived judicial scrutiny are those found to have been rationally connected to their objective. ... [P]roperly formulated programmes go a long way to satisfying the requirement of rationality. This is so since a properly crafted programme or policy provides a basis upon which it can be measured as to whether it meets the constitutional objective. ... [T]he term 'measures' as set out in s 8(3)(a) as well as the terms 'practices' and 'policies' in item 2(2)(b) of Schedule 7 of the LRA mean something much more than mere ad hoc or random action as we have in this case." [Paragraph 22]

"The injunction that the public service must be broadly representative is an important one. It enjoins those in charge to strive towards representivity. This in my view calls for attention to be focused on the respects in which the service is not representative and what measures should be implemented to achieve the required representivity. ... *In casu* ... Mr Mkongwa's race was ... the only basis on which his appointment was sought to be linked to the constitutional imperative ... From the evidence it is clear that the respondent did not have a policy or overarching plan of affirmative action. ... [T]he Commission itself had not applied its mind to the implementation of affirmative action: they simply held a view in this case that a black candidate should be appointed. ..." [Paragraphs 23 – 24]

"It has to be pointed out, as appears from the cases cited, that the policies, plans and/or programmes involved there were crafted in consideration of the context, such as identifying relevant demographics and the gaps in representivity that had to be addressed through affirmative action. This was not the case here nor was the application of affirmative action one of the criteria applicable in the selection of candidates. ... Clearly, the appointment was an ad hoc and arbitrary act." [Paragraph 25]

The appeal was upheld, and the respondent was ordered to pay the applicant the difference between what he would have earned had he been promoted, and what he actually earned until his retirement.

S V CROSSBERG 2008 (2) SACR 317 (SCA)

Case heard 21 November 2007, Judgment delivered 20 March 2008

The appellant had been convicted in the High Court for the murder of a Mr Dube, a farm worker. The appellant was also convicted on four counts of attempted murder, in that during the same incident, he had fired shots in the direction of four of the deceased's co-workers. On appeal, the appellant argued inter alia that there had been a fundamental irregularity in that 13 witness statements had been destroyed or lost from the police docket, infringing his right to a fair trial. On the accused's version, he admitted firing two shots "blindly" into the bush in an attempt to scare off baboons which had crossed

his path. The accused claimed to have been unaware of the presence of the deceased and his co-workers.

Writing for the majority, Navsa JA (Brand and Ponnan JJA and Malan AJA concurring) overturned the murder and attempted murder convictions, but found that on his own version, the accused fell to be convicted of culpable homicide. Forensic evidence suggested that two shots had been fired from the appellant's revolver. It was also noted that witnesses testified to seeing animal tracks, including of baboons, in the vicinity of the shooting.

Navsa JA found that the State's version of events was at odds with the objective facts and the probabilities [paragraphs 60, 65]. The evidence of the State's three main witnesses was found to have lacked credibility, and to be wholly unreliable [paragraph 71]. Regarding the State's obligation to make disclosure, Navsa JA found that the missing statements were "highly relevant" to the outcome of the case and to the issue of a fair trial, and that the State had not offered satisfactory reasons for re-taking the statements or for why the statements were missing. Navsa JA found that "the conclusion that the first set of statements did not suit the State's case and that they are missing by design rather than misfortune is compelling." [Paragraph 80] Navsa JA rejected the contention that a wholly suspended sentence was justified, and sentenced the appellant to five years imprisonment, two of which were conditionally suspended.

Mlambo JA dissented:

"I intend to deal only with those facts which, in my respectful view, have not been accorded their appropriate impact by my colleague Navsa JA. ... A critical factor is that the State's version excludes the presence of baboons in the vicinity of the shooting whilst the appellant's version excludes the presence of the five employees. My colleague Navsa JA is correct that the appellant never said he mistook the five employees for baboons. His version properly understood excludes the presence of the five employees in that vicinity when he fired the shots. ... In my view the presence of the deceased's body as well as the undisputed recovery of work tools in that vicinity fortifies the State's eyewitness' version that there were five employees on the scene, the deceased being one of them, and no baboons. It is stating the obvious that humans walk upright whilst baboons use all four limbs. In addition, humans are much larger than even the largest baboon. Objectively speaking therefore humans can be effortlessly distinguished from baboons. Therefore the presence of the deceased's body at the location, having succumbed to a bullet fired by the appellant, as another objective fact strengthens the State's version that he was one of the five employees who were shot at by the appellant at that location." [Paragraphs 117 – 119]

"... [T]he appellant and the eyewitnesses pointed out the same location where the shooting took place. The appellant pointed out the scene on the day of the incident and the eyewitnesses nearly three weeks thereafter. This lends further credence to the eyewitness account about the incident per se. ..." [Paragraph 124]

"... A further basis of improbability relied on is that the State's version suggests that the appellant behaved like a complete lunatic in shooting at the five employees at point blank without provocation and in full view of witnesses. I do not find any improbability in this eyewitness account. We have no evidence from the appellant, other than his claim - which strikes me as equally absurd - that he shot blindly to scare off baboons, to suggest that the situation is not as described by the eyewitnesses. It is not open to us sitting on appeal to reject first-hand evidence, without controverting evidence, but simply because we

think people in the heat of the moment, could not have behaved in a certain manner. ... [W]e cannot, sitting on appeal and relying on nothing but our own inclinations of how people should or would have behaved, reject otherwise plausible direct evidence. ...” [Paragraph 125]

“The discovery of the deceased's body by the appellant is another aspect that deserves proper consideration. The objective evidence is that the body was found in dense bushes. Superintendent Nephawe, Captain Boshoff and Inspector Louw who were the first on the scene are all *ad idem* that they would never have seen the body, hidden as it was in the dense bushes, had the appellant not pointed it out to them. ... [Appellant] provides no detail how this was possible with the surrounding dense bushes and what exactly drew his attention to the body. The explanation he ventures is dubious to say the least - that on the return trip his view into the bushes was not impeded. The probability - which in my view is overwhelming - is that the appellant knew that he had shot someone there and had gone back to assess the situation.” [Paragraph 127]

“The finding of two shells in the appellant's revolver, as an objective fact, is also relied upon to discredit the eyewitness account that the appellant fired more than two shots. My respectful view is that the appellant had ample time from the time of the shooting until he handed his revolver to the police to tamper with his firearm to fit in with the version he proffered ... That this is a strong probability is fortified by his dubious story of firing shots to scare off baboons, which as I have already shown, stands to be rejected out of hand.” [Paragraph 128]

“... The mere fact that the State has breached its duty to disclose does not necessarily mean that [the appellant’s] right to make full answer and disclosure has been infringed with the consequence that he has not received a fair trial. The issue that has to be determined first is the extent of the breach and its impact on the trial. ... The appellant cannot, in my view, be heard to assert that his right to make full answer and defence to the charges was also infringed. The appellant provided a version from the time he reported the incident to the police ... and persisted therein right through the trial. ... The impact of the non-disclosure on the appellant's right to test the credibility and reliability of the eyewitness evidence was minimal if anything. In the first place the prosecution was unaware of the existence of the missing statements ... the prosecution itself was not privy to nor placed any reliance on the missing statements. The prosecution case was also of necessity not based on the missing statements but on statements it had provided to the defence. Therefore the prosecution's case was in no way advantaged by the missing statements nor can the appellant claim to have been ambushed. A further point to make is that the appellant made full use of his right to cross-examine. ... [Paragraphs 133 – 134]

“Curiously, the defence was in possession of one of the missing statements ... Possession by the defence of this statement, albeit one, nevertheless lessened whatever negative impact the non-disclosure of the others had on the appellant’s right to a fair trial.” [Paragraph 135]

“I do not agree ... that a conclusion that the missing statements did not suit the State’s case is irresistible. Captain Boshoff, the original investigating officer ... had perused four and a part of a fifth of the original statements and the only discernible contradiction he could point out in these statements related to the type of firearm the appellant used. We have had no sight of these statements and as a result we are not in a position to make our own assessment whether indeed the missing statements did not suit the State's case or would have advanced the appellant's case. ... I also do not agree that the statements went

missing by design rather than by misfortunate. ... In my view the breach by the State to make disclosure was not so fundamental as to vitiate proceedings. ...” [Paragraphs 136 - 138]

Ponnan JA (Navsa and Brand JJA and Malan AJA concurring) wrote a separate judgment:

“I agree with my colleague Mlambo that, in determining the guilt of an accused person, all the evidence must be taken into account. ... That, however, is no licence for an inversion of the inquiry. The correct starting point remains the State case, which unquestionably has to pass a certain minimum threshold before one even turns to consider the veracity of the defence. To commence with the defence version, to subject it in isolation to rigorous scrutiny, to find it wanting and thus susceptible to rejection, as Mlambo JA has done, is to my mind the very antithesis of approaching the evidence holistically.” [Paragraph 142]

“... [E]ven if one were to accept - as my colleague Mlambo appears to - that the appellant falsely conjured up the baboons to explain his resort to his firearm, that hardly justifies the conclusion that the shooting was intentional. Nor is acceptance of the fact that the workers were present necessarily the end of the inquiry. Each participated in a pointing out. What was pointed out was inconsistent with their oral testimony in court and difficult to reconcile with the objective facts. The nett result of all of this is that one is totally at a loss as to what the vantage point of each worker was or precisely what each saw. ...” [Paragraph 145]

“Mlambo JA states that it is not open to us, sitting as a court of appeal to reject evidence simply because we think people could not have behaved in a particular way. ... [T]hat is not the sole basis for the rejection of the evidence in this case. My colleague Mlambo JA also objects to us relying on our own 'inclinations' as to how people should have behaved to reject plausible direct evidence. ... [T]he evidence properly analysed is anything but plausible. Second, courts of law daily have regard to their own experiences of, and insight into, human behaviour, in deciding upon the inferences to be drawn from the objective facts relating to the actions of witnesses ...” [Paragraph 147]

“... Whilst it is notionally possible for the appellant to have tampered with his firearm, the State gave no hint at that possibility during his cross-examination. And yet Mlambo JA concludes as a strong probability that he must have tampered with his firearm. What advantage would have been gained by such conduct is lost on me. The appellant admitted from the outset to firing two shots. That, at a time when he knew that the deceased had been struck and killed and when he was not to know what the version of the eyewitnesses would be. ...” [Paragraph 148]

“My reading of the record reveals each [State witness] to be manifestly unreliable. ... [E]ven if the appellant's version were to be rejected, as Mlambo JA would have it, the State case remains nonetheless woefully inadequate to support a finding that the appellant discharged his firearm with the requisite *dolus directus*.” [Paragraph 150]

“I can hardly imagine that the impact of what may well have been two sets of statements per eyewitness would have been 'minimal if anything', as Mlambo JA puts it. Quite the contrary, for clearly the defence was denied the opportunity of cross-examining eyewitnesses on material evidence contained in their witness statements. ... The standing of the witnesses - who were, in a word, pathetic - would not, I daresay, have improved if they had also been subjected to cross-examination on the additional

statements, particularly statements that, on the State's own case, were logically incoherent and had been made by witnesses who had influenced and schooled one another. ...” [Paragraph 153]

“Mlambo JA suggests that the possession by the defence of one statement lessens whatever negative impact the non-disclosure may have had on the appellant's rights to a fair trial. That, of course, assumes ... that there *was* indeed a negative impact; a negative impact which, according to him, is incapable of quantification. Well, if there were indeed a negative impact, the logical corollary thereof - notwithstanding my colleague's finding to the contrary - has to be that the State in fact has been advantaged. It strikes me that on any reckoning the prejudice to the appellant in this case has to be substantial. ...” [Paragraph 155]

“... Navsa JA ... details various unsatisfactory features in the State case. Those are glossed over, largely ignored or dealt with in a somewhat random fashion by Mlambo JA. Instead Mlambo JA contents himself, from the outset, with what he terms 'those facts [that] . . . have not been accorded their appropriate impact by . . . Navsa JA'. He then proceeds to level what I can only describe as various disparate criticisms at the judgment of Navsa JA. Those criticisms leave me in no doubt that the carefully reasoned judgment of Navsa JA is unassailable.” [Paragraph 158]

PRIVEST EMPLOYEE SOLUTIONS (PTY) LTD V VITAL DISTRIBUTION SOLUTIONS (PTY) LTD 2005 (5) SA 276 (SCA)

Case heard 12 May 2005, Judgment delivered 30 May 2005.

This case concerned the interpretation of a written agreement and its addendum. At the beginning of the trial, the parties agreed for issues to be separated in terms of Rule 33 (4) of the Uniform Rules of Court. The High Court was thus required to determine which party was obliged to prepare weekly time sheets, and whether the time sheets for the period of the contract were duly authorised.

The SCA dismissed the appeal. At the conclusion of the judgment, Mlambo JA (for a unanimous court – Mpati DP, Zulman, Lewis and Jafta JJA concurring) discussed the separation of issues sanctioned by the High Court:

“It is correct that the objective of Rule 33(4) of the Uniform Rules of Court is to facilitate the convenient and expeditious disposal of litigation. ... A court approached to sanction this course has a duty to satisfy itself that the separation will serve the desired purpose ...” [Paragraph 26]

“In the present case, in spite of the separation of the issues as sanctioned by the trial Court in terms of Rule 33(4), almost all causes of action and defences are still open to the parties. The underlying dispute ... has yet to be determined. For example, the defence of estoppel raised by the appellant, and which was foreshadowed in the particulars of claim, still awaits its day in court. Neither counsel could deny that all the litigation thus far has not resulted in the expeditious disposal thereof despite the fact that it has now gone through three Courts at monumental cost, no doubt, to the litigants. I refer to this scenario simply to voice our disquiet at yet another manifestation of a failure to ensure that a separation of issues in terms of Rule 33(4) has the potential to curtail litigation expeditiously. Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation.” [Paragraph 27]

SELECTED JUDGMENTS

HLOPHE V CONSTITUTIONAL COURT OF SOUTH AFRICA AND OTHERS [2009] 2 ALL SA 72 (W)

Applicant sought an order declaring that the lodging of a complaint against him by the judges of the Constitutional Court violated the judicial authority of the Constitutional Court, and that the publication of a media statement of untested allegations of gross misconduct against him was unlawful and violated several of his constitutional rights. Applicant further sought an order declaring that respondents' decision to lodge a complaint with the JSC was unlawful and legally incompetent.

Mojapelo DJP (Moshidi and Mathopo JJ concurring) held:

"... [I]t is overwhelmingly clear that in lodging a complaint the respondents did not act as a court in the sense of performing an adjudicatory or judicial function. They acted, as they say, as complainants against the applicant. They took a decision to and proceeded to file a complaint. They are complainants. They also took a decision to and proceeded to release a media statement about the complaint. The latter act is a far cry from being a judicial function." [Paragraph 19]

"... [I]f [applicant's] right to be heard is violated, and he is unable to defend it, his dignity and the integrity of the judiciary, of which he is a senior member, will be violated ... The foundation of the right to be heard is not only constitutional; it is also anchored, in the common law principle of audi alteram partem that recognises as part of the rules of natural justice the right of every person to be consulted or heard before a decision or step is taken that affects or may affect such person." [Paragraph 20]

"... The applicant asserts the right to be heard not just at the final adjudication stage of the complaint procedure but at each material stage of the procedure. This is a right which is asserted in favour of the applicant as a member of the judiciary. The integrity of the judiciary resides in each and every member of the judiciary. The complaint procedure must therefore assume the integrity and innocence of the judge, even in the face of a complaint, until the guilt of the judge has been proven following a fair procedure and process. ... The judiciary as an institution stands to suffer in its image and integrity, each time an accusation of misconduct is made. One must therefore afford the judge, facing a complaint, an opportunity to clear his or her name and correct any misunderstanding or misgiving of the complainant before the process has gone too far and the harm to the dignity and integrity has become irreversible." [Paragraph 22]

"The rules and process of filing and considering complaints against judges should however not inhibit the filing or consideration of complaints. It is thus an established principle in this regard that to impose on the complainant an obligation to afford the accused judge an opportunity to be heard before lodging the complaint would be to stretch the requirements of procedural fairness a bit too far. ..." [Paragraph 24]

"The respondents knew ... that the complaint that they intended to lodge was serious and would have grave impact on the dignity and standing of the applicant. They proceeded nevertheless." [Paragraph 41]

"... [W]hile there was no obligation on the twelfth and thirteenth respondents, if they lodged a complaint, to offer the applicant the right to be heard before proceeding to lodge the complaint on the basis of what they had experienced directly with the applicant, there was certainly such an obligation on the rest of the respondents ... The obligation was heavier on the second and third respondents who stand in different relation to the applicant, as a person over whom they hold a position of leadership and who

... look up to them, *inter alia*, not only for guidance but also for fair action in matters involving him and the rest of members of the judiciary." [Paragraph 43]

"... [T]he respondents proffer no explanation or justification for the speed and haste in which the steps were taken ... It is that speed and haste that brought about the unfair treatment of applicant and a violation of his rights. The respondents admittedly had a right and a duty to lodge the complaint with the JSC once they received information about the events and they considered that a breach of judicial conduct had taken place. It is, however, not in the lodging of the complaint *per se* that the applicant's rights were violated, but in the speed and lack of detail that took no account of his right to dignity and the right to have his dignity respected and protected." [Paragraph 48]

"The respondents also possibly had a right to decide to go public about the complaint inasmuch as they possibly considered it in the public interest to publish. ... The public right to know had to be balanced with the way that knowledge and information is purveyed. That balance was lost in the speed and haste with which the matter was handled and the lack of sufficient averment of factual details ... The applicant was dealt with unfairly and his rights were violated by the failure to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary. The respondents ... for inexplicable reasons, executed their decision in haste and with the speed that eroded and negated all reasonableness." [Paragraph 49]

"The rights of the applicant were violated by the denial of natural justice and breach of procedural fairness in lodging the complaint and particularly in publishing the making of the complaint. ... It can ... not be said, as the applicant submits, that that complaint is tainted by the procedural unfairness in lodging it, because the applicant will be afforded procedural fairness in the consideration of the complaint by the JSC when it deals with that complaint. ..." [Paragraphs 52 – 53]

Mojapelo DJP then considered foreign jurisprudence and practice regarding complaints of judicial misconduct, and continued to find that the lack of factual details in the published complaint added to the violation of the applicant's rights [paragraph 82]. Mojapelo DJP found that the publication of the media statement was unlawful and infringed the applicant's dignity [paragraphs 86, 87], but that the right to a fair hearing was only violated in respect to the publication and laying of the complaint, not in respect of the complaint laid and later substantiated on 17 June 2008. Mojapelo DJP found that the applicant's right to equality had been violated, but that his rights to privacy and access to the courts had not. Mojapelo DJP further rejected the argument that it was unlawful for the respondents as judges of the Constitutional Court to lodge a complaint with the JSC [paragraph 90].

Mojapelo DJP then dealt with the argument that the respondents had violated the judicial authority of the Constitutional Court:

"... [T]his contention is to be considered on the basis that the respondents concerned acted either "as a court" or as a group of individual judges and outside the exercise of their judicial authority. On an overall conspectus of all the facts, the respondents did not act as a court exercising judicial authority in laying the complaint. For this reason alone, the citation of the Constitutional Court as a respondent, apart from other submissions made by the respondents, is improper ... It is ... not unheard of for judges to be litigants in their own courts. ... All that the law requires is that when their own cases serve before the courts they shall recuse themselves on the basis of ordinary principles that govern recusal. At best for the applicant therefore, his argument amounts to this, that there is likely to be an application for recusal if this case should ever serve before the Constitutional Court. That eventuality is not before this Court and

need therefore not be considered. ... I am satisfied that the applicant has not established a ... violation of the judicial authority of the Constitutional Court. ...” [Paragraphs 92 – 94]

Gildenhuys J and Marais J, in separate judgments, dissented, finding that the application should have been dismissed in its entirety. The majority decision was overturned by the Supreme Court of Appeal in Langa and Others v Hlophe [2009] 3 All SA 417 (SCA)

S v SMIT 2008 (1) SA 135 (T)

Case heard 21 June 2006, Judgment delivered 21 June 2006

The accused refused and failed to pay tollgate fees on 12 occasions, and failed to comply with a road traffic sign (a red signal). The accused was charged with 2 offences, each of 12 counts, for contravening section 27(5) (b) and section 27(6) of the South African National Roads Agency Limited and National Roads Act.

The accused did not deny the facts, but argued that the road in question was not a toll road as defined in relevant statue and he hence he was not liable for the toll fee. As a general defence the accused alleged that the state had failed to prove beyond reasonable doubt all allegations necessary to convict him. This included that the Toll plaza was a toll road as declared by the 1998 Act, that he was liable for the payment of tolls and that Trans Africa Concessions was entitled to operate the said toll road. The Prosecution argued that even though this particular toll road had not been declared one under section 27 of Act 7 of the 1998, it was still valid under the section 9 of the predecessor Act of 1971. [Pages 140-144]

The prosecution argued that a notice had been published in the newspapers declaring the new intended toll road and that letters had been sent to local authorities inviting them to make representations within 30 days. The Acts required, amongst others things, consultation with local authorities affected by the declaration. Mojapelo DJP cited *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities* as authority for the view that consultation requires that “communication must in fact be effective and genuine for consultation to take place.” In *Maqoma v Sebe NO and Another 1987 (1) SA 483* the court emphasised that consultation must “allow reasonable opportunity to both sides ... to communicate effectively and achieve the purpose for which prior consolation is prescribed.” [Pages 150 – 153].

Mojapelo DJP found that “[o]n the version of the State, the best that the board and the Department of Transport did was to invite representations, considered those received and took a decision to proceed with the declaration of a toll road.” [page 170]

“The question to be considered is whether, having furnished the Middelburg TLC with information regarding the position of the tollgate, the board and the department did consult with the TLC at all. The furnishing of information regarding the position of toll roads is not consultation, it is prescribed as something that has to be provided in the consultation process, just as it also has to be provided in the invitation for representations ... The TLC thought that the TRAC meeting of 27 August 1997 was the intended consultation. On the State version, however, it was not. Thinking that it was, the TLC thus wanted to discuss the position of the plazas but was told that the decision in that regard had been made already. ... On the State version this meeting was not part of the consultation process prescribed in s 9(3)*(b)*. ... The TLC thereafter requested and pleaded for it and the community to be consulted. On the

evidence before me there was no response to that request. The consultation envisaged therefore never took place."

"The State therefore only relies on the fact that the board called for representations (in terms of s 9(3)*(c)*) and received response from Middelburg TLC ... to prove that the board consulted the said TLC. The real question is therefore whether compliance with s 9(3)*(c)* - invitation for representations - constitutes consultation as prescribed by s 9(3)*(b)*. In my view it does not. ..." [Page 171]

Mojapelo DJP thus held that the State had failed to prove that a toll road was validly declared in terms of s 9 (3) (a) of the 1971 Act. [Page 174]. Mojapelo DJP held that the accused had the right to raise the defence of the invalidity of the administrative act declaring the toll road, as the presumption of the validity of an Act had been rebutted. Mojapelo DJP referred to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)* regarding the rebuttal of a presumption, and held that convicting an individual for not complying with the consequences of an unlawful deceleration would not be consistent with the rule of law. In regards to the red traffic signal, on the authority of the *Oudekraal* case, Mojapelo DJP found that that the validity of the traffic signs depended on the factual existence (and the legal validity) of the toll road, and consequent contract between the government parties. The traffic lights were found not a legal nullity, and the accused therefore acted unlawfully in disobeying the traffic sign. The accused was acquitted of failing to pay tollgate fees but convicted of failing to comply with road traffic signals.

ZULU v MINISTER OF DEFENCE AND OTHERS 2005 (6) SA 446 (T)

Case heard 11 November 2004, Judgement delivered 2 February 2005.

The applicant brought an urgent application to stay the execution of decisions by the military court, which included her dismissal. The Applicant brought an application to review and set aside 2 decisions by the Military courts (third and fifth respondents respectively) and although the review application was not before Mojapelo J, he had to decide whether to grant the urgent application. The respondents argued that the decision of the 5th respondent (the military appeals court) was not reviewable and that the urgent application disclosed no cause of action.

The application centred on the conviction of the applicant on certain charges and her dismissal from the South African National Defence Force (SANDF) by the third respondent. An appeal to the fifth respondent was made, and at the same time an application for review was made to the fifth respondent. The review was on 3 main grounds: bias of the Senior Judge in the court of the third respondent; the failure to reconstitute the matter to commence *de novo* when one of the assessors recused himself (allegedly due to the bias of the Judge); and that part of the proceedings were conducted in a language in which the applicant was not conversant (Afrikaans). Mojapelo J found that these were all substantive grounds of review, "each of which touches on the right of an applicant to a fair trial which is guaranteed under the Bill of Rights ... They call into question the fundamental fairness of the trial of the applicant ..." [Paragraph 9]

"The respondents opposed the interim interdict before this Court and raised the crisp point that the applicant chose to follow a particular route and has exhausted all the remedies available within the military court structure and that having been heard by the fifth respondent she exhausted all available legal remedies to the full. The respondents contend in particular that the fifth respondent has considered

the matter and decided thereon and that the decision of the fifth respondent ... is not reviewable by the High Court. It is in essence the contention of the respondents that having been heard in an appeal and review by the fifth respondent, the applicant exhausted all her remedies and has no right to any further remedy or access to this High Court and that she accordingly has no *prima facie* right nor any right to an interdict at all." [Paragraph 15]

Mojapelo J noted that the respondents relied heavily on the High Court decision in *Steyn v Minister of Defence*, which held that in a military court system a decision of a judge cannot be reviewed by another Judge or taken on appeal to another Judge or Judges, unless there are specific provisions in the Act or rules for such appeal. Respondents argued that *Steyn* followed the decision of the SCA in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others*. [Paragraphs 17 – 20]

"The application in the *Steyn* matter was specifically for a declaration of rights as to whether a decision of the court of military appeals was appealable to the High Court, and if so, to which appeal court the appeal should be noted and the procedure that should be followed in prosecuting such appeal. The decision of the Court on that specific question was that the decision of the court of military appeals is final and not appealable. The question of reviewability of the decision of the court of military appeals by the High Court was not before the Court in the *Steyn* matter. The remark made by Maluleke J [is] ... clearly to the effect that the decisions of the court of military appeals are not subject to appeal or review to the High Court. The remark of Maluleke J with reference to review was therefore *obiter* as that question was not before that Court. That remark, therefore, is not binding on this Court." [Paragraph 21]

"It seems to me therefore that while the power to entertain an appeal exists only where there is a specific provision for it, the inherent power of the High court to review decisions and proceedings of the lower courts and other bodies exists unless it has been excluded expressly or by necessary implication...." [Paragraph 27]

"... [I]n terms of s 2(c) of the Military Discipline Act ... one of the objects ... is 'to ensure a fair military trial and the accused's access to the High court of South Africa.'" [Paragraph 28]

"[The respondents] argued ... on an even broader basis, that because the chairperson of the fifth respondent, who presided over the decision ... is a Judge of the High Court, then the decision ... cannot be reviewed. ...The respondents relied for this proposition on *Pretoria Portland Cement Co Ltd* ..." [Paragraph 30]

Mojapelo J then analysed the *Pretoria Portland Cement* case"

"... The matter ... therefore concerned the action of a Judge sitting in his Chambers at the seat of the High Court hearing an *ex parte* application in a case registered in the High Court. It is in my view the clear authority of *Pretoria Portland Cement* ... that a Judge acting in those circumstances acts as a Judge of the High Court and is not reviewable. His or her decision may only be corrected by other means including appeal but certainly not by review proceedings. It is clear from the reading of the judgment in *PPC* that where reference is made to the decision of a Judge not being subject to review, reference is in fact to a Judge of the High Court acting as a Judge of the High Court. ..." [Paragraph 32]

"Where a judge, however sits or acts in other and separate capacity than in the exercise of judicial authority as a Judge of the High court, his or her decisions may well be subject to review. A good example referred to the *PPC* case is where a Judge of the High Court sits as a chairperson of a Commission of

Inquiry, ... [or] sits as an arbitrator, presides over a tribunal or as a chairperson of a statutory board ..." [Paragraph 35]

"At the very least for the applicant ... it has not been established as a cut and clear principle in our law that the decision of the fifth respondent (and that of the third respondent after being upheld by the fifth respondent) is not reviewable. ... I need not decide finally, for the purposes of the present application for interim relief, the question(s) of law that arise in the main review application. It is sufficient that I hold the *prima facie* view, as I do, that she has a *prima face* on the probabilities ... for her in order to succeed with the interim interdict. ..." [Paragraph 37]

"I am satisfied that the applicant has a prima face right for the interim interdict which she seeks. The balance of the requirements for the grant of an interim interdict are satisfied and are not an issue in this case." [Paragraph 43]

CHRISTIAN LAWYERS ASSOCIATION v MINISTER OF HEALTH AND OTHERS (REPRODUCTIVE HEALTH ALLIANCE AS AMICUS CURAIE) 2005 (1) SA 509 (T)

Case heard 24 May 2004, Judgement delivered 24 May 2004.

The plaintiff sought an order declaring sections of the Choice of Termination of Pregnancy Act ('the Choice Act') to be unconstitutional. Mojapelo J delivered judgment on an exception field by defendants, on the grounds that the plaintiff's particulars of claim failed to disclose a cause of action:

"The provisions ... that the Plaintiff's claim is directed at are the provisions that allow women under the age of 18 years to choose to have their pregnancies terminated without (a) consent of the parents or guardians, (b) consulting the parents or guardians, (c) first undergoing counselling, and (d) reflecting on their decision or decisions for a prescribed period. The measures in (a) to (d) are ... hereafter referred to as parental consent or control. It is the plaintiff's case in essence that young women or girls below that age are not capable on their own, that is, without parental consent or control to take an informed decision whether or not to have a termination of pregnancy which serves their best interests. ... In order to succeed with its claim the plaintiff has to establish that the relevant provisions of the Choice Act are in conflict with and affront the specified sections of the Constitution ..." [Page 512]

"It is on the basis of ... conclusionary factual allegations that the plaintiff concludes in its particulars of claim ... that the Choice Act is in conflict with the Constitution ..." [Page 513]

Mojapelo DJP then set out the impugned provisions, and the structure and scheme generally, of the Choice Act, and continued:

"It is therefore not as if the legislature left the termination of pregnancy totally unregulated. The cornerstone of the regulation of the termination of pregnancy of a girl or indeed of any woman is the requirement of her 'informed consent'. No woman ... may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so." [Page 515]

"It has come to be settled in our law that in this context [as the basis for the doctrine of *volenti non fit injuria*], the informed consent requirement rests on three independent legs of *knowledge*, *appreciation* and *consent*." [Page 515]

Mojapelo J quoted with approval from the judgment in *Waring & Gillow Ltd v Sherborne* 1904 TS 340, which held that a defence of consent required "that it must be clearly shown that the risk was known, that it was realised and that it was voluntarily undertaken. Knowledge, appreciation, consent-these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not always equivalent to consent." [Page 515]

Regarding the capacity to consent, Mojapelo J held:

"...[V]alid consent can only be given by someone with intellectual and emotional capacity for the required knowledge, appreciation and consent. ... What the Choice Act does not do however is to fix a rigid age ... Instead of using age as a measure of control or regulation, the Legislature ... opted to use capacity to give informed consent as the yardstick. ..." [Page 516]

"It would be incorrect to approach the matter as if the Choice Act is totally blind to questions of youth or minority. The Choice Act has specific provisions dealing with minors. ... In the leading judgement on the requirement of informed consent, Ackermann J ... in *Castell v De Greef* [a 1994 full bench decision of the Cape Provincial Division] ... made it clear that the *ratio* for that requirement was to give effect to the patient's fundamental right to self-determination. ..." [Page 517]

"This Court more recently endorsed the approach in *Castell* on the basis of the patient's right to exercise her 'fundamental right to self-determination'. See *C v Minister of Correctional Services* ... [T]he fundamental right to individual self-determination itself lies at the very heart and base of the Constitutional right to termination of pregnancy. ..." [Page 518]

Mojapelo J held that the recognition of the individual's right to self determination "has now become an imperative under the Constitution", and continued:

"In a sense therefore the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so. To provide otherwise would be unconstitutional." [Page 518]

"What has to be accepted ... includes the allegation in para 20.2 of the plaintiff's particulars of claim to the effect that a woman under the age of 18 'is not capable of giving informed consent' as required in s 5(1) of the Choice Act. This approach is fatal to the plaintiff's claim as formulated. ... On the basis of the truth of the allegation in para 20.2 that a girl under the age of 18 is incapable of giving informed consent, then on the proper interpretation of informed consent, such a girl will for that reason be excluded from accessing the termination of pregnancy right under the Choice Act because such consent is the cornerstone of the regulation and a prerequisite for the exercise of the right. It is in this regard that para 20.2 of the particulars of claim is fatal to the plaintiff's claim." [Page 519]

"For the particulars of claim to disclose a cause of action the allegations contained in them must support the conclusion of fact reached by operation of law as well as the remedy sought. Because a category of persons to whom the plaintiff's complaint relates are those excluded by incapacity to give informed consent, the allegations in the particulars of claim do not support the conclusion. Claims A, B G and C are excipiable because they assume that the Choice Act permits girls under 18 years to have their pregnancies terminated when it in fact never permits them to do so (assuming the truth of para 20.2).
On the basis that it is true, that a girl under the age of 18 years is not capable of giving informed consent required by s 5(1) of the Act, and if in practice the pregnancy of such girls is terminated on the basis of

their purported consent, then the plaintiff's remedy is not to attack the Choice Act but to stop the medical practitioners and midwives who terminate the pregnancies of girls under the age of 18 because they are doing so unlawfully in violation of s 5(1) of the Choice Act. The constitutionality attack can therefore not be sustained on the particulars of claim." [Page 520]

Mojapelo J thus upheld the exception. Mojapelo J continued to examine the issue of a woman's right to termination of pregnancy, comparing the position in the United States, Canada, Germany, and other European Union jurisdiction. Mojapelo J found that:

"[o]ur constitution protects the right of a woman to determine the fate of her own pregnancy. It follows that the State may not unduly interfere with a woman's right to choose whether or not to undergo an abortion." [Page 528]

"I cannot find that the legislation is unconstitutional when it provides for what is constitutionally permissible and regulates it without affronting the Constitution. The exercise of the right is not unregulated. For this reason too, the plaintiff's particulars of claim do not disclose a cause of action." [Page 529]

SELECTED ARTICLES

''DUE CONSULTATION IS CRUCIAL'', TimesLive, 15 May 2011.

The article dealt with the process of appointing a new chief justice in 2011. It discussed the process of appointing the Chief Justice and what was required from both the President and the JSC.

"Consultation ... has to be real, not formalistic. ... It entails the involvement of more than one person, namely the consultant, in this instance the executive ... and the consulted, who confer in the sense of applying their minds to consider the pros and cons of the matter. ... For this to happen, consultation must be accommodated at the formative stages of a proposal before the mind of the executive has become unduly fixed. The invitation to consult must be communicated and therefore there must be adequate time for the consulted to advise and adequate time for the consultant (executive) to consider the advice given by the consulted. ... The mind of the Executive must be open and receptive when consultation is sought and received. If the mind is already fixed, then consultation is not genuine. ... The president is required to consult not only with the leader of the party with the majority in parliament, but also with the leaders of all parties represented in parliament. ... The objective is clear: the whole country, not just a section, is taken along."

"In appointing the chief justice ... and indeed, in exercising any authority that is vested in him by the constitution, the president exercises not a personal power but a public and constitutional one. It is a public power that he exercises on behalf of the people of SA. He acts as president only when he acts in accordance with the constitution and the law. ... Consultation with the JSC is an important constitutional requirement which ensures that the body that advises the president on all judicial appointments is heard on this highest of all judicial appointments. ... In order to consult on a candidate, the JSC must make up its mind on the suitability of a candidate and then communicate its opinion to its consultant, the president. ... The rules and procedures [of the JSC] are as important as the JSC itself, for unless it follows its own rules and procedures, the JSC does not act as the JSC. ... The names of the ... short-listed candidate are published ... [T]he public are invited to comment ... Again, literally any person may submit a comment to the JSC about any short-listed candidate, yet another important window for continued public participation. ..."

"Public participation and transparency are evident at every level. ... The steps listed ... are important not only for legality, but ... more importantly, for the legitimacy of the process. The fact of the matter is that when consultation is not genuine, then it is not legal. In the last appointment of the chief justice, the JSC did not announce the vacancy and invite nominations. ... The public did not nominate candidates. They were not afforded an opportunity to do so. The decision-making process was robbed of an important element of legitimacy, that is, public participation at its initial stages. Consequently, the process was, I submit, critically impoverished. ... It so happened that the candidate appointed was a worthy and deserving candidate. It was unfortunate that the failure to follow procedure created and outcry around his appointment. South Africa must not allow the process of appointing our highest judicial office to again be tainted by a lack of proper consultation. We cannot afford the risk of a lack of public support in this field where legitimacy and public accountability are crucial."

SELECTED JUDGMENTS

SIKHITHA V MINISTER OF POLICE, UNREPORTED JUDGMENT (NORTH GAUTENG HIGH COURT)

Plaintiff, a Metro Police officer, claimed damages of R600 000 for alleged unlawful arrest and detention after he was removed and locked up in a "waiting cell" by members of the SAPS, acting within the course and scope of their employment.

Arnoldi AJ held:

"... The defendant is adamant that the plaintiff was not arrested or detained. According to the defendant the locking up of a person in the waiting cell is not tantamount to detention. ..." [Paragraph 6]

"It was plaintiff's perception that he had been arrested. ... According to the defendant, the plaintiff was not arrested and he was merely requested to go to the Lyttleton Police Station and detained in the waiting cell in order to await his superiors' arrival to reprimand or discipline him." [Paragraph 7]

"The defendant's assertion that the plaintiff had been taken to the Lyttleton Police Station in order to verify his identity as a Metro Police officer is cynical and without merit. This defence must fail ..." [Paragraph 8]

After setting out provisions of the Criminal Procedure Act relating to arrest, Arnoldi AJ continued:

"It has not been suggested that plaintiff refused or failed to co-operate ... The Police officers did not inform the plaintiff that he was being arrested, nor did they charge him. They simply requested him to accompany the police to the ... police station ...In the absence of evidence of what would have happened to plaintiff had he refused this request, it cannot be said that his submission to the request amounts to deprivation of freedom. ... Although he was not technically arrested, the Police assumed control over his movements when he was put into a waiting cell. This amounts to "arrest" as one cannot be detained without having been arrested." [Paragraphs 13 - 14]

"It has not been shown by the defendant that it was necessary to detain plaintiff. In fact, having regard to the defendant's version, being that plaintiff was taken to the ... Police station, to identify him as a Metro Police officer, is fatal for the defendant. Plaintiff was prior to being detained identified as a Metro Police officer ... Once identified ... plaintiff should have been set free. The detention clearly deprived plaintiff of his freedom and was unlawful." [Paragraph 16]

"Having regard to the fact that the plaintiff, being a Metro Police officer in uniform, was detained with the knowledge of colleagues and members of the SAPS, humiliated and embarrassed him." [Paragraph 19]

"I have considered a variety of cases in order to establish the quantum to which plaintiff is entitled. The closest comparison ... is to be found ... where a police officer was awarded R30 000.00 in 2009 for having been unlawfully detained for 17 hours. In the circumstances I regard an award of R20 000.00 to be realistic and fair." [Paragraph 20]

RANOTO V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO: 9551/2009 (NORTH GAUTENG HIGH COURT)

Plaintiff, a field trainer employed by the Tshwane Metro Police, claimed damages for personal injuries sustained in a collision. The trial proceeded on the question of merits only.

"The plaintiff ... travelled from North to South in the slow lane. He travelled at 100kph when he approached a slower moving vehicle in front of him. He either overestimated the speed of the vehicle in front ... or failed to concentrate on the traffic in front of him. ... [H]e had to take evasive action to avoid colliding with [the vehicle in front of him]. He swerved to his left into the emergency lane where he was confronted with the back of a slower moving vehicle being the insured vehicle ... Although he slammed on brakes and swerved to his left ... he collided with its left rear corner. ..."

"It is common cause that, upon impact, the insured vehicle was stationary. It is also common cause that directly after the collision the insured driver told the plaintiff that he had thought that the plaintiff had stopped him [the insured driver testified that he had seen blue lights on the motorcycle flashing]."

"Mr Naude, on behalf of the plaintiff, argued that the plaintiff's version that the blue lights and siren on the motorbike had not been operational, was uncontested ... I cannot agree. The assertion that the blue lights had been flashing and the siren switched on, effectively disputed this version."

"Mr Naude also urged me to reject the insured driver's evidence because it deviated from his own version ... of his statement to the assessors, in that he told the latter that he had seen the blue light flashing at an early stage, after which the motorbike fell behind ... In his evidence he failed to make mention of the first incident. I do not regard this difference as material and it is certainly not justified to reject his evidence on this ground alone."

"I find that, on the plaintiff's own version, he was negligent. He [f]ailed to heed the traffic and specifically the vehicle in front of him, which resulted in him having to swerve to his left into the emergency lane to avoid a collision. ..."

"The question is whether the insured driver was negligent. ... On his version he was under the impression that the plaintiff had instructed him to stop. He was therefore aware of the fact that the plaintiff had been following him. He stopped, despite that fact that he had lost sight of the plaintiff in his rear view mirrors. He was aware of the plaintiffs presence behind his vehicle, and had a duty to observe his safety before stopping. He was negligent in stopping without being able to see the plaintiff in his rear view mirrors."

"It follows that it is of no consequence whether the plaintiff's blue lights and siren were on or not ... If this matter were to be decided on the probabilities, as a result of the contrasting versions, as suggested by counsel, it would make no difference. ..."

"... The question that remains, is the proportion in which the plaintiff's and the insured driver's negligence had contributed to the collision. The insured driver stopped without heeding the safety or whereabouts of the plaintiff. The plaintiff failed to heed the traffic in front of him as a result whereof he ended up in the emergency lane, where slower moving or stationary vehicles are to be expected. In my view the plaintiff and the insured driver are equally to blame ..."

Arnoldi AJ thus ordered that the damages awarded to the plaintiff were to be reduced by 50%.

SELECTED JUDGMENTS

KHANGEZILE THANDOKUHLE MSIMANGA V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NUMBER: 2010/28881 (SOUTH GAUTENG HIGH COURT)

Case heard 12 – 16 September 2011, Judgment delivered 3 October 2011

The plaintiff instituted an action against the defendant in terms of the Road Accident Fund Act for damages as a result of injuries she sustained in a pedestrian/vehicle accident, when she was 9 years old. Before commencement of the trial, the parties settled the issue of liability, and the only issue that remains for determination was the claim for future loss of earnings.

Baqwa AJ held:

"... According to Dr Yusuf Osman's report, the plaintiff sustained severe head injury ... Prior to the accident the plaintiff was a school child living at her parents' home ... [H]er birth and childhood had been normal. ... She was a normal child with an ability to learn, to behave normally and to socialise. ..." [Paragraph 5.2, 6.1, 6.3]

Baqwa AJ noted that the ambit of the issues related to two scenarios, namely the pre-morbid career path and the anticipated post morbid career path. It was agreed by both Industrial psychologists that the plaintiff returned to school following the accident and completed grades 4 to 12 successfully and the plaintiff was busy with a 3 year diploma at the London Institute School of Fashion, having completed 2 years. The psychologists differed over the anticipated pre-morbid earnings and the projected career ceiling post morbidly.

"Whilst the clinical tests, assessment and subsequent opinions of the various experts have been of immense assistance in weighing up the issues concerning what has to be determined, it bears noting that the recordal of the pre-morbid scenario is in fact a recordal of what has been borne by the facts of this case. ...Inevitably, that is not the case regarding the post morbid scenario. In this area the ground begins to be progressively slippery as one tries to construct a realistic picture of what will happen in future. The approach which a court should adopt was eloquently described by Nicholas AJA in Southern Assurance Association v Bailey No 1984 (1) SA 98 ... " [...] All the court can do is to make an estimate, which is often a very rough estimate of the present value of the loss. [...] It is manifest that either approach [a round estimate of an amount or an assessment by way of mathematical calculations] all involve guesswork ... But the court cannot for this reason adopt a non possumus attitude and make no award. ..." [Paragraph 9.1]

Baqwa AJ noted that the evidence suggested that the plaintiff had problems with the concentrate, memory, fatigue, distractibility, word finding, self-esteem, verbal learning, depression and anxiety. Based on this, he accepted the submission that the plaintiff would be "functionally unemployable", as while she retained her ability to work and her physical and cognitive attributes, she had limitations in operationalizing that ability in the real labour market consistently, especially when competing against healthy and equally or better educated individuals. [Paragraph 12.5]

Baqwa AJ then cited the judgment in *Goodall v President Insurance* 1978 (1) SA 389 (W) as authority for the approach in assessing contingency deductions to the plaintiff's loss of earnings, and found"

"My application of a 70 per cent contingency is based on my acceptance ... that plaintiff is demonstrably functionally unemployable. I have accordingly deemed it appropriate to depart from the trend and award 70 per cent for contingencies. There is ample evidence to support this departure from the experts called by both parties. ..." [Paragraph 13.3]

ASHANDRA ANANDPAUL V BRANDON MOODELY AND ANOTHER, UNREPORTED JUDGMENT, CASE NUMBER: 2010/48106 (SOUTH GAUTENG HIGH COURT)

Case heard 26 August 2011, Judgment delivered 6 September 2011

Applicant, the owner of a residential property adjacent to the property of the first respondent, had launched an application for an interim interdict preventing a building being erected on the first respondent's property, the plans of which had been approved, without the knowledge of the applicant, by the second respondent. The case was based on the provisions of the National Building Regulations and Building Standards Act.

"... [T]he applicant contends that his view is affected by the first respondent's house. The first respondent disputes this right to a view. In *Paola v Jeeva No and Others 2004(1) SA 396 (SCA)* ... Farlam J stated the law as follows: "Once it is clear , as is on the facts presently before us ,that the execution of the plans will significantly diminish the value of the adjoining property, then, on its plain meaning, the section prevents the approval of the plans". That, in law, the applicant does potentially have a right to protect is clear from the Paola decision. This right cannot be exercised on the basis of a mere allegation. It has to be proved and where a transgression thereof is alleged, evidence of that transgression has to be presented by way of evidence. In the present case the applicant does not state how and to what extent his view is affected by the first respondent's house. ..." [Paragraph 5.1]

"Whilst the applicant's case is largely based on a contravention of the Alberton Town planning scheme ..., the ... Scheme relied upon by the applicant does not seem to accord with the applicant's own version. The whole of the applicant's case is predicated on the allegation that the first respondent is building a three storey house in contravention of the Scheme. ... In terms of the Scheme, the first respondent, it seems, could quite competently and lawfully build up to three storeys. ..." [Paragraph 5.2]

"The applicant faces a number of hurdles in his application ... As at that date [the hearing of the application] no objection had been lodged ... against the plans..." [Paragraph 6 – 6.2]

"At this juncture, it is appropriate to refer to paragraph 12 of the applicant's founding affidavit ... Whilst the above allegation may have been justified at the time, it does appear that they have been eclipsed by the effluxion of time in that the building is complete and the first respondent has taken occupation. ... It appears to me that the applicant is asking the court to reverse what appears to be a *fait accompli.* The court cannot, in my view, be used to try and close the stable door after the horse has bolted. If the building is complete and the first respondent has moved in, there does not appear to be a basis for interdicting a 'building work or construction of the property'. [Paragraphs 6.3 – 6.4, 6.6]

"Based on the aforegoing, I am of the view that the applicant has not made out a *prima facie* case." [Paragraph 7]

FIDELITY SUPERCARE SERVICES GROUP (PTY) LTD V JOHANNESBURG METROPOLITAN POLICE DEPARTMENT, UNREPORTED JUDGMENT, CASE NUMBER: 2009/7209 (SOUTH GAUTENG HIGH COURT)

Case heard: 29 August – 2 September 2011, Judgment delivered 15 September 2011.

The plaintiff issued summons for monies owing for services and labour rendered to the defendant. The plaintiff claimed that during the period September to January 2009, at the defendant's instance and request, the plaintiff supplied it with various categories of skilled and unskilled labour. The issue was whether there was a binding agreement between the parties and, if not, whether defendant was unduly enriched by the services which the plaintiff claimed to have rendered to it.

Baqwa AJ held:

" ... The plaintiff's claim B is alternative to the original claim and it is simply to the effect that in the event of the court finding that claim A fails for non –compliance with statutory formalities contained in particular with the Municipal Finance Management Act [MFMA] ..., the plaintiff provided goods and services to the defendant in the *bona fide* but mistaken belief that it was a party to a valid contract with the defendant. ..." [Paragraph 2]

"According to the plaintiff's witness an agreement to provide services to the defendant was first entered into in or about February 2002.This was followed by written confirmation ... The contract initially encompassed the provision of services relating only to horses and their stables. In March 2003, these services were expanded to include servicing dog kennels. What is important about Annandale's letter referred to above [the written confirmation] is that it contained an order number ... The plaintiff's regional director ... confirmed that these services were rendered. Dietrich, Graham and Annandale confirmed that the order number was essential for the payment of services rendered by the plaintiff. ... It is patently clear from the evidence of these witnesses that the plaintiff did render these services to the defendant and rendered monthly invoices to the defendant which were either accompanied by an official order or later by a vendor number allocated to the plaintiff ... by the defendant's procurement department." [Paragraphs 9.1 – 9.5]

Baqwa AJ then noted a letter written by Annandale, confirming that a contract for cleaning services had been accepted, and commented that "It will be observed that the language ... is clear, unambiguous and unequivocal. It is a confirmation of a contract which had been awarded. The terms thereof and the manner of requisitioning payment are explicit." [Paragraph 9.8]

"What is important to note is that it was the defendant who sought out the plaintiff and requested the plaintiff to render services. ... In other words, the defendant proposed to the plaintiff to render services. The plaintiff accepted and submitted proposals together with quotations regarding what those services would cost. ... The contract initially encompassed services relating only to horses and their stables. In March 2003, these services were expanded to include servicing the dog kennels. In 2005 these services were expanded to include garden maintenance and later cleaning services. ... In my view, the agreements that gave rise to a valid contract were the pre December 2004 contracts. In other words the cut off period is the coming into effect of the MFMA." [Paragraphs 11 – 14]

"In terms of the MFMA a contract for the acquisition of services by a Municipality had to be in writing. In terms of section 111 ... each municipality had to implement a supply chain management policy that gives effect to section 217 of the Constitution and ... applicable provisions of the MFMA. ... It is in light of the above legislative developments that I am of the view that the relationship between the plaintiff and the

defendant cannot be seen as giving rise to one single contract. The business relationship did continue and endure ... The defendant eve paid for services which were agreed upon in 2005 without a written contract." [Paragraphs 14 – 15]

"The MFMA ... took effect on 1 December 2004. Accordingly, the agreements between the defendant and the plaintiff could not be valid in terms of section 116 of the MFMA if they were not in writing after December 2004. ... The wording ... is clear and unequivocal and if the legislature had intended it to be interpreted in any other way, it would have said so." [Paragraph 16 – 16.1]

Baqwa AJ then considered the Supreme Court of Appeal judgment in *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC 2010(1) SA 356 (SCA)*:

"The court, per Leach AJA, held that it was not a question of a court being entitled to exercise a discretion having regard to issues of fairness and prejudice, but rather a question of legality. ... The court referred to a number of other SCA decisions in which it had held that contracts concluded in similar circumstances without complying with prescribed competitive process, were invalid." [Paragraphs 16.4 – 16.5]

"It was the conclusion of the court in *Qaukeni Municipality* ... that a procurement contract for municipal services concluded in breach of provisions dealt with above which were designed to ensure a transparent, cost-effective and competitive tendering process in the public interest is invalid and will not be enforced." [Paragraph 16.6]

"I accordingly find that the agreement or agreements that the plaintiff entered into prior to the commencement of the MFMA ... and the services that were rendered in regard thereto were valid. ..." [Paragraph 16.8]

"As to the *bona fide* or reasonableness of the plaintiff prior and post 2004, ... it was confirmed by both Director Maribe and Mr Silal ... that there were two attempts at regularising the relationship with the plaintiff by way of a tender process. Both these attempts came to nothing ... In my view the offer of a standard contract for signature by the defendant and the participation in the flawed tender process by the plaintiff cannot but indicate *bona fides* on the plaintiff's side ..." [Paragraph 17]

Baqwa AJ made no finding on the alternative claim of undue enrichment, it having been separated by agreement between the parties to be determined later.

PETRUS FANIE SIBIYA AND ANOTHER V THE STATE, UNREPORTED JUDGMENT, CASE NUMBER: A217/2009, 15 SEPTEMBER 2011 (NORTH GAUTENG HIGH COURT)

This was an appeal to a full bench against the sentence imposed by the Circuit Local Division. Baqwa AJ (Kruger AJ and Tuchten J concurring) held:

"The appellants were convicted on assault with intent to do grievous bodily harm in relation to Themba Eric Mngomezulu and in relation to Sizwe Dlamini during an attack on these victims by members of the community ... The appellant [sic] are members of this community. They and a number of other community members reacted to allegations of criminal activities allegedly committed by the two men and severly [sic] assaulted the two men. Mngomezulu later died of the wounds he sustained ..." [Paragraph 2]

"The appellants were treated equally for purpose of sentence and they were each sentenced to eight (8) years imprisonment of which half was suspended for five (5) years on condition that they are not found guilty of a violent crime without the option of a fine during the period of suspension." [Paragraph 3]

"In mitigation the circumstances of both appellants were placed before the court: (a) The first appellant was 44 years old with three children below 15 years old. He also maintains his wife and parents. He is in regular employment ... (b) The second appellant was 30 years old with two children aged 5 and 8 years and also supports his mother. He is also in regular employment ..." [Paragraph 7]

"The court *a quo* took into account not only the personal circumstances of the appellants but also the seriousness of the offence. ... The learned judge *a quo* was not invited to consider a sentence of correctional supervision or periodical imprisonment ... In my view, if the learned judge's intention [sic] had been drawn to these sentencing options, he would have at the very least given them serious consideration. It is trite that the imposition of an appropriate sentence is a matter within the discretion of the trial court and that an appeal court will be slow to interfere with the sentence of the court below unless there has been a misdirection (See *S v Holder 1979 (2) SA 70 (A)*). The failure of the court *a quo* to consider alternative sentencing options to which I have alluded is, in my view, such misdirection. Accordingly, this court is at large to determine an appropriate sentence, having regard to all the relevant circumstances." [Paragraphs 8, 10]

"An effective sentence of four years in prison would not only impact upon the appellants ... but also cause them to lose their employment and leave their wives, children and parents without support. The families might not just be left destitute, but could be destroyed. Upon release from prison, the prison terms served would leave an indelible mark on the appellants' employment prospects." [Paragraph 11]

"It is my considered opinion that it is precisely for such circumstances that the retributive aspect of the law has sought to be mitigated through the sentences such as correctional supervision. Such mechanisms ensure that justice is seen to be done whilst at the same time ensuring that negative and unintended consequences are avoided. ... The appellants were found to be guilty of a serious crime. They took the law into their own hands and sought to punish the two men for the crimes they had allegedly committed. ... Every person, no matter what he or she is alleged to have done, is entitled to a fair trial. The imposition of punishment for criminal conduct is a matter for the courts to decide." [Paragraphs 12,15]

Baqwa AJ quoted from the judgment of Schreiner JA in *R v Karg 1961 (1) SA 231 (A)* regarding the approach to sentencing, and continued:

"In my view, the appellants *in casu* are suitable candidates for correctional supervision and the relevant detail in this regard is set out in the Correctional Services reports handed into court." [Paragraph 16]

The appeals were upheld, and the sentences substituted for sentences of eight years imprisonment, wholly suspended on condition of no further convictions, with the accused being placed under correctional supervision for a period of eighteen months.

SELECTED JUDGMENTS

PAUL COSSIE V THE STATE, UNREPORTED JUDGMENT, A114/2011 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 10 October 2011, Judgment delivered 3 November 2011

The appellant and his co-accused pleaded guilty to a charge of fraud and appellant was sentenced to five years imprisonment, the trial court finding that substantial and compelling circumstances existed not to impose the minimum sentence of fifteen years. He appealed against the sentence.

Kubushi AJ (Van Der Merwe J concurring) held:

"The appellant's counsel contended … that the [Criminal Law Amendment] Act must be interpreted restrictively in terms of the Constitution. According to him, in terms of this interpretation the trigger for minimum sentences must be understood to mean the gravity of the offence which has been concretized by monetary thresholds." [Paragraph 11]

"I am of the view that the language used in this section is clear and unambiguous and must therefore be interpreted to give it its grammatical and ordinary meaning. …" [Paragraph 13]

"It was … a material oversight on the part of the trial court to find that the appellant was clearly the mastermind behind the scheme … There was no such evidence before the trial court and by making such findings the trial court misdirected itself. For all we know the co-accused could in fact have masterminded the scheme … This to my mind is a material misdirection by the trial court which vitiated its exercise of its discretion, and entitles us to consider the question of sentence afresh." [Paragraph 16]

"In the face of such grievous offences the interests of society must come first. Courts are expected, as was the case in this instance, to take into account the fact that businesses and financial institutions place a high premium on honesty and that fraud and corruption are nowadays the cause of losses of millions of Rands. The community in general, businesses and financial institutions in particular must be protected against people like the appellant. …" [Paragraph 21]

"My view is that the personal circumstances of the appellant in mitigation … are overshadowed by the aggravating circumstances … The trial court made a finding that the appellant was remorseful … In my view, this was not genuine remorse … He had no option but to change his plea because the evidence of that witness directly implicated his co-accused …" [Paragraph 22]

"More than anything, I was swayed by the appellant's previous conviction. … He had the benefit of a fine and a suspended sentence for that conviction, but he committed a similar offence … during the period of suspension. The previous sentence failed to rehabilitate him and/or deter him from repeating this offence and I do not see what good another similar sentence … would do." [Paragraph 23]

"It must be noted that any serious offence … can lead to imprisonment and frequently imprisonment is the only appropriate sentence which ought to be imposed. [citation to the Appellate Division decision in S v Holder] … In this instance … my view is that … the imposition of direct imprisonment is the only sentence that will be appropriate … [T]he personal circumstances of the appellant must yield to the requirements of deterrence. …" [Paragraphs 24 - 25]

The appeal was upheld and the sentence replaced by one of three years imprisonment, antedated.

TSELENG THERISA LENGAU V MANGAUNG SUN (PTY) LTD T/A WINDMILL CASINO & OTHERS, UNREPORTED JUDGMENT, CASE NO: 1508/2008

Case heard 1, 2, & 4 March 2011, Judgment delivered 9 June 2011

This case was an action based on injuria.

Kubushi AJ held:

"The issue to be decided by this court is whether or not the conduct alleged in the summons amounted to degrading conduct and if so, whether or not the plaintiff's dignity was impaired by such conduct." [Paragraph 7]

"In an unreported case of the Constitutional Court Le Roux and Others v Dey and Others … the court observed in the minority decision of Froneman J and Cameron J that what the common law requires for a dignity claim to succeed are three elements: a deliberately inflicted, wrongful act, that impairs the plaintiff's dignity." [Paragraph 9]

"A plaintiff, in a case of injuria, bears the onus of proving the factual element, which, once established, gives rise to an inference of unlawfulness. In determining whether or not an act complained of is wrongful the court applies the criterion of reasonableness. This is an objective test which requires the conduct complained of to be tested against the prevailing norms of society in order to determine whether such conduct can be classified as wrongful. This approach was confirmed in the majority judgment written by Brand AJ in the Le Roux and Others v Dey and Others-case above, where the court held that to satisfy the objective element, our law requires that a reasonable person would feel insulted by the same conduct. In Jackson v SA National Institute for Crime Prevention & Rehabilitation of Offenders 1976 (3) SA 1 (A) … the Court described the objective test as: "…an objective standard which for example could be constituted by the notional understanding and reaction of a person of ordinary intelligence and sensibilities"." [Paragraph 10]

"If a plaintiff proves that he or she feels insulted in circumstances where a reasonable person would also have felt insulted, a presumption of wrongfulness arises which the defendant may rebut by proving the existence of a ground of justification for his or her conduct. If he or she does not succeed in doing so, wrongfulness is certain. See Neethling, Potgieter and Visser in The Law of Delict …." [Paragraph 11]

"I conclude therefore that plaintiff has failed on a balance of probabilities to prove an essential element of the injuria, namely, the wrongful act. And where the plaintiff has failed to prove that there was any wrongful act the issue of whether there was animus injuriandi on the part of the defendant and whether the plaintiff's dignity has been impaired becomes irrelevant." [Paragraph 25]

P SEHLABAKA & ANOTHER V S, UNREPORTED JUDGMENT, CASE NO: A67/2010

Case heard 16 May 2011, Judgment delivered 25 August 2011

This was an appeal against a judgment of the Regional Court. The appellants had been convicted on three counts of corruption in contravention of the Prevention and Combating of Corrupt Activities Act. On appeal, the issue of the quality of the interpreting services used in the court a quo came under scrutiny.

Kubushi AJ held:

"The right of an accused person to understand the proceedings at all times is a prerequisite of a fair trial. In terms of section 35 (3) (k) of the Constitution …: 'Every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.' The requirements of a fair trial will, therefore, be satisfied if the trial is conducted in a language with which the accused person is sufficiently conversant, or if the proceedings are interpreted into such a language. See MPONDA v S [2004] 4 All SA 229 (C) ..." [Paragraph 9]

"The trial court employed the services of two interpreters. A casual interpreter, Ms Judy Lin, translated the evidence of the complainants from Chinese to English and vice versa; and a permanent interpreter, Mr Konxela, interpreted the English into the language with which the appellants were conversant vice versa. As per the record, because Ms Lin was a casual interpreter, when she was sworn in, the magistrate specifically enquired into her ability to understand the language spoken by the complainants, namely, Chinese and found that she would be able to interpret. And this she did. However, the appellants were not satisfied with Ms Lin's translation. They contended that Ms Lin was incompetent. According to them she seemed not to understand the proceedings and did not interpret correctly. In the heads of argument they referred us to a number of passages in the record where the interpretation was inaccurate or did not make sense. The question that had to be answered was whether, as argued by the appellants, Ms Lin was a competent interpreter or not. Section 6 (2) of the Magistrates' Courts Act … provides that: 'if, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, …' [13] The meaning of a "competent" interpreter has been a subject of many court decisions. In S v ABRAHMS 1997(2) SACR 47 (C) … it was stated that an interpreter who does not appear to understand the language that the accused person is conversant with is not competent to provide that service. In S v NDALA 1996 (2) SACR 218 (C) … it was held that a competent interpreter must be able to give a "true and correct" interpretation of evidence as is implicitly guaranteed by section 25(3) (i) of the Interim Constitution (the current section 35 (3) (k) of the Constitution). The principle should always be that the accused person must be able to understand the proceedings at all times." [Paragraphs 11-13]

"... The appellants were correct, Ms Lin was not a competent interpreter. The passages from the record which we were referred to by the appellants could not be regarded as minor contradictions. The passages are an indication that Ms Lin might have not understood the proceedings or the language she was expected to interpret into. She frequently did not give a true and correct interpretation. Indeed, when reading the record I did get an impression that she did not understand the language which she was expected to interpret into. And there were numerous indications on the record that showed that the evidence adduced against the appellants was not entirely satisfactorily interpreted. The interpretation was at some places distorted and did not make sense. Mr Konxela … had to rely on Ms Lin's interpretation for his interpretation to the appellants. As a result he must have also interpreted incorrectly to the appellants. ... To my mind, therefore, because of this interpretation there was a possibility that the appellants did not understand the proceedings and thus their right to fairness of the trial was infringed. … [T]he failure to provide a competent interpreter might lead to a gross irregularity and subsequent invalidation of the proceedings. See S v NDALA 1996 (2) SACR 218 (C); S v NGUBANE 1995 (1) SACR 384 (T); S v ABRAHMS 1997(2) SACR 47 (C) … and S v MAFU 1978 (1) SA 454 (CPD) ... The question to be answered at this stage was whether the extent of the incompetence in this case was such

that it vitiated the proceedings. Put in other words whether the appellants in this case had a fair trial. ... Because the magistrate accepted the interpretation as it was there was no need for him to enquire into the extent of the incompetence. This left us at large to enquire into the degree of this irregularity." [Paragraph 15-17]

"In the premises I find that the failure by the state to use a competent interpreter was a gross irregularity which invalidated the proceedings and that the appellants did not have a fair trial. …" [Paragraph 20]

Moloi J concurred.

VICTOR MOEKETSI MOKONE & ANOTHER V S, UNREPORTED JUDGMENT, CASE NO: A52/11

Case heard 25 July 2011, Judgment delivered 25 August 2011

This was an appeal from a Regional Court, appellants having been convicted for rape and sentenced to life imprisonment.

Kubushi AJ held:

"... The appellants contended … that when passing sentence the trial court erred in finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the minimum sentence of life imprisonment. According to them, the trial court over-emphasized the interest of the community and deterrence as against the personal circumstances of the appellants. They contended that the trial court failed to take into consideration the fact that the complainant did not suffer any serious physical injuries and that there was no evidence regarding the emotional scars. I therefore had to determine whether the trial court erred in coming to such a conclusion. " [Paragraphs 5-6]

"The court in the case of S v Malgas 2001 (1) SACR 469 (SCA) … set out the guidelines which a court should follow when determining whether there were substantial and compelling circumstances present to justify the imposition of a lesser sentence. According to that decision a trial court must consider all the factors that may reduce the blameworthiness of the offender and mitigate his culpability to come to a conclusion whether substantial and compelling circumstances existed or not. " [Paragraph 8]

"One can never over emphasise the gravity of the offence of rape. Rape is a violation that is invasive and dehumanising and its consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself. Rape constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. See an unreported Supreme Court of Appeal case of De Beer v The State (121/04) … and S v Chapman 1997 (2) SACR 3 (SCA) ... However, in this instance, I agree with the appellants, the complainant did not suffer any severe physical or genital injuries as a result of the rape. The state did not proffer any aggravating factors except to state that the complainant suffered severe injuries on her face as well as in her vagina. The evidence did not show that the complainant suffered severe physical injuries. No medical evidence or any evidence whatsoever as to the extent of the injuries sustained by the complainant was led at the trial. The J88 form, which was admitted into the record without the medical doctor giving evidence simply stated that the complainant sustained multiple abrasions and small cuts to the cheeks, slight bleeding in the inside of the lip and a small tear on the left leg. The vagina was

inflamed, tender and slightly bleeding. These, in my view, are not severe injuries. A psychological report was also not submitted to determine the extent, if any, of the impact of the rape on the complainant. It is quite unrealistic to suppose that the complainant might not have experienced psychological damage as a result of this incident, it is however not possible in the absence of appropriate evidence to quantify its likely duration and degree of intensity. This I concede should not mean that one should approach the question of sentence on the footing that there was no psychological harm. See S v MAHOMOTSA 2002 (2) SACR 435 (SCA) ... These factors, to my mind, must cumulatively, be taken into account in the process of considering whether substantial and compelling circumstances warranting a departure from the prescribed sentence were present or not. I therefore find that the trial court misdirected itself in finding that no substantial and compelling circumstances existed. The sentence must therefore be considered afresh." [Paragraph 11-14]

"When considering all the factors of this case I am of the view that the imposition of a life sentence by the trial court was disproportionate. The mitigating factors and the lack of aggravating factors in this case, cumulatively considered, render the sentence of life imprisonment disproportionate and unjust. Life imprisonment as a sentence for rape should be imposed only where the case is devoid of substantial factors compelling the conclusion that such sentence is appropriate and just. See S v ABRAHAMS 2002 (1) SACR 116 (SCA) … An appropriate sentence must fit the crime, the offender and be in the interests of society. The courts have held that even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as "ordinarily appropriate" is a consideration that the courts are to "respect, and not merely pay lip service to". When sentence is ultimately imposed, due regard must therefore be paid to what the Legislature has set as a "bench mark". See S v MALGAS ..." [Paragraphs 15-16]

The appeal against conviction was dismissed, whilst the appeal against sentence was upheld and the sentence replaced by one of 20 years imprisonment (antedated) (Moloi J concurring).

TANKISO TOBOKO V S, UNREPORTED JUDGMENT, CASE NO: A/284/2009

Case heard 23 May 2011, Judgment delivered 23 June 2011

This was an appeal against the decision of a Regional Court, whereby appellant was convicted of raping a ten year old girl and sentenced to life imprisonment.

Kubushi AJ held:

"The crime, which the appellant was convicted of, falls within the provisions of the Criminal Law Amendment Act ... In terms of section 51 (1) read with part I of schedule II, where a person is convicted of an offence of rape and the victim is a person under the age of 16 years the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which will justify the imposition of a lesser sentence. … [W]here a person is convicted of an offence of rape when committed by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence." [Paragraph 7]

"The trial court failed, as conceded by the respondent's counsel, to mention the personal circumstances of the appellant when considering whether there are substantial and compelling circumstances. It

concentrated more on the circumstances leading to the commission of the offence and the aggravating factors. In S v Malgas … it was said that all factors traditionally taken into account in sentencing (whether or not they diminish the moral guilt) continue to play a role. As endorsed in S v Mahomotsa 2002 (2) SACR 435 (SCA) and in S v Nkomo 2007 (2) SACR 198 (SCA)." [Paragraph 9]

"… [T]he appellant is a person who can be rehabilitated. At face value the appellant's circumstances are not indicative of an inherently lawless character. However in my view the personal circumstances are overshadowed by the gravity of this offence, particularly because the appellant raped the complainant without using a condom well knowing that he was HIV positive. This is an aggravating factor by its very nature." [Paragraph 12]

"After careful consideration of all the relevant circumstances I could not find that there are substantial and compelling circumstances which justify the imposition of a lesser sentence than life imprisonment. There is nothing that persuades me to impose a sentence different from that imposed by the trial court. The sentence imposed is just and appropriate to this particular offence and there is no justification to temper with it." [Paragraph 14]

Musi J concurred.

SELECTED JUDGMENTS

MARK HAROLD POWELL AND ANOTHER V THE REGIONAL MAGISTRATE FOR THE REGIONAL DIVISION FOR LIMPOPO MR R RAMBAU AND 3 OTHERS, UNREPORTED JUDGMENT, CASE NO 76623/2009 (NORTH GAUTENG HIGH COURT, PRETORIA)

Applicants, who were charged with fraud in the Regional Court for the regional division of Northern Transvaal sitting at Sibasa, sought to review and set aside the First Respondent's dismissal of a recusal application.

Muller AJ held:

"... When First Respondent adjourned the trial to the agreed date [for the delivery of judgment] he withdrew the bail of both Applicants on the basis that he is going to convict them. That prompted Applicants to approach the Limpopo High Court Thoyandou for urgent relief. Hetisane J granted an order re-instating the Applicants bail ..." [Paragraph 9]

"... At the resumption of the proceedings Applicants applied for the recusal of First Respondent on the ground that he is biased. First Respondent dismissed the application. Application was then made to adjourn the trial again to allow the Applicants the opportunity to launch an application to review the dismissal of the recusal application. That request was also denied. ... First Respondent proceeded to deliver a judgment and convicted both the Applicants. Application was then made to adjourn the proceedings ... to obtain pre-sentence reports and to adduce evidence in mitigation of sentence. First Respondent acceded to the request ... Again First Respondent withdrew the bail of Applicants. Applicants once again approached the Limpopo High court for urgent relief by way of a bail appeal. ... Mann AJ upheld the appeal and restored the Applicants bail. The present application was launched in this Court to review and set aside the decision of First Respondent not to recues [sic] himself ... " [Paragraphs 10 - 11]

"I am ... not precluded from determining whether this Court has jurisdiction to entertain the application despite the abandonment of the point of law ... To determine whether this Court or the Limpopo High Court has jurisdiction ... it is apposite to start with the source of a High Court's authority to review the proceedings of an inferior court situated in its area of jurisdiction." [Paragraphs 13 - 14]

"Section 169(b) of the Constitution ... confers authority on a High court to decide only those matters not assigned to another court by an Act of Parliament. ... The jurisdiction of the High Court cannot exceed what was conferred upon it by the statute. ... " [Paragraphs 15 - 16]

"When the interim Constitution ... came into effect ... the Republic of Venda ceased to exist. The interim Constitution provided for the continuation of the courts. The final Constitution also made provision for transitional arrangements ... " [Paragraph 20]

"This Court exercised jurisdiction over the Province of Transvaal in terms of the First Schedule immediately before the commencement of The Interim Rationalisation of High Courts Act. This Court therefore ceased to exercise jurisdiction over the area comprising the Republic of Venda since its independence." [Paragraph 23]

"The regional court sitting at Sibasa is situated within the area of the former Republic of Venda and falls without any doubt within the area of jurisdiction of the Limpopo High Court ... The Limpopo High Court,

therefore, has the jurisdiction to review the proceedings of the inferior courts within its area of jurisdiction. .. The renaming of the regional division Limpopo merely had the effect that regional division of Limpopo was included in the area of jurisdiction of this Court as well as the area of jurisdiction of the Limpopo High Court. But that does not mean that this court may exercise jurisdiction over the area of the Limpopo High Court or vice versa. Their respective areas of jurisdiction do not overlap. ... I hold that this court does not exercise concurrent jurisdiction in the area of jurisdiction of the Limpopo High Court." [Paragraphs 24 - 25]

The application was dismissed

MICHAEL CHUCHU MAKALANGA V THE STATE, UNREPORTED JUDGMENT, CASE NO: A239/11, 22 SEPTEMBER 2011 (NORTH GAUTENG HIGH COURT)

Appellant was granted leave to appeal against his conviction on two counts of robbery with aggravating circumstances, and sentence of fifteen years imprisonment.

Muller AJ held:

"It was suggested to the witness that the appellant will deny that he robbed him and that first complainant is making a mistake with respect to the identity of the appellant. It must be noted that it was not suggested to the first complainant that the appellant had an alibi that he was in Johannesburg at the time. The importance of that omission will become clearer presently." [Pages 3- 4]

"The issue of the identification of the appellant was correctly identified by the learned magistrate. I am also mindful of the dangers pertaining to the identification of an accused in these circumstances. The first complainant's evidence with respect to the identification stands alone. Second complainant was unable to identify any of the perpetrators. First complainant is treated therefore as a single witness as to the identification of the appellant. The learned magistrate found his evidence and identification of the appellant to be reliable. I agree. First complainant had the opportunity to observe the appellant closely during the scuffle. Appellant was known to him for a number of years and had seen him on various occasions in the past.

The learned magistrate rejected the evidence of the appellant and his sister. I also agree with his reasons for not accepting their evidence. I may add that the appellant's evidence why he did not tell his representative of his alibi, is unconvincing to say the least. ..." [Pages 5 – 6]

"The appellant is a first offender and 32 years of age. The offences are without any doubt, serious. The learned magistrate found that no reasons exist for him to deviate from the minimum prescribed sentence. There are no exceptional substantial circumstances that warrants any other sentence than the prescribed minimum." [Page 6]

The appeals were thus dismissed (Preller J concurring).

PHOMELLA PROPERTY INVESTMENTS (PTY) LTD V AGRI SOUTH AFRICA, UNREPORTED JUDGMENT, CASE NUMBER 56976/2010 (NORTH GAUTENG HIGH COURT)

Plaintiff sought an order compelling the defendant to furnish certain particulars for trial. It was alleged that the parties had entered into a written sale agreement for a business enterprise, which the defendant had breached as no valid certificate of occupation existed at the time of the transfer of business. Plaintiff claimed damages for the costs incurred in satisfying the requirements for a valid certificate.

Muller AJ held:

"... [T]he onus to prove that no valid certificate of occupation existed ... rests with the Plaintiff. As I read ... the plea, Defendant does not deny that no valid certificate of occupation existed. Defendant denies that it breached a term of the agreement ... When Plaintiff requested further particulars, Defendant replied to certain requests but refused others ..." [Paragraphs 4 – 5]

"To my mind the Plaintiff is not entitled to the particulars referred to in paragraph 1 and 14 – 22 ... The Defendant is not obliged to supply Plaintiff with evidence to prove its case. ... Nor is it obliged to set out it's interpretation of the law with reference to the ambit and applicability of the 'voetstoots' clause on which it relies." [Paragraph 10]

"... It would be unwise for me to make any findings with respect to the applicability and ambit of the 'voetstoots' clause in this matter. I do not wish to bind the trial court by any remark made by me in this judgment ... Whether the contract contains the terms referred to in ... the plea depend on the interpretation of the contract and I accordingly refrain from making any further comment with reference thereto." [Paragraphs 11 – 12]

"I agree with the submission ... that the claim of Plaintiff is dependant upon the Competition Commission having authorised the sale. I mention this because no such averment is made in the particulars of claim. Defendant did not take issue with the absence of the averment. Be that as it may, there is no dispute between the parties that the sale was approved ... The question whether the approval was conditional, as pleaded by Defendant, or unconditional as pleaded by Plaintiff, is neither here nor there. It is not Defendant's case that the conditions for approval were not complied with and that the sale failed because of that. Neither is it Plaintiff's case that the sale has failed due to the Competition Commission not having approved the sale. I cannot see how the particulars requested can be relevant and necessary to prepare for trial ... The particulars requested ... must also be refused." [Paragraph 15]

"Plaintiff bears the onus with respect to set off as pleaded ... On the basis that no replication was filed, the allegations are deemed to be denied. Plaintiff, is not entitled to particulars in relation to mere denial. Plaintiff made the allegations in the pleading and must therefore lead evidence as it has at it's disposal to prove set-off ..." [Paragraph 18]

"Plaintiff was successful with respect to one item only. However, I think that it will be fair to reserve the costs for the trial court to determine whether the requested information was strictly necessary." [Paragraph 19]

Z J SITHOLE N.O V LEON HERMANUS STEENKAMP IN RE: LEON HERMANUS STEENKAMP V Z J SITHOLE AND ANOTHER, UNREPORTED JUDGMENT, CASE NUMBER: 7815/2010, 16 SEPTEMBER 2011 (NORTH GAUTENG HIGH COURT)

Muller AJ held:

"Before me is an exception that is pleaded almost as a special plea as part of first defendants plea." [Page 1]

"The exception is directed against paragraph 7 of the particulars of claim on the basis that plaintiff has failed to make allegations necessary to sustain a cause of action in that plaintiff has failed to allege that: a) He furnished first defendant with a bank guarantee acceptable to first defendant; and b) He paid occupational interest on the balance of the purchase price ..." [Paragraph 1]

"Plaintiff merely stated in paragraph 7 that: "The plaintiff has duly complied with his obligations in terms of the agreement..." [Paragraph 2]

"The claim as set out in the particulars of claim is plainly a claim for repayment of plaintiff's performance pursuant to the cancellation of the contract. Such a claim is a distinct contractual remedy. ..." [Paragraph 4]

"The allegation is no doubt widely stated but that to my mind is not fatal. Save where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute ... an excipient must make a very clear and strong case before he will be allowed to succeed. ..." [Paragraph 7]

"The particulars of claim must set out, in order to disclose a cause of action every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It does not comprise every piece of evidence which is necessary to prove each fact ..." [Paragraph 8]

"I am satisfied that the allegation in paragraph 7 is not a conclusion of law or an opinion but indeed a statement of fact." [Paragraph 9]

"It is well settled that an exception can only be upheld if the pleading concerned is excipiable on all reasonable interpretations thereof and that no possible evidence led on the pleading can disclose a cause of action. I am satisfied that evidence can be lead on the pleading and that the allegations are sufficient to disclose a cause of action." [Paragraph 10]

The exception was dismissed with costs.

SELECTED ARTICLES

NOTE: Although the candidate has published articles, these were written in Afrikaans and hence could not be included in this report.

SELECTED JUDGMENTS

AIRPORTS COMPANY SOUTH AFRICA LTD V ISO LEISURE OR TAMBO (PTY) LTD AND ANOTHER 2011 (4) SA 642 (GSJ)

Case heard 6 December 2010, Judgment delivered 31 March 2011

Applicant sought to stay review proceedings which had been brought by the first respondent, in order for the dispute to be referred to arbitration. At the pre-arbitration meeting, concerns had been raised as to whether the dispute could validly be referred to arbitration. The original review application sought to set aside the applicant's decision to grant second respondent contract to design, build and operate a hotel at OR Tambo International Airport.

Vally AJ identified the core issue in the stay application as being whether the review application could be substituted with arbitration proceedings. First respondent argued that s 7(4) of the Promotion of Administrative Justice Act (PAJA) prohibited a review in terms of PAJA from being considered by any forum 'except a High Court or the Constitutional Court.' After finding that the first respondent had not compromised its right to seek recourse to review proceedings in the High Court, Vally AJ turned to consider the question of whether arbitration proceedings were prohibited by s 7(4) of PAJA, dealing first with whether PAJA applied to the dispute:

"The fact, that the applicant is incorporated as a private company, and that its decision not to grant the contract to the first respondent was not taken strictly in the course of an exercise in public power, is not decisive of the issue concerning the applicability of the provisions of PAJA. ... [T]he provisions of PAJA do apply to the decision not to grant the contract to the first respondent. ..." [Paragraph 49]

"It is still necessary to ask if the decision sought to be impugned constitutes administrative action as contemplated in PAJA. The question of what does, or does not, constitute administrative action is a particularly vexed one. It is one that is not susceptible to a general conclusion applicable for all time to all cases: there is no universally applicable test as to what conduct constitutes administrative action." [Paragraph 50]

"The kinds of decisions referred to in [s 1 of PAJA] imply a determination of final and definitive result or conclusion. In short, there must be finality in the decision sought to be impugned, for it to fall within the scope of PAJA. There is no doubt that the decision sought to be impugned ... is final and definitive." [Paragraph 53]

"The applicant places great store in a dictum of Nugent JA [in Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010 (5) SA 457 (SCA)] which, according to it, advances the view that focus must be directed to the function performed by a functionary when considering whether any conduct ... constitutes administrative action ... [T]he applicant contends that the key to determining whether particular conduct constitutes administrative action ... is whether the said conduct arises from the exercise of a governmental function or not. It also draws support from the judgment in *Transnet Ltd v Goodman Brothers (Pty) Ltd* ... This, in my view, is too narrowly stated. It is not uncommon to find that modern governments have relinquished much of their duties and responsibilities of, inter alia, controlling public assets and funds, and have handed these functions to private bodies ... It may keep a controlling interest ... but does, nevertheless, empower them with substantial autonomy to control and administer these assets. In such a circumstance it is particularly

worrisome if any party, adversely affected by the conduct of these bodies, is denied the forceps or scalpel of PAJA in order to surgically dissect the conduct, and seek appropriate relief from a court. Such a narrow interpretation is not consistent with the constitutional principle that the rights contained in the Bill of Rights must be purposively interpreted. PAJA, it is to be recalled, gives greater meaning and content to such right — the right to fair administrative action. [citation to the Constitutional Court judgment in AAA Investments (Pty) Ltd v Micro Regulatory Council and Another]" [Paragraphs 54 - 55]

"In any event, I do not agree with the applicant's contention that Nugent JA reduced the issue, of what constitutes administrative action ... to the single criterion, being whether the conduct complained of is part of a governmental function. ... [T]he question of whether conduct constitutes administrative action ... can only be determined by having regard to a number of factors, such as, for example, whether the body carrying out the function is publicly funded, publicly owned, performing functions that would otherwise be performed by a 'pure' governmental organ such as a department that is part of the executive, controls public assets, acquires liabilities that ultimately will have to be borne by the public, or acting in the public interest or is subject to the regulation by statute ... " [Paragraphs 57, 59]

"In the present case, the fact, that the decision sought to be impugned may fall foul of one or more of the provisions of PFMA [Public Finance Management Act] ... is a weighty factor ... It may well be that the accounting authority of the applicant has committed financial misconduct, as contemplated in PFMA, by virtue of allowing the applicant to take the decision sought to be impugned. ... There is no doubt that if a company owned by government gives a lucrative contract to persons connected with a political party, whether it be the governing party or one of its associates, the granting of which contract is marred by improper and irregular conduct, there is a strong case for holding that the granting of such a contract constitutes administrative action as contemplated in PAJA. It certainly cannot be said that the granting of such contracts does not have any effect on the public purse. By virtue of the fact that these companies are owned by government, they are, ultimately, dealing with public funds. Whether they make a loss or turn a profit, the public purse is affected. This, in my view, provides compelling reason not to interpret the definition of administrative action too narrowly, as is contended for by the applicant. Furthermore, the fact that the conduct is regulated by the provisions of PFMA point to the direction that it falls within the scope of PAJA. " [Paragraphs 60 - 61]

Vally AJ then considered the argument that s 7(4) of PAJA did not preclude the referral of the dispute to private arbitration:

"It must be remembered that PAJA is no ordinary statute. It is a statute that is enacted in terms of a provision in the Bill of Rights and, as pointed out above, gives effect to a right in the Bill of Rights." [Paragraph 65]

"This case involves an adjudication of a constitutional matter. Section 7(4) of PAJA clearly recognises this. Our Constitution is unique in many respects, one of which is that it grants exclusive jurisdiction to the High Court and the Constitutional Court in certain matters ... It is as part of this architecture that s 7(4) of PAJA must be understood. ... [A]ll adjudication in terms of PAJA is adjudication over the interpretation and applicability of s 33 of the Constitution. It is therefore perfectly understandable that the adjudication of such disputes is reserved for the High Court and the Constitutional Court. ..." [Paragraphs 66 – 67]

"I, therefore, hold that s 7(4) of PAJA precludes any forum, apart from the High Court and the Constitutional Court, to adjudicate over claims brought in terms of PAJA. The parties cannot, in my view, confer jurisdiction upon a private arbitrator to decide a claim brought in terms of PAJA. To allow such

would be to allow parties to privatise constitutional disputes, and this bears the risk of allowing a parallel constitutional jurisprudence to develop in this country — one that is separate and independent from that developed by the Constitutional Court. Such a development goes against the entire grain of our constitutional system ...” [Paragraph 68]

The application was dismissed.

SUTHERLAND V HOFMEYR [2011] JOL 27451 (GSJ)

Case heard 24 August 2010, 6 October 2010, Judgment delivered 9 December 2010

In divorce proceedings, the parties had negotiated a settlement agreement, which was to have been made an order of court. An issue arose regarding provision for rehabilitative maintenance to be paid by the respondent to the applicant. The relevant clause in the agreement referred to rehabilitative maintenance for a period of 18 months, in the amount of R17 500 per month, from 7 December 2009. However, when the agreement was not concluded by 7 December as intended, the applicant sought to amend the clause.

Vally AJ held:

“The respondent maintains that regard must only be had to the fact that it is from 7 December 2009, and that it is for a period of 18 months. He contends that the words, "Rehabilitative maintenance" must not be given any prominence. Alternatively, if it is to be given any prominence, it must be read in the context of the entire clause, which demonstrates that the parties only intended to conclude an agreement that limited the payments of "rehabilitative maintenance" for a period of 18 months *from 7 December 2009*. ... If this contention is correct, it would mean that the interim payments the applicant was entitled to pending the granting of the divorce order by the court ("maintenance *pendent lite*") would be subsumed in the "rehabilitative maintenance". The applicant insists that this is not what she bargained for. ...” [Paragraph 23]

“It is common cause that the rule 43 application was only abandoned at court because the respondent agreed to bind himself to the terms of the Settlement Agreement, which agreement anticipated that the divorce action would have been finalised by 7 December 2009. The respondent must accept full responsibility for delaying the finalisation of the divorce action. ... The respondent's version that the parties only bargained for a payment of R17 500 for a period of 18 months from 7 December 2009 and that the usage of the words "rehabilitative maintenance" was fortuitous, rather than designed, is, therefore, not consistent with all the facts.” [Paragraph 24]

“... [T]he only problem with this clause is the contradiction or ambiguity between the words, "rehabilitative maintenance", and the period commencing 7 December 2009.

In this regard the application is for an order for the rectification of the Settlement Agreement, and for subsequent compliance therewith. ... It is correct, as the respondent's counsel pointed out, that rectification is rarely given, or is only ordered when the applicant has shown not only that there is common mistake but that the common mistake needs to be rectified in order to give effect to the true intention of the parties as recorded in the agreement as a whole.” [Paragraphs 27 – 28]

"... Courts are inclined to give effect to the words that have been used by the parties to record their common intention, and parties are generally prevented from claiming that they intended something other than that which is conveyed by the words used in the instrument recording their common intention. ... At the same time, there is a principle that despite the words used by the parties it is necessary for the courts to ensure that the true intention of the parties is given effect to, and if this can only be achieved by rectifying the instrument then this must be done. ..." [Paragraph 29]

"A person seeking to obtain rectification of a contract must show that the facts, "in the clearest and most satisfactory manner", entitle him/her to the relief sought. The person must also show that there is a mistake common to the parties, and which mistake can only be dealt with by extraneous evidence. The court is entitled to have regard to extraneous evidence, where such evidence assists in identifying the true intention of the parties. ... [T]he extraneous evidence will only address the ambiguity, uncertainty or contradiction in the contract as a whole." [Paragraphs 30 - 31]

"... These two phrases ["rehabilitative maintenance" and "7 December 2009" in the settlement agreement] cannot be reconciled: the respondent had no duty to pay rehabilitative maintenance as long as the parties remained married. That obligation, should it be found to be one by the court or should it be agreed to by a party to a divorce proceeding, only arises post the dissolution of the marriage, but as of 7 December 2009 the marriage had not yet been dissolved. ..." [Paragraph 32]

"The common cause facts in this matter clearly demonstrate that the parties intended the "rehabilitative maintenance" payments to commence only after the divorce was finalised. It is not disputed that the divorce was to be finalised by 7 December 2009. That, after all, is the reason for aborting the rule 43 application. ... Thus, to the extent that the Settlement Agreement provides that this payment commenced before the finalisation of the divorce it fails to capture the common intention of the parties. ... In conclusion, the respondent's contention ... that he commenced payment of the *rehabilitative maintenance* prior to the divorce is not correct." [Paragraph 34]

"I, therefore, hold that the applicant has shown that there is a need to rectify the Settlement Agreement to reflect the true intention of the parties." [Paragraph 35]