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

30 SEPTEMBER 2011

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 and April 2011 interviews.
3. The intention of these reports is to assist the JSC by providing an objective insight into the judicial records of the short-listed candidates. The reports are also intended to provide civil society and other interested stakeholders with an objective basis on which to assess candidates' suitability for appointment to the bench.

METHODOLOGY OF THIS REPORT

4. This report applies the same basic principles as previous DGRU reports. We set out summaries of the nominee's judgments, as far as possible in their own words. We do not advocate for or against the appointment, and do not provide analysis or criticism of the judgments summarised. Our intention in doing so has always been to attempt to move beyond the often partisan and personalised debates surrounding the suitability of candidates for judicial appointment. Instead, we hope to further a deeper analysis of the criteria in terms of which judicial appointments are made, and enable stakeholders to assess how a candidate's judicial track record matches up to those criteria.
5. We have searched for candidate's judgments on the *Jutastat* and *Lexis Nexis* online legal databases. We have tended to prioritise judgments reported and available on these databases where they are available. Where there are few or no judgments available, we have drawn on judgments annexed to the candidate's application forms, and the *SAFLII* online database.
6. For candidates with a larger 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. Unlike in our previous reports, we have not limited the judgments included in the report to those focusing on constitutional issues. We have done so in an

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

attempt to make the report more 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; 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. Regrettably, we have not had the capacity, within the time available, 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.
10. 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. Rather, it 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

11. 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.
12. 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.
13. 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.
14. We have previously discussed in some detail our thoughts on the questioning of candidates by the JSC.[2] We do not intend to re-canvass these issues here, save 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 discussed above. 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

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

task with the necessary information at its disposal, and a shared understanding of what it is trying to achieve.

ACKNOWLEDGMENTS

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DGRU

30 September 2011

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SELECTED JUDGMENTS

QHINGA AND OTHERS V THE STATE [2011] ZACC 18

Case heard 17 February 2011, Judgment delivered 25 May 2011.

This case was an application for leave to appeal to the Constitutional Court against an order of the Supreme Court of Appeal (SCA) which had dismissed the applicants' petition for leave to appeal against convictions and sentences imposed by the High Court. The applicants had been implicated solely on the basis of statements and pointings-out made to the police or a magistrate. The trial court had not discussed its reasons for admitting the statements and pointings out, but referred to reasons set out earlier in the record [Paragraph 6].

Applicants had applied for leave to appeal to a full bench of the High Court, on the basis that the statements and pointings-out had been wrongly admitted into evidence. The trial court refused leave to appeal, and did not discuss the reasons for its rulings in the trials-within-the-trial by which the contested statements and pointings-out had been admitted as evidence [Paragraph 9]. Applicants then petitioned the President of the Supreme Court of Appeal for leave to appeal to a full court of the High Court. This petition was dismissed.

Mthiyane AJ, for a unanimous court, held:

"The relief requires this Court to consider the fairness or otherwise of the procedure followed by the Supreme Court of Appeal when it refused the applicants' petition for leave to appeal. The essence of the applicants' complaint ... is that the judges concerned were obliged to but did not have regard to the relevant portions of the record of the proceedings in the High Court when they considered the petition. Therefore they could not have conducted an adequate reappraisal of the case in accordance with the applicants' constitutional right "of appeal to, or review by, a higher court" under section 35(3)(o) of the Constitution." [Paragraph 2]

"A petition for leave to appeal to the Supreme Court of Appeal must be considered by two judges, whose decision becomes the decision of the Court. This Court has also held that the Supreme Court of Appeal is entitled, in circumstances where no constitutional issues are raised, to refuse leave to appeal without that Court hearing oral argument or providing reasons. ..." [Paragraph 11]

"The applicants ... argue that the Supreme Court of Appeal did not have regard to those portions of the record in which the rulings in the trials-within-the-trial and the reasons for those rulings were located. ... The Supreme Court of Appeal did not provide reasons for its order. We therefore did not know whether the Supreme Court of Appeal had regard to the relevant portions of the record when it considered the applicants' petition. ..." [Paragraphs 13 - 14]

Mthiyane AJ then noted that the Chief Justice had addressed a letter to the President of the SCA, who replied noting inter alia that the petitioners had not placed any portion of the record before the judges considering the application, nor did the identify that the judges should read all or part of the record. Mthiyane AJ further noted that it was uncertain whether a full record existed when the SCA considered the petition [Paragraph 15].

"...[T]he rules referred to in the letter from the President of the Supreme Court of Appeal impose no obligation on a petitioner to provide the Court with the record. Rather, the quoted rule 6(5)(b)(i) ... provides that the petition "shall not be accompanied by the record", although rule 6(6) empowers the judges considering the petition to call for the record or parts of it. ..." [Paragraph 16]

"In *S v Ntuli*, this Court held that the right of appeal or review envisages, as a minimum, "the opportunity for an adequate reappraisal of every case and an informed decision on it."... A significant safeguard of adequate reappraisals of petitions for leave to appeal is the guarantee that petitions must be considered by two judges. Moreover, it is required that those judges must make an informed decision and must therefore have sufficient information before them in order to conduct an adequate reappraisal of the correctness of the convictions and sentences being appealed against. As a minimum, this implies that they must have before them the challenged rulings and the reasons for those rulings ..." [Paragraphs 25 – 26]

"...It was necessary to determine whether the reasons provided in the judgment of the trial court were indeed sufficient for a finding of guilt and thus for the purposes of the petition. On the law as it stood at the time of the applicants' petition, it was required that the appellate court was able to ascertain and adequately reappraise the reasons for the imposition of the convictions and sentences by the trial court." [Paragraph 28]

"The applicants' petition ... challenged the rulings in the trials-within-the-trial. These were neither included nor discussed in the judgment of the High Court. They were to be found only in the record. It follows that the Supreme Court of Appeal would not have been able to assess whether those rulings were reasonably open to challenge on appeal." [Paragraph 30]

"We can come to no conclusion other than that the applicants did not have the benefit of an adequate reappraisal of their case or an informed decision on it. Regrettably, the applicants were not afforded a fair procedure in terms of their right "of appeal to, or review by, a higher court", as contemplated by section 35(3)(o) of the Constitution. The Supreme Court of Appeal's order, accordingly, cannot stand." [Paragraph 31]

Mthiyane AJ thus ordered that the matter be remitted to the SCA for reconsideration of the petition, having regard to the relevant portions of the record.

THE CITIZEN 1978 (PTY) LTD AND OTHERS V MCBRIDE 2010 (4) SA 148 (SCA)

Case heard 2 November 2009, Judgment delivered 26 February 2010

The case concerned an action for defamation based on statements made in editorials and articles published in The Citizen newspaper, arguing that the respondent was unfit to hold a position as Head of a Metro Police Force, and that the respondent was a murderer. For the majority, Streicher JA found that the editorials and articles were defamatory, and rejected the defence of fair comment.

Mthiyane JA dissented:

"The reason, which relates to the claim of defamation based on the statement that the plaintiff was unfit for appointment as a metro police chief because he is a murderer, is that we differ over the proper interpretation of the relevant provisions of the Promotion of National Unity and Reconciliation Act ... (the TRC Act). ... Broadly speaking ... we are in agreement ... that as a matter of fact the plaintiff is a murderer. Where we disagree is in the conclusion ... that the effect of the provisions of the TRC Act is that he may no longer be described as such and is no longer to be regarded as a murderer, thereby rendering a statement to that effect false and hence fatal to the defence of fair comment advanced by the appellants (the defendants). In my view the relevant provisions of the TRC Act under which amnesty is granted do not have that effect. The result of our disagreement on this point is that I would uphold the defence of fair comment and also the appeal." [Paragraph 49]

"In my view, on a proper reading of the above articles the right-thinking reader of The Citizen would have been left with the impression that the authors are clearly and principally commenting or expressing an opinion on the suitability of the plaintiff as a candidate for appointment as police chief. As I see it the reader would have understood the writers to be arguing, rightly or wrongly, that because of the plaintiff's involvement in the bombing of Magoo's Bar and the Why Not restaurant ... and his subsequent conviction and sentence, he ought not to be appointed to the post of chief law-enforcement officer of a large municipality. Despite the strong and robust language used and the somewhat extreme (if not right-wing) views expressed, the articles and editorials remain comment or opinion on the issue of his suitability for the position of the Metro Police Chief. ..." [Paragraph 62]

"I turn to consider whether the impugned statements comply with the requirements of fair comment or opinion. The test for fair comment is whether the reasonable reader would understand the statements as a comment. One of the hallmarks of comment is that it is connected to and derived from discernible fact. In each of the offending statements it is clear that the authors are expressing an opinion as to the suitability of the plaintiff as a candidate for the post of police chief. The two editorials and the articles that caused offence appear to be part of a series of interrelated commentary on the suitability of the plaintiff as a candidate for the position of police chief." [Paragraph 67]

"The second requirement is that the offending statement 'must be fair'. What the authors ... did was to base their assertions that the plaintiff was not suitable for appointment on two grounds, namely that the plaintiff had committed murder and other crimes for which he was convicted and sentenced to death. In their minds, rightly or wrongly, a person with that track record ought not to be a police chief. The second matter that they advanced as a disqualification was his alleged activities in Mozambique, for which he was arrested and detained for six months. The question is whether, based on those matters, the comment that the plaintiff was unsuited for appointment as a Metro police chief was fair. In determining whether the comment is 'fair' there is no room for consideration of the merit of the comment or opinion. ... I have already alluded to the fact that the views expressed in the impugned statement may well be regarded as extreme or even right-wing, but on the above test they cannot be taken to be unfair. To succeed in their defence all that was required ... was to justify the facts and not their comment, and it was sufficient for them to show that they were expressing a genuine view on the subject of whether the plaintiff should be appointed as police chief." [Paragraphs 69 – 70]

"The third requirement, which holds the key to the outcome of this case, is that the factual allegations being commented upon must be true. If they are and the defence of fair comment is established in relation to the comment or opinion based on those facts, then it follows a fortiori that the publication of

the stated fact is justified. The statement that the plaintiff was not suitable for appointment was not a factual allegation. It was a comment and ... the plaintiff, rightly or wrongly, conceded that it cannot found a claim for defamation. The allegations in relation to murder and the commission by the plaintiff of the other crimes were expressly said to be the facts on which the comment or opinion on the suitability of the plaintiff for appointment ... was based. Their factual accuracy is thus fundamental." [Paragraph 71]

"In principle I have difficulty with the notion that a person who has been convicted of the crime of murder may not be described as a murderer or as a criminal if he has been granted amnesty. ... [T]he reference to the plaintiff as a murderer or a criminal is, strictly speaking, factually correct. The question is whether it is in law rendered untrue or false by the granting of amnesty. In my view the TRC Act does not have this effect." [Paragraphs 72 – 73]

Mthiyane JA examined the provisions of s 20 of the TRC Act, and a decision of the Constitutional Court, before continuing:

"The plaintiff contends that the effect of the grant of amnesty is that it is now impermissible to say that he committed murder or is a murderer, irrespective of the factual accuracy of that description. That is a far-reaching construction of s 20(10) that does not appear expressly in the language of the section." [Paragraph 76]

"Altering public records is one thing, but expunging from the historical record the fact of what the plaintiff did is another. That can only be said to follow, if at all, from the further provision that his 'conviction shall for all purposes . . . be deemed not to have taken place'. However, this relates only to his conviction and is a 'catch-all' provision intended to supplement the deemed expungement of the convictions from official records. It does not in terms relate to what may be said about the plaintiff arising from the conduct that gave rise to the application for and grant of amnesty. The section nowhere says that it is no longer permissible to refer to what the plaintiff did that caused him to apply for amnesty. ... If, as my colleague says, they are part of the historical record and not obliterated by the grant of amnesty, I fail to see on what basis it has become impermissible to say simply and in summary of their effect that the plaintiff is a murderer. That is a conventional description in common parlance of someone who perpetrates such acts and to say it is false in these editorials and articles is, with respect, not correct and involves an alteration of the historical record." [Paragraph 78]

"It is hardly surprising that s 20 does not in its terms require that the historical record be altered so that there can be no reference to the plaintiff's deeds. That would be wholly contrary to the expressed purpose of the TRC Act, which was, amongst other things, 'to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future'. The interim Constitution that sanctioned the entire process of the Truth and Reconciliation Commission, ... protected the right of freedom of expression, as the Constitution now does. It is in my opinion wholly contrary to that constitutional guarantee to require that the facts of our historic past should be disregarded and, if stated, treated as false, which is what the respondent wishes this court to do." [Paragraph 79]

Mthiyane JA concluded that the comment related to an issue of public importance, and therefore that the defence of fair comment ought to have been upheld.

The majority judgment was overturned by the Constitutional Court on appeal, although the Court found the statement that the respondent had not been contrite to be defamatory: **The Citizen 1978 (Pty) Ltd and Others v McBride [2011] ZACC 11**.

CARTER V HAWORTH 2009 (5) SA 446 (SCA)

Case heard 16 February 2009, Judgment delivered 20 March 2009

The case concerned whether an appeal lay from a "judgement" by a trial court, in which damages and other relief were "allowed", and findings of fact were referred to an actuary in order to facilitate the calculation of an item of damage, which was then to be referred back to the judge if the matter was not settled. No order had been made by the trial court directing the appellant to compensate the respondent.

Mthiyane JA held that:

"During argument both counsel contended that the judgement is appealable. Counsel for the respondent in particular submitted that, in the Cape of Good Hope Provincial Division, matters are routinely disposed of as the trial court had done. I have not been able to find any authority to support this contention. I have found at least two cases which suggest the contrary. These cases indicate that, where a judge is required to determine certain issues, be they legal or factual, he or she will in conclusion at the very least make an order."

"[I]t is difficult to see how an assertion to the effect that a particular amount should be 'allowed' or is 'fair, equitable or reasonable' – without such finding culminating in an order – would be of any assistance to a successful party. This is not to say that a court may not be required by the litigants to determine certain factual or legal issues to enable them to thereafter either settle or move on to the next stage of their dispute based on the finding of the court. " [Paragraph 7]

"This is unfortunately not what happened in the present matter. ... as to the 'factual assumptions' made by the judge in respect of the past and future loss of earnings which were to be referred to the actuary for the calculation of the loss of earnings, there is no indication in the judgement as to what was to happen after the actuary had completed the calculation. ... The proceedings in the trial court in respect of the issue of damages have therefore clearly not finally concluded, and an appeal to this court is premature." [Paragraph 8]

"The wasted costs of the postponement ... were reserved by the judge for later determination. Again, was the matter to be referred back to the judge for finalisation? These factors militate against the judgment of the court below having finally disposed of the issues and against the judgment being final and therefore appealable." [Paragraph 9]

"An appealable 'judgement or order' as intended by s 20(1) of the Supreme Court Act ... has three attributes. First, it must be final in effect and not susceptible to alteration by the court of first instance. Second, it must be definitive of the rights of the parties in the sense that the person seeking relief has, for example, been granted definite and distinct relief. Third, the 'judgment or order must have the effect of disposing of at least a substantial portion of the relief claimed. [citing Zweni v Minister of Law and Order and Ndlovu v Santam Ltd]" [Paragraph 10]

"But this litmus test only finds application when the court concerned has pronounced conclusively on the issues submitted to it for determination. The difficulty with the judgement of the court below is that we do not even get to the application of the test in Zweni because on a proper reading of the judgment the issues in the case do not appear to have been brought to final conclusion." [Paragraph 11]

"[T]he weakest link in the judgment lies in the absence of an order. I do not think there is a part of the judgment that provides a stronger indication of finality than an order at the end. If the order is removed or omitted the judgment is rendered ineffective and so, too, its element of finality. ... Given the uncertainty regarding the fate of the actuarial calculations and the absence of an order, the conclusion is unavoidable that the judgment of the court below is not appealable. " [Paragraphs 12 - 13]

The appeal was struck from the roll.

TRANSNET LTD AND OTHERS V CHIRWA 2007 (2) SA 198 (SCA)

Case heard 28 February 2006, Judgment delivered 29 September 2006

The case concerned the lawfulness of the dismissal of the respondent (applicant in the court below)

Mthiyane JA held that:

"Although the applicant challenged her dismissal on the basis that it violated her right to administrative action that was lawful, reasonable and procedurally fair, as enshrined in s 33 of the Constitution ... Brassey AJ decided the matter ... on the principles laid down in Administrator, Transvaal and Others v Zenzile and Others; and Administrator, Natal and Another v Sibiya and Another. In these cases it was held that the termination of a contract of a public sector employee was an exercise of public power which is subject to the principles of natural justice and administrative law. The learned Judge held that since Transnet was an organ of State... the applicant was entitled to the application of the rules of natural justice... " [Paragraph 4]

"On appeal, two issues were raised. The first is whether the dismissal was a matter which fell to be determined exclusively by the Labour Court in terms of s 157(1) of the Labour Relations Act ... The second was whether the dismissal ... constituted an administrative action as defined in s 1 of the Promotion of Administrative Justice Act... " [Paragraph 5]

Mthiyane JA dealt first with the question of jurisdiction:

"The appellant alleges that the 'termination of [her] services constituted a violation of [her] right to administrative action that is lawful, reasonable and procedurally fair, as enshrined in s 33 of the Constitution.' She thus raised a constitutional issue justiciable in the High Court. The High Court derives its power to deal with such a matter from s 169 of the Constitution. The Labour Court, on the contrary, has 'concurrent jurisdiction' with the High Court in respect of any violation of a constitutional right. It does not have general jurisdiction on labour matters where a constitutional dispute is raised. The applicant could therefore institute proceedings in either the Labour Court or the High Court. That she deliberately exercised her option is clear from her founding affidavit... If an employment dispute raises an alleged violation of a constitutional right, a litigant is not confined to the remedy provided under the LRA and the jurisdiction of the High Court is not ousted." [Paragraphs 6 - 7]

Mthiyane JA analysed judgments by the Constitutional Court, Supreme Court of Appeal and High Courts, and concluded that the High Court had jurisdiction in the matter. He then proceeded to consider the question of whether the dismissal violated the appellant's administrative action right:

"For the success of her challenge as framed or pleaded, the applicant has to establish that the dismissal constituted administrative action as defined in s 1 of PAJA. The applicant's case is that Transnet is an organ of State. With that I agree. When Smith conducted an enquiry leading to the dismissal, continues the applicant, he was performing an administrative action. ... [W]ith that I cannot agree..." [Paragraph 10]

"Even though all administrative actions are subject to review under PAJA ... Brassey AJ did not submit the decision to dismiss to scrutiny under PAJA. He determined that it was sufficient to apply the common law as laid down in Zenzile ... In my view, he erred. The 'cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.' [citing Minister of Health v New Clicks.]" [Paragraph 11]

"Section 33 of the Constitution confers a right to administrative action that is lawful, reasonable and procedurally fair; PAJA gives effect to this right. The common-law principles developed by the courts ... are now regulated by the Constitution. ... The common law informs the provisions of PAJA and the Constitution derives its force from the latter." [Paragraph 12]

"...[I]n terminating the applicant's contract of employment, Transnet ... was not exercising a public power or performing a public function in terms of any legislation. ... [W]hether a particular conduct constitutes administrative action depends on the nature of the power that is being emphasised rather than the identity of the person who does so. By parity of reasoning Smith's conduct did not therefore fall within the definition of 'administrative action' as defined in PAJA. No reference is made in the applicant's founding affidavit to any provision in the Constitution, a provincial constitution or legislation. ... The fact that a State organ, such as Transnet is, derives its power to enter into a contract from statute does not mean that its right to terminate it is also derived from public power. " [Paragraph 14]

"Under PAJA, which now governs the position, conduct only amounts to administrative action if it is the exercise of public power or the performance of a public function in terms of any legislation. The nature of the power or function is paramount, the identity of the functionary exercising the power or performing the function, secondary. The question requires an analysis of the nature of the power or function exercised. That, in turn, requires a consideration of, *inter alia*, the source of the power or function exercised, its nature, its subject-matter, whether it involves the exercise of a public duty and how closely it is related to legislation. The nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or performance of a public function in terms of some legislation. Ordinarily the employment contract has no public law element to it and it is not governed by administrative law. The mere fact that Transnet is an organ of State does not impart a public law character to its employment contract with the applicant. The power to dismiss is found not in legislation, but in the employment contract between Transnet and the applicant. When it dismissed the applicant, Transnet did not act as a public authority but simply in its capacity as employer." [Paragraph 15]

Mthiyane JA thus found that it had not been shown that the dismissal was administrative action under PAJA, or that any rights under s 33 of the Constitution had been violated, and upheld the appeal (Jafta JA concurring). Conradie JA, in a separate judgment agreed that the appeal be upheld and that the

appellant's reliance on PAJA was misplaced, but was prepared to accept that the dismissal constituted administrative action. Cameron JA (Mpati DP concurring) found that the Constitution permitted an employee of a public body to seek relief in the ordinary courts for dismissal-related injustices that constitute administrative action, and would have allowed the appeal only to the extent of setting aside the order reinstating the appellant. On appeal, the Constitutional Court, in Chirwa v Transnet Ltd [2007] ZACC 23, found that the claim should have been brought under the Labour Relations Act, and that the High Court did not have concurrent jurisdiction. It also found that the dismissal did not constitute administrative action.

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL V P 2006 (3) SA 515 (SCA)
Case heard 9 November 2005, Judgment delivered 1 December 2005.

This case dealt with an appeal by the State against a sentence imposed by the High Court upon P, a 14 year old girl, following her conviction for the murder of her grandmother, and for theft.

Mthiyane JA held:

"The passing of sentence was postponed for a period of 36 months on condition that the accused complies with the conditions of a sentence of 36 months of correctional supervision ... These conditions include provisions relating to house arrest, schooling, therapy, supervised probation and the performance of community service." [Paragraph 1]

"... [H]aving had regard to the evidence and the trial Judge's assessment of it, I am satisfied that the Judge gave due and careful, if not anxious, consideration to the matter. I am not persuaded that, save in one material respect, he misdirected himself." [Paragraph 6]

"The trial Judge, in my view, did not approach the evidence of the witnesses dealing with sentence with the necessary degree of objectivity and accepted their say-so without considering whether they had a factual basis for their opinion. This caused him to place too much emphasis on the personal circumstances of the accused, under-emphasising the other material considerations. ..." [Paragraph 7]

"... [T]he issue on appeal can ... be narrowed down to whether the sentence imposed by the trial Court was appropriate, given that Court's duty to have regard to the seriousness of the offence and the interests of society as well as the true character of the accused. This issue must, of course, now be considered not only with reference to the so-called traditional approach to sentencing but also with due regard to the sentencing regime foreshadowed in s 28(1)*(g)* of the Constitution ... and international developments as reflected in, for instance, instruments issued under the aegis of the United Nations" [Paragraph 11].

"The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the 'triad consisting of the crime, the offender and the interests of society' (*S v Zinn*). In the assessment of an appropriate sentence, the court is required to have regard to the main purposes of punishment, namely, the deterrent, preventive, reformative and the retributive aspects thereof (*S v*

Khumalo and Others). To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender. ...” [Paragraph 13]

“With the advent of the Constitution the principles of sentencing which underpinned the traditional approach must, where a child offender is concerned, be adapted and applied to fit in with the sentencing regime enshrined in the Constitution, and in keeping with the international instruments which lay 'emphasis on *reintegration* of the child into society'...” [Paragraph 14]

Mthiyane JA then discussed the origins of section 28 of the Constitution (dealing with the rights of the child, specifically subsection (1)(g), dealing with the detention of children) in international law. Mthiyane JA considered the United Nations Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and recommendations of the South African Law Commission (noting that the latter “can have but peripheral value at this stage”, having not yet been adopted by Parliament).

“Having regard to s 28(1)*(g)* of the Constitution and the relevant international instruments ... it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'. ... Furthermore if the juvenile concerned is a child as described, he or she should be kept separately from persons over the age of 18 years and the sentencing court will have to give directions to this effect, if it considers that the case before it warrants detention. This follows from s 28(2) of the Constitution, which provides that a child’s best interests are of paramount important in every matter concerning the child.” [Paragraph 18]

Mthiyane JA then considered the mitigating and aggravating factors in the case, and found that the court *a quo* had not had sufficient regard to the gravity of the offence [paragraphs 21 – 22].

“The postponement of the passing of sentence, even when coupled with correctional supervision was, in my view, inappropriate in the circumstances and leaves one with a sense of shock and a feeling that justice was not done. Even in the case of a juvenile ... the sentence imposed must be in proportion to the gravity of the offence. If this case does not call for imprisonment of a child, I cannot conceive of one that will. Admittedly ... the learned Judge did allude to the principle of proportionality but, I believe, he failed to give due and sufficient weight to it, and this Court is therefore at large to interfere and impose what it considers to be an appropriate sentence.” [Paragraph 22]

“If I had been a Judge of first instance I would have seriously considered imposing a sentence of imprisonment. ... The present case is, however, far from simple. We know that the Department of Correctional Services, in detaining children, does not comply with either the Constitution or the provisions of its Act. There is also no indication that, in this case, it would. There appears to be a general unwillingness to accept the fact that there are children that have to be detained in prison-like facilities, and there are none for their purposes. All the other detention options are as bad or non-existent. ...” [Paragraph 23]

“In spite of my reservations about the duty of a sentencing court to investigate prison conditions and the like, I have to refer to the fact that the witnesses from Correctional Services misled the Court below.

When correctional supervision was introduced, courts embraced it enthusiastically as a real sentencing option, something that will have a substantial effect on the prison population in this country. As time went on courts became more sceptical, but I am now completely disillusioned. ... However, one cannot fault the trial Judge for having imposed this sentence, carefully crafted as he did, and it has to stand subject to minor amendments that speak for themselves." [Paragraph 25]

"It is the postponement of sentence that has to be reconsidered. It is too late to impose a sentence of direct imprisonment but the interests of justice will be served by imposing a term of imprisonment but suspending it on certain conditions, which if breached might result in the accused having to serve time in prison. In this way, I believe, recognition will be given to the interests of society in the sense that it would be protected against her, and she against society, which might wish to seek revenge." [Paragraph 26]

[Harms JA, Streicher JA, Combrinck AJA and Nkabinde AJA concurred].

SELECTED JUDGMENTS

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? Prof H.P. 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 afore-quoted." [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 several 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

JANUARY V STANDARD BANK OF SOUTH AFRICA LTD (2235/2008) [2010] ZAECGHC 6 (28 JANUARY 2010)

This was an urgent application in which the applicant sought orders rescinding a judgment of the High Court; staying execution or any eviction process instituted pursuant to that judgment, and an appeal against that judgment. The application was dismissed. Respondent sought an order that the Applicant's legal representatives pay the costs of the application, de bonis propriis on an attorney / client scale, based on the manner in which the application had been dealt with by the attorney and counsel for the applicant.

Goosen AJ held:

""The general principle at common law is that a party who litigates in a representative capacity (such as a trustee) cannot be ordered to pay the costs de bonis propriis unless he or she has been guilty of improper conduct. (Cooper NO v First National Bank of South Africa Limited 2001 (3) SA 705 (SCA)). Such party may however be ordered to pay such costs where there is a want of bona fides on his or her part or if he or she has acted with gross negligence. (Blou v Lampert and Chipkin NNO and Others 1973 (1) SA 1 (A))." [Paragraph 65]

"Orders of this nature have been made against attorneys where, in the prosecution of an appeal, there has been a flagrant disregard of the rules applicable to such appeals and in particular the preparation of the record. [Citation to High Court and Supreme Court of Appeal decisions]" [Paragraph 66]

"Where a legal practitioner has conducted himself in an irresponsible and grossly negligent manner in relation to the litigation such a cost order marks the Court's disapproval of the conduct. ..." [Paragraph 67]

"... The manner in which this application has been prepared and prosecuted in this Court is indicative of grossly unreasonable and negligent conduct on the part of both the applicant's attorney and counsel instructed by him." [Paragraph 71]

Goosen AJ found that the applicant's attorney had instructed counsel to prepare an application for recession of judgment on the basis of a "manifestly false" allegation that the judgment had been taken without the applicant's knowledge. Goosen AJ noted that the application was prosecuted in a manner which led to it being struck off the roll on four occasions, and that the applicant's legal representatives had failed to comply with the Rules in relation to urgent matters. Goosen AJ then found:

"In my view this conduct on the part of the Applicant's attorney and counsel is grossly unreasonable and negligent and it warrants an appropriate punitive costs order." [Paragraph 77]

"A litigant who engages the services of an attorney and counsel is entitled to expect that such professionals will prosecute his or her cause with due diligence ... Litigants are also entitled to expect that every effort will be taken to ensure that their cases are properly prepared and presented. ..." [Paragraph 78]

Finally, Goosen AJ referred the failure of the applicant's counsel to appear at a hearing of the matter to the Bar Council.

H AND OTHERS V S (CC79/2009) [2010] ZAECGHC 8 (26 MAY 2010) (SENTENCE)

The court had to determine sentence for 3 teenagers convicted of the rape and murder of a 5 year old boy (sentences of 14, 7 and 8 years imprisonment respectively were ultimately imposed).

Goosen AJ held:

"The determination of an appropriate sentence requires the balancing of a range of competing interests. The well known triad of factors, namely the nature of the crime, the circumstances of the accused and the interests of the community must be considered. These factors must be evaluated in the light of the purposes for which punishment is imposed, including deterrence, reform and rehabilitation and retribution. All of this must be considered in the light of the values that underlie our constitutional order." [Paragraph 5]

"Society expects that the courts, in seeking to vindicate the law to exact punishment for its violation, to impose a sentence which not only protects society from persons who constitute a danger but also serves to deter others who may contemplate a similar conduct. At the same time our society is not one in which criminal justice is based on retribution and vengeance. It is a society which is founded upon the inherent dignity of human beings and seeks to venerate the fundamental humanity of its members." [Paragraph 6]

"Thus the values of human dignity, of equality and freedom form the very core of our system of justice. These values are writ large across our system of criminal justice and they place an obligation upon the courts to ensure that in imposing punishment for transgressions against our society, the nature and form of punishment should serve also to vindicate the fundamental values of human dignity, equality and freedom that all members of society enjoy." [Paragraph 7]

"Where the offender is a child these conditions are amplified. This is so because children are by their nature not as mature, nor as physically and emotionally developed as adults. Their moral culpability too differs from that of adults. International law recognises this and requires civilised societies to act accordingly. Our Constitution requires too that we treat young offenders differently" [Paragraph 8]

"Section 28 of the Constitution specifically requires that where a young offender is to be detained, such detention must be a measure of last resort. It requires also that the young offender may only be detained for the shortest appropriate period of time and when so detained that he/she has the right to be kept separately from detained persons over the age of eighteen years and treated in a manner and kept in conditions that take into account of the Child's age." [Paragraph 9]

"This does not mean that children who commit heinous crimes and who act with brutality and callous disregard for the lives and the dignity of others should not be subjected to punishment. All it requires is that in determining an appropriate punishment a court must take due and careful cognisance of the fact that it is dealing with a youthful offender and it must determine a sentence which is cognisant of the particular frailty and vulnerability of youth" [Paragraph 12]

"The principle of proportionality which must be applied in determining an appropriate and individualised sentence comprises two aspects. On the one hand the sentencing response, both in terms of the sentencing option and its form, must be in proportion to the nature and gravity of the offence. Thus, the type of sentence imposed must be appropriate and must mark a considered response which takes into account the gravity of the offence. On the other hand the sentencing response must be appropriate to the needs and interests of the juvenile offender who is being sentenced." [Paragraph 53]

S V MBANJWA (CA&R 41/07) [2008] ZAECHC 192 (17 NOVEMBER 2008)

Case heard 22 October 2008, Judgment delivered 17 November 2008

The Appellant was convicted on a charge of assault and of crimen injuria by a magistrate. On appeal, it was argued that the magistrate had committed an irregularity in failing to subpoena two witnesses to testify.

Goosen AJ held:

"Where ... it appears that the evidence of a witness is essential to the just decision of the case, the discretionary power to subpoena a witness becomes a duty which must be exercised by the presiding officer. (See in this regard R v Hepworth 1928 AD 265.)" [Paragraph 26]

"It is incumbent on the trial court to decide whether the evidence is essential or not. If it appears that the evidence is in fact essential to the just decision of the case then a failure to call a witness constitutes an irregularity. See in this regard S v B & Another 1980(2) SA 946 (A); R v Dlakavu 1948(3) SA 1202 (E); R v Lesabe 1960(4) SA 217 (T). See also Director of Public Prosecutions, Transvaal v Mtshweni 2007(2) SACR 217 (SCA)" [Paragraph 27]

"The term "essential to the just decision of the case" means that the court, upon an assessment of the evidence before it, must consider that unless it hears the evidence of a particular witness it is bound to conclude that justice will not be done in the end result. If the statement of the proposed witness is not unequivocal or is not specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value. (S v Gabaatlholwe and Another 2003(1) SACR 313 (SCA) ...)" [Paragraph 28]

"A court of appeal will only interfere with the exercise of the discretion on very limited grounds ... If however it is contended ex post facto that a witness was objectively essential to the just decision of the case and it is apparent that the trial court did not apply its mind to the matter (because it was not requested to do so) then in that event a court of appeal would be justified in interfering if it is satisfied that the witness was indeed essential. (see Gabaatlholwe ...)" [Paragraph 29]

"Whilst a trial court must ensure that justice is done and to this end is obliged in certain circumstances to ensure that essential evidence is placed before it, its function is not to conduct the litigation on behalf of the parties. Where a witness statement is relied upon by a party and that witness is available to testify, a court will be slow to cause such witness to be subpoenaed in the event that the party elects not to call the witness. It will of course only do so if it is convinced that the evidence is essential for the proper and just decision of the matter." [Paragraph 36]

"It is trite law that an appeal court will not lightly interfere with a trial court's findings on credibility. The magistrate was steeped in the trial and was best placed to assess the veracity of the evidence tendered by the witnesses ..." [Paragraph 40]

Goosen AJ found that the magistrate had not erred or misdirected himself, and dismissed the appeal (Jansen J concurring)

OCTOBER V NELSON MANDELA BAY METROPOLITAN MUNICIPALITY (CA 173/2008) [2008] ZAECHC 205 (12 DECEMBER 2008)

Case heard 24 October 2008, Judgment delivered 12 December 2008

The Appellant suffered a serious leg injury after stepping onto the cover of a concrete catch pit located on a pavement. The claim was dismissed. On appeal, the appellant argued that the magistrate had erred in not applying the correct legal principles to the matter and in finding that the appellant was solely to blame for her misfortune.

Goosen AJ held:

"The question of a municipality's liability for damages suffered in consequence of a wrongful and negligent omission to repair or maintain roads or pavements within its jurisdiction has recently received further consideration in a number of matters similar to the present matter. (cf. Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SCA); Municipality of the City of Port Elizabeth v Meikle [2002] JOL 9525 (SCA); Pook v Nelson Mandela Bay Municipality unreported case ...)" [Paragraph 8]

"In Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) Marais JA, ... after assessing the import of the so-called doctrine of general immunity for omissions and the question of liability based upon the legal convictions of the community, concludes that: 'While the Court a quo's conclusion that it was open to it to re-visit the general or relative immunity of municipalities and, if justification existed, to jettison the notion, was therefore correct, I think that, having done so, it was wrong to substitute for it what amounts to a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. In my view, it has to be recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments ad hoc.'" [Paragraph 9]

"Significantly, the Court in that matter did not assert a general legal duty upon local authorities to maintain roads and pavements, but found that the existence of the legal duty is a matter to be determined in the particular circumstances of the matter. It is therefore for the plaintiff in any particular matter to establish both the existence of the legal duty ... and that the failure to do so was blameworthy in the circumstances (Bakkerud ...)." [Paragraph 10]

Goosen AJ found that the appellant had failed to discharge the onus of establishing that the respondent had been negligent in failing to repair the defective pit cover in the circumstances. The appeal was dismissed (Jansen J concurring).

EX PARTE: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS, IN RE RUBBER WITH REGISTRATION DTP 988, BOAT TRAILER WITH REGISTRATION DNT 118 EC (1466/07) [2008]

Applicant, the Asset Forfeiture Unit under the auspices of the Director of Public Prosecutions, sought an order in terms of section 50(2) of the Prevention of Organised Crime Act (POCA) authorising Marine and Coastal Management officials to utilise the rubber duck (described as a super duck and boat trailer) in law enforcement activities pending the recommendations of the Criminal Asset Recovery Account Committee and final allocation of the items by the Cabinet in terms of section 69A of POCA.

Goosen AJ held:

"The type of orders that may be made [under s 50(2) of POCA] are not circumscribed other than that they must be ancillary to the forfeiture order. The language used ... suggests that the orders must be of such a nature as to facilitate the carrying into effect of the primary order, namely the order declaring certain property forfeit to the state. ... [A]pplicant, argued that the order sought is indeed ancillary to the forfeiture order insofar as it regulates the utilization of the forfeited property in accordance with the primary objectives and purposes of the Act, namely the utilization of forfeited property in law enforcement and the combating of organised crime." [Paragraph 4]

"It will be immediately apparent that the allocation of property or funds out of the Criminal Assets Recovery Account is an executive function that is specifically regulated. In the first instance the authority to make such allocation is that of the Cabinet, acting upon the recommendations of a Committee comprising Cabinet ministers and in accordance with a policy adopted for that purpose. Furthermore, the allocation of property must be for a specific purpose and must ... be accounted for separately from other funds and resources allocated to the law enforcement agency. The allocation itself is made subject to reporting requirements to Parliament, thus establishing a measure of oversight and control." [Paragraph 17]

"I have grave doubts that a Court is entitled to venture into the terrain of resource allocation in matters of this nature. The utilization of forfeited property in accordance with the statutory scheme is a matter for the exercise of executive authority. Whilst it may be that a Court can, in appropriate circumstances, issue orders that have the effect of holding the executive to account in terms of the legislation, it will not seek to usurp the executive's function." [Paragraph 18]

The application was dismissed.

TEMPI V THE ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO: ECD 1455/05

Case heard 22 August 2006, Judgment delivered 5 September 2006

This was an application brought in terms of section 3 of the Interim Rationalisation of Jurisdiction of High Court Act in which the Applicant sought an order removing a case from the East London High Court to the Bisho High Court

Goosen AJ held:

"...The purpose of this Act is to make provision for a mechanism by which interim arrangements for the rationalisation of the jurisdiction of the High Court can be affected. The legislature specifically recognised that the process of rationalisation of the structures, composition, functioning and jurisdiction of the High Court, as required by the Constitution, would require a considerable period to be completed. This is self evident regard had to the fact that the previous political and constitutional dispensation created several courts with fragmented jurisdiction within areas that are now consolidated politically, socially and economically" [Paragraph 7]

"The Act in fact provides for two mechanisms by which interim adaptations to jurisdiction may be affected. The first of these is section 2, which contemplates adaptation by proclamation ... The alteration of a Court's jurisdiction in terms of this section is clearly envisaged to be one that occurs in the course of the rationalisation process envisaged by the Constitution. This much is evident from the requirement that

the alteration is subject to consultation with the Judicial Service Commission and is approved by parliament. ” [Paragraphs 8 - 9]

“The other interim measure available by which issues as to jurisdiction in matters can be addressed is that provided for in section 3, namely a transfer of the matter in the discretion of the Court before which such matter is prosecuted.” [Paragraph 10]

“The language of section 3 is all encompassing. It refers to ‘any civil proceedings’ before ‘any High Court’ and provides for a removal upon two alternative bases, i.e if the matter should have been instituted in another court or if it would more conveniently or appropriately determined by another court.” [Paragraph 11]

“The phrase ‘should have been instituted in another court’ clearly means something other than considerations of convenience and can only refer to the Court’s jurisdiction. To hold otherwise would render section 3 of the Act entirely superfluous.” [Paragraph 13]

“Furthermore, to interpret section 3 in the manner contended for by the Respondent would require I read into the section a qualification of an unambiguous section. It is not for the Courts to draft legislation and it is not suggested that the section is in anyway inconsistent with the Constitution” [Paragraph 14]

“In my view the section contemplates precisely the set of circumstances that we are here dealing with, where proceedings are incorrectly initiated in a particular Court which does not have jurisdiction to deal with the matter. In those circumstances a Court has a discretion whether or not to order the removal of the matter to another High Court which has jurisdiction.” [Paragraph 15]

It was ordered that the case be removed from the East London Circuit Local Division to the Bhisho Division.

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 105 of 1997 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

SCHOOL GOVERNING BODY OF NTILINI J.S.S & OTHERS V N MAKHITSHI & OTHERS, UNREPORTED JUDGMENT

Case heard 6 November 2009, Judgment delivered 25 March 2010

The respondents instituted review proceedings in the court a quo seeking an order setting aside the appointment of the fifth appellant by the Superintendent General for Department of Education. The application was opposed by the appellants but it was successful. With the leave of that court the appellants appealed that decision.

Ndengezi AJ held:

"It appears ... that the members of the School Governing Body experienced internal conflicts which prevented them from carrying out their statutory duty. For this reason delegated its statutory powers to shortlist, interview and recommend a candidate for appointment to the Department of Education." [Paragraph 10]

"The question that arises is whether it is correct to say that educators of a school have no substantial interest in the appointment of the principal of their school." [Paragraph 11]

"In my view educators have a substantial interest in the appointment of a school principal. It is a legal requirement that they be represented in the body that governs the school and which, among other things, has the power to recommend the appointment of a school principal." [Paragraph 14]

"The resolution taken by the school Governing Body to delegate its powers is null and void. The Department of Education ought not to have relied on it." [Paragraph 18]

"... It is a legal requirement that the respondents be represented on the School Governing Body. That in itself is an important indication that they have an interest in the appointment of their school principal by virtue of their membership of the School Governing Body. ..." [Paragraph 19]

The appeal was dismissed (Sandi J concurring). Petse ADJP wrote a separate concurring judgment.

MASAKHANE SECURITY SERVICES (PTY) LTD V MEC FOR PUBLIC WORKS, ESTERN CAPE & OTHERS, UNREPORTED JUDGMENT, CASE NO. 205/09

Case heard 27 October 2009, Judgment delivered 12 November 2009

The applicant sought an order directing that the bid awarded to the third respondent by the Department of Public Works be judicially reviewed in terms of section 6 of the Promotion of Administrative Justice Act, alternatively be set aside. On the date of hearing (27 October), the contract of service between the first, third and fourth respondents had expired at the end of September.

Ndengezi AJ held:

"The question that arises is whether the matter has not become academic. Is it in the interest of justice that the court pronounces on the merits? I think not." [Paragraph 1]

"The view I hold is that this matter has become academic and the order will have no effect. It is obvious there is no award of bid or contract to be set aside since it expired." [Paragraph C]

The application was dismissed with costs.

CHURCH OF CHRIST MISSION V VUYISILE JAMES & OTHERS, UNREPORTED JUDGMENT, CASE NO. 125/08

Case heard 20 October 2009, Judgment delivered 29 October 2009

The applicant sought an order restraining the respondents from threatening the members of the applicant and from conducting any activities within the applicant's premises.

Ndengezi AJ held:

"... What is clear is that Article 3 [of the applicant's constitution] does not provide for any penalty for failure to pay membership fees. It does not authorise the applicant to excommunicate members. Effectively, to grant the order prayed for would be tantamount to excommunication of respondents by this court. In any even there is sufficient evidence and proof that membership fees have been paid how late it may be. In my view it should never be the function of courts to enter into disputes of voluntary associations like applicant who should resolve their disputes amicably." [Paragraph 7.2 (a)]

"It is doubtful that applicant owns the church at Zwelitsha because the permission to occupy was granted to the Zweliistha Congregation and nobody else. I am not satisfied that the applicant is the owner and therefore has a right to interdict other people from entering the premises" [Paragraph 7.2 (c)(v)]

"I must state that it is undesirable for members of voluntary associations like applicant to approach courts of law when they can easily resolve their differences." [Paragraph 7.2(c)(v)]

The application was dismissed.

K.S.D MUNICIPALITY V UNKNOWN PERSONS ERECTING STRUCTURES ON THAT PORTION OF THE REMAINDER OF ERF 912, MTHATHA SITUATED ON TOWNSHIP EXTENSION NO. 77 & 15 OTHERS, UNREPORTED JUDGMENT, CASE NO. 392/08

Case heard 24 October 2008, Judgment delivered 20 November 2008

The applicant sought an order interdicting and restraining the respondent and/or any persons acting on their or stead from erecting fences and/or structures on that portion of the remainder of Erf 912.

Ndengezi AJ held:

"The identity and locus standi of the parties in a law suit cannot be overemphasised. An application can easily be dismissed on the lack of the locus standi of a party be the applicant or respondent. I propose to deal with locus standi of the respondents in this matter." [Paragraph 4]

Ndengezi referred to the case of *Nonene Rosemary Tibeza Jama and 135 Others v The Minister of Safety and Security and Another* (case no. 314/2003), and continued:

"The respondent attempted to distinguish Jama's case on the basis that the case I dealt with was concerned with the citation of applicants and not respondents. ... I am of the view that his argument cannot stand, both parties must prove their locus standi particularly when challenged." [Paragraph 5.2 – 5.3]

"The application sought in the notice of motion must be granted on this ground alone which is that there is no answering affidavit to the founding affidavit" [Paragraph 5.5]

"I hold the view that the unknown persons, second to fifteenth respondents and or any other person has no right in law to interfere with applicant's ownership of the land until such ownership is set aside or annulled by a competent authority." [Paragraph 6.5]

"I am satisfied on the facts before me that the applicant has satisfied all the requirements for the grant of the final interdict."

SELECTED JUDGMENTS

ROBERTS V FYNNEY, UNREPORTED JUDGMENT, CASE NO 330/2009

Case heard 12 August 2010, Judgment delivered 26 August 2010.

The Plaintiff claimed that he was assaulted by the defendant, and claimed damages in the amount of R150 000.00 in respect of pain, suffering, contumelia and denial of enjoyment of life. The defendant denied that he wrongfully and unlawfully attacked the Plaintiff, arguing that he acted in self-defence. The plaintiff brought application in terms of Rule 33(4) of the Uniform Rules of Court for an order directing that the issue of the defendant's plea of self defence be adjudicated and disposed of prior to and separately from any other question or issue.

Seti-Nduna AJ held:

"For order to be granted under this rule it should be shown that substantial grounds exist for such and further that that would result in the convenience to all concerned, see in this regard minister of Agriculture v Tongaat Group LTD [1976] 2 ALL SA 365 ... It is no clear how the separate adjudication on the issue of self-defence will be dispositive of the matter as the plainitff's claim is predicated on other forms of assault on him other than the one on his eye. Even if the issue of the eye injury is disposed of in favour of the defendant, plaintiff would still be entitled to lead evidence to prove other denied forms of the assault. Further, against the advantage of the containment of costs by not calling the surgeon, there is the obvious disadvantage that if the defendant is successful in his counterclaim, he will have to be wait to prove his quantum. This would definitely not be to his convenience especially when he is ready to prove such when the matter is tried" [Paragraph 6]

"In balancing the advantages and disadvantages of the separation as requested, I am of the view that balance of convenience has been shown to favour the defendant." [Paragraph 7]

The application for the separation of issues was thus dismissed.

XOLANI GCINA V THE STATE, UNREPORTED JUDGMENT, C.A.&R CASE NO: 22/10

Case heard 16 August 2010, Judgment delivered 23 August 2010

Appellant had been arrested and arraigned on charges including armed robbery within the ambit of schedule 6 of the Criminal Procedure Act. The accused, who bore the onus under s 60(11)(a) of satisfying the court that exceptional circumstances existed which permitted his release in the interests of justice, was denied bail by the magistrate.

Seti-Nduna AJ held:

"The meaning of the phrase 'exceptional circumstances' in relation to the incidence of proof as contemplated in Setion 11 (a) of the Act has been interpreted by the courts as not to mean factors different to or beyond the normal conditions enumerated in ss 4 -9 of section 60 of the Act. Instead it had been interpreted to mean that these common or unusual facts should, in any case, be shown to be sufficiently unusual or different as to warrant the applicant's release ..." [Paragraph 9]

"... On the aspect of appellant's state of health, all that he stated was that he suffers from a high blood pressure and asthma ... There is no mention ... whether before his arrest and incarceration his condition neither was stable nor is there any connection made between his elevated blood pressure and his incarceration. Further it was not shown why his blood pressure could not be treated and/or stabilised at the prison hospital. The aspect of a lengthy period of detention and a trial date not in the near future was not canvassed at the bail hearing. It was only introduced by way of statement from my bar. In my view this is improper ... I therefore agree with the magistrate that the facts stated by the appellant are not in anyway blended with an element of exception or difference. ... " [Paragraph 10]

"... [I]t is clear that the appellant's denial of his involvement in the commission of the crime as well as him having a fixed address was not disregarded by the magistrate. ... I can thus not fault the magistrate's finding that the circumstances listed in s 60(4)(b), which prohibit the release of appellant on bail, exist. ..." [Paragraph 12]

"Lastly, I will briefly address the argument advanced that of the state's failure to cross examine the appellant on his affidavit. I truly fail to appreciate nor comprehend the counsel's argument. Appellant's election to present his evidence on an affidavit had the advantage of him being protected from cross examination by the state ... I therefore do not understand how it was envisaged that the state would have tested appellants' evidence." [Paragraph 13]

The appeal was dismissed.

SELECTED JUDGMENTS

THE STATE V VUSI SITHEBE & 3 OTHERS, UNREPORTED JUDGMENT, REVIEW NO. R204/2010 (7 MAY 2010, KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

The accused had been convicted by a district magistrate on one count of theft, it have been alleged that they had stolen 114 timber poles. Accused 3's defence was that he had bought the poles from a Mr Ncube. The remaining accused argued that they had been hired by accused 3. The reviewing judge had requested the magistrate to explain why, in the absence of any evidence of direct appropriation, the accused had not been convicted of contravening section 37 of the General Law Amendment Act.

Buthelezi AJ held:

"The sixth and final point by the magistrate for convincing [sic] the accused is even more outrageous. He said people do not normally work on Sundays. ... The prosecutor had said that people normally go to church on Sundays. This reasoning seems to me to be unsound and narrow-minded. There are thousands and thousands of citizens in this country who are not Christians and who so [sic] not go to any church on a Sunday. I know that Sundays have been designated as rest days but there is no law which outlaws working on a Sunday. ... It is no offence to work on a Sunday and should never have been considered adversely against any individual. ..." [Page 7]

"...[A]ccused 3 trades in timber poles. He approached Ncube at his trading store and bought poles ... There is no evidence to gainsay that accused 3 did not believe or even suspected that Ncube was not the owner of the poles. There is nothing in the evidence which should have aroused the suspicion of accused 3. As for accused 1, 2 and 4, they were simply "innocent victims" as described by the magistrate. ... To have expected them to question accused 3 why he was buying poles from Ncube, was to expect too much. Even if it is viewed objectively, no reasonable person would have expected accused 1, 2 and 4 to question Ncube about his possession of the poles. They knew accused 3 for a long time as a dealer in timber poles. ... " [Pages 7 - 8]

Buthelezi AJ then considered s 37 of the General Law Amendment Act, and the Constitutional Court decision in *S v Manamela*, and continued:

"There is no evidence to suggest that the accused doubted that the timber poles belonged to Ncube or that they had not believed that he was authorised by the owner to dispose of them. ... They subjectively believed him to be the owner. I have no doubt that viewed objectively, anyone would have believed Ncube to be the owner or authorised by the owner to dispose of the poles, based on the manner he conducted himself when dealing with the accused." [Page 9]

The conviction and sentences were set aside (Gorven J concurring)

THE STATE V ZWELANDILE HLAPISI AND ZWELIBANZI JAM-JAM, UNREPORTED JUDGMENT, REVIEW NO. R 207/2010 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

The accused were convicted of theft and sentenced to three years imprisonment. The reviewing judge noted that the conviction of accused 1 was not based on the doctrine of recent possession, but that the accused had been found guilty on the basis of wrongful and unlawful *contrectatio*, committed ten days after the housebreaking in question. However, the charge sheet had identified the *actus reus* as

contrectatio, and thus the accused had been found guilty based on elements of conduct the differed from those identified in the charge.

Buthelezi AJ held that:

"... Some ten days after this incident [the housebreaking] the accused and another person were found in possession of most of complainant's stolen property. The accused and his companion denied that they had broken into complainant's house and stole the goods. They alleged that they had found the goods in the veld and had taken it for themselves. Because the magistrate felt that there was no evidence of the crime of housebreaking, he concluded that they were guilty of theft." [Paragraph 3]

"I do not think it was necessary for the magistrate to have laboured and referred to an old 1925 Appellate Division judgment. ... [I]n such circumstances, the legislature has created an offence for: - 1) any person who is found in possession of any goods in regard to which there is reasonable suspicion that they have been stolen; and 2) is unable to give a satisfactory account if such possession. See in this regard s36 of the General Law Amendment Act ... The evidence clearly shows that the accused and his companion were not able to give a satisfactory account of their possession of the goods. Section 36 is a competent verdict on a charge of theft. ... " [Paragraph 5]

"I am satisfied that a conviction under s36 would have been competent. In the result the verdict is altered to one of guilty of contravening s36 ... and the sentence of three years imprisonment is confirmed." [Paragraph 6]

MBUYISELWA MICHAEL MAJOZI V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO: 1686/09 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Plaintiff suffered injuries when a motor taxi collided with him, and sued the Defendant under the Road Accident Fund Act, alleging that the insured driver "was the sole cause of the accident and attributed various improper actions by him while driving the insured vehicle." [Paragraph 4]. It was agreed that the court would determine the issue of liability only.

"In my observation, the plaintiff did not appear to be an impressive witness. One, however, cannot say that because of his demeanour he was not telling the truth. For some reason he appeared timid. Whether this was due to him being unfamiliar with appearing in court, one cannot say. ... On the other hand the insured driver appeared impressive and able to answer questions without difficulty. ... I, however, hasten to say that neither education nor intellectual capacity are a yardstick for honesty and that it will be advisable to resolve the factual disputes with reference to inherent probabilities. ..." [Paragraph 10]

"... These observations bring me to the conclusion that plaintiff was under the influence of liquor at the time of the accident. It appears to me that because of his intoxicated state of mind, he ventured towards the oncoming vehicle, hence the collision." [Paragraph 11]

"... The insured driver admitted that he must have taken his eyes off the three people because he was unable to say how the plaintiff suddenly landed in front of the vehicle. ... The insured driver had a duty to reduce the speed of his vehicle and to carefully observe the three people after observing that they were unsteady on their feet. ... I find that the insured driver did not exercise his responsibilities properly.

If I were to compare the respective degrees of negligence, I would conclude that the insured driver was more negligent that the plaintiff. ...” [Paragraph 12]

“...I asses the degrees of negligence of the parties as 70/30 in favour of the plaintiff.” [Paragraph 13]

SELECTED JUDGMENTS

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

Case heard 11 February 2011, Judgment delivered 1 March 2011

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

Majiki AJ considered the evidence and held:

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

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

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

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

(Dhlodhlo ADJP concurred).

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

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

Majiki AJ held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The application thus succeeded.

SELECTED JUDGMENTS

ALGOA BUS COMPANY V SATAWU & OTHERS [2010] 2 BLLR 149 (LC)

This was an application under section 68(1)(b) of the Labour Relations Act (LRA) seeking damages against the third and fourth respondents (employees of the applicant) arising from an unlawful strike. It was alleged that as a result of the strike, many of applicant's buses had not operated, causing financial loss. First and second respondents had given notice of their intention to oppose the application, but filed their notice of opposition and supporting affidavits out of time.

Mthembu AJ held:

"It is trite that in an application for condonation, the court will consider the extent of the delay, whether the applicant has provided a reasonable explanation for the delay, whether the defence is bona fide and has reasonable prospects of succeeding, and whether the balance of convenience favour the applicant." [Paragraph 16]

"At best, the answering affidavits serve to convey the allegations relevant to the deponents only. There being no confirmatory affidavit by the remainder of the second respondent's members and no basis for distinguishing them from the first respondent's members. It must then be assumed that none of them has chosen to oppose this applicant's version as set out in the founding affidavit." [Paragraph 18]

Mthembu AJ then set out the provisions of s 68(1)(b), which empowered the Court to order the payment of just and equitable compensation for any loss attributable to a strike, lock-out or conduct, having regard to various enumerated factors.

"As in terms of section 68(1)(b), the court has a discretion to order the payment of just and equitable compensation for any loss attributable to the strike, it cannot be said that the listed SATAWU members have raised a defence and have good prospects of success should condonation be granted. They admit the loss suffered by the applicant and all they are asking this court to do is to reduce the amount of the loss allegedly suffered by the applicant" [Paragraphs 28 - 29]

"In casu, the listed SATAWU members did not show sufficient cause warranting the exercise of the court discretion condoning the late filling of their opposing papers. Therefore, the condonation application falls to be dismissed." [Paragraph 32]

Mthembu AJ found that the strike did not comply with the LRA, and caused loss to the applicant.

"In my view, the words "just and equitable" in the Act means no more than that compensation awarded must be fair. Section 68(1)(b) providing for compensation for unprotected strike action was designed to compensate an aggrieved party for losses actually suffered. However, compensation need not necessarily do so." [Paragraph 44]

Mthembu AJ then made the following order:

"[1] The application is dismissed as against the second respondent.

[2] The condonation application by the third and fourth respondent is dismissed.

[3] The second respondent and the third and further respondents must pay the applicant the sum of R100 000 in monthly instalment of R50 jointly and severally, the one paying the other to be absolved. ..."

UPUSA V COMMISSION FOR CONCILIATION MEDIATION AND ARBIRATION, UNREPORTED JUDGMENT, CASE NO JR 1825/08 (LABOUR COURT)

Case heard 18 July 2009, Judgment delivered 2 October 2009

This was an application under section 145 of the LRA to review and set aside an arbitration award.

Mthembu AJ held:

"The main review ground is that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings." [Paragraph 16]

Mthembu AJ considered case law on the meaning of "gross irregularity", and continued:

"...For the application to succeed the latent gross irregularities, if any, have to be such that they prevented a fair trial of issues [citation to the decision of the Labour Appeal court in *Toyota South Africa Motors v Radebe*]". [Paragraph 19]

"Second respondent [the arbitrator] was clearly conscious of the fact that the conflicting evidence existed which the parties failed to agree on, it then remained his duty as an arbitrator to resolve such issues." [Paragraph 20]

"A commissioner's failure to apply his mind would only qualify as a gross irregularity if the issue that the commissioner failed to consider is of material importance and of such nature that the failure to consider it materially deprive the party concerned of his right to a fair hearing. ..." [Paragraph 21]

"In respect of the conflicting versions, the second respondent indicated in his award which version he accepted and which version he rejected. However he failed to give reasons for arriving at such specific conclusions. In the absence of such reasons, it cannot be ascertained why he accepted one version and rejected the other. Nor did he deal with the credibility and reliability of various factual witnesses in the resolution of their conflicting version." [Paragraph 23]

"Well intended as the approach of the second respondent was, it did in my finding prevent a fair trial of issues and therefore amounts to a gross irregularity." [Paragraph 24]

The arbitration award was thus reviewed, set aside and remitted to the first respondent for a *de novo* arbitration.

PRINCE LENTSOANE V THE STATE, UNREPORTED JUDGMENT, CASE NO.: A45/2010 (FREE STATE HIGH COURT)

Case heard 3 May 2010, Judgment delivered 8 July 2010

This was an appeal against a sentence of six years imprisonment imposed on the appellant for theft of a motor vehicle by a Regional Court.

Mthembu AJ held:

"There is no doubt that the offence committed by the appellant is one of the most prevalent in the country. However, when a court imposes a sentence it must arrive at a balanced sentence taking into

account the seriousness of the offence, its prevalence, the personal circumstances of the appellant and the interest of the community." [Paragraph 8]

"... There are aggravating circumstances ... The appellant came to Kroonstad with the purpose to steal the vehicle. The complainant did everything to protect his property by keeping the vehicle behind a locked gate, but that did not help." [Paragraph 10]

"If it is accepted that normally the courts impose sentences of between three and five years imprisonment for vehicle theft, then the sentence of six years imprisonment ... is not a misdirection ..., in view of the aggravating circumstances. " [Paragraph 11]

"... I am of the view that there exists no 'striking' disparity between the court a quo's sentence and that which this court would have imposed. Interference with the sentence is not justified in the circumstances." [Paragraph 12]

"The imposed sentence is a proportionate and balanced sentence taking into account the seriousness of the offence, the personal circumstances of the appellant and the interest of the community. The sentence would serve to instil confidence in the community that such behaviour inconsistent with the ethos of our constitution will not be tolerated in any civilised society: courts must project this message clearly and vigorously." [Paragraph 13]

The appeal was dismissed (Mocumie J concurring)

JANTJIE LESOLE V THE STATE, UNREPORTED JUDGMENT, CASE NO.: A55/2010 (FREE STATE HIGH COURT)

Case heard 3 May 2010, Judgment delivered 8 July 2010

This was an appeal against a sentence of fifteen years imprisonment for robbery with aggravating circumstances, imposed on the appellant by a Regional Court.

Mthembu AJ considered case law relating to appeals against sentence, and held:

"The trial court should have found that the fact that the appellant was 24 years of age when he committed the offence, he was a first offender, the knife was not used and the victim did not sustain bodily injuries constitute substantial and compelling circumstances." [Paragraph 12]

"... [T]his court ... should interfere with the sentence imposed and arrive at a balanced sentence taking into account the seriousness of the offence, its prevalence, the personal circumstances of the appellant and the interests of the community. This court accordingly finds that substantial and compelling circumstances in terms of section 15 of the Criminal Law Amendment Act ... are present in this case." [Paragraph 13]

The appeal was upheld and the sentence replaced with one of ten years imprisonment (Mocumie J concurred).

PETER FRANCIS N.O. & ANOTHER V ALITORI 1470 CC, UNREPORTED JUDGMENT, CASE NUMBER: 6113/2009 (FREE STATE HIGH COURT)

Case heard 27 May 2010, Judgment delivered 25 June 2010

In this case, an application was made in terms of Section 8 of the Close Corporations Act, read with Section 13 of the Companies Act of 1973, to require the Respondent (Plaintiff in the main action) to provide security for the Applicant's costs. Applicant argued that the Respondent would be unable to meet an adverse costs order, and was "impecunious and insolvent."

Mthembu AJ held:

"Once the requirements of Section 13 have been satisfied, the only remaining issue is the exercise of the Court's wide discretion. It is trite that this discretion is to be exercised upon a consideration of all the relevant facts and in so doing the Court will have regard to the nature of the claim, the financial position of the Company at the stage of the Application for security and its probably financial position if it should lose the action." [Paragraph 5]

"In the exercise of its discretion, the Court does a balancing exercise which requires that the Court needs to be appraised of all the relevant information. The Applicant, for security, will need to show that there is a probability that the Respondent will be unable to pay costs. The Respondent ... will have to explain the nature of the litigation and should indicate the nature and importance of its litigation to rebut allegations that the litigation is without prospects of success. A full inquiry into the merits ... is not required." [Paragraph 6]

"The discretion which the Court is enjoined to exercise is a narrow and strict one. The onus in this regard rests on the Applicants in that they have to convince this Court that not only are there such facts before the Court entitling it to conclude that there is reason to believe that the Respondent will be unable to satisfy an adverse cost order but, furthermore than notwithstanding, it should exercise its discretion in favour of the Applicants." " [Paragraph 7]

"... [T]he Application was initially premised on the Respondent's first set of financial statements for the financial year ending 28 February 2007, which was its first year of trading and did not represent the nature and extent of its growth. A comparison between the liabilities of Respondent in 2007 as compared to 2009 / 2010 seems to show a turn around in excess of R3million. ...The current statements reveal that the Respondent's liabilities exceed its assets. This position is exacerbated by the fact that the Respondent's trade and other payables are R928 000.00, while its current assets are R726 000.00. On the Respondent's own version, it is admittedly insolvent." [Paragraph 23]

"The reasons advanced by Mr. De Wet, in particular that there has not been growth over the past three years, and the most recent statements are not correct because the R4 million Applicant paid the Respondent as a consequence of a representation made by the Respondent that goods were delivered, when in fact goods had not been delivered is included as an asset, and the fact that the loans are unsecured, satisfactorily established that there is reason to believe that the Respondent will be unable to pay the Applicants' costs." [Paragraph 27]

The respondent was thus ordered to furnish security, in an amount to be determined by the Registrar.

SELECTED JUDGMENTS

THE GA-SEHUNELO JOINT VENTURE/COOPER HOUSE (PTY) LIMITED V THE PREMIER: FREE STATE PROVINCE AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 2439/2010

Case heard 11 June 2010, Judgment delivered 25 June 2010

Judgment makes reference to Supreme Court of Appeal and local division decisions, as well as relevant legislation and common law.

This case involves a dispute regarding the registration of a long lease in favour of the applicant.

Daffue AJ held:

"Applicant claims a right to have the lease notarially executed and registered based on the common law and/or an agreement between the parties. It is also of the view that the fact as to whether the purchaser of the property is 100% owned by historically disadvantaged individuals, is immaterial for purposes of the adjudication of this application. According to this argument, first respondent will be entitled to dispute that the extended lease term had become effective should it appear on the registration of transfer of the property that the purchaser does not comply with the aforesaid criteria. Respondents deny that applicant is entitled to notarial execution and registration of the lease, either based on the common law principles, or an agreement entered into between the parties. It is specifically alleged in the answering affidavit as in argument that none of the written agreements entered between the parties provided for notarial execution and registration. " [Paragraph 14-15]

"The following dictum of De Villiers JP in Heynes Mathew Ltd v Gibson N.O 1950 (1) SA 13 (C) ... is apposite and it should be also borne in mind that this judgment was delivered, having in mind the common law and the predecessor of Act 18 of 1969: "When once the lessee has been granted a lease of more than 10 years then certain legal qualities attach thereto. One of the legal qualities that attaches to it is that, being a lease in longum tempus, it requires to be registered to bind third parties. Registration really may be said to be equivalent to full delivery to the lessee of the rights granted to him by the lease. He is entitled therefore to whatever advantages flow from a lease of this description. One of the advantages is that upon registration he is protected for the term of lease against all third parties. This right flows from the lease, and it is a right which he is entitled to have registered in proper form, which means registered in the Deeds Registry. I am of the opinion that the position is no different from that of a servitude in regard to which it is a common cause that the holder of a servitude is entitled to have the servitude registered against the title deeds of the property. In my opinion a lease in longum tempus being a subtraction from the dominium of the property, for at any rate of the period of the lease, entitles the lessee to register is against the title deed" (emphasis added) This has been echoed in the judgment of this court in Van Coller v Ocean Bentonit Co. ... No authority could be provided to me to the effect that a lessor has a right to have this long lease registered against his title deed. The whole purpose of registration of a long lease is to protect the right to tenure of land of the lessee against the successor in title and/or creditors of the lessor. I agree ... that a remedy is only afforded to a litigant who has a recognized right. This principal is encapsulated in the rule ubi ius ibi remedium. See Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) ... Van Dijkhorst J explained this aspect in the following words: "It follows that the court engaged in its task of enforcing rights must grant a remedy where a right exists. The obverse is true. Where there is no right the Court has no function." See also Cerebos Food Corporation v Diverse Foods SA 1984 (4) 150 T at 172 B. I have carefully considered the

arguments advanced on behalf of applicant ..., but I am unpersuaded that notwithstanding the advantages that may flow from registration in this particular instance, a right to relief can be afforded to applicant in accordance with either the common law or the statutory provisions referred to above. " [Paragraph 17-18]

"I indicated supra to various remarks made at various places in the documentation placed before me to the effect that the Free State Provincial Government wanted to have clarity and assurance that the deal structured with the purchaser of the Cooper House Property was such that the entity that would become the new owner would be 100% black owned. According to applicant this assurance and proof was given as long ago as 2006, but it is apparent that respondents are now also satisfied, after having inspected the documents in the Masters Office. It is now common cause that the purchaser is indeed a 100% black owned entity. At no stage, either during the period prior to the issue of this application, or in the answering affidavit of respondents, was it ever alleged that the lease contract in respect of Cooper House is null and void, or that its validity can be attacked on any basis whatsoever. In the further affidavit which has been filed to which I referred above, it is now alleged that the first respondent has instructed an investigation to be launched pertaining to all leases entered into by the Free State Provincial Government. I do not take congnisance of these issues as it is, based on the evidence placed before me, irrelevant. An oral agreement between the parties pertaining to the notarial execution and registration of the lease is not an amendment to the written lease or an agreement contrary to the provisions of such written lease and is therefore not hit by the principle enunciated in SA Sentrale Koop Graan Maatskaoy BPK v Shifren ..." [Paragraph 23-25]

"Respondents failed to call upon Mr Msibi to file an affidavit on their behalf to contradict the version of applicant ... I make a negative deduction from the failure to tender such evidence and consequently I find that an express oral agreement pertaining to notarial execution and registration of the lease was entered into between applicant and the former Department of Public Works Road and Transport as represented by Adv M.S Misbi. Even if I am wrong in this conclusion, there is sufficient room for a finding that the notarial execution and registration of the lease on the terms and conditions already agreed upon in writing, was tacitly agreed or by necessary implication. See Alfred McAlpine and Son (Pty)LTD v TVL Provincial Administration 1974 (3) SA 506 A ... Based on the surrounding circumstances and in particular the express and unexpressed intentions of all the role players in the Free State Government, ..., the Free State Provincial Government agreed to go out of its way to assist any potential purchaser of Cooper House and the purchaser in this case in particular to obtain financial assistance to enable it to purchase the property and to become the lawful lessor and beneficiary under the lease contract. I therefore find that first respondent is contractually bound to sign all documents required for the execution and registration of a notarial lease upon the terms and conditions agreed upon between the parties in writing." [Paragraph 26]

NOE E.P AND OTHERS V DEPARTMENT OF PREMIER FREE STATE PROVINCIAL DIVISION AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 3607/09

Case heard 27 May 2010, Judgment delivered 4 June 2010

The applicants sought an order declaring that termination of their employment be declared unlawful and that they be allowed to resume their positions with full pay.

Daffue AJ held:

"None of the applicants were appointed in terms of the selection procedures applicable to Public Service employees. In particular, the posts in which they were appointed, were never advertised and consequently no applications were received from a pool of candidates. No selection process and/or short listing and/or interviews by an interviewing and selection panel took place" [Paragraph 6]

Daffue AJ considered the provisions of section 197 of the Constitution, and continued:

"… [T]he PSA as a whole is considered by me and not only particular sections thereof. It must also be pointed out that the definition of "employee" prior to the amendment thereof through the Public Service Amendment Act, 30 of 2007, read as follows: "Employee means a person contemplated in section 8(1)(c)"and in turn section 8(1)(c) previously provided that "The public service shall consist of persons who – ... (c)(i) hold posts on the fixed establishment other than posts referred to in paragraph (a);(ii) are employed temporarily or under a special contract in a department, whether in a full time or part time capacity, additional to the fixed establishment or in vacant posts on the fixed establishment." Section 8 was entirely substituted through the 2007 Amendment Act. The legislature clearly had in mind to distinguish between the appointment of persons on grounds of policy considerations which may be seen as political appointments, provided for in section 12A of the PSA and other Public Service appointments. Unlike in the event of section 12A appointments, the latter appointments must comply with the provisions of section 197 of the Constitution, together with section 11 of the PSA and the Regulations. The advertising of a particular post in the Public Service is a necessary requirement before an appointment can be made and the Regulations are clear. The purpose is to reach the entire pool of potential candidates for the particular post and especially persons that were historically disadvantaged in order to comply with affirmative action and the Employment Equity Act ... Unlike persons that might be appointed in terms of section 12A of the PSA, no employee of the Public Service may be favoured or prejudiced only because he/she supports a particular political party or cause. See section 197(3) of the Constitution." [Paragraph 43-44]

"I do not agree ... that the matter in casu should be adjudicated on the basis of a normal common law employment contract. Strict statutory provisions must be complied with in the appointment of Public Service employees. Where a public official has performed an act which is ultra vires or invalid according to a statutory provision, the ultra vires principle should apply and the contract should be null and void and of no force and effect." [Paragraph 46]

"I am in respectful agreement with the judgment of Hlophe J (as he then was) in UNIVERSITY OF THE WESTERN CAPE & OTHERS ... to the effect that non-compliance with the provisions of the PSA and the Public Service Staff Code (which applied then) is fatal and it is not possible for employees and officers to contract out of them. ... As also found by Hlophe J, no one could have a legitimate expectation to do something contrary to the law or to prevent a functionary from discharging his/her statutory duty. The requirement that the prescripts of the PSA be strictly complied with was directly dealt with in KHANYILE where it was found that non-compliance with the PSA and its Regulations relating to a purported appointment of a person, rendered such appointment of no force and effect. The following dictum by Levinsohn J in this regard is with respect fully supported "Having purported to appoint him as such the relevant authorities were obliged to follow the procedures set forth in the law. To do otherwise would result in a most chaotic and inequitable dispensation in the Public Service." ... " [Paragraph 47]

"The full bench of the Cape Provincial Division dealt with a not too dissimilar factual matrix in MGOQI v CITY OF CAPE TOWN AND ANOTHER; CITY OF CAPE TOWN v MGOQI AND ANOTHER 2006 (4) SA 355 (CPD). In that matter the Mayor of the City of Cape Town exceeded her authority in purporting to amend

the terms of her delegated power and thereupon extended the employment contract of the city manager. The full bench found that this decision was fatally flawed and hence unlawful and invalid. ..." [Paragraph 48]

"Mr. Khang's reliance on either waiver or the doctrine of estoppel is without substance. If I were to allow either of his submissions, I would give validity to an act which is statutorily invalid. As Marais JA found in EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS v CONTRACTPROPS 25 (PTY) LTD ...: "It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel." In my view the same principle should apply pertaining to waiver." [Paragraph 49]

"Me Marshoff's purported permanent appointment of applicants in terms of section 14(1) of the PSA was unauthorised and she not only exceeded her powers, but acted contrary to the strict provisions of the PSA and the Regulations. ... Part III.B.2 of the Regulations relied upon by Me Marshoff for approval of the appointments of applicants ... deal with strategic planning, ... and did not give any authority to her to appoint the applicants permanently and/or to transfer them in terms of section 14 without complying with the procedures set out in Part VII of the Regulations." [Paragraph 51]

"Section 5(7) of the PSA states that a functionary shall correct any action of omission purportedly made in terms of this Act by that functionary if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission. "Functionary" is defined in section 1 ... to mean "any person upon whom a power is conferred or a duty is imposed by this Act". At the first glance it might be argued that the only person that may correct an action or omission is the very functionary who was responsible for the action or omission. In my view, such an approach would be over technical. "Functionary" is also defined as an official and an "official" is defined as "a person holding public office or having public duties". See South African Concise Dictionary ... I am of the view that the legislature also intended to include a functionary who replaced the functionary whose action or omission was based on an error of fact, or law or fraud. Therefore the Premier who replaced Me Marshoff was entitled and obliged to take corrective measures, which he did. Not all actions or omissions can be set aside as a proper safeguard was built in by the legislature, i.e. the corrective measures must be in the public interest." [Paragraph 44-45]

"The golden rule of statutory construction is to ascertain the intention of the legislature by taking the language used and where the words are clear and unambiguous, to place upon them their grammatical construction and to give them their ordinary effect. However, due regard must be given to the context in which the words are used, the apparent purpose of the provision in which they are found and of course to their setting in and the object of the statute as a whole. ... The ordinary meaning should therefore in principle be adopted, unless the context shows or furnishes very strong grounds for a different reading of the intention of the legislature, such as that giving the section its ordinary meaning would lead to the interpretation of the section in question being unreasonable, inconsistent or unjust, or the result being absurd or the section being unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights. ..." [Paragraph 56]

The application was dismissed with costs.

SELECTED JUDGMENTS

UNITRANS AUTOMOTIVE (PTY) LIMITED V THE TRUSTEES OF THE RALLY MOTORS TRUST, UNREPORTED JUDGMENT, CASE NO: 6017/2010

Case heard 3 March 2011, Judgment delivered 10 March 2011

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

Fischer AJ held:

"The legal position has been dealt with over a number of years in cases [citation to Appellate Division and High Court judgments] … All the above cases … deal, amongst other things, with the causal connection between the representation and the extent to or manner in which the representee acted on such representation to his or her own prejudice which has commonly become known as the so-called proximate cause test. In casu it was incumbent upon the respondent to show that culpa on the part of the applicant caused the respondent to be misled into the erroneous belief that Kok had the right to dispose of the vehicle. Put differently, the respondent must discharge the onus of proving that the negligence on the part of applicant (and not any other person's negligence) was the cause of respondent's erroneous belief. See: GROSVENOR MOTORS (POTCHEFSTROOM) LTD v DOUGLAS 1956 (3) SA 420 (AD) ... The Appeal Court appears to have gone even further in the JOHAADIEN-case, … by qualifying the view expressed in … GROSVENOR MOTORS … by saying that it was conceivable that the owner of a motor vehicle could "by reason of compelling considerations of fairness" be estopped from asserting his or her rights even if there was no culpa on his or her part. ..." [Paragraphs 4-5]

"The legal position has however been succinctly stated by the Supreme Court of Appeal in, amongst others, the case of STELLENBOSCH FARMERS' WINERY LTD v VLACHOS t/a THE LIQUOR DEN 2001 (3) SA 597 (SCA) …: "As in the present instance, cases of estoppel by negligence often involve the fraudulent conduct of a third party and the complaint against the person sought to be estopped is that his negligence permitted or facilitated the fraud. In this situation our Courts have rejected, as being too broadly stated, the so-called 'facilitation theory', viz. that whereever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it (see Grosvenor Motors' case, supra at p. 425; see also Connock's (S.A .) Motor Co. Ltd. v Sentraal Westelike Ko-operatiewe Maatskappy Bpk., 1964 (2) SA 47 (T) A …). It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other's mistaken belief and resultant loss; and whether this result was reasonably foreseeable."" [Paragraph 7]

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

"I am of the opinion that if regard be had to not only the manner in which applicant dealt with Kok, but in addition thereto the extent to which Kok was entrusted with the indicia of dominium or jus disponendi, being the vehicle, its ignition keys, the certificate of registration and the motor vehicle licence and licence disk evidencing that the vehicle had been transferred into the name of Kok, it must be accepted that applicant had as such provided Kok with all the "scenic apparatus" with which Kok was able to represent to the respondent that he was entitled to dispose of the vehicle and that respondent was as such entitled to purchase same from him. In the OAKLAND NOMINEES (PTY) LTD-case, … Holmes JA encapsulates what in my opinion is the correct approach: "It would be wrong to say that the requirement is that the representation which is relied upon must be the cause of the defendant's loss. Such a formulation would emasculate the defence of estoppel, for the cause of the defendant's loss is nearly always the villainy of the intermediary. (my emphasis) In estoppel by negligent representation we are concerned with the effect of the representation on the state of mind of the defendant, i.e., that his reliance on it was the cause of his having entered into the transaction... This state of mind precedes his loss. Hence the requirement is that the representation and his reliance on it must be the cause of his having acted as he did - to his detriment." (emphasis of Holmes JA) I find on the facts before me that without the indicia of dominium or the "scenic apparatus" provided by applicant to Kok, Kok would have been unable to persuade respondent to act to its own detriment and purchase the motor vehicle in question. The respondent purchased the motor vehicle and was able to register same in its own name by virtue of the indicia or "scenic apparatus" provided to it by Kok. Kok had in turn been provided with such indicia by applicant in circumstances where it acted negligently and on its own ipse dixit contrary to normal practise and procedure in parting with the indicia and/or "scenic apparatus" before receiving payment. The applicant was furthermore negligent in not foreseeing that Kok could and in fact did deal with the vehicle as his own property given the facts. In the circumstances and having regard to the facts and considerations of fairness I am of the opinion that the applicant is not entitled to the relief it seeks and that the application should be dismissed with costs." [Paragraphs 11-12]

S V GODFREY MANALE, UNREPORTED JUDGMENT, SPECIAL REVIEW NO: 108/2008 (29 MARCH 2008)

This was a special review in terms of section 304(4) of the Criminal Procedure Act, where it appeared that the accused had raised a valid defence and that his plea of guilty was not freely and voluntarily given.

Fischer AJ held:

"If the questions put to the accused by the presiding magistrate are read in the context of the written statement handed up by the accused in terms of section 112(2) of the Act, it is quite clear that the answers as well as the statement do not contain admissions of fact upon which the allegations in the charge sheet are based. "Section 112(2) provides that where an accused or his legal advisor hands in a written statement by the accused in which the accused sets out the facts which he admits and upon which he had pleaded guilty the Court may, instead of questioning the accused, convict and sentence him. It is clear that this section required not only a series of admissions but the facts upon which those admissions are based." See S v B 1991 (1) SACR 405 (N) ..." [Paragraph 7]

"Section 112(2) of the Act gives the court a discretion to put any question to the accused in order to clarify any matter raised in the written statement handed up and read into the record. This proviso has been interpreted to mean that it is imperative that the court should be satisfied not only that the accused committed the act charged of but that he committed it unlawfully and with the necessary mens

rea. See S v LEBOKENG ... It is quite clear from a reading of the record that the accused did not admit all the essential facts as set out in the charge sheet but, more importantly, in fact raised what is tantamount to a plea of self defence." [Paragraph 8-9]

"Had the court applied its mind to the written statement especially following on the answers to the questions raised by the court, the court would have been left in no doubt that there was material ambiguity regarding admission of all the relevant allegations against the accused and the presiding magistrate should have, in the circumstances, entered a plea of not guilty in terms of section 113 of the Act. But this was not done. … [T]he conviction and sentence are set aside and the matter is remitted to the Magistrate's Court for hearing de novo before another presiding officer." [Paragraph 10]

(Musi J concurred).

MATISO AND OTHERS V MINISTER OF DEFENCE [2005] JOL 14082 (TK)

Case heard 10 March 2005, Judgment delivered 25 March 2005

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

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

"In the Kate case the constitutional obstacle as well as the prohibition contained in the State Liability Act were "overcome" by reading and interpreting the Jayiya judgment so as to allow for: "… an adapted common law rule of civil contempt, shorn of its criminal elements of punishment, in the form of a declaratory order that a State functionary is in contempt of a court order" (my emphasis). The idea was that the State functionary could then be called to court to explain how and when the order sounding in money would be complied with … I, with respect, cannot agree with the interpretation of the Jayiya judgment by Froneman J in so far as it relates to the development of the common law in respect of orders sounding in money and allows for the suggested adaptation of the common law. As I understand the development and rationale of our common law …, the whole object of contempt proceedings is not only to vindicate the court's honour in cases where a judgment debtor deliberately and mala fide ignores the court order … but as importantly to compel compliance therewith by the judgment debtor (see Herbstein & Van Winsen …). ... Furthermore, civil contempt has always been and still is a criminal offence which is committed only when a party to a court order deliberately and mala fide ignores the order of the court ad factum praestandum and not when such party ignores the order of the court ad pecuniam solvendam (the state of mind of the judgment debtor as regards the latter order is irrelevant for purposes of a successful execution) (see Jayiya, … Herbstein and Van Winsen, … Coetzee v Government of the RSA; Matiso & others v Commanding Officer, Port Elizabeth Prison & others 1995 (4) SA 631 (CC) ... Civil contempt remains a common-law crime irrespective of whether or not it has been "shorn of its criminal element of punishment". A declaratory order in such circumstances as proposed by Froneman J would perpetuate the very common-law distinction complained of in that it would not only serve to discriminate between State functionaries and private individuals in respect of orders ad pecuniam solvendam but would once again give the judgment creditor no more than a "hollow and unenforceable" judgment." [Paragraph 11-13]

"This Court, like all other courts throughout the country, is enjoined by the Constitution to interpret the law (both common law and statute) within the new constitutional context in order that all such law, where reasonably possible, complies with the Constitution ... Where such law does not comply with the Constitution it must be remedied, where possible, to enable it to so comply and where this is not possible it must be declared unconstitutional (see section 172 of the Constitution and National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others …). Section 165(5) of the Constitution stipulates that "an order or decision issued by a court binds all persons to whom and organs of State to which it applies" and to the extent that the State Liability Act, as amended in 1993, as read together with the prevailing common law frustrates a judgment creditor in attempting to compel compliance by the State with an order ad pecuniam solvendam by effectively placing the State above the law it would appear that such Act (Act 20 of 1957), and more specifically section 3 thereof, is in conflict with section 165(5) ..." [Paragraph 14-15]

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

The application was dismissed with costs.

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

Judgment delivered 26 June 2003

This case was about: "(a) Whether the employment contract entered into between the plaintiff and the Mayor on the 7th November 2001 was valid notwithstanding the fact that the Mayor did not have the authority of defendant to conclude such an agreement; (b) If the contract was valid, whether the termination thereof by the defendant was valid." [Paragraph 7]

Fischer AJ held:

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

"The court furthermore accepts that the parties have complied with the requirements of Rule 33(2) in that the facts have been stated accurately and the question for adjudication concisely formulated. It is of the utmost importance that great care be applied in the formulation of such statement of agreed facts especially if regard be had to the provisions of section 21A of the Supreme Court Act 59 of 1959. See the Commissioner for Customs & Excise v Standard General Insurance Co Ltd 2001 (1) SA 978 (SCA) ... It is common cause between the parties as regards the stated case that the legal position is governed by the

Local Government: Municipal Structures Act … and the Local Government: Municipal Systems Act … as read with the Constitution…" [Paragraph 9]

"The intention of the legislature regarding the power to conclude a contract of employment on behalf of the defendant municipality must be inferred from the language of the legislation referred to above and read within the context thereof. ... The cardinal rule of interpretation furthermore requires that this Court adhere to the plain meaning of the words of the statute unless such would lead to an absurdity or anomaly [citation to Appellate Division and SCA authority] … Section 57 of the Municipal Systems Act distinguishes in clear and unequivocal grammatical language between the written employment contract on the one hand and the performance agreement on the other hand. Section 60 of the same Act simply serves to confirm this distinction as in this section the Executive Mayor may be delegated the power to negotiate matters incidental to the employment contract but not to conclude the contract as such. Section 59(2) quite clearly stipulates that a delegation or instruction must not conflict with the Constitution, the Municipal Systems Act or the Municipal Structures Act. There is nothing in the relevant legislation to support the suggestion that the municipal mayor has the power to negotiate and conclude an employment contract with a municipal manager independently of the Municipal Council or that such power may be delegated by such Council. The maxim delegatus delegare non potest is apposite. See Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd 1965 (4) (SA) 628 (A) … I find in the circumstances that the Executive Mayor, in negotiating and concluding the contract with the plaintiff independently of the municipal council acted unlawfully." [Paragraph 15]

"The further argument advanced … on behalf of the plaintiff is premised upon the submission that even though the statutory provisions are clear and unequivocal and notwithstanding the fact that the Executive Mayor had no authority, … the defendant would nevertheless be bound by the action of the Executive Mayor, regard being had to the status of such office and the alleged overriding principles of the Turquand rule. The State, like any other company or corporation can only act through its employees. An outsider contracting with a company in respect of a contract that may be lawfully entered into, is entitled to assume that certain classes of company officials have the necessary implied authority to do what is usually associated with the powers relating to the office held by such officials. ... Similarly when dealing with a statutory body such as the defendant in concluding a contract that may be lawfully entered into by such body, an outsider is entitled to assume that certain classes of officials have the power to conclude such contracts on behalf of the statutory body. See National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) … and Potchefstroomse Stadsraad v Kotze 1960 (3) SA 616 (A) ...Mr Dukada relied heavily on both these cases in advancing his argument. I am of the opinion that both these cases are distinguishable … In the present case the provisions of the Constitution as read together with the Municipal Structures and Municipal Systems Acts make it quite clear that the process relating to the employment of a municipal manager does not depend on acts relating to the internal management of the defendant as opposed to the position … in the National & Overseas case ..." [Paragraphs 16-19]

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

because that person held the particular office. The checks and balances contained in the relevant statutes would amount to nought and this would lead to an anomaly the legislature could never have intended. ... The Executive Mayor in concluding the contract with the plaintiff on 7 November 2001, acted ultra vires and the contract is thus invalid. It is accordingly unnecessary to decide whether the termination of the contract was valid or not." [Paragraph 25-27]

SELECTED JUDGMENTS

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 …, confirming the decision taken in De Lange v Costa above 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 facts of the case are that on the 12 or 13 June 2007 appellants were arrested at Senekal for unlawfully soliciting money from the complainants, namely, three Chinese businessmen, trading in the town of Senekal. It was alleged that the appellants, who were policemen from the Crime Intelligence of the permits of foreigners in the town of Senekal, approached the three complainants and demanded money from them claiming that their permits were not valid when in fact they were. The Chinese reported the case to the police and the appellants were arrested." [Paragraph 1]

"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 32 of 1944, 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 (the permanent interpreter) 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. In my understanding Ms Lin was used as a Chinese interpreter because Mr Konxela did not understand or was not conversant with Chinese. He could therefore not have understood what the complainants were saying and relied entirely on the translation by Ms Lin. Since Ms Lin did not interpret truly and correctly it stands to say that Mr Konxela did not translate truly and correctly 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. Regard being had to section 6 (2) of Act 32 of 1944, the 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. This question could be answered in the positive only if the requirements of section 35(3)(k) of the Constitution had been complied with. 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]

"The correct approach for a court to determine whether an irregularity is such that it would vitiate the proceedings was laid down by Holmes JA in S V MOODIE 1961 (4) SA 752 (AD) … " [Paragraph 18]

"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. The other grounds of appeal had become academic. I therefore consider that the following order should issue:" [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:

"As regards the conviction, the appellants' grounds of appeal were that, firstly, the trial court erred by not applying the cautionary rule to the evidence of the complainant as a single witness; and secondly, by failing to accept the evidence of the appellants as reasonably possibly true. At the appeal hearing the appellant's legal representative abandoned the appeal against the conviction. The appellants contended,

in their heads of argument, 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 thus 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

Judgment refers to Supreme Court of Appeal decisions as well as relevant legislation.

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 respondent's counsel, Mr Chalale, in his argument, conceded that although the personal circumstances of the appellant were placed on record the trial court did not mention them when passing sentence. He however contended that the trial court correctly found that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence than the minimum sentence of life imprisonment." [Paragraph 5]

"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. In terms of section 51 (1) read with part I of schedule II, where 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

FREDDY MATABOKO TSIE & ANOTHER V S, UNREPORTED JUDGEMENT, CASE NUMBER A233/08

Case heard 24 August 2009, Judgment delivered 3 September 2009

The two appellents were sentenced to imprisonment for murder and robbery with aggravating circumstances. Both were convicted and sentenced before the verdict and the sentence, without leading evidence. The sentences were ordered not to run concurrently. Counsel for both parties argue that the sentences were inappropriate as well as shockingly excessive and that the trial court may have misdirected itself.

Lekale AJ held:

"I was left in doubt, after going through the record of the proceedings before the court a quo and listening to verbal submissions, as to whether or not the Act on minimum sentences viz Criminal Law Amendment Act …, was applicable to the charges. I, therefore, effectively requested counsel on both sides, ante omnia, and as a point of departure to address the court on … whether or not the said Act was applicable, and if so whether or not the appellants, qua accused persons in the court a quo, were informed adequately of that fact as well as the consequences of convictions on the relevant charges such as the possibility of life sentences on the murder charge as a prescribed minimum sentence and fifteen years in respect of each of the two other charges." [Paragraph 10-11]

"The aforegoing request was motivated mainly by the realisation, … that, contrary to the contentions made in the Heads of Argument filed for the appellant to the effect that it is common cause that the Act applied, no specific mention or reference to the said Act was apparent ex facie the record of the proceedings from the verdict stage to and including the end of the sentence stage. Not even during the application for leave to appeal did the learned Judge mention the Act in question specifically save by possible implication …" [Paragraph 12]

"In response to my inquiry Mr. Nkhahle, effectively, submits that it appears that the Act was applicable but that the appellants were not informed adequately of the case they had to meet as well as the consequences attendant on a conviction." [Paragraph 19]

"It is, therefore, correct as submitted by counsel on both sides that the Act in question was applicable to all of the three charges insofar as all the jurisdictional facts necessary for the application of the Act were effectively present as at the end of the conviction stage." [Paragraph 29]

"In S v LEGOA, … the court … found that an accused person standing trial has a substantive right to a fair trial in terms of the Constitution … and that the right in question is: "To be informed of the charge with sufficient detail to answer it." [Paragraph 32]

"… [A]lthough he acknowledges that there is nothing on the record suggesting that the appellants were informed of the applicability of the relevant Act and its sentence implications, Mr. Pienaar eloquently and effectively argues that such an inference may be drawn, as a reasonable one, from the fact that the appellants were represented by eminent or experienced counsel of senior standing during the trial. He, however, effectively concedes, correctly so, that such an inference is not based on the record as the material properly before the court. In S v NDLOVU … the Supreme Court of Appeal, … in rejecting an almost similar submission pointed out that: "The difficulty with this argument, of course, is that there is

no indication whatsoever in the record that the appellant or his legal representative had the slightest idea, prior to the sentence, that the appellant was facing the prospect of imprisonment of fifteen years in terms of the minimum sentencing provisions of the Act." Similarly in this matter a submission that the appellants were aware of the consequences of their convictions is, with respect, not grounded on any recorded evidence and, as such, remains speculative and unreliable. Such a submission, in my view, amounts to inviting the court to go beyond the appeal material properly before it and to rely on Mr. Pienaar's subjective knowledge of the competencies and experiences of the legal practitioners who represented the appellants at the trial, … in order to determine an issue as fundamental as observance of a constitutional right. …. [S]uch a conduct on the part of a court exercising appeal jurisdiction, would be highly irregular, irresponsible in the extreme, judicially unsound and mischievous at the very least insofar as it would amount to relying either on its own subjective knowledge and impressions of such legal practitioners or that of counsel appearing before it without just and/or legal cause. The appellants were not alerted to the provisions of the minimum sentence legislation and their sentencing was, thus, substantively unfair. The said fact constitutes a substantial and compelling circumstance for departing from the prescribed minimum sentences in respect of all of the three charges involved. (See S v NDLOVU ...)" [Paragraph 32-37]

"The fact that there exist substantial and compelling circumstances does not detract from the barbaric and callous nature of the murder ...""" [Paragraph 55]

"A submission by Mr. Nkhahle, … to the effect that the murder involved was not the worst kind of murder is, with respect, unfortunate. Murder is essentially a violation of the victim's constitutional right to life, which was described by the Constitutional Court in S v MAKWANYANE … as the: "Most fundamental of all rights, the supreme human right" per Langa J …; and "... most basic of rights" by Kriegler J …; and together with the right to dignity "...most important of all human rights, and the source of all other personal rights... [that] we are required to value... above all rights" per Chaskalson P ..." [Paragraph 56]

"In the present matter the court has decided to exercise its limited discretion … in the light of the nature of the substantial and compelling circumstances found to exist, which relate to violation of fundamental rights. The aforegoing prevails because of the high premium which this court places, as it is supposed to, on the Constitution, as the supreme law, and the Bill of Rights enshrined in it." [Paragraph 65]

Kruger J and Van Zyl J concurred.

MALITABA REBECCA PHOKONTSI & ANOTHER V KHATSE EVELYN SEBOLAI, UNREPORTED JUDGMENT, Case no: A199/2009

Case heard 31 January 2011, Judgment delivered 24 February 2011

This case involved a dispute regarding ownership of property originally owned by the deceased. The court a quo had been required to determine whether or not the appellants inherited equal shares in the property together with their late brother.

Lekale AJ held:

"The respondent, … defended the action and opposed the application on the basis that: the property in question was inherited by and transferred to her late husband, to whom she was married in community

of property, on the 8 September 2006 in terms of the provisions of section 23 of the Black Administration Act, …; her husband died intestate and she became entitled to the said property by virtue of marriage in community of property and inheritance in terms of the law of intestate succession." [Paragraph 5]

"The real legal issue raised by this appeal relates to the proper interpretation of the relevant orders in the Bhe-decision insofar as the appellants do not agree with the construction placed on them by the court a quo" [Paragraph 11]

"The court a quo, with respect, appears not to have read the judgment in the Bhe-decision as a whole in order to appreciate its effect and application. In our view a proper construction of the relevant order requires one to look at, inter alia, the reasoning of the Constitutional Court and its findings on, at least, the retrospective application of the specific orders." [Paragraph 17-18]

"It is clear … that the court a quo misdirected itself and erred on the question of law in, inter alia, finding that the Bhe-decision was not applicable in the present matter and that it does not apply retrospectively. The court in the Bhe-decision only qualified the retrospectivity of the orders so as to ensure that the orders of invalidity were just and equitable as contemplated by Section 172(1) of the Constitution. A proper interpretation of the relevant orders show, in our view, that the date of transfer of property and not the date on which the deceased, whose estate is in issue, passed away is the determining factor for the application of the Bhe-decision. The aforegoing is borne out by the following findings in the judgment of the Constitutional Court: 24.1 the relevant orders of invalidity do not invalidate a transfer of property which took place prior to the Bhe-decision where the primogeniture heir took transfer without knowledge that the property in question was the subject of a constitutional challenge in the context of the primogeniture rule and the provisions of Section 23 of the Act; 24.2 estates which were being administered in terms of Section 23 of the Act and its Regulations as at the date of the Bhe-decision remain immune from the effect of the invalidation of that section and its regulations until they are finally wound up; 24.3 the invalidation of the primogeniture rule, however, affects such estates only to the extent to which that rule excludes or hinders women and children of the deceased born out of wedlock from inheriting property with the result that: (a) women and children of the deceased born out of wedlock are not excluded from inheriting property from such estates; (b) although the administration and distribution of such estates continue to take place in terms of the Act and its regulations, women and children of the deceased born out of wedlock are not prejudiced and may be identified as heirs in accordance with the Intestate Succession Act 81 of 1987 read with orders 5 and 7 in the Bhe-decision." [Paragraphs 22-24]

"The Bhe-decision is applicable to the dispute between the parties in this appeal because the respondent's late husband took transfer of the property after the date of that decision. The appellants thus inherited equal undivided shares in the property together with the respondent's late husband in terms of the law of intestate succession when their sister died intestate." [Paragraph 25]

The appeal was upheld (Ebrahim J concurred).

PETRUS FRANCOIS BOTHA V MATJHABENG MUNICIPALITY, UNREPORTED JUDGMENT, CASE NO: A78/2009.

Case heard 1 February 2010, Judgment delivered 18 February 2010

Applicant sponsored a motion for the removal of the Respondent's Executive mayor. He further requested that a secret ballot vote take place in terms of the Standing Rules and orders. The Speaker allowed and entertained a counter request for the voting to take place by a show of hands rather that by secret ballot. The motion to remove the Mayor failed after the applicant and other opposition councilors refrained from participating in the vote. The Respondent refused to rescind the decision, and the matter came before the court.

Lekale AJ held:

"It is clear from the Constitution and legislation that publication by notice in the Gazette is a sine qua non for a by-law to take effect." [Paragraph 18]

"The applicant contends that the relevant actions of the respondent, through its Speaker, constitute an administrative action and that the relevant decision falls to be reviewed and set aside in terms of section 6 of PAJA." [Paragraph 20]

"The enquiry into whether or not the conduct in question constitutes an administrative action and is, as such, subject to PAJA is twofold and involves, as a starting point, the constitutional stage which is concerned with whether or not the conduct involved constitutes administrative action within the meaning of section 33 of the Constitution. Only if that question is decided in the affirmative does the second stage of the enquiry arise viz. the statutory leg which relates to whether or not the conduct in question amounts to an administrative action for the purposes of PAJA and, as such, is reviewable in terms thereof." [Paragraph 24]

"The constitutional stage of the enquiry is concerned with determining whether action should be characterised as the implementation of legislation and, as such, an administrative action or as the formulation of policy which does not constitute an administrative action. It involves a series of considerations including the source of the relevant power which was exercised, its nature and subject matter as well as whether it involves the exercise of public power. In making the relevant determination –"difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the constitution and the overall constitutional purpose of an efficient, equitable and ethical public administrative. This can best be done on a case by case basis."(see SARFU decision paragraph [143] and Marais v Democratic Alliance 2002 (2) AIISA 424 (C) …)." [Paragraph 26]

"In casu I am not satisfied that the conduct in question qualifies as an administrative action for the purposes of the Constitution. The aforegoing obtains because: 29.1 in my view the causes of the applicant's grief are, in effect, the rulings made by the Speaker, as the presiding chairperson, in the course of ensuring that the meeting was being conducted in accordance with the Standing Rules and Orders of the respondent;29.2 the source of the Speaker's powers to make such rulings is section 37(a) read with section 37(f) of the Local Government: Municipal Structures Act … which provides that the Speaker presides at council meetings and obliges him to ensure that meetings are conducted in accordance with Standing Rules and Orders; 29.3 although the nature of the relevant power and function

involved is obviously statutory, its subject matter viz. compliance with Standing Rules and Orders relating to voting at Council and Committee meetings, indicates that the exercise of the same and performance of the duty involved are limited to council meetings and do not impact on the general public. There is no apparent need for it to be exercised in the public interest. The power is confined to internal procedural affairs of the respondent which are applicable only to meetings and not to other operations involving, inter alia, interaction with members of the public. ...; 29.4 the relevant decision evidently affects the rights of the applicant and other councillors in their capacities as councillors and not as members of the public; 29.5 in my view the Constitution and, a fortiori, PAJA … are intended to protect members of the public in their capacities as such and not functionaries as they interact with one another in their official capacities and in the course of performing their official duties as such. [citation to the Constitutional Court judgment in Chirwa] ...; 29.6 the primary function of the respondent's council at the relevant meeting was to exercise its elective or decision - making powers concerning the exercise of its powers and functions as a municipality as provided for by section 160 of the Constitution. The exercise of the administrative powers of the respondent are the domain of the administration under the Municipal Manager as the head while the Executive Mayor exercises most of its executive powers as per Section 56 of Structures Act. The Speaker, as the chairperson of the council, is the head of the legislative side of the respondent and exercises those executive powers of the council as may have been delegated to him. The relevant decision-making powers are provided for under internal procedures by the Constitution. … [T]he relevant decision was, as such, made in the context of an internal decision-making process a kin to policy formulation and is, therefore, related thereto." [Paragraph 29]

"Even if I am wrong in the aforegoing finding with regard to the constitutional leg of the enquiry, I am not satisfied that the relevant conduct satisfies the statutory test in terms of PAJA …" [Paragraph 30]

"PAJA is, therefore, not applicable in this matter and the issue falls to be decided in terms of the court's common law powers of judicial review insofar as the applicant, inter alia, effectively contends that the respondent acted outside the provisions of applicable Standing Rules and Orders in making the impugned decision." [Paragraph 32]

"It is clear from applicable law and the uncontroverted version of the applicant that: … 33.3 in terms of the … applicable Standing Rules and Orders, a request for a secret ballot in respect of any question gets carried or effected once it is seconded; 33.4 the applicant's request for a secret ballot was seconded; 33.5 the relevant Standing Rules and Orders do not authorise the respondent to allow and entertain a counter motion or request to the contrary once the request for a secret ballot has been seconded; 33.6 the respondent, therefore, acted outside the applicable by-law when it, through its Speaker, allowed and entertained a counter request; 33.7… the respondent acted ultra vires the relevant Standing Rules and Orders when it subjected the applicant's seconded request for a secret ballot to a vote; 33.8 the relevant decision falls to be set aside on these grounds alone; 33.9 everything that followed after the irregular step was taken is, therefore, a nullity insofar as it was, further, not condoned by the applicant." [Paragraph 33]

(Van Zyl J concurred).

SELECTED JUDGMENTS

BRISEN COMMODOTIES (PTY) LTD V FARMSECURE (PTY) LTD AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 4137/2009

Case heard 22 October 2010, Judgment delivered 23 December 2010

This case was an application for leave to appeal against the decision of the court to dismiss an application made on 22 October 2010 and uphold certain exceptions on the grounds of a lack of averments to sustain the action, and against the costs order.

Murray AJ held:

"The first issue to determine, then, is the appealability of the application for the admission of evidence at the exception stage." [Paragraph 10]

"The Constitutional Court in S v SHAIK AND OTHERS, … expressly labelled an application for leave to adduce further evidence a "preliminary" or interlocutory application. Harmse AJA … with reference to Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) SA569 (A) stated in ZWENI v MINISTER OF LAW AND ORDER 1993(1) SA 523 (A) that "Section 20(1) of the Act no longer draws a distinction between 'judgments or orders' on the one hand and interlocutory orders on the other. The distinction now is between "judgments or orders" (which are appealable with leave) and decisions which are not "judgments or orders". In JONES v KROK, 1995(1) SA 677 (A) … Corbett CJ confirmed this in view of the fact that leave is now required for all civil appeals. According to Nienaber JA, in WELLINGTON COURT SHAREBLOCK v JOHANNESBURG CITY COUNCIL 1995(3) SA 827 (AD) … the judgment in Zweni's case … makes it plain, furthermore: "that the appealability of any decision given during the course of proceedings is not contingent solely on the discretion of the trial Judge in granting leave to appeal. To be appealable the decision primarily has to be a 'judgment or order' with certain attributes, the first of which is that it must be final in effect, that is to say, not susceptible to alteration by the Court of first instance ... [which] was the very criterion, before the amendment to S20 of the Act was introduced, for differentiating between interlocutory orders appealable as of right and simple interlocutory orders appealable only with leave..." The question of appealability was fully addressed, furthermore, in MAIZE BOARD v TIGER OATS LTD AND OTHERS, … by Streicher, JA, who … referred to CRONSHAW AND ANOTHER v COIN SECURITY GROUP (PTY) LTD, 1996 (3) SA 686 (A) in which it was found that one of the attributes of a "judgment or order" (in other words one which is appealable) was that it is final in effect and that the rule regarding the question as to when a decision is final, was already laid down by Schreiner, JA, in PRETORIA GARRISON INSTITUTES v DANISH VARIETY PRODUCTS (PTY) LIMITED, … where he stated that: "…a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit', or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing". The test for appealibility … is whether the decision in question is final, definitive of the rights of the parties and effectively disposes of a substantial portion of the relief claimed in the main case." [Paragraphs 14-20]

"What this Court, in other words, needs to determine is whether any appeal can lie against the order dismissing the application, even with leave, and, accordingly, whether it is competent for leave to be granted regarding this order. In doing so, the Court needs to consider, predominantly, the effect of the dismissal …" [Paragraph 22]

"In my view this application, similar to what was held in WELLINGTON COURT SHAREBLOCK v JOHANNESBURG CITY COUNCIL, … is "not the sort of case where it is incontrovertible on the papers that the ultimate relief claimed in the action, or a special defence which will be destructive of such relief... hinges solely on the point taken in the [application]." As in that case, the action in casu is to continue to trial despite the dismissal of the application. Here, too, "final relief will only follow if the [plaintiff] proves the remainder of its case" against the defendants. In my view, therefore, the dismissal of the application in casu does not dispose of a substantial portion of the relief claimed in the main action and therefore does not amount to an appealable 'judgment or order' ... It would therefore, in my view, not be competent to grant leave to appeal against its dismissal" [Paragraph 23-26]

"In S v SHAIK, … the Court stated specifically that leave to adduce further evidence on appeal, which for the purpose of this application for leave to appeal will be viewed as the introduction of new evidence after judgment, is ordinarily granted only where "special grounds exist [or where] there will be no prejudice to the other side and further evidence is necessary in order to do justice between the parties." In RAIL COMMUTERS ACTION GROUP AND OTHERS v TRANSNET LTD T/A METRORAIL AND OTHERS, 2005 (2) SA 359 (CC) … and in PROPHET v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS, 2006 (2) SACR 525 (CC) the requirement of "exceptional circumstances" was confirmed as set out in S v Lawrence; S v Negal; S v Silberg, 1997 (4) SA 1176 …: "The court should exercise the powers conferred by section 22 'sparingly' and further evidence on appeal should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor..." [Further citations to Supreme Court of Appeal judgments] … I am of the opinion that the plaintiff has established no exceptional circumstances ... Neither did it establish a basis on which it can be found that the evidence is likely to dispose of a substantial or even of some portion of the relief claimed in the main action. Nor was any reasonable explanation offered for its attempted introduction at this late stage either." [Paragraphs 32-35]

"It is trite law that the upholding of exceptions based on the failure to disclose a cause of action is in principle appealable, whereas the upholding of those based on vagueness and embarrassment is in principle non-appealable. …" [Paragraph 38]

"I agree that in contracts which do not contain clauses explicitly excluding the operation of tacit or implied terms, evidence and the 'innocent bystander' test could play a role and that in such cases the presence of tacit or implied terms cannot be decided at the exception stage. But, in the case under consideration the parties … explicitly excluded from the contract "with regard to the matters dealt with [in the co-operation agreement]" all "terms ... express or implied not contained in" the contract. They reconfirmed their intention to limit the contract to that which is expressly contained in the written agreement by adding Clause 14 which reads: "No agreement varying, adding to, deleting from or cancelling this agreement, and no waiver, whether specifically, implicitly or by conduct of any right to enforce any term of this agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties. It is recorded that there exists no collateral and/or other agreements and that this is the sole agreement entered into by and between the Parties."" [Paragraph 48-50]

"In my opinion Mr Duminy was therefore correct in stating that the Appeals Court has confirmed that if the contract itself determines that one cannot rely on implied terms, one cannot plead implied or tacit terms." [Paragraph 55]

"The purpose of a pleading is not only to enable the other party to plead thereto, but also to inform the Court about the issues it needs to decide. In the instant case the trial court will need to decide whether

the arbitration clause is indeed invalid and whether it is a jurisdictional requirement for the activation of the penalty clause in the term in which it is contained. To enable the Court to do so, the plaintiff needs to address the requirements of the submission of the dispute to prior mediation and arbitration and the prior determination of the amount claimable by the arbitrator. Although I am of the view that the plaintiff needed to address the requirements expressly contained in … the co-operation agreement, there is a reasonable possibility that another court may come to a different conclusion as to whether the plaintiff needed to address the express requirements of arbitration and mediation before cancelation. I therefore grant the plaintiff leave to appeal against the upholding of exceptions 3, 5 and 6." [Paragraphs 71-73]

"It is common cause that the right to claim three years' loss of profit is a penalty clause. The courts regard a penalty clause as "an alternative to a claim for damages for breach of contract". (VAN DER MERWE et al ...) It is important to note that a contractant may not claim damages instead of a penalty clause unless the contract expressly provides otherwise, which the contract in the instant case does not do. If a breach of contract occurs which is not covered by the penalty clause, the penalty cannot be claimed for that breach, but nothing prevents the plaintiff from claiming damages for the breach." [Paragraph 78]

"... Based on the findings in DATACOLOUR-decision and the finding in TAGGART v GREEN 1991 (4) SA 128 (T); METALMIL (PTY) LTD v AECI EXPLOSIVES AND CHEMICALS LTD 1994 (3) SA 673 (A) … that a provision in a contract which determines that if malperformance takes place the debtor must be notified to rectify the defect within a certain period does not afford a party in breach any protection in case of repudiation, it is conceivable that another court may come to a different conclusion regarding the sufficiency of the plaintiff's averments to sustain the right to invoke the penalty clause by way of repudiation. I therefore grant the plaintiff leave to appeal against the upholding of exception 4." [Paragraphs 84-86]

FIRSTRAND BANK LIMITED V MR SAVVA CHRISTOFI, UNREPORTED JUDGMENT, CASE NO: 3568/2009

Case heard 23 November 2010, Judgment delivered 17 December 2010

This case was an application for review of a taxation by a judge in chambers in terms of Rule 48, on the grounds that said bill was taxed in Defendant's absence and that certain items on the bill were contrary to the costs order in Defendant's favour.

Murray AJ held:

"The questions to be decided, therefore, are whether the Taxing Master had been entitled to proceed with the taxation in the absence of the Defendant's representative, and if so, whether the items objected to were indeed erroneously allowed by the Taxing Master." [Paragraph 12]

"Rule 70(4) is preemptory. The provision that the Taxing Master shall not tax a bill unless he is satisfied that the party liable to pay the costs has received due notice of the time and place of such taxation and notice that he or she is liable to pay the costs has received due notice of the time and place of such taxation and notice that he or she is entitled to be present thereat is imperative, as clearly stated in Schaeffer and Schaeffer v Maller & Emdin NO, 1937 CPD; Grunder v Grunder, 1990 (4) SA 680 (C) at 684 C and Jacobs & Ehlers, Law of Attorney Costs and Taxation Thereof, ... Failure of a party who has been awarded an order for costs (Plaintiff in the instant case) to satisfy the Taxing Master that due notice had

indeed been given to the party liable to pay such costs would therefore in the absence if any of the circumstances now provided for in subrule (4)(b), effectively bar the Taxing Master from proceeding with the taxing of the relevant bill of costs (see the discussion of the new Rule 70 in Erasmus, Superior Court Practice ...) If a Taxing Master nevertheless proceeds in the absence of proper notice of taxation, the taxation may be declared invalid as in Schaeffer & Schaeffer... Failure to give proper notice of taxation may also result in the matter being reviewed on that ground. (Ex parte: Kent, 1907 TS 325). It has been held, too, that the consequences of a failure to give proper notice of taxation are that the bill is regarded as untaxed and cannot be sued upon and execution cannot lawfully follow the taxation thereof. (Krull v Bursey, 1966 (4) SA 448 (E) ... In the instant matter there can be no doubt that the original notice which Plaintiff served on Defendant would have been considered adequate notice had the taxation indeed proceeded on 23 April 2010. In such circumstances the Taxing Master would have been justified in proceeding in Defendant's absence. " [Paragraph 16-19]

"Since the Taxing Master himself arranged the new taxation date and time …, and in view of Mr Modise's telephonic confirmation of the date and the fact that he would have had no reason to doubt that the correct date and time had been conveyed …, the Taxing Master would have been entitled to proceed with the taxation in the absence of Defendant's attorneys. The circumstances in the instant case therefore differ from those in Brenner's Service Station & Garage (Pty) LTF v Milne … (W) where a taxation held at a later date that the date in the notice was held to be irregular and set aside since in that case no new notice was given to the Defendant when the taxation could not proceed on the specified date. In Brenners Service Station … it was found that the party liable for the costs had the right to attend the hearing and to challenge each and every item in the successful party's bill of costs and the court concluded that being deprived of those right is sufficiently prejudicial to that party to entitle it to an order setting aside the taxation. In Grunder v Grunder … however it, was found (which was before the implementation of the revised Rule 70) that substantial compliance with the notice requirement in the Rule 70 (4) is sufficient. " [Paragraph 26-29]

"The requirement of proper notice is for the protection of the party who has to pay the costs. If the party after having received due notice, chooses not to appear, the Taxing Master can certainly not be blamed for proceeding in their absence. It cannot be found, therefore, that the taxation of the Plaintiff's bill of costs in Defendant's absence had been irregular and should be set aside on that basis." [Paragraph 30-31]

"A party who was not present at the Taxation, is not debarred from taking on review a Taxing Master's decision to mero motu, i.e. is without any objection being raised, disallow an item. (See: Rogoff v Law Society, Cape 2982 (1) SA 563 (C) …). One would assume that same applies to items so allowed, as in the instant case. Rule 48 which provides for such a review, specifies the circumstances under which a court will, on review, interfere with the exercise of the Taxing Master's discretion." [Paragraphs 36-37]

"The courts are reluctant to interfere with a ruling by a Taxing Master if he had excercised his discretion properly. The general principles governing interference with the exercise of the Taxing Master's discretion are that a court will only interfere: 39.1 If it appears that the Taxing Master has not exercised such discretion judicially, or has exercised it improperly, or 39.2 If he failed to bring his mind to bear on the issue, or 39.3 If he acted on a wrong principle. The court will only interfere, furthermore, if it is of the opinion that the Taxing Master is clearly wrong and if the court is in the same or better position than the Taxing Master to decide the issue. It has also been held that where a court finds that the Taxing Master is

clearly wrong, it is the court's duty to reverse the Taxing Master's decision and to come to the assistance of the aggrieved party. …" [Paragraphs 39-41]

"In casu Respondent objected to the Taxing Master's allowing the specified list of items for the reasons set out above. It is not clear from the stated case and the Defendant and Plaintiff's response thereto or from the allocated bill of costs whether there is indeed any merit in this allegation. I therefore deemed it necessary to request the two legal representatives concerned to appear before me in chambers with the Taxing Master to hear oral evidence on the disputed items only, in order to determine whether there is any merit in Respondent's contention that those items should not have been allowed because of the Defendant's court order." [Paragraph 45-46]

The bill of costs was remitted to the Taxing Master for correction.

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. The court insisted that the complainant be brought to court, since he was by then at a late stage of his testimony. ..." [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 hearing the case at first instance 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 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. At this juncture arrest ceased to be a mere formality, as the second respondent had earlier on made the appellant so to believe. 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

GUGA V MINISTER OF SAFETY AND SECURITY AND OTHERS [2011] 1 ALL SA 413 (ECM)

Applicant, a taxi businessman, sought a declaratory order setting aside the seizure of his motor vehicle by members of the South African Police Service (SAPS) at a roadblock; as well as the certificate purporting to authorise it under sections 13(8) of the SAPS Act. Applicant further sought an order interdicting the respondents from further unlawfully seizing the vehicle, and a mandamus compelling respondents to release the vehicle to the applicant. Respondents argued that the purpose of the roadblock was to check for stolen motor vehicles by examining engine and chassis numbers.

Pakade ADJP held:

"A seizure of property is prima facie unlawful hence to be justified because section 25 of the Constitution ... protects every person's right to property from being interfered with by seizure or being deprived of his property except where such seizure or deprivation is done in terms of the law of general application" [Paragraph 6]

"The element of reasonable suspicion in section 20 of the [Criminal Procedure] Act is a common jurisdictional factor which precedes the issuing of both a search warrant in terms of section 21(1)(a) and a certificate in terms of section 13(8) of the Police Act. The authorities that guide the court in the interpretation of section 20 apply, mutatis mutandis, in the interpretation of a search warrant and a section 13(8) certificate. These pieces of legislation require strict interpretation. ..." [Paragraph 16]

"The need for strict interpretation of a statutory provision which authorises the seizure of a person's property arises from the fact that it limits the individual right to property which is protected by the Constitution. The courts of this country recognised long before the advent of the constitutional dispensation that search and seizure legislation constitutes an unacceptable invasion into the rights of individuals, thus calling for strict interpretation thereof. It was required even then that the search and seizure should comply strictly with the seizure warrant. ..." [Paragraph 17]

"The issue to consider is ... whether the information placed before the court ... is sufficient to establish, objectively, reasonable circumstances as envisaged in section 13(8)(a) of the Police Act, justifying the issue of the authorisation certificate for the setting up of the roadblock." [Paragraph 20]

"Nothing further can be gleaned from the information furnished ... as creating reasonable circumstances justifying the issuing of the authorisation certificate ... to set up the roadblock ... Neither is information contained in the certificate evidence from which Nqadini [the police officer who had issued the certificate] could have inferred the existence of reasonable grounds justifying the issuing of the section 13(8)(a) certificate. The information in the certificate is no more than conclusion arrived at by Nqadini from undisclosed information on the basis of which he acted. " [Paragraph 21]

"... [C]ounsel for the respondents, submitted that Nqadini acted on the requirements of section 215 of the Interim Constitution which are the prevention of crime; the investigation of any offence or alleged offence; the maintenance of law and order and the preservation of the internal security of the Republic of South Africa. I have no doubt that these are general constitutional functions of the members of the South African Police Service which have to be carried out subject to section 20 of the Act. To be exact, in order for a policeman to act in terms of section 215 of the Interim Constitution, there must be information placed before him, which he must in turn place before the court, which made him to believe

on reasonable grounds that he must seize an item for the prevention of crime; investigation of an offence or alleged offence; the maintenance of law and order and the preservation of internal security of the Republic. That information has not been placed before the court. The existence of the reasonable grounds must be before the search and seizure and must justify the search and seizure" [Paragraph 22]

"... [U]pon seizure of the applicant's motor vehicle, the police found some discrepancies on its engine and chassis numbers. These discrepancies induced reasonable belief ... that the applicant's motor vehicle was stolen. As said above, the reasonable belief entertained after the search cannot justify the search and seizure which was otherwise unlawful." [Paragraph 25]

Pakade ADJP thus found that the respondents had not shown that the applicant's vehicle qualified as an item to be seized. Pakade ADJP then considered the question of whether the applicant could lawfully possess the vehicle despite the discrepencies in its engine and chassis numbers:

"... [T]he police must establish a case in terms of section 31(1)(*a*) of the Act. Those provisions are that if no criminal proceedings are instituted in accordance with the article or that such article is not required at the trial for purposes of evidence or an order of the court, the article must be returned to the person from whom it was seized if such person may lawfully possess it. ... The respondents have not placed evidence before the court showing that the motor vehicle is required for purposes of trial or an order of court. Although the evidence of the respondents is that the engine and chassis numbers of the motor vehicle had some discrepancies, there is no evidence that these are not discrepancies which were cleared by the police earlier when the applicant took the motor vehicle to them for a checking and issuing of a clearance certificate. ..." [Paragraph 26]

The search and seizure of the vehicle was thus declared unlawful and set aside.

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSKEI V DUBO 2011 (1) SACR 191 (ECM)

Case heard 19 March 2010, Judgment delivered 1 April 2010

This was an appeal by the Director of Public Prosecutions against a suspended sentence of 10 years imprisonment imposed on the respondent following a conviction for rape. The rape was described as "violent and brutal" by the trial court and the court on appeal.

Pakade J held:

"Though the court a quo does not make a specific finding that the respondent is a young first offender ... it can be assumed, nevertheless, that it had those factors in mind when it passed sentence. ... A simple arithmetic calculation shows that the learned magistrate was wrong in his finding that the respondent was 16 years old, as he was already 17 years 5 months old at the time of the commission of the offence, and 19 years 4 months at the time of the hearing. The court a quo took into consideration, erroneously, ... that he was 16 years old, and concluded on that factor alone that a wholly suspended sentence was appropriate in those circumstances. The magistrate has, in my view, committed a misdirection, of the nature which vitiated the proper exercise of his discretion, on the assessment of a proper punishment to be imposed for this brutal, premeditated rape on a 14-year-old child" [Paragraph 6]

"In an appeal brought under s 310A, the Director of Public Prosecutions must show that the trial court exercised its discretion on sentence irregularly, unreasonably, improperly, or in an unbalanced manner, vitiating the exercise of the discretion. A mere difference, between the sentence imposed by the trial court and the sentence the appeal court would have imposed, is not a sufficient ground for interference ... The difference between the two sentences must be of such a nature and degree that it appears that the trial court exercised penal discretion unreasonably. Similarly, under- or overemphasis of relevant factors must result in an unreasonable or improper exercise of the penal discretion by the trial court, before an appeal against sentence by the Director of Public Prosecution can succeed ..." [Paragraph 7]

Pakade J considered Supreme Court of Appeal cases where increased sentences had been imposed, and continued:

"The sentence imposed by the court a quo is not the culmination of a balancing exercise of the basic triad of sentencing ... There is no indication in the record of the proceedings ... that, apart from the personal circumstances of the respondent, which the trial court appears to have overemphasised, the gravity of the offence and the interests of society were ever taken into consideration ... Our courts require these factors to be taken into consideration on an equal basis, without over- or underemphasising the one against the other. The seriousness of the offence and the protection of society should be considered on an equal basis with the mitigating factors. This, regrettably, is what the sentencing court did not do." [Paragraph 9]

"That the victim was 14 years old at the time of the incident is a factor which alone would, but for the age of the respondent (... see Centre for Child Law v Minister for Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-integration of Offenders, as Amicus Curiae)2009 (2) SACR 477 (CC) ..), obviously have aggravated the type of sentence to be imposed and would then have cautioned the court a quo to meticulously analyse every aspect of the sentencing criteria. The type of rape committed by the respondent falls, by reason of the age of the victim and the infliction of grievous bodily harm on her, within the purview of Schedule 2 of Part 1 of the Criminal Law Amendment Act... s 51(1) or (2) of which provides for a prescribed punishment. These two subsections were, however, declared unconstitutional in the Centre for Child Law case, supra, and as a result thereof the prescribed punishment which was hitherto provided in those subsections, to a child of 16 and 17 years old, no longer applies. To this extent I partially agree with both counsel that, even on a proper age assessment, the sentence would not have been any different from that imposed by the court a quo. However, the declaration of constitutional invalidity of these subsections left the sentencing court with other sentencing options, provided for by the Criminal Procedure Act. This is what the court a quo has failed to investigate." [Paragraph 10]

Pakade J found that the case should be remitted to the court *a quo* for fresh sentencing, taking into account the proper age of the respondent, the gravity of the offence and the interests of society.

NO-ITALY PHINDIWE MTIRARA V MEC FOR HOUSING, LOCAL GOVERNMENT & TRADITIONAL AFFAIRS, UNREPORTED JUDGMENT, CASE NO.: 1402/2004 (HIGH COURT, TRANSKEI DIVISION)

Case heard 1 September 2005, Judgment delivered 15 September 2005

This case concerned the appointment of the applicant as acting chieftainess of the Mpeko Traditional Authority. Applicant sought an order setting aside the first respondent's refusal to confirm her appointment as acting chieftainess, and setting aside the refusal of the second respondent (Zimlindile Andile Mtirara) to step down as chief of the Mpeko administrative area.

After considering the powers to appoint chiefs and acting chiefs in the former Transkei (which power had been assigned to the first respondent), and dismissing various points in limine, Pakade J considered the argument that there was a dispute of fact in relation to the resolution designating the applicant as acting chieftainess:

"Even if I am wrong in my finding that Prince Mthandeni Jongisizwe Dalindyebo was still an Acting King on 7 August 2003 [when the resolution was issued by the third respondent, the Dalindyebo Regional Authority], the resolution would still be valid on the basis of the omina praesumuntur rite esse acta presumption. Baxter; Administrative Law ... explains the operation of the presumption as follows:- 'There exists an evidential presumption of validity ...and until the act in question is found to be unlawful by a Court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.' " [Paragraph 17]

Pakade J considered High Court, English and academic authority regarding this presumption, and continued:

"The resolution of the 3rd respondent has not been set aside. It was submitted for the first time in Court that it is tainted with an illegality ... There was not even a counter-application before Court seeking a declaration of nullity of the resolution on the alleged ground. The applicant now relies, correctly in my view, on the existence of the resolution as an undisputed fact [citation to the Plascon Evans case] ... The Oudekraal Estates ... (SCA) judgment is authority for the view that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act has not been set aside when its enforcement is sought..." [Paragraph 20]

Pakade J then rejected an argument that the second respondent had not been given a hearing. In the course of this finding, Pakade J considered the right of women and illegitimate male children to be appointed as chiefs and headmen:

"In customary law, a kraalhead who has no legitimate male issue may institute as his heir his illegitimate son born out of wedlock provided that he has paid damages and isondlo to the woman's guardian and that the prescribed formalities are observed [citation to the academic writers Kerr and Bennett]... The institution of heir is a formal matter requiring publicity. ... In Kewana v Santam Insurance Co Ltd 1993 ... (TKA) ... [t]he Court found that this ceremony constituted a valid adoption under customary law. Therefore, by parity of reasoning, the Child Care Act does not amend or repeal the customary law of adoption." [Paragraphs 29 - 30]

"It is important to realise that certain provisions of the Constitution put it beyond doubt that a basic law requires specifically that customary law should be accommodated, not merely tolerated provided that its provisions are not in conflict with the Constitution. Section 39(2) of the Constitution ... specifically

requires a Court interpreting customary law to promote the spirit purport and object of the Bill of Rights. Section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. ..." [Paragraph 31]

"It could be seen from section 211 that customary law enjoys Constitutional protection. It is for this reason that an approach which condemns provisions of customary law merely on the basis that they are different to those of the common law or legislation would be incorrect [citation to the Constitutional Court judgment of Bhe] ... The Constitutional Court developed customary law in this judgment by giving women equal status with men. The result is that women can now be appointed in positions which were previously reserved for men alone. On the authority of this Constitutional Court judgment, the applicant would still qualify to be appointed a Chieftainess by reason of the fact that she is the widow of the late chief of Mpeko Tribal authority and would not be disqualified by reason of the fact that she is a woman." [Paragraph 32]

The application was granted. An application for leave to appeal against the decision was dismissed: [2010] JOL 24889 (Tk).

WAYMARK AND OTHERS V MEEG BANK LTD [2003] 1 ALL SA 518 (TK)

The Premier of the Eastern Cape had issued a Proclamation (No. 9) on 10 July 1997, appointing the three plaintiffs as joint liquidators of the Magwa Tea Corporation. On 1 December 1997, the Premier issued Proclamation No. 157, also dissolving the Corporation. The proclamations were identically worded, except that subparagraphs 2.2 – 2.7 had been omitted from the first Proclamation (No. 9). After a separation of issues in terms of Rule 33(4), the only issue for the court to determine was whether the Corporation had been dissolved by the first or second proclamation.

Pakade J held:

"It is clear from the wording of section 19(2) of the [Transitional Provisions (Eastern Cape)] Act that the Premier is required to regulate in such proclamations, all matters resulting from the dissolution, including assets, liabilities, rights and obligations of such corporation. The provisions embodying these requirements are categorised by the use of the word "shall" while the remaining provisions of section 19(2) are couched by the use of the word "may". The primary question therefore is whether, notwithstanding the omission to insert sub-paragraphs 2.2 to 2.7 in the first Proclamation, the Premier has complied with the above Legislation" [Paragraph 9]

"The question whether a statutory requirement is peremptory or directory has been the subject of numerous decisions. The basic test is whether the legislature expressly or impliedly visits non-compliance with nullity. In each case one must look to the subject matter, consider the importance of the provision that has been omitted and the relation of that provision to the general object and purpose intended to be achieved by the legislation, and with that framework, decide whether the provision is imperative or directory. ..." [Paragraph 13]

Pakade J considered judgments by the former Appellate Division, and continued:

"Our courts have frequently decided that the use of the word "shall" in a statutory provision does not necessarily mean that the provision is peremptory. If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, the presumption is in favour of an intention to make the provision only directory. ... [T]he ... attitude of the Appellate Division in the Nkisimane case ... is that the courts should refrain from inferring the intention of the legislature from the mere use of labels in a statute. The statute should be looked into holistically to ascertain the legislative intent. ..." [Paragraph 16]

"In the present case we have a situation of a provision of a statute being couched in a peremptory language in so far as it enjoins the Premier to regulate the matters arising from the dissolution of a corporation and directory regarding the rest of the provisions. ..." [Paragraph 17]

Pakade J then considered the content of sub-paragraphs 2.2 – 2.7, the content of the second proclamation and sections of the Companies Act incorporated into the first proclamation, and continued:

"The Premier authorised the liquidators in the first Proclamation to exercise, mutatis mutandis, the same powers provided for and mentioned in section 386 of the Companies Act, including those mentioned in the Insolvency Act, on the same terms as those mentioned in section 386(4)(g) of the said Act. ..." [Paragraph 22]

"Though the expression mutatis mutandis is not in frequently used in statutes and in other legal enactments, there seems to be a noticeable dearth of authority as to its precise significance and the limits of the effect, which should be given to it. ...[discussion of Appellate Division and High court judgments discussing the term] In my view the use of the expression mutatis mutandis in the provisions of the Companies Act and the Insolvency Act incorporated in the first Proclamation means that those provisions must be applied subject to the necessary alterations to fit the changed circumstances " [Paragraphs 23 - 24]

"... Section 386 of the Companies Act and the provisions of the Insolvency Act, which have been incorporated in the Proclamation, cover adequately all the matters set out in subparagraph 2.2 to 2.7 and it would be superfluous to incorporate them in the Proclamation as well. Their absence in the first Proclamation does not have anything to do with its validity. ... In my view the language of section 19(2)(b) of the Act confers a discretion on the Premier to either incorporate 2.2 to 2.7 in the Proclamation ... or to incorporate certain sections of the Companies act and the Insolvency Act therein and not both." [Paragraph 26]

Pakade J then dealt with the submission that the second proclamation was intended to replace the first and to set the effective date of the dissolution:

"It is ... correct ... that the literal meaning of the word "replace" is that the second Proclamation substituted the first one. This is not only indicated by the use of the word "replace" but also by the words "is hereby substituted". ..." [Paragraph 31]

"However, this does not provide an absolute answer to the question as to when the Corporation was dissolved. The draftsman has made use of the phrase "substituted from the date hereof" to portray the intention of the Premier as to when the substitution should take effect. ... It is clear ... that the Premier intended the second Proclamation to start operating from 1 December 1997 and not before that date. In any event if the Premier intended it to operate retrospectively, he would have expressly said so in the clearest language. ... [T]he repealed Proclamation No. 9 was in force until the second Proclamation ...

came into operation ... This is an interpretation that is borne by the literal grammatical meaning of the words "replace" and "substituted from the date hereof". To give a different interpretation would lead to an absurdity so glaring as never have been contemplated by the Premier." [Paragraph 32]

The plaintiffs' claim therefore succeeded.

NGXAMANI V ROAD ACCIDENT FUND [2002] 2 ALL SA 405 (TK)

Plaintiff sued defendant for damages arising from a motor vehicle accident. The issues for trial were separated with the issue of liability to be determined first.

Pakade AJ held:

"The main issue in dispute is whether or not the defendant has rebutted the presumption raised by the res ipsa loquitur, having been common cause that the collision occurred on the insured driver's incorrect side of the road, being the plaintiff's correct side of the road. If not, whether the plaintiff did not contribute to the negligence of the insured driver." [Paragraph 6]

"The plaintiff did not create a good impression of himself as a witness under cross-examination. He contradicted himself in a number of respects. ... But all that is clear from his evidence is that the collision occurred on his correct side of the road. ..." [Paragraphs 9, 11]

"In an action for damages arising out of a motor vehicle collision where the driver of the insured vehicle concedes that the collision had occurred on his incorrect side of the road, an inference, and not a presumption of negligence arises. The onus still rests with the plaintiff to prove negligence on the part of the defendant's driver. There is no onus on the defendant to show that he had not been negligent. However, once the plaintiff has proved an occurrence giving rise to an inference of negligence on the part of the defendant's driver, the latter has to give an explanation which is sufficient to dispel the prima facie proof of negligence, ... It is on this basis that I refused an application for absolution from the instance at the close of the plaintiff's case. I wanted to give the defendant an opportunity to dispel the prima facie proof of negligence that had been created by his concession that the collision occurred on his incorrect side of the road. ... " [Paragraph 12]

"I now deal with the explanation of the defendant's driver in the light of his concession that the collision occurred on his incorrect side of the road. The inquiry at this stage is whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by the negligence attributable to the defendant's driver. In that enquiry the explanation tendered by the defendant's driver will be tested by considerations of probability and credibility." [Paragraph 16]

"From what the defendant's driver has stated in his evidence it becomes clear that he is relying on a sudden emergency." [Paragraph 18]

"When considering the position of a driver who is faced with a sudden emergency, the proper test is that of reasonableness. The test is that of a reasonable driver who is faced with a sudden emergency. The reasonable driver is expected to be alert and to have a certain nerve. He should know that in modern traffic and road conditions the unexpected may happen at any time and that it may not always be plain sailing. Difficult situations arise suddenly and the reasonable driver must be able to cope with such situations. ..." [Paragraph 19]

"However, a party can only rely on the doctrine of sudden emergency if and when the sudden emergency is not of his own doing. If his actions were the reason or cause of the sudden emergency he can, for that reason, be found to be negligent. ..." [Paragraph 20]

"... I have ... no doubt that the insured driver drove without exercising a proper lookout on a road he knew to be transversed by stray animals. I find that his failure to see the beast beyond 5 paces from him created a sudden emergency of his own making. Had he exercised a proper lookout he would have seen the beast timeously to allow himself time to avoid colliding with it. ..." [Paragraph 21]

"A motorist travelling in wet and slippery conditions has a duty to take special care to regulate his speed and to drive in such a way as not to involve himself in a skid. Where the driver has by his actions, caused a skid which by the exercise of care and skill, he could and should have avoided it and such skid resulted in the collision in his incorrect side of the road, an inference of negligence has to be drawn. The speed in which the insured driver was travelling also contributed to the accident. ..." [Paragraph 22]

Pakade AJ then rejected a defence of contributory negligence:

"... A person who finds himself in a position of imminent danger cannot be guilty of negligence merely because on that emergency he had not acted in the best way to avoid that danger if and when the sudden emergency in which he finds himself is not of his own doing. ... The emergency in which the plaintiff found himself was not of his making. It was caused by the insured driver's failure to exercise a proper lookout, speed and sudden application of brakes." [Paragraph 24]

Judgment on the merits was thus given in favour of the plaintiff.

SELECTED JUDGMENTS:

MCOYI AND OTHERS V INKATHA FREEDOM PARTY; MAGWAZA-MSIBI V INKATHA FREEDOM PARTY 2011 (4) SA 298 (KZP)

Case heard 12 November 2010, Judgment delivered 17 March 2011

First to third applicants in the first application had been expelled as members by the National Council of the respondent, for alleged divisive behaviour. Applicants challenged the lawfulness of the expulsion on the grounds that National Executive Committee and National Council did not lawfully exist, and its office bearers were not validly in office at the time of the expulsions. The applicant in the second application raised similar arguments to prevent disciplinary proceedings against her should not go ahead.

Patel DJP held:

"A court should be reluctant to interfere in what are essentially political questions, and therefore it is not necessary to go into details of the events leading to the first, second and third applicants' expulsion from the IFP; suffice to say that from the papers it is clear that there is an internecine conflict going on in the IFP. ... The struggle between the factions is for mastery of the soul and membership of the IFP, and hence the pejorative terms used by one to describe the other. I do not want to dwell on these tendentious appellations by the one of the other, or on the obloquy hurled by the one side onto the other, as manifest from the various annexures ... since such issues should best play itself out in the political arena. I shall, therefore, through the process of interpretation determine the proper meaning of the relevant clauses of the IFP's constitution." [Paragraph 23]

"It must be mentioned at the outset that this court finds it strange that the expelled applicants did not have a problem with the legitimacy of the National Council prior to their disciplinary hearings, but only chose to attack the legitimacy of the council after their expulsions. ..." [Paragraph 24]

Patel DJP then analysed clause 4.1 of the respondent's constitution, which provided that the National Council of the Party "shall consist" of 100 members, and noted that it was common cause that at the time of the expulsions the National Council did not consist of 100 members. Patel DJP noted that the parties had advanced different interpretations of the word "shall", and continued:

"In this case it is clear that there would be chaos if one had to interpret clause 4.1 as being peremptory. The IFP and its members would be thrown into a state of disarray, and this would not be a wise thing to do. The better option might be for the IFP to amend its constitution, so as to provide clarity in this regard. Presently there is no provision made in the constitution for non-compliance with clause 4.1." [Paragraph 27]

"The matter also proceeded on the basis that the term of office of the National Council expired in October 2009. Clause 3.6 makes reference to a 'reasonable period', and once again this court must decide on the interpretation ... 'Reasonable' is a relative term, and what is reasonable depends upon the circumstances of each case. Even though the term of office of the National Council and its office bearers expired in 2009, the IFP did not have much of a choice, other than to retain the office bearers that it had in place at that time. If it did not do so then more turmoil would have resulted

within the party. It could not have been the intention of the drafters ... that, upon the expiry of three years, the National Council would cease to exist. Having regard to the circumstances of this case, it must be found that the National Council and its office bearers have been preserved by clause 3.6, since the relevant committee/officers would have to have their necessary powers until the next election, in order that relevant decisions relating to the governance of the IFP could be taken on a daily basis." [Paragraph 28]

"... [T]his court finds that a term entitling the applicants to demand an elective conference cannot be implied in the IFP's constitution. ... At the end of the day, the applicants voluntarily bound themselves to the party and its constitution." [Paragraph 38]

Regarding the second application, Patel DJP held:

"... Magwaza-Msibi accepted the interpretation accorded by the officials of the IFP, until she was charged, and this application was brought. It may well be that she sought legal opinion, and realised that her interpretation was incorrect and that there was a lacuna in the constitution. This court cannot for that reason rewrite the constitution for the IFP. Clause 10.9 gives the National Council discretion to pass a resolution, including the resolution passed charging Magwaza-Msibi. Such a resolution must be passed by a two-thirds majority of members of the National Council present. This requirement provided the first three applicants in the first application, and will provide Magwaza-Msibi, with the necessary protection, should she be tried against any particular bias or one-sided approach to her hearing. If Magwaza-Msibi would have this court believe that, until she sat in the hearing of the first three applicants in the first application, the National Council was properly constituted and unbiased, I find it difficult to understand how the same members of the National Council would become biased when her matter is to be heard. Even if her complaint is premised on bias of some members ... then she can ask for their recusal. ... Her approach to court is, in my view, premature." [Paragraph 44]

Both applications were thus dismissed.

SINGH V RAMPERSAD & OTHERS 2007 (3) SA 445 (DCLD)

Case heard 22-25 May 2006, Judgement delivered 22 January 2007

The plaintiff and first defendant had been married according to Hindu religious tradition and the parties had agreed not to register the marriage in terms of the Marriage Act. It was common cause that their marriage had broken down. The plaintiff sought, *inter alia* , to have the marriage declared legal in terms of the Constitution, the amended Marriage Act, and the Divorce Act, so that religious marriages would in future be recognised under these two statutes. The plaintiff in addition sought a decree of divorce. She claimed that the non-recognition of Hindu marriages violated her constitutional rights to equality and dignity. Patel J held:

"It is common cause that in India, the Hindu Marriage Act 25 of 1955 was promulgated to ameliorate the position of spouses married according to Hindu customary law." [Paragraph 9]

"Legislatures all over the world require registration of a marriage for the purpose of proof thereof and to afford parties an opportunity to select the proprietary regime that will attend their marriage." [Paragraph 11]

"In South Africa the Marriage Act similarly accommodates the registration of marriages either after the celebration of a Hindu marriage according to rites and rituals chosen by the parties…." [Paragraph 11]

"Our Courts have, since the advent of the Constitution, consistently come to the aid of spouses and their children if the marriage was one under the common law if there was a need, especially if unfairness would result by the application of the strict letter of the law." [Paragraph 38]

" Accordingly in my view the argument that the plaintiff is unfairly discriminated against because the Legislature through the promulgation of the RCMA has given recognition to customary marriages entered into by people of African descent and has thereby favoured them has no validity." [Paragraph 49]

"In any event if I were to rule in favour of the plaintiff and adopt the arguments constrained by her and grant her divorce I would be interfering in theological issues which may cause offence to members of the Hindu community. Our Courts have tried assiduously not to get entangled in doctrinal issues and it can be safely accepted that 'the doctrine of non-entanglement' is part of our law." [Paragraph 50]

"Accordingly on the basis of this doctrine it is not for the Court to pronounce the parties as being divorced if they elected to practise a faith and took vows which did not countenance divorce."[Paragraph 51]

"The Marriage Act in my view provides a compromise which permits parties to marry according to the tenets of their religion and obtain secular recognition through the process of registration." [Paragraph 52]

"The plaintiff failed to advance any cogent or acceptable evidence establishing that the non-recognition of the marriage as a valid legal marriage offended her dignity." [Paragraph 53]

S V BALKWELL & ANOTHER 2006 (1) SACR 60
Case heard 2 June 2005, Judgement delivered 18 October 2005

Both the appellants were convicted of culpable homicide. They were each sentenced to seven years' imprisonment. The magistrate found corroboration of a witness' evidence in an affidavit deposed to by the first appellant. It was argued on behalf of the first appellant that this constituted a misdirection since he had not been warned by the magistrate hearing the bail application that the affidavit would feature in his trial. Patel J held (Radebe AJ concurring):

"In my view, there is no merit in this argument, since the State did not introduce the affidavit in terms of s 60(11B) *(c)* of the Criminal Procedure Act ... It was freely and voluntarily injected into the proceedings in terms of s 220 of the Act. In any event, the appellant chose not to testify in his bail

application but elected to file an affidavit. At the time the admissions were made the first appellant was legally represented." [Paragraph 41]

"The affidavit, in my view, is the proverbial nail in the coffin for both the appellants, since, although the contents of the affidavit are not directly admissible against the second appellant, the contents thereof provide corroboration of Jinenka's evidence that a serious assault was perpetrated on the deceased in the parking lot by both the appellants." [Paragraph 43]

The appeals of the appellants both against their convictions and sentences were dismissed. The judgment was upheld by the Supreme Court of Appeal.

MEC: DEPARTMENT OF FINANCE, ECONOMIC AFFAIRS, ECONOMIC AFFAIRS & OTHERS V MAHUMANI (2005) 2 ALL SA 479 (SCA)

Case heard 8 November 2004, Judgement was delivered on 30 November 2004.

The appellant, the MEC for Finance, Economic Affairs and Tourism, appealed against the finding by that court that the respondent was entitled to be legally represented at a disciplinary hearing. The presiding officer's decision was reviewed and set aside by the court *a quo*. It held that the respondent was entitled to be legally represented at the disciplinary hearing. Patel AJA held (Streicher, Navsa JJA, Jafta and Ponnan AJJA concurring):

"I agree with Wallis AJ [in the Labour Court decision of *Mosena and others v The Premier: Northern Province and others*] that clause 2.8 is an injunction as to the general approach that should be followed. I furthermore agree that clause 7.3(e) is a fundamentally important provision of the agreement and that it should not lightly be departed from. But, there may be circumstances in which it would be unfair not to allow legal representation." [Paragraph 10]

"In terms of our common law a person does not have an absolute right to be legally represented before tribunals other than courts of law. ... However, it does require disciplinary proceedings to be fair and if in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion". [Paragraph 11]

"The parties, who agreed on the Code, were intent on devising a fair procedure ... and it is reasonable to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation. In these circumstances it is likely that they would have intended the presiding officer to have a discretion to allow legal representation in circumstances in

which it would be unfair not to do so. I can find no indication in the Code to the contrary. There is, therefore, no justification for interpreting "appropriate circumstances" in clause 2.8 so as not to include circumstances, which would render it unfair not to allow legal representation at a disciplinary enquiry." [Paragraph 12]

"The presiding officer erred in holding that he had no discretion to allow such a departure. The court *a quo*, therefore, correctly reviewed his decision and set it aside." [Paragraph 13]

NDPP V MOHUNRAM & OTHERS (2005) JOL 13223 (N)
Case heard 5 May 2003, Judgement delivered on 2 February 2004

The Director of Public Prosecutions sought the forfeiture of immovable property in terms of section 48(1) of the Prevention of Organised Crime Act (POCA). Patel J held:

"When the first respondent acquired the shares in the second respondent it was clear and is common cause that he did so with the intention of conducting a legitimate operation. It is also common cause that the whole building was not used as a gambling house ... The entire building cannot, accordingly, be deemed to be an instrumentality of the offence. Different considerations may prevail had the entire property been purchased for the purpose of running an illegal operation and illegal operations were indeed conducted on the entire property."

"In this case, it was the gambling machines, not the entire building, which was used as a means or instruments in the commission of the offence." [Page 8]

"In the *Seevnarayan* case ... Griesel J sounded a word of caution against the wide interpretation of "instrumentality of an offence" as it could result in unconstitutionality of the very provision. I do not propose to deal with the constitutional aspects since the same were not argued before me, save to quote Professor AJ van der Walt: "In view of the characteristics of the Bill of Rights in the 1996 South African Constitution (and particularly the property clause in s 25 and the general limitation provisions in s 36), the courts should consider the possibility that an excessively unfair or disproportionate forfeiture might have to be treated as a material expropriation of private property rather than a legitimate deprivation, ...".

"This caution is particularly relevant in this case where the first respondent has already paid a heavy fine and had his machines confiscated." [Page 9]

The court referred to United States case law which was presented by the applicant.

"I am accordingly not satisfied that the immovable property is an instrumentality of an offence as envisaged by the Legislature and the present application must accordingly fail." [Page 10]

On appeal, the SCA held that the use of premises was of the essence of the crimes defined in the Gambling Act. It followed, therefore, that the particular premises, having been intimately concerned

in the commission of the crimes, were an instrumentality thereof: **National Director of Public Prosecutions v Mohunram 2006 (1) SACR 554 (SCA).** On appeal to the Constitutional Court, a majority found that the forfeiture was disproportionate (although there was agreement that the property was an 'instrumentality of the offence' in terms of POCA): **Mohunram v National Director of Public Prosecutions 2007 (4) SA 222 (CC)**.

KRITZINGER V NEWCASTLE LOCAL TRANSITIONAL COUNCIL AND OTHERS 2000 1 (SA) 345 (N)

Case heard 19 September 1998, Judgement delivered 28 June 1999

The applicant sought an order declaring that his employment with the first respondent had become redundant due to restructuring. The applicant did not rely on any provisions of the Constitution nor did he claim that any of his constitutional rights were violated. The respondent claimed *in limine* that the court lacked jurisdiction to adjudicate the matter as it was the *domaine reserve* of the Labour Court. Patel AJ held:

"It is trite law that the applicant bears the *onus* of establishing that this Court has jurisdiction. To that end the applicant must set out sufficient facts in his founding affidavit to justify a conclusion that this Court indeed has jurisdiction"

"I might in passing mention that the object of the Labour Relations Act was to create mechanisms whereby labour disputes could be resolved expeditiously by people who were knowledgeable in the field of labour law. One of the mechanisms so established is the Labour Court, which has the same status as the High Court in respect of matters falling within its jurisdiction."

"The applicant has not relied on any provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and neither does he in his founding affidavit nor in reply allege a violation of any constitutional rights. Mr *Muller* ... submits that, although there is no specific reference in the affidavits to the violation of any fundamental rights of the applicant, the breach nevertheless of the applicant's constitutional right of having been properly heard or consulted is implied."

"Mr *Muller's* submission, accordingly, verges on being disingenuous as nowhere in the papers is there a hint of the same."

"Accordingly, this Court is of the view that an implied violation of a constitutional right appears to be an afterthought."

"It is not apparent from the papers nor was it argued by either party that a residual unfair labour practice has been perpetrated so as to visit the Labour Court with exclusive jurisdiction."

"Can the mere reliance by the applicant on the industrial council agreement and the circular for a *declarator* of redundancy oust the jurisdiction of this Court? In terms of s 19(1) *(a)* of the Supreme Court Act 59 of 1959, a Provincial or Local Division of the High Court has jurisdiction."

"In terms of this provision the Court certainly has jurisdiction over this matter. Further, it is a well-established rule of statutory interpretation that there is a strong presumption against the Legislature

ousting the jurisdiction of a Court of law and, further, a clear legislative provision is required to displace this presumption."

SELECTED ARTICLES

Race and Labour Law, in *Race and the Law in South Africa* by A Rycroft pages 163-173

"More than any other branch of legal studies labour law is regarded as more accessible to a radical analysis because labour jurisprudence evidences in a very transparent way power struggles in the workplace . This is particularly so in South Africa where the state has used labour legislation in a quasi-instrumental way to achieve its political design dividing the working class along racial lines, thereby inhibiting a class consciousness and identity from emerging." [Page 163]

"At the same time racial determinants have cannot be underplayed since South African black people irrespective of their class positions have been systematically denied equal opportunity. South African labour history is a sad tapestry through which the threads of racism and class exploitation interweave to create a divided response to capital and state intervention in labour relations." [Page 163]

"White workers were rudely surprised to find that capital was colour blind when it came to profit maximization and this was particularly so in recessionary times when it was willing to reallocate job categories to poorly paid blacks. It was this fact which precipitated the first strike in 1907 by white miners on the goldfields which in turn led to the passage of the Industrial Disputes Prevention Act 1909. The Act excluded blacks from participating in the collective bargaining machinery. The 1909 Act had important underlying ramifications for future industrial relations. The primary weapon of the industrial worker, the strike, was severely restrained." [Page 164]

"Matters came to a head at the end of 1921 when, because of losses caused by a drop in the gold price, mining capital once again replaced semi-skilled white miners with blacks. This led to the Rand Revolt and passage of the Industrial Conciliation Act of 1924." [Page 165]

"The mechanics of dispute settlement was a departure from the previous system. Industry based Industrial Councils were set up with employer and employee representation. Black workers and a section of Indians were excluded from the ambit of the Act by defining an employee under the Act to include all workers except 'pass-bearing Africans' and 'contract Indians'." (Page 165]

The Industrial Conciliation Act 1924, The Mines and Works Act of 1911, The Apprentice Act of 1922 and the Wage Act of 1925 were all utilized to advance the cause of the white worker at the expense of his black counterpart." [Page 165]

"Black workers were becoming unionized and the unions started to flex their muscles in the 1973 Durban strikes and the strikes which were to follow. The state's reaction to these pressures was to hit out at the trade union movement with the security legislation at its disposal, at the same time being forced to develop a new policy in respect of blacks." [Page 166]

"The Wieham aim of encouraging black worker participation in the official bargaining and dispute resolution system has met with qualified success. Industrial unrest has not been reduced and this can be attributed to a great extent to the deficiency in the institutions of collective bargaining." [Page 167]

"It is therefore not surprising that a separate system has developed virtually spontaneously, namely, plant- and – company level bargaining in terms of recognition agreements. Black trade unions have in the main resorted to recognition agreements to negotiate with management." [Page 168]

"On the positive side the industrial court, using the concept of unfair labour practice and the interim relief status quo order, has created spaces which can be utilised in the short term to redress the collective bargaining imbalance." [Page 168]

Industrial workers enjoy significant and equal protection in terms of the other protective legislation which exists today. However two very important sectors of the labour force who in the main are black have been sadly neglected, namely domestic and farm workers." [Page 168]

"With inadequate financial resources a domestic servant has very little chance of challenging unilateral repudiation of the contract by the employer. Common law requires a month's notice or payment in lieu of notice, no minimum wage provisions exist and domestic servants as a class are exposed to extreme exploitation." [Page 169]

"No discussion on race and labour law is complete without reference to the products of apartheid. The so-called 'independent TBVC states and the homelands have either modified or retained the pre-Weihahn law regime which existed prior to their independence." [Page 170]

"It is a sad indictment of homelands that independence was achieved at the expense of their workers." [Page 171]

"South African labour legislation is rapidly moving away from racial discrimination….We are entering the phase where increasingly the focus will be adapting legislation to harness the labour management conflict." [Page 171]

SELECTED JUDGMENTS

S V MKHIZE 2011 (1) SACR 554 (KZD)

This case involved the admissibility of a confession made in a criminal trial. The accused argued that the confession was inadmissible as he had been assaulted and threatened to make a statement.

Govindasamy AJ held:

"... It is a trite principle of our law that the onus is on the State to prove beyond a reasonable doubt that the confession was made freely and voluntarily and without any undue influence by the accused whilst in his sound and sober senses." [Paragraph 33]

Govindasamy AJ considered the provisions of Section 35(1) of the Constitution, and Section 50(1) of the Criminal Procedure Act (relating to the time for which an accused may be detained after arrest), and continued:

"... Section 50 of the CPA was designed to discourage police officers from secretly and irregularly arresting and detaining an accused. ...Section 39(3) of the CPA provides for lawful detention during the period between lawful arrest and the first court appearance, but does not legalise the accused's detention until accused is eventually charged." [Paragraphs 35-38]

"... The most disturbing aspect was that the accused was not brought to court within 48 hours of his arrest on ... or within 48 hours from ... when his warning statement was taken. ..." [Paragraphs 39-40]

"The enormity of his unlawful detention was compounded by obtaining a confession from him on 5 November 2009, when he should have made his first appearance in court. This does not mean that the accused should not have been brought to court within 48 hours after his arrest on the 27 August 2009. ..." [Paragraph 42]

"The evidence certainly does not show in any way that the exceptions to the 48 hour time limit are applicable to this case. The accused's right in terms of Section 35(1)(d) was violated, plain and simple. ... The fact that he was only brought to court on 6 November 2009, was a serious breach of his Constitutional right and "made a mockery of his fundamental right" using the words of Bosielo AJP (as he was) in State v Maasdorp 2008(2) SACR 296 (NC). ... [citation to the academic work of Steytler, Constitutional Criminal Procedure] ... In State versus Shabalala and Another 1996(1) SACR 627 (A) Nedstadt JA had to consider a similar question, that is whether the confessions were admissible inspite of the unlawful detention of the appellants. Although the Appellant Division held that the illegality of their arrest and subsequent detention in no way influenced the appellants to confess and therefore admitted the confessions, the case can be distinguished on the basis that there was no constitutional challenge ... which was unfortunate given our country's changed circumstances in our new found constitutional democracy. It is important to note that in this case the contention that the evidence was illegally obtained was not persisted in by the Appellant. The only remaining question is whether the confession should be admitted against the accused. It was during his unlawful detention that the confession was obtained. ... Can it be said that the confession was properly and legally taken during the accused's unlawful detention? I do not think so." [Paragraphs 43-48]

"Since 27 April 1994 the constitutional rights and in particular s 35 (1) (d) has placed an imperative on all criminal trials to be conducted in accordance with the "notions of basic fairness and justice" as was

observed by Van Reenen J in State v Coetzee en Andere 1995(2) SACR 742 (C) ... The evidence obtained in violation of the accused's fundamental right is inadmissible. See S v Viljoen 2003(4) BCLR 450 (T) ... I am in agreement with the learned Judge Patel in Viljoen's case that there is no discretion afforded to a judicial officer when he/she is confronted with a situation when evidence is obtained unconstitutionally. To admit such evidence, contaminated as it is, will be a violation of the accused's rights and above all will be prejudicial to the administration of justice. ... In S v Burger & Others 2010(2) SACR 1 (SCA) … Navsa JA said: "South Africa is not a police State. Section 35 of the Constitution is emphatic about the rights of arrested, detained and accused persons. These rights are not to be flouted. The police's methods … reflect an attitude reminiscent of the darker days of South Africa's history and have no place in our present democratic order. It should be dealt with by the relevant authorities"." [Paragraph 49-52]

"Exhibit "C" specifically calls for information and the steps taken to secure the services of a magistrate. It is not sufficient to record the words of the accused "after he spoke to the person he wanted to make a statement to an officer". Captain Eva and Inspector Shandu failed the accused. Captain Eva's testimony that the accused waived his right to have his statement recorded by a magistrate does sound suspicious and contradicts the evidence of Inspector Shandu in this regard. The accused's version in that regard is reasonably possibly true and not that of Captain Eva." [Paragraph 61]

"It is against this backdrop that one has to consider the accused's strong claims that he was assaulted during the interview when the confession was obtained. Why should the accused be disbelieved and Inspector Shandu and the other police officer's be heard to be telling the truth, when in the first place they violated the accused's right not to be unlawfully detained." [Paragraph 63]

"The accused's evidence was satisfactory and cannot be faulted in any way. His evidence cannot be rejected as not being reasonably possibly true. It was improper, in the first place, to take his confession, when he should have at that time been in the court where the element of suspicion would have been removed altogether. It was in this later atmosphere that the accused would have been in better hands and to have his rights explained to him in open court by an independent judicial officer." [Paragraph 72]

"The following passage in State v Maasdorp 2008 (2) SACR 296 (NC) … is apt: "Given the historical evolution of confessions in this country and the countless reported cases of incidents of abuse of their power and authority by the police, one expects that where there is some indication of improper conduct which could have had an undue influence on the accused to make a confession, …….. ("that confession should be declared inadmissible"). Self-evidently, such conduct is congruent with the basic tenets of fairness to an accused person, which underpins the right of every accused person …….. not to be compelled to make any confession or admission that can be used in evidence against such person. This is particularly important when viewed against our grim and horrible past history of torture and intimidation of accused persons whilst in police custody." Taking all the factors cumulatively I am not satisfied that the confession was made freely and voluntarily by the accused and without any undue influence. The prosecution has failed to prove beyond a reasonable doubt that a confession was made in terms of the requirements of Section 217(1) of the Criminal Procedure Act. The confession is therefore inadmissible. That is not the end of the matter. The court has to assess the evidence in relation to each count in this case, in order to determine the guilt or otherwise of the accused. ..." [Paragraph 74-77]

"… [T]he State case in respect of both counts of murder is based almost entirely on the confession … Since the confession is inadmissible, the State case in respect of both counts is rather weak. No reasonable court can and may convict an accused on such flimsy evidence. ..." [Paragraph 88]

SHANGE V MEC FOR EDUCATION, KWAZULU – NATAL (15860/2008) [2011] ZAKZDHC 28 (17 JUNE 2011)

Case heard 7 March 2011, Judgment delivered 17 June 2011

This was an application for condonation in terms of Section 3 (4) of the Institution of Legal Proceedings against certain Organs of State Act, for non-compliance with Section 3 (2) (a) of the Act.

Govindasamy AJ held:

"The need for procedural requirements for litigating against organs of state has been sanctioned by our courts and held to be constitutional. [citation to the Constitutional Court judgment in Mohlomi v Minister of Defence] …" [Paragraph 11]

"Thus ordinarily prescription would have been delayed for a period of a year after the plaintiff had become a major. The incident giving rise to the Applicant's claim against the Respondent occurred in June 2003 when the Applicant was 15 years old and a minor. More importantly, at that time, the Applicant was told that the incident was a mistake. This is what he understood it to be until early in January 2006 when, following questions from a friend of his mother's about the eye patch he was wearing, it was suggested to him that the Deputy Principal's conduct was wrongful and that he should lay a complaint with the Public Protector, which he did, on 19 January 2006. He consulted with his Attorney Ms Smyth on 26 January 2006. He knew at whose hand the incident was committed but only after receiving advice in January 2006 did the Applicant appreciate that the Deputy Principal had acted wrongfully. ... It was this appreciation in January 2006 that would have set prescription in motion but for the fact that the Applicant was 18 years old at the time. He was therefore a minor against whom prescription did not run ... The Applicant who was a minor at the time when the envisaged claim arose, prior to the commencement of the Children's Act and in terms of the Prescription Act, would have had a year after he turned 21 to institute the envisaged action, ie. by 26 August 2009. On 1 July 2007, however, with the commencement of section 17 of the Children's Act, which reduced the age of majority to 18 years, and in terms of the Prescription Act the plaintiff had one year from 1 July 2007 to institute his envisaged action. i.e by 30 June 2008." [Paragraphs 18-21]

"When applying the Children's Act, it is clear that the rights which a child has in terms thereof, supplement the rights which a child has in terms of the Bill of Rights and all organs of state in any level of government are obliged to respect, protect and promote the rights of Children contained in the Children's Act. In terms of the Constitution … the rights of children are of paramount importance. The Applicant was a child at the time his cause of action arose and accordingly the Constitution applied to him. In my view the proper approach to this matter is to consider the effect of the repealed law in terms of the common law principles of the interpretation or the relevant provisions of section 12(2) of the Interpretation Act … which reads as follows: "Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-(a) …; (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; (d) … (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."" [Paragraph 23-24]

"On 1 July 2007 the Children's Act … came into operation and changed the age of majority from 21 to 18 years. The Applicant was then 19 years and 10 months old and therefore already a major in terms of that statute. On that day the statutory impediment ceased to exist. It followed, therefore, that if taken literally, the effect of this change in the age of majority would be to impinge upon the applicant's accrued rights. That is because the effect of the reduction of the age of majority read with Section 13 of the Prescription Act was that he now had to institute his claim within one year of his achieving majority ie. 18 years or, at very best for him, within one year of the commencement of the Children's Act. Although the effect of the amending Act is not procedural in nature, it impacts negatively upon the applicants substantive right to a claim for damages by impairing and limiting its enforcement. The interpretation given to Section 17 of the Children's Act, that is, to allow the impediment and the right to Applicant's claim to be exercised sooner than age 21, has the effect of abolishing his right, which is protected in terms of Section 6 read with section 28 (2) of the Constitution. … The legislature must have been aware that when the age of the majority changed from 21 years to 18 years under the Children's Act it did not intend to affect the Applicants right to a claim for damages against the Respondent under the Age of Majority Act. I am of the view that once that date is established ie. 29 August 2009, it remains immutable and any change in Applicants status, read with the Prescription Act, would not affect that date. This construction does not offend the plain wording of Sections 6 and 8 of the Children's Act read with Section 28 (2) of the Constitution. Any other interpretation in terms whereof the Applicant would be deprived of his acquired right or accrued right would lead to an absurdity. Moreover it may be said to be irrational and discriminatory of the Applicant. As between the general run of plaintiffs and Applicant whose case Section 17 of the Children's Act affected, to his disadvantage, there is inequality, which was not intended by the legislature. It is surely not in the interests of justice or fairness and equity that Applicant's right may be taken away by the stroke of a pen. Imagine waking up on 1 July 2007 to find that not only your status has changed but also certain rights which you were entitled to or which accrued to you no longer exist. The barring of Applicant's common law claim because overnight he became a major is untenable. This unjustifiable consequence could not have been intended by the legislature, as it imposes unreasonable hardship. This interpretation cannot be sustained." [Paragraph 26-29]

"Nothing in the Children's Act indicates that it will operate retrospectively. … [T]he amending statute will not always be interpreted as having retrospective effect. It will depend on the impact of Applicant's substantive rights. Accordingly, the Children's Act must be interpreted in a manner which promotes the spirit purport and objects of the Bill of Rights as contained in the Constitution …" [Paragraph 31]

"As indicated, Section 28 (2) of the Constitution protects the rights of children. The Children's Act must therefore be read in such a manner as to not interfere with any accrued rights of a child. Accordingly on a proper interpretation of Section 17 of the Children's Act read with the relevant provisions of the Prescription Act, a child whose cause of action arose before the commencement of Section 17 of the Children's Act is still entitled to the same period of time in which to institute his or her claim for damages as he or she would have had, had the age of majority not been changed." [Paragraph 32]

"Under the circumstances I am of the view that a proper case for condonation has been made out. The Applicant is entitled to the benefits of constitutional dispensation that promotes rather than inhibits access to courts of law" [Paragraph 40]

SELECTED JUDGMENTS

THE STATE V ELSTON MATTHEWS AND GLADWIN GREEFF, UNREPORTED JUDGMENT, HIGH COURT REVIEW CASE NO: 83/10 (17 DECEMBER 2010; NORTHERN CAPE HIGH COURT)

This case was a special review in terms of section 304A of the Criminal Procedure Act. The accused had been charged with robbery with aggravating circumstances. It emerged that there had been confusion as to how the accused had pleaded, and that there was an issue regarding the jurisdiction of the Magistrate's Court to hear the case. It appeared that the accused had been convicted in the District Court, and the matter was then referred to the Regional Court for sentencing, at which point the accused claimed that they had intended to plead guilty to "common robbery" rather than robbery with aggravating circumstances. The accused also claimed that they had not been warned of their rights, and were not aware of the nature and implications of the offence charged.

Henriques AJ held:

"... [T]he magistrate indicates that on the day the accused were to be sentenced she was advised by their attorney that they had intended to plead guilty to "common robbery". ... [A]n application was made ... for the matter to be dealt with in terms of section 304A. Faced with such application, and in light of the fact that she was of the view that the proceedings were not in accordance with justice, she ordered that the proceedings be stopped and referred the matter in terms of section 304A." [Paragraph 3]

"It is not apparent from the record that the magistrate advised the accused of the seriousness of the charges and that the provisions of the Minimum Sentencing Act applied. ..." [Paragraph 7]

Henriques AJ considered the provisions of section 304A and High Court judgments interpreting the section, and continued:

"The question to be answered is – was there an irregularity in the proceedings and is it of such a nature that it requires the proceedings to be set aside...? It is trite that in considering a review one must determine whether the proceedings were in accordance with justice. ... [O]ur courts have held that in determining whether proceedings are in accordance with justice one must consider whether or not an accused has had a fair trial as envisaged in section 35(3) of the Constitution." [Paragraph 35]

"What stands to be determined is whether the district court had the necessary jurisdiction to have dealt with the matter? A determination of same requires that the court be satisfied that it has territorial, punitive and substantive jurisdiction. All three must be present." [Paragraph 37]

"... Section 92 of [the Magistrate's Court Act] sets out the punitive jurisdiction ... and provides that a district court cannot impose a term of imprisonment exceeding three years and a fine exceeding R 60 000.00. In terms of section 51 of the Criminal Law Amendment Act ... schedule 2, part 2 a sentence of 15 years is prescribed for a first offender, convicted of robbery with aggravating circumstances, unless the court finds that substantial and compelling circumstances exist. It is thus clear that the district court did not have the necessary punitive jurisdiction..." [Paragraph 38]

"It appears to be a common occurrence in the lower courts that when legal representatives are drafting plea explanations ... there is a tendency to merely repeat the allegations in the charge sheet verbatim. This is not acceptable. The section requires an accused not only to admit each of the allegations

contained in the charge sheet, but also to set out the facts which he admits to enable a court to determine whether or not the plea is indeed one in terms of sec 112(2)." [Paragraph 44]

"I am of the view that the proceedings were grossly irregular and given the nature of the irregularities an order setting aside the conviction is warranted even though the accused were legally represented throughout the trial." [Paragraph 49]

(Lacock J concurred).

BRC DIAMONDCORE LTD V SYBRAND ALBERTUS TITINGER N.O AND ANOTHER, UNREPORTED JUDGMENT, CASE NR: 775/2010 (NORTHERN CAPE HIGH COURT)

Case heard 3 December 2010, Judgement delivered 17 December 2010

This was an interlocutory application to compel compliance with a rule 35(12) notice and an application to furnish security for costs in terms of rule 47. In the main application, respondents sought relief in their capacity as trustees of a trust to assist ex shareholders of Diamond Core Resources, a company in liquidation. It was alleged that there was a case to investigate BRC's title to shares sold to Ansafon (Pty) Ltd as being tainted by fraud, Ansafon having purchased shares in Diamond Core from BRC. After the interlocutory notices had been filed, the liquidation of Diamond Core was set aside.

Henriques AJ first considered the rule 35(12) application, and held:

"... [A]ny document annexed to a pleading or an affidavit forms as much a part of the pleading or affidavit as the contents of the pleading or the affidavit itself. ... Having regard to the authorities, a party's entitlement to a document arises as soon as reference is made in the pleading or affidavit. ... [O]ur courts have held that it is implied in the rule that a party cannot be called upon to draft its own pleadings or affidavits until it has been given an opportunity to inspect or transcribe a document referred to in a pleading or an affidavit." [Paragraphs 12 - 13]

Henriques AJ then considered an argument that the provisions of rule 30A had not been complied with prior to the application being instituted. [The rule provides that where a party fails to comply with the rules or a request or notice made in terms of the rules, the other party may notify the defaulting party that the intend applying for an order to compel compliance within 10 days].

"On my reading of rule 35(12), it provides a negative sanction in that a party who does not comply with the rule 35(12) notice is prevented from using the document in the proceedings. Does it provide a specific remedy? The answer ... must be in the negative and would thus mean that the provisions of rule 30A apply. ..." [Paragraphs 16 – 17]

"...I agree that the provisions of rule 35(12) do not provide for a specific remedy but rather have a negative sanction. In the result, therefore the provisions of rule 30A ought to have been complied with before this application was launched and the point in limine must be upheld." [Paragraph 20]

Henriques AJ then turned to deal with the application for security:

"The test to be applied as to whether or not an action is unsustainable is less stringent when one is considering an application for security for costs. In terms of ... **Fitchet's** case other considerations also apply like a party's ability to pay. ..." [Paragraph 33]

"In exercising its discretion to award security for costs in terms of section 13 of the Companies Act, our courts have held that there is no reason why the court must order security for costs only in exceptional cases. ..." [Paragraph 35]

"Applying the principles in **Crest** [Enterprises v Barnett and Schlosberg NNO] it appears that it is only if I am satisfied that the trust is litigating in a vexatious, or reckless manner or that the application amounts to an abuse of process that I can order it to furnish security for costs." [Paragraph 41]

"I am satisfied that the court has inherent jurisdiction to regulate its processes and to make an order for security for costs to prevent an abuse of its processes and where a party is engaged in reckless and vexatious conduct." [Paragraph 52]

"It is clear from Crest's case that a trust is not a body corporate. I cannot under circumstances accede to the request to treat it as a corporate identity. Having said that, given the nature of the trust, the purpose for which it was established and who the *dramatis personae* are ... I am of the view that the trustees are litigating in a reckless and vexatious manner and the main application constitutes an abuse of process." [Paragraph 53]

"This is especially so when it is apparent that this court does not have the necessary jurisdiction to set aside the order of the South Gauteng High Court sanctioning the section 311 scheme and where certain of the relief is not competent." [Paragraph 53]

The application to compel compliance with Rule 35(12) was dismissed, but the respondents were ordered to furnish security for costs.

STAMFORD TYRES (AFRICA) (PTY) LTD V TYRE PLUS CC AND OTHERS, UNREPORTED JUDGMENT, CASE NR: 1988/2009 (NORTHERN CAPE HIGH COURT)

Case heard 26 November 2010, Judgment delivered 10 December 2010

This was an application for summary judgment. Plaintiff claimed payment of the sum of R 122 307, 05 against the first and second defendants for goods sold and delivered. Defendants pleaded a compromise.

Henriques AJ held:

"Our courts have consistently held that the defence need not be formulated with the same precision as would be required in the plea. The defence must however, be set out with a sufficient degree of clarity to enable the Court to ascertain whether such defence, if proved at trial, would constitute a good defence to action" [Paragraph 10]

"… [A] Court can grant summary judgment in respect of that part of a claim to which a defendant has no defence and that this extends to a claim of interest and costs." [Paragraph 15]

" ... [S]ummary judgement is not intended to deprive a defendant from having his day in court ..." [Paragraph 16]

Henriques AJ found that first and second defendants had disclosed a *bona fide* defence, and refused summary judgment.

SELECTED JUDGMENTS

37 GILLESPIE STREET, DURBAN (PTY) LTD V THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. 12091/2005 (KWAZULU NATAL HIGH COURT, DURBAN)

Case heard 15 – 19 March and 9 April 2010, Judgment delivered 21 June 2010

Plaintiff sued the first defendant for damages arising from the execution of a preservation order obtained by the first defendant under the Prevention of Organised Crime Act. The preservation order was subsequently set aside by the High Court, a decision confirmed by the Supreme Court of Appeal. It was not in dispute that the seizure was effected in the course of a crime prevention operation in the building, in the course of which certain damage was caused to the building.

Naidoo AJ held:

"It is clear from the provisions of Section 42 of the [Prevention of Organised Crime] Act as well as the preservation order that the curator bonis was the person intended to be vested with the power to take possession and control of the seized property ... It also appears ... that the curator, acting in accordance with the powers conferred on him ... was the most likely person to have requested SAPS to execute the preservation order ... Even though it is very likely (and probably happens in the ordinary course of events) that the curator would have acted with the knowledge and cooperation of the first defendant, the factual position is that, in law, the curator was the person who bore the responsibility for the execution of the preservation order. ..." [Paragraph 15]

"The plaintiff claims that the first defendant's liability for the losses it suffered is grounded, inter alia, in his obtaining an order... to which he was not entitled, rendering the act of obtaining the order wrongful." [Paragraph 16]

"The plaintiff's approach therefore, is that the first defendant should be held liable in law on the basis that two courts had found that he was wrong to believe that the building was an instrumentality of the offence. This, in my view, is incorrect. The correct approach is to examine whether the conduct of the first defendant was wrongful and unreasonable in order to determine whether such conduct attracted delictual liability. In other words it must be determined whether the first defendant instigated the proceedings ... without reasonable and probable cause and with the intention to injure the plaintiff." [Paragraph 17]

Naidoo AJ referred to the Constitutional Court decision in *National Director of Public Prosecutions v Mohamed NO*, and continued:

"... [T]wo things are clear: firstly that the public interest is seriously under threat from organized crime and criminal gang activities generally and, secondly, that the Act provides for and empowers functionaries such as the first defendant and SAPS to act ... to curb such activities in order to protect the public interest. Viewed in light of what has been set out above, and in the total absence of any evidence to the contrary from the plaintiff, I am not persuaded that the first defendant acted without reasonable and probable cause. ... I do not agree ... that the first defendant acted recklessly and/or maliciously in spite of his appreciation of the harm that would be suffered by the plaintiff." [Paragraph 18]

"... In view of the applicable law ... and the evidence which was at the disposal of the plaintiff, it would be expected of the plaintiff to have joined the curator and the police as parties to this action. The plaintiff,

however, specifically sought no relief against the second defendant (the curator) and failed to join the police as a party. The plaintiff furthermore failed to prove that the action of the first defendant was wrongful or ... caused the losses it allegedly suffered. The actions and events ... which the plaintiff alleges caused the loss it suffered, were directly within the purview of the powers and duties of the curator and did not involve the first defendant at all. ..." [Paragraph 21]

The action was dismissed.

GROUP FIVE CONSTRUCTION (PTY) LTD V ROYAL PALM PROPERTY HOLDINGS LTD, UNREPORTED JUDGMENT, CASE NUMBER: 1601/2010 (KWAZULU NATAL HIGH COURT, DURBAN)

Case heard 2 March 2010, Judgment delivered 26 March 2010

The applicant exercised a builder's lien over the affected units. It came to the applicant's attention that some of the lien notices had been removed from some of the affected units and that some of the units were occupied by the respondent or its representatives, without the knowledge or consent of the applicant. The applicant instituted proceedings to restore to the applicants' possession the affected units.

Naidoo AJ held:

"The onus is on the applicant to prove, on a balance of probabilities, the two requirements for the grant of mandament van spoile, namely that he was in possession and that he was in possession and that he was dispossessed forcefully or wrongfully or without his consent. The respondent has not denied that: (i) the applicant is in possession of the keys to the affected units; (ii) the applicant exercised its lien by affixing lien notices thereto; (iii) it removed some of those lien notices; (iv) third parties are occupation of some of those units. In addition it has not shown that the documents put up in support of its allegation that it is in possession of keys to the units as a result of being handed same by the applicant, relate to the units in question or to the period relevant to this application. The respondent also does not allege or state that the applicant gave it the keys to enable it to occupy or control the affected units. The delivering of keys or duplicate keys to the respondent did not result in the applicant losing possession of said units. It was dispossessed when the respondent illicitly removed the lien notices from some of the units and gave access and/or possession thereof to third parties, without the applicant's consent. It is consequently, my view that the applicant has established on a balance of probabilities that it was in possession of those units and was dispossessed of the affected units without its consent. The respondent, conversely, has failed to set out any facts to support its assertion that the keys to the affected units were handed over to it by the applicant." [Paragraph 18]

"... The constant presence of the applicant at the site was not required for him to exercise control/possession thereof. I do not therefore, consider it unreasonable, given the circumstances of the matter, for the applicant to have embarked on the action that it did. I am accordingly of the view that this is a case where it is appropriate for the court to exercise its discretion in the applicant's favour." [Paragraph 20]

"... [S]even of the affected units are occupied by third parties who have not been joined in these proceedings. It is not competent to grant a spoliation order against those parties, especially if they are purchasers who have acquired ownership of those units." [Paragraph 21]

The application was granted.

ANDRIAS LEBELONYANE, GLADWELL NKOSI, BONGANI BEMBE & MFANAFUTHI KHUMALO V S, UNREPORTED JUDGMENT, CASE NUMBER: AR209/07 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 23 April 2009, Judgment delivered September 2009

The appellants were charged with one count of housebreaking with intent to rob, and robbery with aggravated circumstances. All four were found guilty as charged and sentenced to fifteen years' imprisonment each. This was an appeal against the sentences.

Naidoo AJ held:

"It is clear that the learned magistrate's actions in simply disregarding his earlier judgment and proceeding to finalise the matter as he did, amounts to an irregularity. I am also of the view that Section 176 of the Criminal Procedure Act is to be invoked only where, due to mistake, a wrong judgment is delivered, or where the judicial officer wants to clarify a point which was vaguely made in the judgment, or to correct the wording without altering the tenor thereof. That section does not apply to a situation such as this, and it was, therefore not permissible for the learned magistrate to have invoked Section 176. However, I am satisfied that this irregularity also did not taint the evidence in this matter or result in a failure of justice. It was a procedural irregularity which did not deprive the appellants of a fair trial. I am therefore of the view that in spite of the irregularities that have occurred, the interests of justice have not been compromised, nor have any of the appellants suffered any prejudice as a result thereof" [Paragraph 10]

"With regard to sentence, I find that the learned magistrate took into account all the circumstances placed before him in respect of the first and second appellants. I also find that he did not misdirect himself with regard to the application of the facts or the law in arriving at the sentence that he imposed on them. I therefore find it unnecessary for me to interfere with the sentence of fifteen years' imprisonment each imposed on the first and second appellants. In view of my finding in respect of the conviction of the fourth appellant, the sentence of fifteen years' imprisonment would be inappropriate and must be replaced with one that is more appropriate" [Paragraph 15]

The fourth accused's sentence was set aside and substituted with a sentence of three years imprisonment (Steyn J concurred).

ADAM JOHANNES POTGIETER V THE STATE, UNREPORTED JUDGMENT, CASE NO. AR 157/07 (KWAZULU NATAL PROVINCIAL DIVISION)

Case heard 19 May 2009, Judgment delivered 21 May 2009

The accused was charged with theft, unlawful possession of a firearm, and defeating or obstructing the course of justice. He was convicted on all three charges. On appeal, an issue was raised as to which legislation the accused should have been charged under in relation to the charge of unlawful possession of a firearm. It was argued by the appellant that the Firearms Control Act 60 of 2000 was not applicable, since it came into operation in 2004, and the events in question occurred in early 2001. The State argued that the Act's transitional provisions allowed the appellant to be charged under the Act.

Naidoo AJ held:

"... It is clear in this matter that although the offences were committed in 2001, which was prior to the coming into operation of the later Act, the appellant only pleaded to the charges ... in July 2006, some two years after [the] Act ... came into operation. Section 8(4)(a) ... was clearly intended to have retrospective effect and rendered the provisions of Act 60 of 2000 applicable ... While it would have been preferable for the learned magistrate to have dealt with this aspect and made such a finding, I am of the view that he was correct to have allowed the matter to proceed in terms of the later Act. More importantly, I am satisfied that this failure on the part of the magistrate did not render the trial unfair. If ... the previous Act was held to have been applicable, it is clear that the protection afforded thereunder would not have availed the appellant ..." [Paragraph 5]

"Counsel for the appellant further allege that the conduct of the magistrate throughout the proceedings was intimidating and indicative of his having prejudged the matter. ... I am unable to agree... While the magistrate appears to have been quite vocal, verbose and at times somewhat over-zealous in ensuring that proceedings were completely understood by all ... I am unable to find that his conduct was such that it amounted to an irregularity which rendered the trial unfair. It must be remembered that the appellant was legally represented throughout the trial. ... It is preferable, however for a presiding officer to be circumspect about the frequency and the manner in which he articulates his interventions, ... lest he create the impression that he has rendered the trial unfair ..." [Paragraph 7]

The appeal against conviction was dismissed, but the sentences were altered to run concurrently (Steyn J concurred).

SINGH & ANOTHER V RAAM HARICHUNDER JAIRAM T/A SHIP & ANCHOR LIQUOR STORE & OTHERS [2009] JOL 24113 (N)

Case heard 1 September 2008, Judgment delivered 1 October 2008.

The applicants sought an interdict preventing the respondents from proceeding with the issue of a warrant of execution in respect of the taxed costs in a case, pending the finalisation of the application. Applicants also sought an order rescinding the taxed bill of costs. The bill of costs referred to arose from an application in which the applicants sought a statutory review of the decision of the Chairperson of the KwaZulu Natal Liquor Board, granting a liquor licence in favour of the first and second respondents. There had been no appearance on behalf of the applicants at the taxation.

Naidoo AJ held:

"In order for the court to exercise its discretion in favour of the applicants in granting a setting aside of the taxation and a rescission of the Taxing Master's allocatur, considerations of justice and fairness to all parties before it, must be a feature of the court's deliberations. The applicants bear the onus of showing the existence of sufficient cause for the relief they seek. They have to satisfy the court, inter alia, that there was some reasonably satisfactory explanation for allowing the judgment (in this case the taxation) to go by default. The court's discretion under the common law extended beyond and was not limited to the grounds provided for in rules 31 and 42(1)." [Paragraph 9]

"... The present matter calls for a consideration of the interests of the respondents as much as those of the applicants. The respondents have at all times acted correctly and in compliance with the Rules of Court. Their representatives took the trouble to contact the applicants' attorney with a view to discussing the bill of costs with him, thereby reminding him of the taxation. He was prepared to discuss it with any attorney in that firm, but received no response. In my view, the respondents should not be visited with the consequences of the failures of applicants' attorney. In addition, the applicants have not shown that they have any defence at all to the claim of the respondents for the payment of the amounts due to them in terms of the bill of costs. A bald statement by an attorney who was not involved in the matter ... that certain costs should have been taxed off, without providing reasons therefor is not, in my view, sufficient to show that the respondents have a defence to the respondents' claim for payment." [Paragraph 10]

The application was dismissed.

SELECTED JUDGMENTS

S V THOBANI REGINALD MBEJE, UNREPORTED JUDGMENT, CASE NO: R308/11

This case is a review of the sentence prescribed by the Magistrate's Court

Nkosi AJ held:

"Part of the sentence was that "the accused write an essay to the complainant, Mr. Sandile Mbeje of Burfor area next to Masengemi Tuck-Shop with a cell number ... apologising for his behaviour. The essay must not be less than one hundred words and must include the topic of forgiveness as envisaged in Proverbs 6 verse 3 and 4…" [Paragraph 2]

"The propriety of the condition of suspension relating to the writing of an essay was queried on review, both in principle as well as in the form in which it was cast. After some delay caused by the Magistrate's indisposition, the Magistrate responded at some length in his endeavour to explain what the condition of suspension entailed and what had motivated him to conjure up such a condition. The Magistrate saw nothing wrong in imposing the said condition and also in the manner it was case. However, it was aptly demonstrated by Kroon J in S v Mbola and Others 1992 (2) SACR 175 E, how onerous, objectionable and improper such a condition of suspension might turn out to be if it cannot, demonstrably, be fulfilled. The first practical problem relates to some form of control, short of invigilation, that the essay 'be the fruits of the accused's own labour', otherwise a danger exists that disrespect for legal machinery may arise. The second problem or objection relates to the quality of the essay and whether the accused is capable of producing an essay of such quality. Besides the question who would be the arbiter of the quality or whose standards should be employed, if in the result it proves that the accused is incapable of producing an 'acceptable' essay, the condition of suspension would not be capable of being fulfilled and it would have to be either ignored or compliance therewith would have to be excused, neither of which would be in the interests of the sound administration of justice. Another problem would relate to a situation where in the essay the accused imposes his moral views or expresses an opinion how his actions were palliated and seek, somewhat, to justify the commission of the offence in question. This would result in a watered-down apology. The aforesaid problems have a direct bearing on whether the intended purposes of a condition of sentence may be achieved. " [Paragraph 3-6]

"…First of all, courts cannot compel parties to undergo a process of reconciliation and particularly not in the manner it was done in this case. No foundation had been laid to encourage participation by the parties. Furthermore, the Magistrate went ahead and imposed a 'restorative' sentence without any investigation whether the sentence condition could be fulfilled. In that regards, the following aspects were not canvasses: the literacy of the parties, their relationship, if any, and their traditional or biblical beliefs, procurement of a probation officers' report to guide the court and to establish whether the accused would be capable of producing such an essay and whether the essay would promote reconciliation; and lastly, the identification of a person or persons who would supervise and or monitor the implementation of the condition and the standards set for compliance. There is nothing on record to show that the Magistrate was properly informed before he imposed the essay condition of the sentence." [Paragraph 7]

"In the circumstances of this case, the essay condition of suspension is unlikely to achieve the intended purpose of that nature and, in my view, its imposition was wholly inappropriate. From the aforegoing, the essay condition of suspension of the sentence is unreasonable and stands to be deleted. Magistrates are again discouraged to impose similar conditions in future, in the interests of good administration of justice." [Paragraph 8]

The sentence was thus amended by deleting the condition of suspension relating to the writing of the essay. Otherwise, the proceedings were confirmed. (Gorven J concurred).

SIMELANE V S [2011] JOL 27022 (KZP)

Case heard 10 February 2011, Judgment delivered 2 March 2011

This case was an appeal against a Magistrate's Court decision to convict appellant for assault with intent to do grievous bodily harm.

Nkosi AJ held:

"… [T]his appeal will be decided on a narrow but critical point, namely, the lack of crucial evidence, in particular the medical evidence, to prove the case against the appellant beyond a reasonable doubt. The arguments and submissions made by both counsel will, therefore, not be traversed in full, save to illustrate relevant points in the judgment." [Paragraph 10]

"It is a trite principle that in criminal proceedings, for the prosecution to succeed, the State must prove its case against an accused beyond a reasonable doubt. In the corollary, a court does not have to be convinced that every detail of an accused's version is true, as long as such version is reasonably possibly true in substance. It is also improper for a court to reject an accused's version merely because it is improbable unless such version can be said to be so improbable that it cannot be reasonably possibly true (see S v Shackell 2001 (2) SACR 185 (SCA) … and S v V 2000 (1) SACR 153 (SCA)..." [Paragraph 14]

"In this case, the State's case rested profoundly on the evidence of a single witness, the complainant, as to the actual assault. It is a well-known judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors, evident in the entire body of evidence, which militate against his or her credibility (see Stevens v S [2005] 1 All SA 1 (SCA) …" [Paragraph 16]

"A disquieting feature in the judgment of the court a quo is that the learned Magistrate chose to ignore a vital piece of evidence properly placed before him. In this regard, the words of Nugent J (as he then was) in S v Van der Meyden 1999 (1) SACR 447 (W) ... He said the following:"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logic corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must count for all the evidence. Some of the evidence might be found to be false; some of it might

be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none may simply be ignored."" [Paragraph 18]

"The reasonable inference which the learned Magistrate purported to draw from the location of the appellant's injuries in her hand does not exclude other reasonable inferences or possibilities save the one drawn (R v Blom 1939 AD 188 … and R v De Villiers 1944 AD 493 …). The appellant's version that she sustained the injuries during the struggle for possession of a mug is not implausible and cannot be discounted as unreasonable and remote. In the absence of expert evidence by the doctor who examined the appellant's injuries, the learned Magistrate could not draw any adverse inference based purely on his imagination and/or speculation of how the appellant might have sustained the injuries which she sustained." [Paragraph 23].

The appeal was upheld and the conviction and sentence set aside (Balton J concurred).

MFANINI BHEKUMUZI CEBEKHULU V S (CASE: AR 457/10)

Case heard 23 June 2011, Judgment delivered 30 June 2011

This was an appeal against the conviction and sentence on a charge of rape.

Nkosi AJ (Gorven J concurring) held:

"It is a trite principle of our law that the appeal court can only interfere with a conviction when there is a serious misdirection on fact which vitiates the conviction." [Paragraph 7]

"On the facts … counsel for the Appellant, was unable to submit any point of misdirection by the Court a quo on the conviction. He conceded that on the strength of the Appellant's admission, namely, that he did have sexual intercourse with the complainant, the conviction can hardly be assailed, and instead, he directed his focus on the sentence imposed. The concession was not misplaced. On a conspectus of the evidence led, the Appellant's version that he and the complainant were lovers and that they had consensual sexual intercourse does not dovetail with reasonable possibilities. This is so, in view of the complainant's insurmountable emotional state after the incident, and the manner in which the aforesaid incident, previously unknown to the complainant's parents, came to the fore. It is highly unlikely that the complainant had made a volte-face about the alleged love relationship and equally unlikely that her mother had hit her in order to extract a confession of sorts about the incident. Therefore, the Appellant's proposition that the complainant had either lied in order to save her skin or because her mother had colluded with her to cause him to be arrested, so as to avoid paying his wages, does not find support in the evidence and it was correctly rejected in the Court a quo. The conviction must therefore stand." [Paragraph 8]

"In casu, the court a quo found no substantial and compelling circumstances despite the mitigating factors alluded to above, and correctly so, in my view. The Appellant was a 37 year old man, who should have acted with utmost maturity towards the 12 year old, innocent child. Instead, he responded to his sexual urges by taking advantage of the defenceless child, in the sanctuary of her home, in order to satisfy his wicked desire. This was after he had been warned and barred from

entering her premises for fear he might eventually force himself on her in that sexual manner. His actions were evidently fully and carefully calculated. At his trial, he showed no remorse for this dastardly act, but instead blamed the victim and her mother for his woes. The aforegoing is aggravating against him. The gravity of the crime and its repulsiveness outweigh his personal circumstances which must, therefore, recede. These crimes, perpetrated against the most vulnerable members of society, are a cancer that eats away into our social fabric of decency and should, therefore, be treated with contempt which is deserved. The finding of the Court a quo can, therefore, not be faulted." [Paragraph 10]

SELECTED JUDGMENTS

WHEELER V WHEELER & OTHER CASES [2010] JOL 25083 (KZP)

Case heard 22, 27 October 2009, Judgment delivered 23 February 2010

In the seven divorce cases before the court, the court had granted the orders of divorce but had provided that the parts of the orders relating to the minor children (excluding those relating to maintenance) would be interim orders. The reason for that order was the court's realisation that although the relevant provisions of the Children's Act 38 of 2005 came into operation since 1 July 2007, uncertainty existed as to whether the concepts of custody and access, and to a lesser extent guardianship, had survived the Act.

Rall AJ held:

"It seems to me that the uncertainty about the impact of the Children's Act needs to be cleared up. I shall attempt to do so. The starting point is to determine whether that Act effected a change to our substantive law or whether it merely introduced new terminology for old concepts." [Paragraph 4]

"Although the two statutory concepts of care and contact correspond broadly with their common-law equivalents, the correspondence is not exact. The difference is this: Whilst the statutory concepts include all the elements of the common-law concepts, the former are wider than the latter. For example, paragraphs (h) and (i) of the definition of care and paragraph (a) of the definition of contact, were not traditionally components of custody and access respectively." [Paragraph 21]

Rall AJ then considered section 1(2) of the Act, which provided that, in addition to any meaning given to the terms "custody" and "access" in any other law or the common law, in any other law the terms must be construed to mean "care" and "contact".

"The net effect of my interpretation of the Act is that custody can be used interchangeably with care, and access with contact. This in turn means that the use of the common-law concepts would not be wrong. However, in my view, it would be preferable for the new terminology to be used in pleadings and court orders. This would bring these documents into line with the Act and would avoid confusion." [Paragraph 28]

"On my interpretation of the Act, the use of both the common-law and statutory terminology would not be wrong but would be tautologous. Accordingly, in my view, it should be avoided." [Paragraph 30]

"In my opinion, "primary caregiver" and "primary residence" should only be used where a qualified joint custody situation is what is desired. The use of those words would then indicate that although the parents would have joint custody (or in the words of the Act full parental responsibilities and rights) there would be a qualification to the effect that the child would spend more time with one parent and therefore that parent would be the primary caregiver. It would not mean that the primary caregiver would be in the same position as a custodian parent, who has the sole right to decide on the care of the child. The other parent would have an equal say, except that for practical purposes the primary caregiver would play a greater role in caring for the child. It may be argued that the terms are too vague to be incorporated in a court order. However, as was the case with access, the parents would have to reach agreement on these matters, and if they could not agree, they would have to approach a court to resolve the dispute" [Paragraph 33]

S V MAZIBUKO AND ANOTHER 2010 (1) SACR 433 (KZP)

Case heard 22 October 2009, Judgment delivered 19 November 2009

This was an appeal against a decision to refuse bail. The two appellants were in custody awaiting trial on three counts of armed robbery and two of murder. The appellants and one of their fellow accused applied for bail in the Regional Court. The State opposed bail, and the regional magistrate refused bail to all three applicants. The two appellants challenged that decision. It was common cause that, as section 60(11)(a) of the Criminal Procedure Act was applicable, appellants bore the onus of proving on a balance of probabilities that exceptional circumstances existed which required their release in the interests of justice. [Paragraph 3]

Rall AJ held:

"What was not common cause was what was meant by the expression "exceptional circumstances" in section 60. At the outset I should point out that the magistrate was of the view that by using that expression the legislature's intention was to make it extremely difficult or almost impossible for an accused to make out a case for bail" [Paragraph 4]

Rall AJ considered High Court judgments on the meaning of "exceptional circumstances", and continued:

"What then is meant by the expression "exceptional circumstances"? Firstly, in Dlamini's case it was held that the subsection does not say that there must be circumstances above and beyond, and generally different from those enumerated in subsections (4) to (9). By this I understand the learned judge to mean that it is not required of an accused to prove the existence of factors in addition to those enumerated in those subsections. ... Each one of the final paragraphs in subsections (5) to (9) is a "catch all" paragraph reading "any other factor which in the opinion of the Court should be taken into account." In effect therefore the Constitutional Court decided that an accused is entitled to rely on any factor expressly mentioned in subparagraph's (4) to (9) or any factor which is covered by the last paragraphs of subsections (5) to (9)." [Paragraph 13]

"It seems to me that "exceptional" can firstly denote the rarity of something (i.e. the infrequency with which something occurs) as in "(i)t is exceptional to find a nocturnal animal walking around during the day". Secondly, it can denote the extent or degree to which a quality or characteristic is present, as in (to use the example of Comrie J) "The musician has exceptional talent." The two meanings are however interlinked. Once again employing Comrie J's example, the more talented a musician is, the more unusual or rare that musician would be." [Paragraph 16]

"With respect, I am of the view that the emphasis should be placed on the degree to which any circumstance is present. This is the terminology used by Kriegler J in Dlamini's case ... " [Paragraph 18]

"For the circumstance to qualify as sufficiently exceptional to justify the accused's release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling. The case to be made out must be stronger than that required by subsection (11)(b), but precisely how strong, it is impossible to say. ... Applying this approach, the process of deciding a bail application would be the same as in a case governed by subsection 11(b), save that the additional requirement of exceptional circumstances must be satisfied. This means that if an accused does not satisfy the subsection 11(b) test, it is not even necessary to consider whether the additional requirement imposed by subsection 11(a) has been met" [Paragraph 19]

"Subject to two qualifications, the approach of the magistrate in the present case was correct. The first ... is that 'exceptional circumstances' has the meaning given to it by me, and the second is that the magistrate's statement that the legislature intended that it should be nearly impossible to obtain bail is to set the bar too high. ..." [Paragraph 24]

The appeal was dismissed.

SHUNMUGAM &OTHERS V NEWCASTLE LOCAL MUNICIPALITY & OTHERS; NATIONAL DEMOCRATIC CONVENTION V SHUNMUGAM & OTHERS [2008] JOL 21212 (N)

Case heard 22 October 2007, Judgment delivered 4 December 2007

This case involved two applications dealing with floor-crossing legislation. A number of members of the applicant in the second application, NADECO, had been expelled from the party, and they joined other political parties. The first application was brought by eighteen of those municipal councillors. The respondents were the municipalities in which the applicants served as councillors, the Electoral Commission (EC), and the political party to which the applicants once belonged (NADECO). The applicants in the first application sought the review of their expulsion from NADECO. In the second application, NADECO sought to enforce the councillors' expulsion.

Rall AJ noted that a crucial issue was whether the various councillors were still members of NADECO at midnight on 31 August 2007, as this determined whether they retained their council membership. [Paragraphs 14 – 16]. Regarding the first application, Rall AJ held:

"To me there can be no clearer and more unequivocal statement by conduct of a wish to no longer have anything more to do with their political home, NADECO, than their joining other political parties. If they were still members of NADECO, then this amounted to a resignation from that party and if they were no longer members this was a statement that they had no intention of regaining their membership. This conduct is plainly inconsistent with an intention to enforce the right to set aside their expulsion from the party and hence regain membership thereof. I am therefore of the opinion that in doing so the councillors abandoned that right. ..." [Paragraph 19]

"In my opinion, the councillors had to have their expulsions set aside prior to their crossing the floor if they wanted to ensure that they did not lose their seats ... It is now too late for them to do that." [Paragraph 21]

The first application was dismissed, and Rall AJ turned to deal with the second application:

"In my opinion, the second application must succeed if the councillors were no longer members of NADECO on 31 August 2007 unless the councillors are entitled to challenge the lawfulness of their expulsions. In my judgment, they are not." [Paragraph 40]

"... [T]he only possible obstacle in the way of NADECO succeeding in the second application is any appeals [against expulsions] which were still pending as at 31 August 2007. This is because if an appeal suspends an expulsion, those who had lodged an appeal would still have been members of NADECO on that date. In the case of certain of the respondents this issue does not arise because it is common cause that there were no appeals pending at that date. ..." [Paragraph 44]

"... I conclude that by launching the first application, those of the first 18 respondents who had applied for leave to appeal, abandoned those appeals and therefore that they were no longer members of NADECO when the floor-crossing period opened. This means of course that the second application must succeed against the first 18 respondents." [Paragraph 46]

Regarding the 19th respondent, who argued that she had lodged a timeous appeal and was not a party to the first application, Rall AJ found that she was still a member of NADECO on 31 August 2007 and hence the application against her failed.

"In my opinion, the consequential relief sought by NADECO in the second application follows as a matter of course from the finding that the first to eighteenth respondents were no longer members of NADECO at midnight on 31 August 2007. It was a prerequisite for the decision by the EC to recognise the respondents as having crossed the floor without losing their seats that when they did so, they were still members of NADECO. My finding to the contrary means that these decisions and all consequences that flowed from them were based on incorrect facts and therefore fall to be set aside in terms of section 6(2)(b) or (e) of PAJA. In this regard I am in respectful disagreement with the statement of Davis J in the Max case ... that once the vacancy created in a legislature by the expulsion of a member from a party has been filled whilst an appeal against the expulsion is pending, there is no constitutional basis on which the replacement member can be removed and the expelled member can regain his seat if the appeal is successful. The learned Judge gave no reasons for this conclusion and I cannot understand why he came to this conclusion. The setting aside of an expulsion on internal appeal means that with effect from the date of expulsion, the expulsion is set aside and the person continues to be a member. Similarly, the setting aside of an expulsion on review would have the same effect. This means that any subsequent administrative action which was dependent for its validity on the existence of the expulsion falls to be set aside on review." [Paragraph 52]

"In the present case one has the converse situation. A finding followed by a declaratory order that the first 18 respondents were no longer members of NADECO at midnight on 31 August 2007 means that as far as all parties bound by this judgment are concerned, at that time, the first 18 respondents were in fact no longer members of NADECO. This in turn means that the decision to accept that these respondents retained their seats falls to be set aside" [Paragraph 53]

The matter was appealed to the Supreme Court of Appeal, which dismissed the appeal in respect of the first application, but upheld the appeal in respect of the second application: Shunmugam and others v National Democratic Convention [2009] 2 All SA 285 (SCA).

WEARE AND ANOTHER V NDEBELE NO AND OTHERS 2008 (5) BCLR 553 (N)

Applicants challenged a Kwazulu Natal Ordinance which, respondents argued, precluded juristic persons from operating as bookmakers in the province.

Rall AJ held that the ordinance could not be interpreted so as to permit juristic entities to operate as bookmakers; and rejected the argument that the Ordinance conflicted with national legislation. Rall AJ then considered challenges to the Ordinance on the grounds of inconsistency with the Bill of Rights:

"The applicants would only be entitled to rely on the equality clause in the Constitution if juristic persons are entitled to the rights in the Bill of Rights. ... The Constitution is not categorical one way or the other on this aspect, although it does deal with it. ..." [Paragraph 30]

"Determining whether a juristic person can successfully invoke section 8(4) involves a careful consideration of the rights and the juristic person in question. The first step must still be to consider whether the juristic person in question is capable of exercising the right in question. One then has to consider whether the juristic person is entitled to exercise the right. It seems clear to me that before one can say that the nature of a particular right and a particular juristic person require the juristic person to be entitled to the right, something more must be present than it being merely possible for such a juristic person to exercise such a right. ... In my view that "something more" is that the Constitution requires that juristic persons or a particular category of juristic persons be entitled to the right in question. In determining whether this is the case, one of the important factors to consider is the consequences of not according the right to juristic persons, as was done by the Constitutional Court in the Hyundai case ..." [Paragraph 35]

"... I am of the opinion that the rights in section 9(1) of the Constitution are such that they are capable of being exercised by juristic persons." [Paragraph 37]

"Having regard to the purpose of section 9(1) ..., to the consequences which could flow from not according juristic persons section 9(1) rights and to the values enshrined in the Constitution, I am of the opinion that the Constitution requires juristic persons to be accorded those rights ... Furthermore, if, on the strength of the Botha and Hyundai cases ... juristic persons are entitled to the rights of freedom of expression and privacy, then a fortiori, they are entitled to the right to equality before the law. After all, the former rights are ones which are more closely associated with natural persons than the latter." [Paragraph 41]

Rall AJ then found that the Ordinance differentiated between natural persons and associations of persons, and that the distinctions were not constitutionally permissible.

"... It could be argued that only the first part of the subsection should be struck down because the proviso, standing alone, would be unobjectionable. However, if the proviso were to be saved, it would differentiate irrationally between partnerships and other kinds of associations, but this time against and not in favour of partnerships. In my opinion therefore the whole subsection should be struck down. ..." [Paragraph 55]

"I am of the opinion that this is a case in which it would not be appropriate for the declaration to take effect immediately. ... Given the purpose of the legislation and the inherent dangers in an inadequately controlled gambling environment I am of the opinion that the Legislature ought to be given an opportunity to rectify the Ordinance either by amending it or by replacing it with other legislation" [Paragraph 56]

Section 22(5) of the Ordinance was thus declared to be inconsistent with section 9(1) of the Constitution and invalid, with the declaration of invalidity suspended for three months. The Constitutional Court declined to confirm the declaration of invalidity, finding that the differentiation was not inconsistent with the achievement of the legitimate government purpose of regulating gambling: Weare and Another v Ndebele and Others 2009 (4) BCLR 370 (CC)

SELECTED ARTICLES

'THE NEW HEARSAY RULES', VOL 3 NO. 1 CONSULTUS (1990)

This article critically examines sections 3 and 9 of the Law of Evidence Amendment Act, 45 of 1988 (the Act).

"The intention of the Legislature in enacting the above two sections of the Act appears to be clear. However, a careful examination shows that it is by no means clear that the sections achieve their objective. Section 3 defines and lays down requirements for the admissibility of hearsay evidence. Section 9 repeals ss 216 and 223 of the Criminal Procedure Act, 51 of 1977, which dealt with hearsay and dying declarations respectively" (Page 53)

"The new definition is meaningless. It reads: '"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.' ... In order to analyse the definition, the use of traditional hearsay statements is helpful. A witness (W) states 'D (a non-witness declarant) said: "I saw the accused shooting the deceased' , . ' The evidence in question is the evidence of W, ie what is said in court, and not the statement by D. To this extent the new definition is similar to the old one which was 'evidence of statements made by . . . '. Under the old rule, if W's evidence was tendered to prove: (a) that the accused shot the deceased it was inadmissible (true hearsay evidence); but if tendered to prove: (b) that D uttered the words in question, it was admissible (not being hearsay at all)." (Page 54)

"The new rule, using the suggested modified definition of hearsay evidence, would have the same object as the old rule, namely, the exclusion of inherently unreliable evidence. The reluctance of the courts to admit hearsay evidence is fully justified, based as it is on the fact that the declarant does not testify under oath and is consequently not subjected to cross-examination. The unreliability only arises when the evidence is tendered to prove something more that the mere making of the statement. The advantage of the new rule over the old is however that it gives the courts a discretion to allow hearsay evidence in appropriate circumstances. Why Part VI of the Civil Proceedings Evidence Act, 25 of 1965, was not repealed, at least partially, by the Act is not clear. Now that the courts have such a wide discretion, Part VI is largely unnecessary. The only possible area which Part VI covers and which is not covered by s 3, is documentary evidence which is not 'in writing' (eg photographs, videos, etc). Should the suggested amendments be made to the Act, Part VI should be repealed. Whilst the definition of hearsay evidence in the Act is open to criticism it is wide enough to include implied assertions (whether verbal or by conduct). The reason for this is that the words 'whether oral or in writing' refer to the evidence (in casu the sworn testimony of W) and not to the subject matter of the evidence (ie the statement by D). There is therefore no limit to the type of statement about which evidence is given. As indicated earlier, the discretion granted to the courts is to be welcomed, and the factors set out in s 3(1)(c) appear to be comprehensive. However, as a result of the suggested amendments to the definition of hearsay an appropriate amendment to s 3(1)(c)(v) is also required." [Page 55])

SELECTED JUDGMENTS

S V DLAMINI AND ANOTHER [1998] JOL 2307 (N)

This case deals with the admissibility of evidence presented at a bail hearing.

Vahed AJ held:

"This judgment reflects the unanimous view of this Court. It is indeed unfortunate that it is not going to be able to reflect fully the results of our combined research. As I indicated when we adjourned on the last occasion I intended preparing a fuller judgment than the one that is about to be delivered, but matters of a personal nature have unfairly occupied much of my time since we have last adjourned and if, as a result thereof, there appears to be shortcomings in the judgment, those shortcomings are mine alone and do not and are not intended to reflect at all on the input, the valuable input, of the two assessors sitting with me. Neither is it intended to detract from the extremely helpful assistance I received from counsel in the case for which I record this Court's indebtedness" [Page 1]

"Two issues were to be determined during this second trial within a trial. The first was the admissibility or otherwise of a statement made by accused 2 to a magistrate ... and the second concerned the admissibility of certain statements made by accused 1 in facie curiae during the course of a bail application. I elected to sit with assessors to hear the evidence on this second trial within a trial." [Pages 4-5]

"The admissibility of the bail proceedings agains accused 1 deals with a far more fundamental problem. It was purely a legal question, ... and the point is correctly ... a challenge based on a crisp proposition of law. The contention is simply this: that an accused person should be free to say whatever he wants to at a bail application in order that he may feel comfortable and secure in securing his freedom at that stage. I use the words "comfortable" and "secure" deliberately, because he needs to seek comfort from and be secure of the fact that whatever he says at the bail application is not admissible against him at his subsequent trial. Mr Blomkamp contended that those proceedings should be encapsulated and isolated and kept distinct, separate and as far removed from the trial as possible. The effect of the contention is the following: a detained person who appears for bail is free to say whatever he needs to say to secure bail. He is free to perjure himself, admit involvement in offences for certain reasons or deny involvement in offences for other reasons. He may, for example, at a bail application unfold a version before a magistrate that consists entirely of an alibi defence. At his subsequent trial none of that would be admissible against him if he adopts a different stance at the trial. Using the example of an earlier alibi defence tendered he might change his stance and adopt a different alibi. Mr Blomkamp's contention that this was the correct proposition in law and ought to be a proper extension to the common law if it is not already part of our Constitution and Bill of Rights is based on the case of S v Botha and others 1995 (11) BCLR 1489 (W) ...
'In England the enquiry into voluntariness is made at 'a trial on the voir dire', or, simply, at the voir dire, which is held in the absence of the jury. In South Africa it is made at a so-called 'trial-within-a-trial'. Therefore the question of admissibility of a confession is clearly raised. An accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt (see R v Dunga 1934 AD 223 ...). The prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial-within-a-trial.' That, submitted Mr Blomkamp, is authority for the proposition that this division ought to adopt the stance that

everything said at a bail application is not and ought not ever in the future to be admissible against an accused at his subsequent trial. A curtain is drawn across it and at the trial one proceeds as if nothing was said and nothing happened at the bail application. As a point of departure I do not see Botha's case as being authority for that proposition. Starting from the premise as laid down in the case of S v Nomzaza and another 1996 (3) 411 SA 57 (A), everything said at a bail application is admissible at later proceedings unless certain circumstances suggest that those statements are to be enquired upon within the trial within a trial process. Botha's case, in my view, takes that proposition one step further by saying that if an accused person is of the view that, in order to balance the tensions operating between the exercise of his right to silence and right to a fair trial, he is entitled to have those statements examined at his trial within the trial within a trial process. If at the subsequent trial he is able to satisfy the court that there were tensions operating between the exercise of the apparently conflicting rights, that in order to exercise his right to be admitted to bail at the bail application stage he sought to give more consideration to the exercise of that right as opposed to his right to remain silent and that, in so doing, he unfairly prejudiced his subsequent trial, and, offers the trial court a reasonable and justifiable explanation for such thinking, he ought to receive the protection of the trial within a trial process and have what was said by him at the bail application excluded. It could never be said to be in the interests of justice to allow an accused person to lie at a bail application, thereafter lie at his trial and not have him explain that apparent conflict at his subsequent trial. It would bring the administration of justice into disrepute if, for example, an accused person for some reason admits the commission of a certain offence at his bail application but nevertheless is in a fortunate position to be admitted to bail, but is allowed thereafter to be immune from that admission and deny the commission of the offence at his later trial and for some other reason achieve an acquittal. It must be remembered that both proceedings are open ones at which the public are entitled to be present and, if such an occurrence had to take place as in the last given example, the public would indeed be entitled to say that the law is an ass. If, however, I am wrong in that conclusion, it appears to me that, if the law makers intended isolating the bail application proceedings in the manner suggested by Mr. Blomkamp, they would have said so specifically in the legislation constituting either our Bill of Rights or some other Act of Parliament." [Page 8-13]

"The Bill of Rights incorporated as Chapter 2 of our Constitution... is drawn freely and largely from inter alia the Canadian Charter of Rights and Freedoms. Article 13 of the Canadian Charter of Rights and Freedoms says the following: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." No such provision was incorporated into our Bill of Rights. We must presume that when our Constitution and the Bill of Rights it contains was drafted, that the draftspersons were acutely aware of the provisions of article 13 of the Canadian Charter of Rights and Freedoms and that they ought to have been acutely aware of the opportunity it afforded accused persons in the circumstances that accused 1 claims to be in, and I must assume that the lawgiver in not either adopting that provision or a provision similar in nature was mindful of these facts and thought our law sufficiently capable of dealing with problems of this nature." [Page 13]

"Mr Blomkamp also referred me to the decision of Saunders v United Kingdom 1977 (2) BHRC 358 which is a decision of the European Court on Human Rights. That case dealt with the position where there was a statutory compulsion upon a witness to testify in certain proceedings and whether or not the right not to be compelled to give self-incriminating evidence was infringed when what was said under statutory compulsion was sought to be used at a subsequent trial. The court held that the right was indeed infringed. Saunders is distinguishable from this case in that there is no statutory compulsion upon a person appearing at a bail application to make any statement whatsoever. The prime considerations at a

bail application are whether or not it would be in the interest of justice to admit an accused person to bail taking into account chiefly whether or not he would in due course stand his trial and whether or not, if admitted to bail, he would interfere with the further investigation of the case or interfere with potential witnesses. By far the great majority of bail applications dealt with in this country are dealt with by addressing those two questions alone and no entry upon the merits of a case to the extent where an accused person is required to delve into questions of admissions of involvement or otherwise are necessary. In the limited number of cases that would come before bail hearing courts where the tension I refer to surfaces, those would be comfortably dealt with in the trial within a trial process I outlined earlier." [Page 14]

"If again I find myself to be incorrect in that line of reasoning, and if indeed a valid tension occurs between the exercise of the two rights at bail application proceedings, it is in my view appropriate to consider section 36 of our Constitution and, if indeed an infringement of rights in that limited sense takes place during the course of an accused's bail hearing, it is, in the interest of justice, a justifiable limitation of the right so as to avoid bringing the entire administration of criminal justice into disrepute. For those reasons the contentions raised by Mr Blomkamp were rejected." [Page 15]

This decision was confirmed on appeal to the Constitutional Court. See **S v Dlamini and others 1999 (4) SA 623 (CC)**.

SELECTED JUDGMENTS

RANDALL V KARAN T/A KARAN BEEF FEEDLOT & ANOTHER (2010) 31 ILJ 2449 (LC)

Case heard 15, 16, 22 April 2010, Judgment delivered 19 May 2010

Francis J held:

"This court is required in terms of the pretrial minute to decide whether the respondent's conduct constituted an automatically unfair dismissal on the discriminatory grounds of age and whether he was unfairly discriminated against on the grounds of age" [Paragraph 15]

"It is common cause that the applicant is a 65 year old male who was dismissed on the grounds of his age. He was 62 years and 11 months old at the time of his dismissal. ..." [Paragraph 17]

"Discrimination in the workplace is generally outlawed in terms of s 187(1)(f) of the Act. The only exception is found in s 187(2) ... Section 187(2)(b) provides that despite subsection (1)(f) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. Since the respondent has admitted that the applicant was dismissed based on his age, it bears the onus to prove the justification or the defence that it has raised." [Paragraph 18]

"The first issue that needs to be determined is whether the respondent has a retirement age and if so what the retirement age is. If it does not have a retirement age, it cannot unilaterally implement such an age, and since it has admitted that the applicant was dismissed as a result of his age, it would follow that such a dismissal would be automatically unfair. ... If the court finds that there was a normal or agreed retirement age, it does not necessarily follow that the applicant's dismissal was fair since he was allowed to continue working beyond his retirement age. The court will than have to consider whether the respondent can unilaterally decide when to retire an employee and whether the defence raised can still be sustained in such an event." [Paragraph 19]

"The aforesaid letter [written to the applicant by the first respondent's group human resources manager] clearly informed the applicant that he would be reaching his retirement age on 25 March 2004, that is, when he turned 60. He did not respond to the said letter. All that he was required to do in terms of this letter was to inform the respondent about his decision on the option concerning his insured benefits. ... The applicant continued working beyond this period. The applicant did not confront the respondent about why it was stated in the aforesaid letter that he would be reaching his retirement age on 25 March 2004. ... He must have known that his retirement age was 60." [Paragraph 23]

"The applicant in his statement of claim alleged that the respondent did not agree to a retirement date with him and that the respondent did not have a normal retirement date at all. However in the pretrial minute ... the applicant alleges that he was unfairly discriminated against because the respondent confirmed that he would continue working for it after having reached his retirement age, that the respondent employs employees older than 60 years of age, and that he had a reasonable expectation that he would continue working beyond his retirement age." [Paragraph 26]

"It is therefore clear ... that despite the applicant's denial, he knew that the respondent has a normal retirement age. The retirement age is 60 for all employees including the applicant. ..." [Paragraph 27]

"... In the aforesaid the letter the respondent stated that it wanted him to continue working for it and that the normal notice period would apply if it would like him to go on retirement. His letter of appointment provides for a 30-day notice period to be given by both parties. The applicant was offered new employment in terms of the letter. There is no reference made in the said letter what the normal or agreed retirement age is going to be. It gives the respondent the right to decide when it would like him to go on retirement. ... His contract of employment was for an indefinite period. In any event he was not dismissed because he had completed his task or in terms of the fixed-term contract. He was dismissed as a result of his age. ..." [Paragraph 28]

"There are two schools of thoughts in this court about what the position is when an employee who has reached the normal or agreed retirement age is allowed to remain on, whether the said employee can challenge his dismissal on the basis that it was automatically unfair and whether the defence in terms of s 187(2)*(b)* would be valid. The one view is that the dismissal is not automatically unfair and that s 187(2)*(b)* is a complete defence. The other is that s 187(2)*(b)* is not a complete defence and that the dismissal is automatically unfair." [Paragraph 29]

Francis AJ considered the case law on this issue and held:

"It cannot and is not our law that an employer can unilaterally decide when to retire an employee who it has required to work beyond his retirement age ... I accept that an employer may decide to terminate a contract of employment by giving the requisite notice. If the said employee accepts termination ... nothing further will happen. If he disputes the termination or dismissal, he could still challenge it and the employer will have to prove that the dismissal was for a fair reason and fair procedures were followed. Our law has fortunately developed and is no longer stuck in the time where an employer could decide on a whim to dismiss employees. An employer cannot carte blanche dismiss employees by giving them the requisite notice. ..." [Paragraph 33]

"It is my finding that the respondent did not have a normal or agreed retirement age after the applicant was offered and had accepted employment beyond 60. The respondent could not unilaterally impose a retirement date as it did in this case. Since it is common cause that the applicant was dismissed solely on the grounds of his age, the application should succeed. ..." [Paragraph 37]

"... Women, the aged and people with disabilities are the most vulnerable employees of our society. This is one reason why the legislature decided to double the compensation that such employees may receive. The applicant was treated in the most shocking manner by the respondent. He was not informed that he was employed to complete a specific task. He was not consulted about this. He was out of the blue told that he was going to be retired. ... The CEO was proud to testify that he could decide when an employee could be retired. His decision was therefore final. This I am afraid is fortunately not the law of our land. The respondent was not frank with this court about what its real defence was ... It concocted a defence that he was employed on a fixed-term contract, which is not the case. The applicant was a good worker. He was loyal to the respondent and was later escorted off the premises by security. This is not how the aged and loyal employees should be treated." [Paragraph 38]

The dismissal was found to be automatically unfair, and the applicant was awarded 20 months' remuneration as compensation.

ATKINS V DATACENTRIX (PTY) LTD (2010) 31 ILJ 1130 (LC)

Case heard 12 November 2009, Judgment delivered 2 December 2009

The applicant was interviewed by the respondent and offered employment. Applicant accepted, and then announced that he wished to undergo a gender-reassignment process (a sex change) from male to female. The respondent terminated the contract of employment on the basis that the applicant had not disclosed this intention during the interview.

Francis J considered an academic article regarding transsexualism, and the equality clause of the Constitution, and held:

"It is apparent from the provisions of s 9 of the Constitution that discrimination is prohibited on any of the grounds referred to in subsection (3) unless it is fair. The provisions are not only applicable to the state but also to persons which would include employers. In compliance with the provisions of s 9(3) of the Constitution, the LRA and the EEA [Employment Equity Act] were enacted which also outlaw discrimination in the workplace unless it is fair. ... Both the EEA and LRA give effect to the provisions of the Constitution that outlaws unfair discrimination." [Paragraph 13]

"Section 5 of the EEA provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 prohibits unfair discrimination ..." [Paragraph 13]

"The LRA defines who an employee is. It does not distinguish between males and females. A transsexual who undergoes a gender reassignment process will continue to remain an employee and the prohibition against unfair discrimination will still exist unless the respondent can show that the discrimination was fair. The LRA, the EEA and Constitution prevent employees being discriminated against on the basis of their sex, gender and other grounds. The only defence against discrimination would be fair discrimination. The respondent does not rely on fair discrimination as a defence but simply that there was a duty on the applicant to have disclosed his intentions but he had failed to do so and was therefore in breach of his common-law duties for non-disclosure. ..." [Paragraph 14]

"The applicant's dismissal is not in dispute. What is in dispute is the true reason for the dismissal. ... It is clear ... that the applicant is a competent employee. He was offered employment which he accepted. It was only after he had disclosed to the respondent that he wanted to undergo a gender-reassignment process that he was dismissed. ... The impression that the respondent is giving is that had the applicant disclosed that he wanted to undergo the process, he would not have been dismissed. I do not think so. The only inference ... is that the respondent would not have employed the applicant in the first place had he disclosed his true intentions. ... " [Paragraphs 15 - 16]

"The respondent's defence presupposes that there was a duty on the applicant to have disclosed that he was a transsexual and that he wanted to go for a gender-reassignment process. .... It is not clear why the respondent contends that the applicant was dishonest when he in the first place had no legal duty to have informed the respondent that he wanted to go for gender reassignment. ... There was simply no legal duty for the applicant to have disclosed what his intentions were. It was simply none of the respondent's business that he wanted to undergo the process. The issue of the applicant's reassignment process did not arise at the interview. The applicant was after all working in the IT industry where the issue of his sex or gender is not important. ..." [Paragraph 17]

"It is clear ... that the principal or dominant reason for the applicant's dismissal was that the respondent was not happy that he was going to undergo a gender- reassignment process and dismissed him for that. The applicant has discharged the evidential burden which raised a sufficient credible possibility that an automatic unfair dismissal has taken place. The respondent has failed to show that the reason for the dismissal was not automatically unfair..." [Paragraph 18]

"The maximum compensation that can be awarded for unfair discrimination is 24 months' remuneration in terms of s 194(3) of the LRA. The legislature had deemed it necessary to award twice the amount for compensation in discrimination cases for obvious reasons. ... This court must send out a message to employers who might still have some hangups about sex change operations that such conduct will not be tolerated at all. The best way to protect those employees who believe that they are trapped in the wrong gender and who are the most vulnerable employees is to award such compensation that will act as a deterrent to employers from acting in the manner that the respondent did. The respondent was totally insensitive to the plight of the applicant. It sought to use reasons to justify why his services were terminated. Discrimination is painful and is an attack on a person's dignity as a human being. It is hurtful and has been outlawed by our Constitution, the LRA and EEA in the workplace. ... We are no longer living in the dark ages or during the apartheid years where some employees had to live in closets. Whatever one's views might be on gender reassignment those should remain one's own views. Whether a person rightly or wrongly believes that he or she is trapped in the wrong gender that should not be a basis to dismiss or discriminate against such a person. It is surprising that in this day and age and 15 years into our democracy some employers would not be mindful of the provisions of s 187(1)(f) of the LRA, the EEA and the Constitution. This is a lamentable state of affairs. ..." [Paragraph 20]

"I have taken into account that the applicant after he was dismissed by the respondent continued to be employed by his employer from whom he did not resign. It would in my view be just and equitable to order ... compensation in an amount of R100,000 which is the equivalent of just less than five months' remuneration for his claim brought in terms of s 187 of the LRA." [Paragraph 21]

Francis J held that no evidence had been adduced to support a claim for damages under the EEA, and that the amount awarded for the claim for unfair dismissal was "generous enough."

FOURIE V PROVINCIAL COMMISSIONER OF THE SA POLICE SERVICE (NORTH WEST PROVINCE) & ANOTHER (2004) 25 ILJ 1716 (LC)

Applicant, a white woman, was employed by the first respondent as an inspector in the detective branch, based at Fochville. Applicant, together with seven African male colleagues, applied for the post of captain. Applicant was not appointed, and claimed to have been discriminated against on the basis of her race.

Francis J held:

"The applicant has limited her ground of discrimination to race only. She is not relying on gender or any other grounds of discrimination. ... She contended that she is more suitable than Moseri [the officer appointed to the position] and should have been promoted to the position of captain. The respondents admitted that they discriminated against the applicant on the basis of her race but pleaded that the discrimination was fair and in compliance with s 9(2) of the Constitution, s 6(2) of the EEA [employment

Equity Act] and the respondents' EEP [Employment Equity Plan] read with its national directive. The respondents must establish that the discrimination was fair. ... The respondents contended ... that the discrimination was fair on the basis that Moseri was the more suitable candidate but more importantly that another white person could not be appointed at Fochville. Fochville was an old-style apartheid police station. ... There were no black senior police officers at the time. ... " [Paragraph 41]

"Discrimination on the basis of race, gender, etc is outlawed in terms of s 6(1) of the EEA. Fair discrimination is permissible if its aim is to take affirmative action measures consistent with the purpose of the EEA. ... Section 5 of the EEA obliges every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment practice. ... One way in which an employer can eliminate unfair discrimination is by taking affirmative action measures consistent with the purposes of the EEA. Designated groups are defined in the EEA to mean black persons, women and people with disabilities. This includes white women. The applicant and Moseri are both in terms of the EEA regarded as members of a designated group. The EEA permits clearly fair discrimination against members of a non-designated group if the intention is to achieve the purpose of the Act. ... Affirmative action measures may however only be taken in respect of 'suitably qualified' people from designated groups. This much is apparent from the definition of 'affirmative measures in s 15 of the EEA." [Paragraph 42]

Francis J then endorsed the judgment in *Stoman v Minister of Safety & Security* (2002) 23 ILJ 1020 (T), where it was held that efficiency and equality should not be viewed as separate or opposing aims in the context of affirmative action, and that affirmative action measures could not be limited to situations where "there was virtually nothing to choose" between candidates. Francis J also considered the decision in *Motala v University of Natal* 1995 (3) BCLR 374 (D), where it was held that African students had suffered significantly greater disadvantage than their Indian counterparts under apartheid. Francis J continued:

"I do not believe that it can be disputed that Black people were discriminated against under apartheid. African people in particular were severely discriminated against. They were treated as fourth class citizens. I accept that white women were discriminated against under apartheid but not to the same extent as Black people and in particular African people. White women have had access to better educational and other facilities. ... The aim as I understand it was not to punish the applicant as an individual, but to diminish the over-representation which her group had been enjoying as a result of previous unfair discrimination. A court dealing with issues of discrimination in the workplace must take cognizance of the history of our country, the imbalances of the past, the fact that the apartheid system was designed to protect white people, but black employees and in particular African employees suffered the brunt of discrimination and the purpose and objects of the EEA. ..." [Paragraph 45]

"It is common cause that the respondents had set aside 13 vacant posts for white women captains for the North West Province. It is further common cause that one vacancy arose for a position at Fochville. At the time of the interviews the quota of 13 white women had already been exceeded. ... It was not disputed that Fochville was an old SA police station. There were no black police officers. The management of the police station was white. The applicant ... is simply aggrieved by the fact that Moseri was appointed above her, because of the colour difference adn that she was more suitable than him. ... The interview panel was in my view duty bound to address the imbalances that existed at Fochville. ... It is clear from the evidence led that both the applicant and Moseri are suitable persons. ... The respondent had to address the demographics at Fochville. The fact that a black candidate was appointed rather than

a white candidate, after consideration had been given to the race factor and the situation at Fochville, is not itself necessarily unjustifiable at all, in view of the constitutional recognition of measures that could be referred to as affirmative action measures, and the policies and guidelines referred to." [Paragraph 46]

"... There is nothing before me showing that the relevant policies and guidelines of the SAPS regarding the measures to achieve equality and representativity do not comply with the constitutional requirements emanating from s 9(2) of the Constitution. ..." [Paragraph 47]

"The appointment of Moseri over the applicant in this case was rational, justifiable and fair in the circumstances. ... The respondents did fairly discriminate against the applicant. The application stands to be dismissed." [Paragraph 48]

BRUCKNER V DEPARTMENT OF HEALTH & OTHERS (2003) 24 ILJ 2289 (LC)

Applicant brought a contempt of court application against the respondents after they had failed to comply with an arbitration award which had been made an order of court. The order had required the respondents to reinstate the applicant as Deputy Director: Medicines Registration.

Francis J held:

"It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show: (a) that the order was granted against the respondent; (b) that the respondent was either served with the order or informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and (c) that the respondent is in wilful default and mala fide disobedience of the order. ..." [Paragraph 26]

"If it is shown that the respondent was aware of the order and disobeyed it or neglected to comply with it, the onus is on the respondent to rebut the inference that he wilfully disobeyed or neglected to comply with the order. ... Dolus eventalis suffices for purposes of a conviction of contempt of court. ... Mala fides as a separate requirement for contempt of court only arises in cases of constructive contempt, ie where a party takes action even before the court's order to evade its consequences. In cases of direct contempt mala fides is not a requirement separate from wilfulness." [Paragraph 27]

Francis J considered the cases of *De Lange v Smuts & others* (CC) [regarding people's entitlement to rely on the State for the protection and enforcement of rights], and *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (Tk) [non-compliance with a court order by the State amounts to a breach of a constitutional duty], and continued:

"It is trite that this court is a court of law. It is unacceptable that orders of this court should be flouted. If orders of a court of law are flouted, the law is brought into disrepute as is the court, and the administration of justice in our country will suffer. ..." [Paragraph 30]

"It is clear from the facts that the court order was granted against the respondents. ... The only issue that must be determined is whether the respondents are in wilful default and mala fide disobedience of the court order." [Paragraphs 31 - 32]

"The defence raised by the respondents in not complying with the order of this court is that the court order posed a practical problem as it directed the first respondent to reinstate the applicant in the position of Deputy Director: Medicine Registration which no longer existed. The respondents have embarked on an extensive transformation and restructuring since the award was issued. The applicant can no longer be placed back in the same position. ... [A] decision was taken to appoint the applicant in a position in the new structure that closest resembles her previous position. ..." [Paragraph 33]

"The defence raised ... can hardly be said to be a defence. No evidence was placed before this court when exactly it was that the restructuring exercise began and when it ended. The respondents always knew that the applicant was unhappy about the fact that her position had been abolished. They knew that there was an application pending before this court to make the arbitration award an order of court. Despite this knowledge the respondents proceeded to abolish the applicant's post. The arbitration award and order of this court are clear that the applicant had to be reinstated in the position that she held before it was abolished. The issues that the respondents are now attempting to raise should have been raised either at the arbitration proceedings or when an application was made to make the arbitration award an order of court. It appears however that these issues were raised and were dealt with by both the arbitrator and by this court in the review application. The respondents did not deem it necessary to appeal ... Raising this issue in these proceedings is therefore not proper." [Paragraph 34]

"The respondents' further defence is that there has been substantial compliance with the court order ... I do not believe that this is a defence that can be raised for the reasons stated in para 34 above. Even if the defence raised is permissible, the onus is on the respondents to prove that there was substantial compliance with the order. They have failed to discharge this onus. No evidence was placed before me that shows that there was substantial compliance with the court order. ..." [Paragraph 35]

"It is clear that the respondents have wilfully and knowingly failed to comply with the court order ... The department has failed to reinstate the applicant and the first and second respondents have throughout been aware that the court order had not been complied with. The respondents' failure to reinstate ... is not only wilful, but also mala fide. They have done so despite the many letters written by the applicant's attorney, the applicant's recorded objection ... to the allocation of her duties to another post and despite the applicant's having instituted the present application ..." [Paragraph 36]

"... Harm has been done in this case to the principle whereby the abuse of power should not be tolerated by any instrument of state. Harm has been done to the laudable objective, articulated by the Constitution that guarantee fair labour practices to employees. Harm has been done to the administration of justice and to the requirement that disputes should be speedily and expeditiously resolved, because of the inertia or arrogance of officials who did not bother to reinstate the applicant in her previous position. Harm has been done to the confidence with which the public may accept the reassurance that court orders will be complied with ... Harm has been done to the applicant, who for almost four years has had to endure the uncertainty whether an unresponsive department would reinstate her..." [Paragraph 37]

Francis J thus found that the second and third respondents [the Minister of Health and the Director-General of Health] were guilty of contempt of court, and committed them to 15 days imprisonment, suspend for 60 days to allow for arrangements to be made for the applicant to be reinstated. On appeal, the Labour Appeal Court found that the department had been cited as the employer party in the original arbitration proceedings, and the arbitration award which was made an order of court had directed the department to reinstate, and made no order against the Minister or Director-General. Without first obtaining a mandamus, it was not competent to seek an order committing the Minister or Director-

General to prison for contempt. The appeal was upheld: Minister of Health & Another v Bruckner (2007) 28 ILJ 612 (LAC).

SELECTED JUDGMENTS

MADIBENG LOCAL MUNICIPALITY V SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (NORTH WEST DIVISION), UNREPORTED JUDGMENT, CASE NO: 2033/09

Case heard 10 March 2011, Judgment delivered 9 June 2011

This was an application to review and set aside an arbitration award made by the second respondent commissioner, in which the dismissal of the third respondent had been found to be procedurally and substantively unfair. The third respondent had been dismissed for representing that she qualified for a car allowance by forging a letter from the Municipality's Finance Department.

Lallie AJ considered case law regarding the test for a review and held:

"This is but one of the many instance in which the arbitrator demonstrated his failure to apply his mind to the issue before him. Had he read the documents presented at the arbitration, he would have realised that Cibe [third respondent] had sated [sic] very clearly in her own heads of argument that she was suspended after allegations of fraud were made against her. His conclusion that her suspension ... took place in vacuo is unreasonable." [Paragraph 14]

"In rejecting the applicant's argument that Cibe did not challenge her suspension he over looked the fact that ... [a]n unfair suspension constitutes an unfair labour practice. As the arbitrator has stated that the issue he had to determine was Cibe's unfair dismissal he should not have dealt with the unfair suspension dispute which falls within the jurisdiction of the ... CCMA..." [Paragraph 17]

"The arbitrator's failure to identify issues which were properly before him is a clear indication of his failure to apply his mind to the issue before him." [Paragraph 18]

"The arbitrator was presented with 2 mutually destructive versions. He rejected the applicant's version without giving reasons. Although the award has a sub-heading for analysis of evidence and arguments the arbitrator did not analyse the evidence at all. ..." [Paragraph 21]

Lallie AJ considered the SCA decision in *Stellenbosch Farmers' Winery Group Ltd v Martell Et Cie* as authority for the correct approach in dealing with factual disputes, and continued:

"The arbitrator gave no reasons for finding Cibe's dismissal procedurally unfair. He therefore failed in his duty to provide brief reasons for his decision." [Paragraph 23]

"Section 193 of the LRA which deals with relief for unfair dismissal does not provide for reimbursement. ... The arbitrator had no basis to grant any additional form of relief to the reinstatement as section 193 ... provides that payment of compensation can be ordered as an alternative to reinstatement or reemployment." [Paragraph 25]

"... There was a duty on the arbitrator to consider the reasons for the postponement ... before making a determination whether it was justified or warranted a costs order against the applicant. His approach shows that he wanted to punish the applicant for the postponement irrespective of the circumstances ... His refusal to consider legal arguments on whether the postponement was justified rendered his decision to grant the costs order reviewable." [Paragraph 27]

The arbitration award was set aside.

NELSON THEMBINKOSI MASHOPI V TRANSNET NATIONAL PORT AUTHORITY, UNREPORTED JUDGMENT, CASE NO. P98/11

Case heard 28 February 2011, Judgment delivered 30 March 2011

Applicant sought an order interdicting and restraining respondent from dismissing applicant prior to 31 March 2011. Applicant had previously been employed by respondent in a position where one of the requirements was registration with the Private Security Industry Regulatory Authority (PSIRA). Applicant was not registered when he took up the position and his application to PSIRA was refused. Respondent gave applicants two months to register in order to retain his employment. On 31 January 2011, applicant obtained a rule nisi, returnable on 24 March 2011, in the High Court in an attempt to effect registration. Respondent declined applicant's request to extend his unpaid leave until 31 March 2011.

Lallie AJ held:

"A proper reading of ... the contract of employment reveals that the contract will not be rendered invalid by the applicant's inability to perform his function as a security provider. The contract will govern other functions which the applicant is responsible for." [Paragraph 20]

"After the applicant had informed the respondent that he was not registered with PSIRA a number of options were available to the respondent. The respondent elected to give the applicant time to do whatever was necessary to get registered ... The election is binding on the respondent. ..." [Paragraph 21]

"... Considering that it is the respondent which opted for the choice of giving the applicant time to get registered with PSIRA, the respondent's refusal to extend the applicant's employment from 28 February to 23 March 2011 was inconsistent with the respondent's own choice." [Paragraph 22]

"Considering the purpose for which the applicant's employment was extended to 28 February 2011 and the purpose for which the further extension was sought, the refusal to grant the extension is unfair." [Paragraph 23]

"I reject the respondent's argument that the applicant has a satisfactory alternatively [sic] remedy of challenging the fairness of his dismissal at the Transnet Bargaining Council. The remedy the applicant is seeking is different. He wants the respondent to be interdicted from dismissing him. The Transnet Bargaining Council lacks the necessary jurisdiction to grant the order the applicant is seeking. ..." [Paragraph 26]

"The balance of convenience favours the applicant because even if the respondent could have dismissed the applicant on 28 February 2011, it would not have replaced him immediately ..." [Paragraph 27]

The order was granted.

DOMINIC VAN DER HEEVER V OVERBERG DISTRICT MUNICIPALITY, UNREPORTED JUDGMENT, CASE NO.: 03/2011

Case heard 3 February 2011, Judgment delivered 9 February 2011.

An urgent application was brought to interdict and restrain respondent from proceeding with a disciplinary enquiry against the applicant, and to direct the respondent to pay all remuneration due to the applicant during his suspension with pay. At the hearing, it was agreed that the issuing of withholding remuneration would be considered first and that issue forms the subject of the judgment.

Lallie AJ held:

"It is common cause that the respondent suspended the applicant ... on 12 November 2001 [sic] with full pay. The applicant's version is that he last received remuneration from the respondent for the month of October 2010. The respondent's version is that it withheld some of the applicant's remuneration. I decided to accept the applicant's version ... because the respondent could not quantify the amounts it withheld from the applicant's salary. ..." [Paragraph 10]

"It is trite that one of the duties of an employer is to remunerate the employee. ... The Respondent relies on the common law principle of set-off in justifying its conduct." [Paragraph 11]

Lallie AJ referred to the work of Professor Christie defining a set-off, noting that the debt to be opposed by means of set-off must be of a liquidated nature, and continued:

"The respondent seeks to rely on the common law principle of set-off because it alleges that there are substantial amounts which are due and payable by the applicant to the respondent, inter alia, in respect of fruitless and wasteful expenditure which are being recovered from the applicant. From the above explanation it is clear that the debt allegedly owed ... is not of a liquid nature because there is no evidence that the debt is due by the applicant to the respondent." [Paragraph 14]

"The respondent did not disclose the amount of the alleged fruitless and wasteful expenditure and when and how it was incurred. ... In the circumstances the respondent cannot rely on set-off to justify withholding of the applicant's remuneration." [Paragraph 15]

Respondent was ordered to pay all remuneration due to the applicant during his period of suspension.

SOUTH AFRICAN POLICE SERVICES V S H SHANGE AND OTHERS, UNREPORTED JUDGMENT, CASE NO. D835/09

Case heard 15 March 2011, Judgment delivered 15 April 2011.

Applicant sought to review and set aside the ruling of the fourth respondent arbitrator, and to declare the arbitration in question irregular and invalid. The main issue in the case concerned the interpretation of a provision in a collective agreement.

Lallie AJ held:

"The applicant and SAPU [South African Police Union, the second respondent] are parties to the collective agreement. In terms of section 23 (1) (b) of the LRA a collective agreement binds its parties and their members in so far as its provisions are applicable to them. ... The collective agreement is therefore binding on the applicant, SAPU and Shange." [Paragraph 9]

Lallie AJ then considered the Labour Appeal Court Decision in *City of Cape Town v SAMWU obo Jacobs & others*, as authority for whether the council had jurisdiction, and continued:

"The arbitrator correctly found that an arbitrator may exercise only those powers granted to the arbitrator by legislation and that neither the arbitrator nor the SSSBC [Safety and Security Sectoral Bargaining Council, the third respondent] has inherent jurisdiction. The applicant's submission that section 147 of the LRA grants the SSSBC jurisdiction to determine disputes of interpretation and application of the collective agreement is incorrect. Section 147 ... grants the CCMA, to the exclusion of bargaining councils, jurisdiction over disputes arising from interpretation and application of collective agreements." [Paragraph 11]

"The applicant's argument that section 24 of the LRA grants the SSSBC jurisdiction over the dispute before the arbitrator is also incorrect. Section 24 ... clearly sets out the procedure to be followed in the resolution of disputes arising from interpretation and application of collective agreements. It requires that such disputes be resolved in terms of the dispute resolution provisions of the collective agreement alternatively ... by the CCMA under specific circumstances. The collective agreement has a conflict resolution procedure which excludes referring the dispute to the SSSBC." [Paragraph 12]

"I have considered both the constitution of the SSSBC and that of the PSCBC ... They contain no provision which gives the SSSBC jurisdiction to determine disputes about the interpretation and application of collective agreements which have conflict resolution provisions that are silent on the jurisdiction of the SSSBC. They further do not grant the SSSBC jurisdiction over disputes regarding the interpretation and application of collective agreements which unequivocally grant such jurisdiction to the PSCBC." [Paragraph 13]

"... [I]t is the PSCBC that has jurisdiction over the dispute before the arbitrator. ... In the circumstances the arbitrator erred in finding that the SSSBC had jurisdiction ..." [Paragraph 14]

The arbitrator's ruling was set aside.

SELECTED JUDGMENTS

NATIONAL UNION OF MINEWORKERS AND OTHERS V REVAN CIVILS ENGINEERING CONTRACTORS AND OTHERS, UNREPORTED JUDGMENT, CASE NO.: C964/2008

Case heard 7 – 11 February 2011, Judgment delivered 1 April 2011

The second and further applicants had been dismissed, allegedly on the basis of the operational requirements of the respondent. Applicants sought primary relief of a declaration that the notices of termination received were unlawful and invalid. Respondents made several concessions, including that section 189A of the Labour Relations Act (LRA) applied to the entire retrenchment process of the employees of the three respondent companies, and that the three companies should have been regarded as divisions of one entity for the purposes of retrenchment (however, respondents also argued that as a result, the court lacked jurisdiction to consider the procedural fairness of the dismissals).

Rabkin-Naicker AJ held:

"It is necessary on the facts of the case to consider two pertinent questions. First, what is the effect of an employer's failure to conduct a retrenchment process in terms of section 189A and instead conduct it as though section 189 applied; and secondly, where, as in this case, on respondents' own version it acknowledges that section 189A was applicable, can this court nevertheless make an order in respect of the procedural fairness of the dismissals." [Paragraph 34]

"I am of the view that on a proper reading of section 189A as a whole, the remedy of a declaration of invalidity of notices of termination, may only be granted on an interim basis, pending compliance with its provisions. In my view the LAC De Beers case is not authority for such a remedy to be afforded in a case such as this, where applicants seek it at the stage of trial proceedings, and which order would be final in effect. ..." [Paragraph 36]

"This brings me to consider the alternative relief sought by the applicants and whether in light of the evidence presented at trial and the concessions made by the respondents, the respondents have proved that the retrenchments were for a fair reason and conducted according to a fair procedure." [Paragraph 37]

"Mr Rautenbach for the respondents submitted that the 'portal' to the granting of compensation for unfair procedure in a section 189A retrenchment process was only by way of section 189(A)(13) of the LRA. In the result the court did not have jurisdiction to make such an order. His submission, if correct, would be the prize for the concession made that section 189A indeed applied to the retrenchment process. ..." [Paragraph 38 - 39]

"Followed to its logical conclusion, the argument would mean that an employer could avoid its obligation to follow the section 189A procedure, concede that such was applicable at the stage of trial, and then claim that this court has no jurisdiction to hear a claim for procedural unfairness. In my view the proposition is at odds with the objectives of the LRA as a whole, and the provisions of s 189A read with s189 in particular. ..." [Paragraph 40 - 41]

"Section 189A(3) offers parties in large scale retrenchments an important election, ie that a facilitator be appointed to assist the consultation process. Although this is an election and not a requirement, failure to go this route closes the door to claiming unfair procedure at a later stage. ... In this case, the applicants

were not afforded the election ... precisely because the respondents chose to conduct the retrenchments as though section 189A did not apply. The applicants cannot then ... lose their right to claim procedural unfairness of their dismissal. A loss of this sort would offend the aims and objectives of the LRA." [Paragraph 42 - 43]

"The concession made by the respondents ... taken together with the evidence ... and the content of the notices ... leads to the conclusion that the respondents were indeed attempting to avoid the scope of section 189A at the time of the retrenchment process. ... In my view the avoidance of the section ... must render the retrenchment process of the applicants procedurally unfair. ..." [Paragraph 45 - 46]

Rabkin-Naicker AJ then dealt with the substantive fairness of the dismissal, noting that as no agreement had been reached on selection criteria, and regardless of whether s 189 or 189A was applicable, the test was whether the selection criteria were fair and objective:

"In my view, on respondents' own evidence, the selection criteria cannot be characterised as fair and objective. Over and above the fact that the process was dealt with in a manner that kept up the façade of three different companies, even where some job categories were shared across the companies, the selection criteria fell far short of the objective and fair test required. The overall impression ... was that the retrenchment process was being utilised to alter the nature of employment in the companies." [Paragraph 53]

The dismissals were thus found to be unfair.

LSRC & ASSOCIATES V ANNA CHRISTINA WILHELMINA BLOM, UNREPORTED JUDGMENT, CASE NO.: J1907/2010

Case heard 18 March 2011, Judgment delivered 11 April 2011

Respondent had worked as a bookkepper for clients of the applicant, and performed administrative functions for the applicant. Applicant sought to formalise oral contracts with its service providers, including the respondent, but respondent refused to sign a written "Independent Contractor Agreement." Respondent was then suspended. After the dispute was referred to the CCMA, the parties entered into a settlement agreement, where by respondent would be paid the amount of R60 000. An issue arose when applicant was advised that it would need to deduct tax from the settlement award.

Rabkin-Naicker AJ held:

"It is evident from the content of the papers that there is an expectation that this court can make findings which will assist in dealing with the question as to which party is liable to pay tax to the Commissioner of SARS ... The expectation is misplaced."" [Paragraph 22]

"The obligation to pay such tax, and on whom it falls, must be determined in line with the provisions of the Income Tax Act ... Paragraph 2(1) of the 4th Schedule ... requires that, if services are rendered by an employee, the person to whom the services are rendered must deduct employees' tax. ... The determining factor, as to whether a person rendering services is an employee or independent contractor, is the definition of "remuneration" in paragraph 1 of the Fourth Schedule of the ITA. ..." " [Paragraph 24 - 25]

"The lack of 'fit' between the criteria used to distinguish between an employee and an independent contractor for purposes of income tax and labour law has been derided. It has been argued that these criteria should be the same, and that the uncertainty created by the different criteria used is detrimental to all parties concerned. [citation to academic article by C. Louw]" [Paragraph 26]

"While this may be a laudable objective, there are important reasons why it is not attainable. Not least of these are the aims and objectives of the LRA and its' provenance as a statute drafted to give expression to the Constitution, and in ... particular the constitutional right to fair labour practices. This provenance means that the characterisation of an employment relationship for the purposes of the LRA will often be at variance with one geared to ensure the necessary for the levy of taxes for the fiscus." [Paragraph 27]

"This point is most clearly brought home if regard is has [sic] to the decision in Kylie v CCMA and Others 2010 (4) SA 383 (LAC). ... " [Paragraph 28]

"In essence, the jurisprudence of the labour courts cannot be relied upon to decide on the tax obligations of parties. ... this court will not enter into the adjudication of tax disputes, an arena properly regulated under the ITA and other tax legislation, nor make orders incidental to an investigation into the parties' liability to pay income tax." [Paragraph 29]

MINISTER OF CORRECTIONAL SERVICES V ABEL MONTGOMERY BALOYI, UNREPORTED JUDGMENT, CASE NO.: JR46/09

Case heard 17 March 2011, Judgment delivered 29 April 2011

This was an application to review and set aside an arbitration award issued by the second respondent Arbitrator, finding the dismissal to have been substantively unfair. The court also had to consider a condonation application due to a delay in filing the review.

Rabkin-Naicker AJ held:

"The grounds for review raised by the applicant include the Arbitrator's reliance on the transcript of the disciplinary hearing at the arbitration, and the allegedly unreasonable inferences drawn by him in regard to the evidence before him. However, in the court's view it is the material mistake of law by the arbitrator that render the Award susceptible to review." [Paragraph 15]

"Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact obliged, mero motu, to raise the point of law and require the parties to deal with it. [Citation to the Constitutional Court decision in Commercial Workers Union of SA v Tao Ying Metal Industries and Others]" [Paragraph 16]

Rabkin-Naicker AJ found that the Arbitrator had made a material error of law in applying the cautionary rule to the evidence of an employee of the applicant, noting on the authority of *Barlowworld Coachworks Wynberg v Motor Industries Bargaining Council* that the cautionary rule against a single witness cannot be applied as a general rule, but that it only applies in circumscribed circumstances, and is confined to criminal proceedings. Rabkin-Naicker AJ then continued:

"The Arbitrator does not appear to have given any regard to the inherent probabilities of Baloyi's [the first respondent] version, and while describing him as 'also a single witness', merely states that Baloyi 'made a good impression during his testimony and the manner in which he answered questions during cross-examination'. Oral evidence can only properly be evaluated by testing it against the inherent probabilities of the evidence presented. The failure to do so amounts to a misdirection. [Citation to the SCA judgment in Cohen and Another v Lench and Another]" [Paragraph 19]

"... [T]he Arbitrator approached the evidence of the witness carrying the burden of proof ... guided by the cautionary rule (a material error of law). This approach was coupled with an evaluation of the evidence of Baloyi, based on his credibility and demeanour only, with no reference to the inherent probabilities of his testimony. In my view a fair trial of the issues could not ensue." [Paragraph 20]

"... While acknowledging the explanation for the delay was far from satisfactory, I am of the view that it is in the interests of justice that condonation be granted. The merits of the main application have clearly tipped the scales in this regard. Moreover, the public interest requires that the material issues in dispute receive a fair trial. ..." [Paragraph 21]

The Arbitration award was set aside and the matter referred back for a new arbitration.

SELECTED ARTICLES

'THE PROTECTED DISCLOSURES ACT: CHALLENGES FOR LABOUR LAW JURISPRUDENCE', (2002) 6 Law, Democracy and Development 139.

This article discusses the Protected Disclosures Act 26 of 2000 (the PDA), which had been in operation for two years when the article was published. The article sought to identify some of the difficulties users of the Act were likely to encounter.

"... [The PDA] is likely to be more widely used following the enactment of the latest amendments to the Labour relations act. Those protected by the PDA may now utilise the "unfair labour practice" and "automatically unfair dismissal" provisions of the Labour Relations Act to seek remedies for "occupational detriment and "dismissal" in terms of the PDA. ..." (Page 139)

The article discusses the background to the PDA, paying particular attending to the United Kingdom Public Interest Disclosure Act, which is identified as the inspiration for the PDA.

"The problems likely to arise around the interpretation and application of the PDA may in part be a result of its initial conception outside of the employment statute context. The PDA was never part of a process involving the social partners. It was not drafted with the provisions of other employment statutes as a major focus. This will impact on the buy-in of the social partners in using and promoting the legislation. It may also give rise to distinct challenges ..." (Page 140)

"Only the whistle blower qua employee is protected by the PDA. The definition of "employee" contained in the PDA, which is identical to that of the LRA before the 2002 amendments, excludes the independent contractor. The exclusion of this category ... is an important departure from the UK Act ... The British approach to extend the definition of "worker" for the purpose of whistle blowing appears logical. ... Yet, as it stands, the PDA will offer no protection or compensation to an independent contractor who through her work uncovers and discloses irregular conduct in a public or private body. Given the growing number of these contractual relationships ... the objectives of the PDA appear to be compromised. ..." (Pages 140 - 141)

"... [Protection against victimisation and prejudice for the disclosure of information that an employee is lawfully entitled or required to disclose is not a new concept in South African employment law. The "Chapter Two" rights of the LRA include a broad projection for just such a right. ... The Occupational Health and Safety Act likewise forbids victimisation of an employee who may have "given information to the Minister or to any other person charged with the administration of a provision of this Act which in terms of this Act he is required to give."" (Page 141)

"With the enactment of the PDA it would appear that an election is given to employees in certain circumstances. For example, an employee who discloses information as required by the Occupational Health and Safety Act, and is victimised with dismissal, can challenge her dismissal either by relying on section 5 read with section 187(1) of the LRA or utilising the new section 187(1)(h) of the LRA read with the PDA. Significantly, the PDA sets out the type of information that an employee may disclose, thus giving more certain content to the right to the disclosure of information contained in the LRA. ..." (Page 142)

The article then considers the definition of "disclosure" in the PDA:

"As a labour law practitioner one approaches this clause with some trepidation. A reference to the definition of unfair discrimination contained in the Employment Equity Act would have kept us on chartered territory. It is rather unexpected that users of the PDA are required to grapple with the definitions in the Equality Act. ... Compounding the problem is the drafting of the Equality Act itself and, in particular, section 5(3) ... which provides that "[t]his Act does not apply to any person to whom and to the extent to which the Employment Equity Act ... applies. ... the inclusion of the reference ot the Equality Act characterisation of unfair discrimination in the PDA may further muddy the waters of our labour jurisprudence." (Page 142 - 143)

The article then examines the circumstances under which a disclosure would be "protected" under the PDA:

"It is the disclosure to the employer that is favoured by the legislation. Using this avenue an employee must simply act in good faith and substantially in accordance with a prescribed or authorised procedure in order to enjoy protection. The PDA, like its UK counter-part, envisages the setting up of structures through which whistle blowers can comfortable disclose. ... The establishment of a disclosure procedure is not unproblematic. For example, how does such a process lie together with a normal grievance procedure? The whistle blower expects confidentiality. The normal route for an employee to raise a concern with the conduct of a superior will be through a grievance procedure. The target of that concern will ... have the right to hear the accusations against him and reply. If the complaint is taken through a distinct whistle blowing route where confidentiality is protected, the target will not necessarily have the right to hear the accusations and reply. The employer, if it needs to institute disciplinary proceedings ... may have to rely on information independent of the whistle blower. If no independent information exists, problems may arise. The balancing of rights in such a scenario will have to be carefully weighed. (Page 143 – 144)

"The breadth of the definition is notable when compared to the definition of an unfair labour practice in the amended section 186 of the LRA. Indeed, subsection (h) ... appears to give the litigant under the PDA the opportunity to seek compensation in the context of a threat rather than seeking an interdict to prevent the imminent harm. Did the drafters envisage the court awarding compensation for such an "occupational detriment"? It is questionable on what basis such an award could be calculated." (Page 144 – 145)

"... Some thought will have to be given to the way in which section 3 of the PDA is to be interpreted. Causation is likely to be the most vexed issue in these cases, with an employer's most probable defence being that the occupational detriment was suffered as a result of reasons that can support a fair dismissal or other fair disciplinary action. (Page 145)

SELECTED JUDGMENTS

PILLMAN 1986 LIMITED V ATLAS CARTON AND LITHO CC AND ANOTHER, UNREPORTED JUDGMENT, CASE NO: 46169/2010

This was an opposed application for summary judgment. Defendant raised a point in limine that the verifying affidavit by the plaintiff's representative in support of the application was defective for failing to comply with the rules of court (particularly, that it lacked sufficient particularity to justify the representative's statement of personal knowledge of the facts).

Bailey AJ held:

"... [S]ummary judgment proceedings can hardly continue to be described as extraordinary. A fortiori, that the time has come to discard these labels and to concentrate rather on the proper application of the rule, concurrent with the principles set out in the decision of Maharaj v Barclays National Bank 1976 (1) SA 418 (AD)" [Paragraph 10]

"In the Maharaj case ... the Appellate Division (as it was then) unanimously found that if a deponent to an affidavit in support of summary judgment, is a person other than the plaintiff himself, such despondent should state, at least, that the facts are within the deponent's personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts set out therein." [Paragraph 11]

"...The acceptability of a deponent's statement that the facts are within his or her personal knowledge, has to be considered in the context of all facts before the court. To this end, the court will consider whether, by virtue of the deponent's office in the circumstances of the case, the deponent appreciates the true meaning of the words. Most significantly, it is not necessary for the court to make either a presumption against the reliability of express evidence or to ignore the fact that the verifying affidavit itself constitutes evidence." [Paragraph 12]

"... [T]he lease agreement itself ... identifies the deponent as the plaintiff's duly authorised representative in the conclusion of the contract of lease. The defendant's submission that the deponent's affidavit does not comply with the formalities of the rule of court, must be seen in the context of the case in toto. ... Taking into account all the aforesaid considerations coupled with the absence of any denial on the part of the defendants as to the conclusion of the lease agreement, the defendants' challenge to the affidavit is without merit." [Paragraph 15 - 16]

The point *in limine* was thus dismissed.

"Summary judgment is granted only where the court has no reasonable doubt to the plaintiff's entitlement to the relief sought. The plaintiff must make out an unanswerable case. It is not disputed that there is pending litigation between the parties ..." [Paragraph 24]

"Having regard to the pending proceedings, it would be inappropriate at this juncture, for this court to make a final determination on issues which might very well have an impact on the outcome of the trial in the pending proceedings ..." [Paragraph 26]

The defendant was granted leave to defend.

THE STANDARD BANK OF SOUTH AFRICA LIMITED V TELCABE CONSTRUCTION AND CIVIL CC AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. 48650/2010

This was an application where the bank sought an order for the perfection of its rights over certain rental and revenue income ensuing in favour of Telcabe, by virtue of certain cessions executed by Telcabe in favour of the bank. The bank also sought an order directing Le-Matt Rentals CC (the second respondent) to cease collecting rentals from any tenants on the mortgage properties and to pay over to the bank any and all rentals or income revenue which it had in its possession, for or on behalf of Telcable.

Bailey AJ held:

"… [H]aving initially argued that the cession in casu constitutes a pledge for a number of reasons proposed by it, it consequently became ad idem between the parties, correctly in my view, that the elucidation or description of the cession did not carry much significance. I say it was correct because either way, whether by way of a pledge or by way of a cession in securitatem debiti, both are aimed at securing payment or satisfaction of the debt. Both are designed to prevent oppressive and unjust conduct which may have the result of an unfair distribution of the assets of the security giver, whether as pledgor or as cedent." [Paragraph 28]

"The security ought to be limited to the satisfaction of the debt. Put otherwise, its intention is to secure payment of value of or of the amount of the indebtedness. It ought not to permit the vesting of a disproportionate benefit in the creditor. When the implementation of a clause in an agreement results in an inequitable distribution of assets, same would constitute a pactum commissorium." [Paragraph 29]

"In the context of a pactum commissorium, and as per the court's judgment in Sun Life Assurance Co of Canada v Kurunda 1924 AD 20, no reason, commercial or otherwise, requires that a pledge and a cession in securitatem debiti should be dealt with differently." [Paragraph 30]

"... [T]he bank is not seeking to sell or to dispose of the ceded rights to the rentals. The rights which were ceded, were limited to Telcabe's indebtedness and capped to a maximum amount in respect of both properties." [Paragraph 37]

Bailey AJ found that the bank was entitled to the relief sought.

RENTCORP AFRICA (PTY) LTD V SPOORNET, A DIVISION OF TRANSNET LTD AND ANOTHER, UNREPORTED JUDGMENT, CASE NO: 2010/15929

This was a review application for the setting aside of the arbitration award of the second respondent and for the remittal of the award to the arbitrator for reconsideration and for the making of a fresh award in terms of section 32 of the Arbitration Act. It was argued that the arbitrator had misconstrued the nature of the enquiry, and failed to take cognisance of material and admissible evidence.

Bailey AJ held:

"In the case of Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA), it was stated ... that where a decision-maker misconceives the whole nature of enquiry, or his mandate, this in itself can constitute a gross irregularity…" [Paragraph 29]

"'Good cause' suggests a wide discretion. It is incumbent upon the court to consider each case on its own merits towards the achievement by it of a just and equitable result. It is not only in compelling circumstances that an award may be remitted. Whilst the issue of finality weighs heavily with this court's consideration of the matter, this principle must be weighed, inter alia, against the relative prejudice that may ensure if the matter is or is not remitted…" [Paragraph 31]

"In applying section 32(2) of the Act, the aforesaid section and the principles enunciated in the authorities ... I am mindful of the fact that courts are always reluctant to interfere with an award of an arbitrator."" [Paragraph 32]

"In ... the arbitration award, and in continuing to limit the issue for enquiry to the first respondent's extent of liability ... no determination was made by the second respondent and he did not pronounce on the correct interpretation that ought to be given to the agreement. In making the award that he did, the second respondent dealt with the ... addendum independently from the original agreement. He did so without furnishing any reasons and absent of any finding on interpretation. A fortiori, the very essence of the enquiry, namely the manner in which the original agreement and the ... addendum ought to be interpreted, has yet to be dealt with." [Paragraph 38]

"In the absence of a decision as to the interpretation of the agreement, the second respondent failed, in my view, to address him [sic] mind to the true issue that the parties referred to arbitration. To this end, the parties were not afforded a fair hearing." [Paragraph 41]

"Accordingly, I am of the view that it would be inequitable to allow the arbitrator's award to take effect without some further consideration. ..." [Paragraph 44]

Bailey AJ found further that the second respondent had misconceived certain evidence, and that the order made had been irregular. The arbitration award was set aside.

SELECTED JUDGMENTS

NAPIER NO V VAN SCHALKWYK 2004 (3) SA 425 (W)

Case heard 15 August 2003, Judgment delivered 5 September 2003

Respondent had successfully sued appellant in the High Court after the appellant had repudiated respondent's claim under an insurance contract. Respondent was the owner of a fleet of heavy duty trucks, one of which had been involved in an accident giving rise to the claim. On appeal to a full bench, it was argued that the respondent had breached clause 3 of the insurance policy, which required the underwriters to be advised of all physical loss or damage within 24 hours. The clause further provided that "[t]he assured or someone on his behalf shall give written notice thereof to the underwriters."

Farber AJ analysed the evidence regarding the circumstances in which the claim had been lodged, and held:

"The matter ... falls to be approached on the basis that the respondent orally notified the appellant of the occurrence within the prescribed period of 24 hours, and that written notification thereof was provided on the following Monday outside the prescribed period. " [Pages 431 - 432]

Farber AJ considered the cases of *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458, *Norris v Legal and General Assurance Society Ltd and Another 1962 (4) SA 743 (C),* regarding the interpretation of such clauses, and continued:

"It has on occasion been suggested that the Courts ought not to regard a time condition as a condition precedent in circumstances where it is either so capricious and unreasonable that a court of law ought not to enforce it or where it is sua natura incapable of being made a condition precedent. This approach did not find favour ... in Sleightholme Farms (Pvt) Ltd v National Farmers Union Mutual Insurance Society Ltd 1967 (1) SA 13 (R) ..." [Page 435]

"There has been judicial debate as to whether a condition such as condition 3 constitutes a condition precedent or is merely a material obligatory term of the policy. More recent authority clearly favours the latter approach. ... Whichever approach is adopted, it seems to me that condition 3 is clear and unequivocal in its meaning and effect. It provides in terms that a failure to furnish notification of the loss in writing within 24 hours is to hold the consequence that the indemnification to which the insured might otherwise have been entitled is to be treated as forfeited. In short, a breach by the omission to furnish the prescribed notification will result in the appellant being absolved from its obligation to indemnify the insured. ..." [Page 436]

"It is of course true, as was pointed out by the learned Judge a quo, that the condition was imposed for the benefit of the appellant and that the failure by the respondent to provide it with written notification of the loss within the prescribed time-frame occasioned no prejudice to it whatsoever ... This consideration does not in my judgment impact on the appellant's right to refuse the claim, for it is now settled law that it is entitled to invoke the benefit conferred upon it by a condition such as condition 3, irrespective of whether it has suffered any prejudice as a result of any non-adherence thereto. ... I must consequently disagree with the approach adopted by the learned Judge a quo. ... [T]here was a clear breach on the part of the respondent which entitled the appellant to disavow liability under the policy, unless of course such disavowal was precluded on the basis of some other legal constraint ..." [Page 437]

Farber AJ found that no waiver had been established, and turned to consider the second issue, namely whether the respondent had breached condition 15 of the policy. This provision established that, if the assured concealed or misrepresented any material fact or circumstance concerning the insurance, or made any claim knowing it to be false or fraudulent, the insurance was void. The evidence showed that the insured vehicle had been fitted with a tachograph device. Respondent had stated that the chart used with the device on the day of the accident had not been used, before a chart was later delivered to the assessor investigating the claim. An expert witness who examined the chart testified that it could not have been used on the day of the accident. Farber AJ considered the evidence and held:

"It seems to me then that the matter must inevitably be approached on the basis that the evidence of Mr Fourie [the assessor] must prevail where it conflicts with that of Gert [an employee of the respondent]. On that basis, it assumes relatively straight-forward proportions. The admission which the respondent made to Mr Fourie that charts were never used in the truck's tachograph device remains undisturbed. Having made the admission, and then having been told by Mr Fourie of the consequences which would flow therefrom in the form of the payment of an additional excess under the policy, the respondent ... sought to avoid that stricture by submitting a chart to Mr Fourie on the basis that it had at the relevant time been used in the truck's tachograph device." [Page 442]

"Given this, it seems to me to be plain that the respondent made a representation of fact ..., namely that the chart in question had been so used. The representation was false. It was certainly material in that it bore directly on the amount of the indemnity which fell to be paid under the policy. ... [I]t was common cause that in the event of the vehicle not having a functional tachograph device at the relevant time, the indemnity under the policy would fall to be reduced by the sum of R20 000" [Page 442]

"I am consequently driven to the conclusion that the appellant discharged the onus of placing the respondent within the framework of the first segment of condition 15." [Page 443]

The appeal was thus upheld. Jajbhay J concurred; Boruchowitz J concurred but wrote a separate judgment, commenting that the facts of the case underscored the need for legislative reform along the lines of Canadian legislation enacted to relieve an insured of the consequences of forfeiture.

S V TOUBIE 2004 (1) SACR 530 (W)

Case heard 27 August 2003, Judgment delivered 8, 9 December 2003

The appellant had been convicted by the High Court on three counts of robbery with aggravating circumstances, one count of murder, three counts of attempted murder (acquitted on one count of attempted murder), one count of unlawful possession of an unlicensed firearm and one count of unlawful possession of ammunition. The accused had been sentenced to an effective 26 years imprisonment.

On appeal to a full bench of the High Court, Farber AJ held:

"... T]he approach to be adopted in determining whether the onus of proof has been discharged in any particular case is frequently misconceived. The assessment of credibility, based on a piecemeal, self-contained and insular analysis of the evidence of each of the witnesses who might have testified at the trial, may tend to distort reality. What is required is an integrated approach, based on the evidence in its

totality. ... I can do no better than refer to the following extract from the judgment of Nugent J (as he then was) in S v Van der Meyden1999 (1) SACR 447 (W)..." [Page 534]

"...[I]n an appeal upon fact, the power of a Court of appeal to upset the findings of the trial Court is strictly circumscribed. The approach, so admirably formulated by Davis AJA in R v Dhlumayo and Another 1948 (2) SA 677 (A) ..., makes all of this perfectly plain. In short, in the absence of a cognisable misdirection by the trial Court, a Court of appeal will rarely interfere with the conclusion arrived at. This is so, even if it is in doubt as to the correctness of the conclusion. ..." [Page 535]

Farber AJ analysed the evidence presented at the trial, and noted that the appellant had not testified or called witnesses. Instead, the appellant had relied on a statement explaining his plea of not guilty, made under Section 115 of the Criminal Procedure Act. Farber AJ then dealt with the appellant's challenge to the conviction, beginning with the approach to the s 115 statement. Farber AJ considered High Court case law, and continued:

"None of this suggests, as was strenuously contended by Mr Omar, that a statement in terms of s 115 ... places what was described in argument as 'an additional onus' on the State. On the contrary, the burden which rests on the State remains static throughout, namely that of having to establish the guilt of an accused beyond reasonable doubt. In finding that the State had done precisely that in casu, the trial Court took cognisance of the appellant's statement in terms of s 115. Its determination was that the exculpatory contents thereof were, on the evidence as a whole, false beyond reasonable doubt. There is, in my judgment, no warrant for interfering with the trial Court's findings in that regard." [Page 543]

Farber AJ found that there was no merit in the challenges to the trial court's essential factual findings, and turned to consider whether that evidence justified the convictions. Farber AJ dealt first with the charges of robbery, addressing the appellant's argument that these were an improper duplication of convictions. Farber AJ considered Appellate Division case law and held:

"In my judgment, the robberies which formed the subject-matter of counts 1, 2 and 3 were committed within the framework of a single intent. Moreover, the evidence necessary to sustain any one of them was indispensable for the purpose of sustaining the others. ... [I]n my judgment the conviction of the appellant on counts 1, 2 and 3 involved an improper duplication. I am fortified in this conclusion by a line of cases which have all held that goods stolen from each of a number of occupants of a single room will only justify a conviction on a single count of theft, and no more. ... It consequently seems to me that count 1 of the indictment must be amended so as to incorporate counts 2 and 3. ... The verdict in respect of counts 2 and 3 must be set aside, with the result that the appellant will properly stand convicted of a single count of robbery." [Pages 547 - 548]

Farber AJ then dealt with the charges of murder and attempted murder:

"The criminal conduct of robbers in flight, and whether the actions of any one of them fall to be ascribed to the others, have on frequent occasions been considered by the Courts. [Citation to Appellate division cases] ... The principle to be extracted from these authorities is relatively plain. Where a group of persons act with common purpose, the unlawful actions of one member of the group will be attributable to the others in circumstances where such actions must have been foreseen and therefore, by inference, were foreseen as part of the general plan. It would be naive to suggest that the common purpose of the group was to rob, and that alone. In the absence of any evidence to the contrary, each one of them must have foreseen and therefore by inference did foresee that they would be required to make good their getaway

and that in that process they might meet resistance. It was equally foreseeable that such resistance would in every likelihood result in firearms being discharged, ... When in that process a life is taken or an attempt is made to do so, it matters nought whether the shot in question is discharged by a member of the group or by one of the pursuers. (S v Nhlapo and Another 1981 (2) SA 744 (A) ...) ... In these circumstances, the appellant must bear the consequences of the acts of his co-conspirators and the crossfire which it attracted. " [Pages 548 - 549]

Farber AJ then set aside the convictions on two of the charges of attempted murder, for lack of evidence of intention, and then dealt with the charges for possession of an unlicensed firearm and ammunition:

"The evidence against the appellant on ... was overwhelming. There is no basis whatsoever for disturbing the verdicts of guilty ... Mr Omar has urged that the convictions ... constitute an improper duplication. I do not agree. The evidence necessary to prove count 9 would have been complete without the essential evidential matter necessary to sustain count 10 being brought into the matter. This demonstrates that the acts foundational to counts 9 and 10 constitute separate criminal offences and fall to be treated as such. ... It bears mention that traditionally our Courts have treated the unlawful possession of a firearm and the unlawful possession of ammunition as separate and distinct offences and punishable as such." [Page 550]

Finally, Farber AJ turned to the issue of sentence:

"Given the trial Court's finding in relation to the existence of substantial and compelling circumstances or rather the absence thereof, it is manifest that in respect of counts 1 and 4, it imposed incompetent sentences. The sentence of six years' imprisonment on count 1 [robbery with aggravating circumstances] ought at least to have been 15 years' imprisonment. Imprisonment for life was called for on count 4 [murder], but only a sentence of 20 years' imprisonment was imposed ... The State lodged an application in this Court for leave to appeal against the sentences in question. This application was, wisely, in my judgment, not pursued. It is not within the competence of a Court of appeal to grant it. ... [B]ar certain exceptions ... leave to appeal is a matter for the trial Court, and it alone. ..." [Page 551]

Farber AJ considered section 322 of the Criminal Procedure Act, and the Appellate Division cases of *S v Morgan* and *S v Shenker* and held:

"...*Shenker* dealt with the right of an appellant to raise on appeal the propriety of his sentence in circumstances where leave to appeal had been granted in respect of the conviction only. There is, in my judgment, no reason in logic why a similar right ought not to enure for the benefit of the State, provided only that the appellant is properly before the Court of appeal. So much is evident from ss (6), which expressly empowers a Court of appeal to impose punishment more severe than that imposed by the Court below ...

Accordingly, this Court clearly has the competence to rectify the position. That it must do so in the wider interests of the administration of justice is clear.

I consequently propose to alter the sentence on count 1 to 15 years' imprisonment and on count 4 to imprisonment for life. For the rest, the sentences imposed by the trial Court, including the concurrency in their operation, will remain unaltered. ..." [Pages 556 – 557]

(Malan and Khampepe JJ concurred).

SANDTON SQUARE FINANCE (PTY) LTD AND OTHERS V BIAGI, BERTOLA AND VASCO AND ANOTHER 1997 (1) SA 258 (W)

Case heard 19 June 1996, Judgment delivered 21 June 1996

Applicants sought to eject the respondents from premises in Sandton Square. Respondents argued that the application had not been properly served, and that they were foreign peregrine and thus in the absence of an attachment ad fundandam, alternatively ad confirmandum jurisdictionem (to found or confirm jurisdiction), the court lacked jurisdiction.

Dealing first with the issue of service, Farber AJ held:

"Under the agreement of settlement the respondents chose domicilium citandi et executandi at 'the address of Biccari Banchetti Bollo Mariano ...'. Service of process was effected at the premises. Hence, so the argument ran, as there had not been service at the chosen domiciliary address the applicants fell to be non-suited. I do not agree. The mere fact that a domiciliary address has been chosen does not preclude effective service through one of the other methods prescribed under the Uniform Rules of Court. Rule 4(1)(a)(ii) provides that service may be effected by leaving a copy of the process or document at the place of business of the person to be served with the person apparently in charge of the premises at the time of delivery. In casu that is precisely what happened."

"It has in this regard not been gainsaid that the respondents took occupation of the premises and have throughout remained in occupation thereof. More importantly, the respondents in terms of the draft confirmed that they carried on business at the premises. ... [T]he chosen method of service was sound in law."

"... In terms of the draft, the respondents qua tenant chose domicilium citandi et executandi at the premises. They are in fact the tenant. There is nothing notionally wrong in a party choosing more than one domiciliary address. Where this is done, service at either chosen address will in my judgment be sound in law. There is consequently no merit in the first point raised." [Page 260]

Farber AJ then dealt with the question of jurisdiction, noting that the contention that the respondents were *peregrini* was based on the assertion that they were Italian citizens ordinarily resident in Italy:

"Insofar as natural persons are concerned, a peregrinus is a person who is not resident or domiciled in the area of jurisdiction of the Court. ... Citizenship does not per se enter the equation and the real question for determination is whether the somewhat conclusory and bald reference to the respondents being ordinarily resident in Italy founds an inference that they are not resident in this Court's area of jurisdiction." [Pages 260 - 261]

"It is plain that a person can have more than one residence. ... Mr Biagi does not explain what he intended to signify in his use of the words 'ordinarily resident'. ... [H]is affidavit eschews all reference to facts supportive thereof. It represents little but a bald and conclusory statement which in the circumstances of the case holds little cogent force. ... [I]t is abundantly plain that the respondents have more than a cursory association with the Republic. ... [T]he respondents have not shown on a balance of probability that they were at the relevant time *peregrine*. The defence based on an alleged absence of jurisdiction must ... fail on this score"

"In any event, I am unpersuaded that, even if the respondents were peregrini, an attachment ad fundandam, alternatively ad confirmandam jurisdictionem was a prerequisite to the exercise by me of jurisdiction in the matter, at least insofar as the claim for ejectment is concerned."

"The enquiry whether a Court has jurisdiction in a particular matter is a dual one, namely is there a recognised ground of jurisdiction and, if there is one, has the Court power to give effect to the judgment sought. ... The applicants seek possession of immovable property situate within this Court's area of jurisdiction. As the forum rei sitae it has exclusive jurisdiction to entertain the suit. ... Moreover, an order for the possession of immovable property granted by the forum rei sitae is open to enforcement by it despite the fact that it might have no power over the defendant. ..." [Page 261]

"The rationale underlying the need to attach the person or the goods of a *peregrinus* in order to found or to confirm jurisdiction lies in the doctrine of effectiveness. ... Where such effectiveness is otherwise open to attainment, it would seem to me to be quite wrong to require an attachment or arrest. ... [T]here was in my judgment no need ... to effect an attachment to either confirm or found jurisdiction." [Page 262]

Farber AJ noted further that the draft contained a submission to jurisdiction rendering an attachment unnecessary. The application was granted.

ISDN SOLUTIONS (PTY) LTD V CSDN SOLUTIONS CC AND OTHERS 1996 (4) SA 484 (W)

Case heard 2 May 1996, Judgment delivered 3 May 1996

This case concerned the interpretation of Uniform Rule of Court 6(12)(c). Applicant had been granted an interim order against the respondents following an urgent application. The order inter alia restrained the respondents from "disseminating injurious falsehoods of and concerning the applicant"; and from using any confidential information belonging to the applicant.

Farber AJ held:

"The notice of motion and supporting affidavits underlying the grant of the order were served on the respondents during the course of the afternoon of the previous day. Prior to the matter being moved, the respondents advised the applicant's attorney that they intended opposing the application. Despite that intimation, the respondents made no appearance and the order ... was made in their absence. ... [T]he Court was told of the respondents' intention to oppose the matter."

"The order was served on the respondents on 3 April 1996. They filed their answering affidavits in the main application on 22 April 1996. Some two days later they filed a notice of set down, intimating that on 30 April 1996 application would be made for a 'reconsideration of the order'. ... Mr *Coetzee*, in support of the relief claimed, has invoked in aid the provisions of Uniform Rule of Court 6(12)*(c)*. He points to the contents of the respondents' answering affidavit, urging that on the basis thereof interim relief ought now to be denied to the applicant, either in whole or in part." [Page 486]

Farber AJ considered the wording of the Rule, which provided that: "A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

"... Counsel were unable to refer me to precedent dealing with the construction thereof. Nor was I able to find any. The Rule has been widely formulated. ... The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order. ... [T]he dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. ..." [Page 486]

"The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. ... Although no hard and fast rule need be laid down, it seems desirable that a party seeking to invoke the Rule ought in an affidavit to detail the form of reconsideration required and the circumstances upon which it is based." [Page 487]

"In casu, I am not inclined to exercise my discretion in favour of the respondents. My disinclination arises from the following considerations: 1. The respondents' absence on 2 April 1996 has not been explained. They clearly knew that an order would be sought on that day. Given such knowledge, I have no reason to suppose that they did not acquiesce in the grant thereof pending the determination of final relief. 2. The order has now subsisted for a month, with, so it seems, little hardship to the respondents. ... 3. The order is of interim operation. The question of final relief is virtually ripe for determination and will in the ordinary course be adjudicated upon within the next three weeks. It would seem pointless for me to enter the fray in circumstances where resolution in the form of a final determination is imminent. 4. Oppression, injustice or imbalance have not been demonstrated. ... 5. Against this, the applicant, given the very nature of its cause of complaint, may be exposed to very real prejudice should the interim protection which it at present enjoys be removed. The balance of convenience overwhelmingly favours the retention of the order." [Pages 487 - 488]

The application for the reconsideration of the order was thus dismissed.

SELECTED JUDGMENTS

EX PARTE AUGUST 2004 (3) SA 268 (W)

Case heard 9 April 2003, Judgment delivered 17 April 2003

This was an appeal against the decision of a magistrate to dismiss the application of the appellant for an administration order.

Francis AJ held:

"The learned magistrate misconstrued the very purpose of administration and in doing so clearly misdirected himself by finding that the appellant caused her own misfortune. There existed no factual basis on which this finding could have been made and even if it was established that the appellant caused her own misfortune, the learned magistrate misdirected himself further by considering this. Section 74 of the Act does not provide as a prerequisite for the granting of an administration order that a debtor should not be the cause of his or her own financial embarrassment. ... [T]he learned magistrate overemphasised the interests of the creditors, none of whom opposed the application, at the expense of the appellant." [Paragraph 10]

"The learned magistrate's finding that it could not have been the intention of the Legislature that one cannot assist a debtor if that would be to the detriment of creditors is untenable. The very nature of an administration is such that creditors' remedies are restricted. ... He therefore misdirected himself in applying this test." [Paragraph 11]

"The learned magistrate misdirected himself by not approaching and adjudicating the applications for administration orders on the foundation based on concursus creditorum. The effect of his finding and judgment is that appellant will now have to consider a voluntary surrender of his estate, alternatively face a possible application for sequestration. If regard is had to the requirements laid down by the Insolvency Act ... and this Division's practice regarding the costs of such an application, this is not a tenable option for the appellant. One creditor might be preferred above another." [Paragraph 13]

"The fact that the appellant has or might have very little money with which to pay the body of creditors and that this would result in the creditors having to '. . . wait many years before they receive their money back' is a further misdirection ... This is not a factor that should play a decisive, if any, role in adjudicating any application for an administration order." [Paragraph 14]

"The learned magistrate misdirected himself by finding that 'the High Court and the Legislature intended a reasonable time within which a debtor should be assisted to get out of his financial embarrassment'. There is no basis in law for the inference that the learned magistrate sought to draw. In addition the learned magistrate found that it would not be in the interest of the appellants should they be under administration for an unreasonably extended period. The result and effect of the said reasoning are again that the applicant ... is left with no alternative procedure but sequestration. This, too, will result in the appellant's not being able to lead a normal economic life within a reasonable period." [Paragraph 15]

"The machinery of s 74 of the [Magistrates' Court] Act [the provision governing administration orders] was designed for the very purpose of assisting debtors and any benefits that creditors might derive from it should be accepted. Had it been the intention of the Legislature that there should be a benefit to

creditors, it would have made express provisions therefor, as in the Insolvency Act regarding sequestration proceedings. ...” [Paragraph 16]

“Section 74 does not make provision for the period within which any debt has to be paid. Had it been the intention of the Legislature that a debt, or the collection of a debt, has to be paid in full within a certain time, it would have made express provision therefor. A further problem that arises with such interpretation of s 74 is how a 'reasonable period' is to be determined or calculated. ...” [Paragraph 17]

“The learned magistrate did not consider those aspects that should have been considered in the granting of an administration order and that by taking into consideration the above factors and refusing the applications, failed to exercise his discretion properly or judicially.” [Paragraph 19]

“I am satisfied that the appellant and the other applications that served before the learned magistrate complied with the formal requirements of the prescribed statutory provisions. The learned magistrate, in refusing each application, did not exercise his discretion judicially, nor on any proper grounds. His findings and orders stand to be set aside.” [Paragraph 20]

The appeal was upheld.

BAADJIES V MATUBELA 2002 (3) SA 427 (W)

Case heard 21 August 2001, Judgment delivered 27 August 2001

This was an application in terms of Rule 43 of the Uniform Rules of Court for maintenance and contribution towards costs pendent lite. The applicant intended to institute an action against the respondent for a decree of divorce, child maintenance, and an order that the parties’ assets be dealt with in terms of the Recognition of Customary Marriages Act. The respondent opposed the application on the grounds that no marriage, by customary or civil law, had ever existed between him and the applicant; that no divorce action was pending; and that he had no legal or other duty to maintain the applicant or contribute to her costs.

Francis AJ held:

“The applicant contends in her founding affidavit that on or about 18 August 1995, the respondent met with her grandfather, ... who is the paterfamilias of her family. They agreed on an amount of R15 000 as lobola for the applicant. An African customary marriage was entered into between the applicant and the respondent on the same day and they lived together as husband and wife” [Paragraph 2]

“The issue that needs to be decided is whether the applicant is a spouse in terms of customary law. If she is a spouse, she will be entitled to receive some relief in terms of the provisions of Rule 43 of the Rules of this Court.” [Paragraph 8]

Francis AJ considered the provisions of the Recognition of Customary Marriages Act, and held:

“It is trite that Rule 43 regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. Rule 43 governs procedure and does not affect the substantive

law. The object of the Rule is that applications of this kind should be dealt with as inexpensively and expeditiously as possible..." [Paragraph 15]

"It is clear from the provisions of the Act that a spouse who is married in terms of customary law before the commencement of the Act and whose marriage is registered with a registering officer can approach this Court for interim relief in terms of Rule 43 ... Such a spouse will have to satisfy the Court hearing the Rule 43 that a valued customary marriage was entered into. Where there is a dispute about whether such a marriage was entered into, the production of a certificate of registration of a customary marriage issued either in terms of the Act or any other applicable statute would be prima facie proof of the existence of that marriage. A spouse who is not in possession of such a certificate can also approach this Court on application that such customary marriage is entered in terms of s 4(7)(a) of the Act." [Paragraph 17]

"The applicant did not produce any certificate of registration of a customary marriage as proof of the existence of the customary marriage with the respondent. She also did not utilise the provisions of s 4(7)(a) of the Act. ..." [Paragraph 18]

"Not only did the applicant fail to submit prima facie evidence of her marriage, but she had deposed to an affidavit on 20 December 2000 in support of a protection order wherein she stated that she regarded her relationship with the respondent as that of boyfriend and girlfriend. ... This supports the respondent's contention that no customary marriage was entered into with the applicant." [Paragraph 19]

"The applicant annexed a supporting affidavit ... deposed to by her grandfather. ... There are material discrepancies in the applicant's version and that of her grandfather. The applicant stated that the marriage took place on 18 august 1995 and that on the same day lobola in the amount of R15 000 was agreed upon. Her grandfather ... does not state when exactly the marriage took place or that it did take place. According to him only R9 000 was paid but the date when it was paid is not mentioned. ..." [Paragraphs 20 - 21]

"As stated above, the respondent denied that he was married to the applicant in terms of customary law. He stated that on 18 August 1995, which is the date the applicant alleges they got married, she was living with another man as husband and wife. The respondent denied that he paid any lobola for the respondent. I find it highly improbable that the respondent, who met the applicant's grandparent for the first time on 18 August 1995, would have paid lobola on that date and got married to her on the same day. Neither the applicant nor her grandfather pursued the balance outstanding for lobola." [Paragraph 22]

The respondent's point in limine was upheld.

SELECTED JUDGMENTS

BLACK TOP SURFACES (PTY) LTD V MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC WORKS & ROADS LIMPOPO PROVINCE & OTHERS [2006] JOL 17099 (T)

Four separate applications were set down for simultaneous hearing. The applicant in each application was the same, and sought the same relief in each application, namely to interdict the second respondent from giving effect to the respective tenders awarded to the third and/or fourth respondents. In deciding on the award of tenders, the second respondent applied what was referred to as the threshold principle. This established contract price thresholds for exclusion. The applicant contended that the threshold principle was in conflict with the Preferential Procurement Policy Framework Act (PPPFA) and was therefore unlawful.

Kruger AJ held:

“On a proper reading of section 2 of the PPPFA, I am of the view that the threshold principle constitutes an objective criterion as is envisaged in sub-section (2)(1)(f). There are good reasons for the existence of the threshold principle; the thresholds of 10% below and 5% above have been accepted and approved by the Board of the second respondent; if the tender is more than 10% below the said estimate, such tenderer is considered a business risk as the project may not be profitable for it and experience in the past has shown that projects are then abandoned and become a problem for the second respondent in that huge costs have to be incurred to salvage the project. Time delays are also important. The 5% threshold ensures that the second respondent does not pay more than 5% of the market related price for any project; this aspect is also important for the budgeting of the second respondent.” [Paragraph 33]

“Further in addition, and with reference to the wording of and criteria laid down by section 2 of the Act, it is evident that one is dealing with what has been described as "policy-laden "or "polycentric decision - making "issues; See the comments by Cameron, JA in Logbro Properties CC v Bedderson NO and others 2003 (2) SA 460 (SCA) ... It follows that the threshold principle constitutes an objective criterium which is not prohibited by or in conflict with the PPPFA. For that reason alone, applicant has not established a clear right (or even prima facie right).” [Paragraph 34]

The application was dismissed.

NEDCOR BANK LTD V DE BEER [2005] JOL 13763 (T)

The plaintiff sought summary judgment in an action against the defendant based on his having bound himself as surety and co-principal debtor in plaintiff's favour. The defendant raised two points in limine. The first was that the knowledge and authority of the deponent of plaintiff's supporting affidavit fell short of the requirements set out in rule 32. Secondly, it was averred that the application for summary judgment did not comply with rule 32 in that the supporting affidavit did not verify the causes of action and the amounts set out in the summons.

Kruger AJ held:

“It is trite that the verifying affidavit goes to the question of the court's jurisdiction. If the affidavit does not comply with the requirements of the rule, the court would have no jurisdiction to grant summary

judgment. If material allegations in the affidavit are hearsay, the affidavit is defective and the application bad. It is therefore open to the respondent in summary judgment proceedings to attack the validity of the application on any aspect, including the admissibility of the evidence tendered in the verifying affidavit (see Mowschenson and Mowschenson v Mercantile Acceptance Corporation of South Africa Ltd 1959 (3) SA 362 (W) ...” [Paragraph 7]

“Can it be said that the verifying affidavit complies with the provisions of rule 32(2), if, on the face of it, it is not altogether compatible with the contents of the particulars of claim (or to formulate the question even narrower: if it is not compatible with the contents of the particulars of claim in material respects)? It is clear that in order to comply with the rule, the affidavit must contain a verification of the cause of action and the amount claimed. The verification is done by referring to the facts alleged in the summons; it is unnecessary to repeat the particulars (Van den Bergh v Weiner 1976 (2) SA 297 (T) ...).” [Paragraph 8]

“That is, however, not what occurred in this instance; the affidavit in support of plaintiff's application, read with the particulars of claim and the annexures thereto, poses several problems. ...” [Paragraph 9]

“In my view these issues, when read together, raise serious doubt with regard to the question whether the deponent had in fact acquainted herself with the cause of action and the amount claimed, as those appear in the particulars of claim. On the face of it the contents of the particulars of claim and the annexures thereto (on the one hand), and the contents of the supporting affidavit (on the other hand) are incompatible; by no stretch of the imagination could the contents of the supporting affidavit reasonably be held to pertain to, or serve as a verification of the cause of action and the amount claimed as those appear in the particulars of claim read with the annexures thereto. Bearing in mind that the approach to be followed in matters of this nature should not be overtly technical, it should also be borne in mind that the procedure pertaining to summary judgment is a stringent one. ...” [Paragraph 10]

The defendant was granted leave to defend.

AFFORDABLE MEDICINES TRUST & OTHERS V MINISTER OF HEALTH, RSA & OTHERS [2004] 4 ALL SA 622 (T)

The applicants launched a constitutional challenge to the Medicines and Related Substances Act 101 of 1965, section 22C(1)(a), and to certain regulations promulgated in terms of the Act. The main bone of contention related to a provision that required medical practitioners to apply for a licence before they would be allowed to dispense medication.

Kruger AJ held:

“It is trite that one of the pillars on which our democratic dispensation is based, is the principle of the separation of powers. As a general point of departure courts will be loath to enter into the fray of legitimate government policy; it is not for a court to adjudicate upon, or apply value judgments with regard to, the contents of government policy. At the same time, the principles of transparency and accountability constitute values which underpin the entire fabric of the Constitution. Herein lies a marked difference between the old order and the current dispensation. In the latter, the formulation of policy is subject to public scrutiny and input, and the end-product is susceptible to assessment by the public. Public officials, be they politicians or civil servants, may be held responsible for their policies by the

public. Accountability, in this sense, forms part of the political process and it is not for the courts to interfere with policy matters under the guise of accountability." [Paragraph 17]

"I ... hold that the words in section 22C(1)(a), ie "on the prescribed conditions" read with the contents of regulation 18, particularly to the extent that the latter refers to the fact that the exact location of the premises where compounding and/or dispensing will be carried out, must be provided to the Director-General and read with regulation 18(7), are rationally related to the stated government policy" [Paragraph 27]

"The purpose of regulations is to spell out detail which, should it have been included in the empowering legislation, would render the latter cumbersome or which, by the very nature of the legislation itself, could conveniently be dealt with by way of regulations without attempting to empower the relevant Minister to supersede Parliament's legislative function or to assume legislative powers which, due to their very nature, reside with Parliament. In the current instance the Minister did not assume Parliament's residual legislative powers, nor did she exceed the powers bestowed on her by section 35 to make regulations; the impugned parts of the regulations fall squarely within the parameters imposed by section 35 regarding issues on which the Minister is empowered to make regulations ... The "conditions" laid down by the Minister in the regulations find their origin in the empowering provision, ie section 35, read within the context of the Medicines Act." [Paragraph 29]

"... When interpreting the relevant legislation and in particular the impugned provisions, full cognisance was taken of the enjoinment that the spirit, purport and objects of the Bill of Rights must be promoted. I am nevertheless of the view that to interpret the relevant legislation in the way I do, in no way impinges on any right of a medical practitioner, whether it be a right which enjoys constitutional protection or otherwise, in any way whatsoever." [Paragraph 43]

The application was dismissed. An appeal to the Constitutional Court was upheld in part. The Constitutional Court set aside the High Court's order, and replaced it with an order dismissing the constitutional challenge to subsection 22C(1)(a) of the Medicines Act; and certain sub regulations. However, subparagraphs (a), (c), (d) and (e) of subregulation 18(5) were held to be inconsistent with the Constitution and therefore invalid. **Affordable Medicines Trust and Others v Minister of Health of RSA and Another 2005 (6) BCLR 529 (CC).**

NOUPOORT CHRISTIAN CARE CENTRE V MINISTER, NATIONAL DEPARTMENT OF SOCIAL DEVELOPMENT & ANOTHER [2004] 3 ALL SA 475 (T)

Applicant sought an order directing the second respondent to register it in terms of section 9(3) of the Prevention and Treatment of Drugs Dependency Act.The applicant was a voluntary association registered as a non-profit organisation with the Department of Social Development and operated as a treatment centre of persons addicted to drugs. The methods adopted at the centre were however, questioned in the media following reports of abuse of patients, and the alleged violation of their human rights.

Kruger AJ held:

"There can be no doubt that the inaction on the part of second respondent complained of, falls under the definition of "administrative action" in section 1 of PAJA. In terms of the relevant parts of that section "administrative action" means any decision taken, or any failure to take a decision, by an organ of State

when exercising a public power or performing a public function in terms of any legislation. In terms of the definitions section a "decision", inter alia, includes any decision of an administrative nature made under an empowering provision, including a decision relating to issuing or refusing to issue a licence, authority or other instrument, or imposing a condition or restriction. "Decision" furthermore includes the doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly." [Paragraph 25]

"The approach to be followed in matters where the exercise of public power is challenged by way of review proceedings, has been encapsulated in various decisions by the Constitutional Court. For present purposes I only refer to the judgment in Pharmaceutical Manufacturers Association of South Africa and another: In re: Ex parte President of the Republic of South Africa and others 2000 (2) SA 674 (CC) ..." [Paragraph 28]

"Although PAJA makes explicit provision for instances where failure to take an administrative decision occurs, the principle involved is not foreign to our case law. [Citation to High Court judgments] ..." [Paragraph 29]

"The question for decision is whether there has been a failure to take a decision. Taking into consideration the definition of "decision" in section 1 of PAJA, read with the definition of "failure", and the contents of section 6(3)(a), it is evident that "a failure" may include a refusal to take a decision, but is not necessarily restricted to an explicit or positive refusal. In appropriate circumstances an unreasonable delay in taking a decision may constitute a failure to take a decision. Whether an unreasonable delay occurred will depend on the facts of each case." [Paragraph 31]

"By way of a letter dated 30 April 2002 and directed to the Chairperson of applicant's Board of Management, the then Director-General of the Department of Social Development (ie the predecessor to the current Director-General), informed applicant that its temporary registration has been extended until 31 July 2002 "pending the outcome of the investigation". It is not clear to which of the four investigations, which have been referred to in this judgment, this reference pertains. ..." [Paragraph 32]

"In view of certain occurrences in the past, second respondent's concerns regarding possible or alleged violations of patients' humans rights, are understandable. In fact, as a responsible public officer, second respondent should be concerned, and was rightly concerned, regarding those allegations. On the proven facts, however, applicant has not been shown to be legally culpable or responsible for any alleged misconduct. Second respondent has powers of inspection at applicant's premises. The full and proper protection of patients' human rights will typically be one of the aspects to which second respondent will be alert. In that regard the role hitherto played by the media, is commendable; awareness on the part of the media regarding the protection of the human rights of patients, also in an institution of the kind conducted by applicant, does justice to the role of the media as watchdogs of the community and also enhances a human rights culture." [Paragraph 36]

"While taking full cognisance of the concerns raised by second respondent for not having taken a decision with regard to applicant's application for permanent registration, and while having carefully considered possible serious repercussions which may arise should an institution of the kind conducted by applicant not be properly administered in all conceivable respects, I am nevertheless of the view that within the context of the matter, and the facts and circumstances which apply, the failure on the part of second respondent to take a decision with regard to applicant's application for permanent registration, is unreasonable." [Paragraph 38]

The second respondent was ordered to decide the applicant's application for registration.

HIGHVELDRIDGE RESIDENTS CONCERNED PARTY V HIGHVELDRIDGE TLC AND OTHERS 2003 (1) BCLR 72 (T)

The applicant instituted proceedings on behalf of the residents of L Township, in the public interest and in the interest of its members. The applicant alleged that the respondents (which, apart from the first respondent, included the mayor and town clerk of Highveldridge and the Minister of Health) had, contrary to ss 27, 28(1)(c) and (d), and 33(1) of the Constitution, unlawfully terminated the water supply of L Township. Relying for locus standi on s 38 of the Constitution, the applicant sought an order, inter alia, reviewing and setting aside the respondents' decision to cut off the water supply. The respondents raised a point in limine in which they denied that the applicant had the required locus standi because it did not fall within the ambit of 'anyone' as intended in s 38.

Kruger AJ held:

"The approach to standing based on s 38 of the Constitution has been considered in various judgments of the Courts. In Beukes v Krugersdorp Transitional Local Council and Another 1996 (3) SA 467 (W) ... it was pointed out that s 7(4) of the interim Constitution ... introduced far-reaching changes to our common law of standing. It has, furthermore, now become settled law that there is no cogent reason for a restrictive interpretation of the provisions of s 38 because of the narrow content given to standing under the common law, (compare Ferreira v Levin NO ... where the majority held that these provisions must be interpreted generously and expansively, thus ensuring that the rights in the Constitution enjoy the full measure of protection to which they are entitled)." [Paragraph 13]

Kruger AJ referred to the judgment of Froneman J in *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E) regarding class actions, and continued:

"Section 38 of the Constitution bestows standing with regard to the enforcement of the rights enshrined in the Bill of Rights, to 'anyone listed in this section'. The second sentence of the section refers to 'the persons who may approach a court', followed by, again, the word 'anyone' in ss (a), (b), (c) and (d); however ss (e) does not refer to 'anyone' but to 'an association'. To the extent that the applicant relies on being 'an association acting in the interest of its members' (as it undoubtedly and inter alia does), the crisp question is whether the 'association' referred to in ss (e) must comply with and adhere to the requirements of the common law pertaining to a voluntary association in order for it to have locus standi, or not." [Paragraph 21]

"Bearing in mind the expanded standing provided for by s 38 and the way in which the latter has been explained and implemented in previous judgments, I am of the view that the restrictions placed by the common law on the legal standing of voluntary associations cannot and should not apply without qualification to voluntary associations seeking to invoke s 38 to seek redress, in the event of rights in the Bill of Rights having allegedly been infringed or threatened. To restrict voluntary associations in the way they are restricted by way of the common-law requirements, particularly when rights enshrined in the Bill of Rights are at stake, would be incompatible with various principles contained in, and which by necessary implication underpin, the Constitution. Those principles include, inter alia, the constitutional

norms of accountability, responsiveness and openness on which the constitutional state is founded. It would equally be contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvement and development of a rights culture pursuant to the rights enshrined in the Bill of Rights. To hold otherwise would, in my view, be to disregard the interests of 'the poorest in our society' who are often not in a position where legal advice is readily accessible and who are more often than not, dependent upon action taken by informally structured associations of civil society so that legitimate issues may be addressed on their behalf. It will also be contrary to the basic values of human dignity, equality and freedom which underlie the spirit, purport and objects of the Bill of Rights" [Paragraph 24]

"A contextual reading and understanding of s 38 does not only allow for an interpretation as is referred to in para [24], but compels the interpreter to ascribe a meaning to the words 'an association' that will be compatible with the overarching spirit, purport and objects of the Bill of Rights. Section 38 bestows certain 'persons' with standing. One such kind of 'person' is 'an association'. An association need not have legal personality for it to sue or be sued in its own name. Ex facie the text no restrictions are placed on the locus standi of 'an association'. When weighing up the common-law restrictions placed on standing pertaining to voluntary associations, against the context within which s 38 stands to be interpreted, I am of the view that to hold that the common-law restrictions apply, would be contrary to the constitutional context and would render the common law an 'impenetrable obstacle', which it should not be, particularly in view of the provisions of ss 39(2) and 173 of the Constitution. Such an approach, in my view, complies with the ratio decidendi laid down in both the Ngxuza judgments, albeit that those judgments pertain to class actions." [Paragraph 25]

Kruger AJ found that the applicant had standing, and granted leave (subject to certain conditions) for it to act as representative on the interest of its members and on behalf of all such other inhabitants of the township whose water supply had been terminated during the relevant time.

SELECTED ARTICLES

NOTE: Whilst the candidate's application form lists a large number of academic articles written by the candidate, those articles which could be located were all in Afrikaans, and could therefore not be included in this report.

SELECTED JUDGMENTS

MOTSOATSOA V RORO AND ANOTHER [2011] 2 ALL SA 324 (GSJ)

The applicant sought an order declaring that a customary marriage existed between her and a third party (the deceased); alternatively that the third respondent be directed to register the customary marriage between the applicant and the deceased in terms of the provisions of section 4(7) of the Recognition of Customary Marriages Act.

Matlapeng AJ held:

"It is trite that customary marriage is an age-old institution deeply respected and embedded in the social cultural fabric of all indigenous people of South Africa. However, over a long period of time during the apartheid era, customary marriage became an object of serious distortions. Regrettably we have now reached a stage where there is a serious and all pervasive confusion regarding the true nature of customary marriage. With the advent of our new democracy, the Recognition of Customary Marriages Act was passed in an attempt to clarify the legal status of customary marriages. ..." [Paragraph 8]

"Section 3(1) of the Act deals with the requirements for the validity of customary marriages. It provides as follows ... Whilst the requirements mentioned in paragraph (a) subparagraphs (i) and (ii) are self explanatory and clear, the requirements that the marriage must be negotiated and entered into or celebrated in accordance with customary law is vague as it does not specify the actual requirements for a valid customary marriage. A factual determination still has to be made in order to reach a finding as to whether this requirement has been complied with." [Paragraph 10]

"The Act defines customary marriage as "a marriage concluded in accordance with customary law" and customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". This statement simple as it may sound creates serious problems regarding how to ascertain the applicable customary law. This is compounded by the fact that some customary and cultural practices among the indigenous people are not homogeneous. This is further exacerbated by the fact that there are many sources of customary law in existence." [Paragraph 11]

"This problem was identified in Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as amicus curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa & another 2005 (1) SA 580 (CC) ... where Ngcobo J (as he then was) ... indentified three ways in which customary law can be established. This is by (i) taking judicial notice of it where it can readily be ascertained with sufficient certainty, (ii) where it cannot be readily ascertained expert evidence may be adduced to establish it and (iii) by having recourse to text books and case law. ..." [Paragraph 12]

"As Ngcobo J correctly remarked in Bhe, in ascertaining customary law, caution should be exercised when relying on case law and text books. The same cautious approach was spelled out as follows in Alexkor Ltd & another v The Richtersveld Community & others 2004 (5) SA 460 (CC) ..." [Paragraph 13]

"It is regrettable that over the years, serious divergence has emerged between the living customary law (customs as practised by the people in their communities) and customary law as written by academics and also that which is contained in case law. As traditional customary law is not written, the tendency was to make it subservient to the one written in statutes, by academics or in case law. The reality is that

in most instances the customary law embodied in statutes, academic writings and case law does not reflect the correct and genuine customary law. The institution of customary marriage is a perfect example of this distortion as I will demonstrate ... It also has to be realised that customary law is not static but vibrant and dynamic in the communities practising it. Despite years of neglect and suppression, it has developed on its own and adapted itself to the changing needs of the communities as they evolved and developed. This phenomenon is admirably captured by Ncgobo J in the Bhe case ...” [Paragraph 14]

“Ascertaining customary law from text books and case law does not present problems. The difficulty lies in determining the current customary law as practised in the communities. This is stated as follows at paragraph the Bhe case ... Therefore true customary law as currently practised in the communities has to be separated from the distorted version. One also has to be alive to the changes brought about by the Act.” [Paragraph 15]

“Proving the existence of a customary marriage should not present many problems as the formalities for the coming into existence of marriage have crystallised over the years. The reasons for these are not hard to find. The institution of customary marriage is an age-old and well respected one, deeply embedded in social fabric of Africans. The formalities relating thereto are well known and find application even in the marriages of the majority of Africans who marry by civil rites as the two marriages are celebrated side by side. Any distortions and deviations to the formalities can easily be identified, particularly by those who are well versed with the real and true customary law.” [Paragraph 16]

“As described by the authors Maithufi IP and Bekker JC, ... a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore it is not about the bride and the groom. It involves the two families. The basic formalities which lead to a customary marriage are: emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties man and woman have agreed to marry each other); a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will then agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding). See also Fanti v Boto & others 2008 (5) SA 405 (C) ..., Chakalisa v Mmemo (CACLB 04106) [2008] BWCA 11 (30 January 2008).” [Paragraph 17]

“One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family namely that of the groom. As the man's family gained a daughter through the marriage, from her family, the bride is invariably handed over to him at his family's residence. Handing over of the bride (go gorosa ngwetsi (Tswana)/ ukusiwa ko makoti e mzini e hamba noduli (Xhosa)) is not only about celebration with the attendant feast and rituals. It encompasses the most important aspect associated with married state namely go laya/ukuyala/ukulaya in vernacular. There is no English equivalent of this word or process but loosely translated it implies "coaching" which includes the education and counselling both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. This is the most important and final step in the chain of events happens in the presence of both the bride and the groom's families. One can even describe this as the official seal in the African context, of the customary marriage.” [Paragraph 19]

“The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom's people there can be no valid customary marriage. [Citation to TW Bennett Customary Law in South Africa] ... In terms of practised or living customary law

the bride cannot hand herself over to the groom's family. She has to be accompanied by relatives." [Paragraph 21]

The application was dismissed, Matlapeng AJ finding that on the facts, no customary marriage had been shown to have existed.

PHILLEMON MOLELEKENG AND OTHERS V E H J ENGELBRECHT AND ANOTHER, UNREPORTED JUDGMENT, CASE NO 1144/09

Case heard 28 May 2009, Judgment delivered 18 June 2009

This was a review of an eviction order made by the Magistrate's court. The application was granted by the Magistrate's court as a result of a consent agreement. The applicant had been unaware of the agreement and was simply told that he and the other occupiers would need to vacate the property. The issues raised were whether an eviction order could be said to have been given with consent, and whether the procedures set out in the Prevention of Illegal Eviction From and Unlawful Eviction of Land Act were followed.

Matlapeng AJ held:

"From the authorities referred to above, it is clear that when one adjudicates on an application brought in terms of PIE, one should do so with a view to promoting the spirit, purport and objectives of the Bill of Rights...the presiding officer is mandated to enquire as to whether any order of eviction is just and equitable." [Pages 10 - 11]

"Section 4(7) of PIE also provides that if an unlawful occupier has occupied the land in question for more than six months at a time when the proceedings are initiated a court may grant an order for eviction if it is in the opinion that it is just and equitable to do so. It is the court in this instance that has to form an opinion. It cannot rely solely on the say so of the parties. The court forms its opinion by considering several factors listed in the Act, namely the rights and needs of the elderly, children, disabled persons and households headed by women. The court has to consider whether any other land has been made available by the municipality, or another organ of State or another land owner for the relocation of the evictees. Self-evidently this is intended to avoid rendering people homeless as this would undermine the very foundation of PIE underpinned by our Constitution which jealously protects and guarantees the right of all citizens to adequate housing" [Pages 13 - 14]

"In my view any material deviation from the clear and peremptory provisions of PIE should not be countenanced, particularly where it holds potential prejudice to the people to be evicted, failing which the ideals striven for by PIE and ESTA, fully supported by the Constitution, would be rendered illusory." [Page 14]

"It is clear in this matter that the applicant was not afforded the guaranteed protections that he was entitled to in terms of the Constitution, PIE and ESTA."

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF EDUCATION, NORTH WEST V K C PRODUCTIONS CC, UNREPORTED JUDGMENT, CASE NO CA 14/2007

Case heard 7 November 2008, Judgment delivered 5 March 2009

This case dealt with the question of "whether a decision by the appellant to cancel a contract arising out of an award of a tender is an administrative action which is subject to the requirements of administrative fairness as laid down in s 3 of the Promotion of Administrative Justice Act". [Page 3]

Matlapeng AJ held:

"A careful reading of our authorities reveals that there is no definitive definition of what constitutes an administrative action. This is not because administrative action defies definition but because one has to make a determination in order to reach a conclusion of whether an act constitutes administrative action or not. This will, logically differ from case to case. This is amply demonstrated by various dicta from our courts, particularly the Supreme Court of Appeal (SCA) and the Constitutional Court (CC)." [Page 4]

"However, it should be clear that the starting point is the Constitution of the Republic of South Africa." [Page 6]

"It should be clear from s 1 of PAJA that administrative action can only be described in general terms. To my mind, it refers as has been aptly put to "the whole bureaucracy in the performance of its daily function of the state". From the authorities traversed above, one is in a position to determine whether a conduct amount to administrative action. To qualify as such it has to be an exercise of public power or performance of public function in terms of legislation which adversely affects the rights of any person and which has a direct external legal effect. The question of who is exercising that is, in my view, not decisive. The important factor is the exercise of public power or performance of legislation itself." [Page 7]

"It is clear to me that from the time the contract was awarded the appellant acted in an insalubrious manner towards the respondent. Its conduct cannot but attract opprobrium. It does not take a savant to see that the appellant did, right from March 2002, not intend to honour the terms of the contract it had concluded with the respondent. As I have alluded to above, the respondent was entitled to a lawful, reasonable and procedurally fair conduct from the appellant. The appellant, in its exercise of public power, when it took a decision to cancel the contract was duty bound to have regard to the basic precepts of administrative justice"

Mogoeng and Gura JJ concurred.

SELECTED JUDGMENTS

S MORABA V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO. 41140/09 (23 FEBRUARY 2011)

The plaintiff instituted a third party claim against the defendant. The plaintiff alleged that he sustained personal injuries in a car accident which arose solely out of the negligent driving of the insured driver:

"In this matter the versions of the plaintiff and that of the defendant are mutually destructive. As such, the court, in resolving the factual dispute between the two parties, will have to make findings on the credibility of the factual witnesses their reliabilities and the probabilities" [Page 7]

"There is no explanation why plaintiff would have sought to overtake a vehicle in the face of an oncoming vehicle. Defendant's version has, or defendant's side has a version of a single witness and it is trite law that all the necessary caution had to be exercised when dealing with evidence of a single witness. The defendant does not explain before this court which way or which destination he intended accessing if he were to have turned right, at the place where the accident is said to have taken place." [Pages 7, 8]

"The second witness for the plaintiff on the other hand is an independent witness, who has no reason to misstate the on goings of the day of the accident. The court finds that the defendant's version is not in line with probabilities and that version is therefore rejected by this court" [Page 8]

"The court finds that the action of the insured driver, caused the accident which led to the damages sustained by the plaintiff." [Page 8]

SKHOSANA V LELAKA AND THE MASTER OF THE HIGH COURT, UNREPORTED JUDGMENT, CASE NO. 5944/10 (10 JUNE 2011)

The applicant sought an order for nullification of a letter of authority issued by the second respondent in the name of the first respondent in respect of the estate of the deceased Mlahleki Johanna Skhosana. The applicant averred that the letter was issued as a result of fraud committed by the first respondent and that the first respondent is not entitled to have the letter issued in her name:

"While Applicant alleges fraud on the part of 1st Respondent in the process of obtaining a letter of executorship from the Master, it became clear during argument, that Applicant has no evidence to sustain the allegations of fraud against 1st Respondent." [Paragraph 12]

"The Act, does require that a person sought to be appointed as executor, be one who stands to inherit from the estate. Neither does it require that members of the deceased's family be notified before "any person" is appointed as executor." [Paragraph 14(2)]

"The 1st Respondent has not committed any of the act that make for valid grounds for the removal by court of an executor." [Paragraph 14(3)]

The application was dismissed with costs.

THULARE V THULARE, UNREPORTED JUDGMENT, CASE NO. 50275/09, (10 JUNE 2011)

Applicant alleged that Respondent publicly denounced the applicant as a legitimate heir to the throne of Kgoshi or Traditional Leader, (Royal Leader), at Marota Marulaneng village. The applicant further alleged that the Respondent had been making public announcements that should only be made by a person who is the duly appointed Kgoshi. The Applicant requested that the Respondent be interdicted from engaging in these and related activities:

"The court has to consider whether Applicant's application for Respondent to be interdicted by court should succeed or not. In Setlogelo vs Setlogelo 1914 AD 221 at page 227, the court determined requirements for the right to claim an interdict. The said requirements are: (a). A clear right, (b). Injury actually, committed or reasonably apprehended, and (c). the absence of a similar protection by any other ordinary remedy." [Paragraph 12]

"It follows from the legislative exposition above; that functions of the nature that Respondent admits to be performing, have to base on a legislative provision. In this case, the relevant piece of legislation is Section 20 of the Traditional Leadership and Governance Framework Act 2003 (Act No 41 of 2003.) Such capacity must flow among others from an appointment in such a position in the manner prescribed by the Traditional Leadership and Governance Framework Act 2003; ... related legislations as well as predecessors to that set of enactments. That in itself does not negate the need for affected Royal Families themselves to identify persons suitable for various positions of Royal Leadership; and to submit recommendations to relevant government authorities. Applicable tribal laws find application in that way. It is on the basis of such recommendations that the Provincial Government in Limpopo appointed Applicant as acting Kgoshi. The court finds that Applicant has successfully proven to this court on a balance of probability that all legislative and customary requirements relevant to the appointment of acting Royal Leaders, have been complied with when he was appointed as acting Kgoshi. He has therefore established a clear right to be acting Kgoshi of the Marota Marulaneng Community." [Paragraph 16]

"Respondent is directed to engage in legal methods of challenging the position of Applicant as acting Kgoshi; if he is not satisfied about it. He may apply for a review of the said appointment. He may also cause the Thulare Royal family to effect changes on who should act as Royal Leader and then forward recommendations to the office of the Premier of Limpopo Province requesting a withdrawal of applicant's appointment. Before any of these measures are done successfully, Applicant shall remain de jure acting Kgoshi of Marota Marulaneng Village." [Paragraph 21]

The interdict was granted.

SELECTED ARTICLES

'LANGUAGE AS A VEHICLE OF CULTURES AND ITS IMPACT ON THE INDEPENDENCE OF THE JUDICIARY', Paper presented at The Annual General Conference of the South African Chapter of the International Association of Women Judges, 5 August 2006

This article was about the role and impact of languages in the South African Judicial system:

"It is important in looking at culture and the law to note that the aspect of culture in South Africa has been taken way out of perspective. A firm understanding is in glace that black cultures in particular encourage the undermining of the rights of women and children on a wholesale basis. This misunderstanding is so entrenched in the minds of the average South African that it is even accepted as a factor that should mitigate against sentence particularly where; in undermining such rights, males end up committing crimes." (Page 7)

"The fact of the matter is that the current practice of such cultures is clearly structured to oppress women and children as well as to undermine their rights. But it is also wrong to allow that to happen in the name of culture on a blanket basis because while several black cultures do contribute considerably to the oppression of women and children, in their true form, they do not tolerate the kind of violence and inhumanity that males visit upon females on an ongoing basis. We therefore should stop availing them a false sense of an excuse in the form of culture." (Page 7-8)

"It is wrong to hold a view that a Venda male possesses a cultural entitlement to assault his wife. It is equally wrong to hold that such a man is entitled to engage into polygamy and be irresponsible and unaccountable. That culture imposes a duty on the man to care for the welfare of his family. In allowing such a man to hide behind the preservation of culture to undermine women and children, is in fact providing him with a false defence. In its pure form, the culture does not regard such conduct as defensible, However, the lie about culture permitting acts of violence against women and children has been repeated so many times that it has come to represent the truth. It is regrettable that by now an impression is firmly in place that we cannot deal with or do away with gender imbalance and the abuse of human rights without undermining certain cultures, (especially black cultures). Unfortunately this creates a very wrong impression that those who seek to defend and preserve certain cultures, albeit with necessary changes and modifications, are of necessity fighting for the gender oppression and the abuse of children to continue unabated." (Page 10-11)

"To achieve a fair delivery of justice, it is vital that judicial officers should be able to function without being burdened by all sorts of dynamics that may erode their independence. However, it would come across as preposterous to wish these languages and their corresponding cultures away. In some circles it would come across as being overly Eurocentric. A t worst, it can cause all sorts of racial, colonial and other cards to be drawn, thereby clouding the issues further." (Page 21)

"At the same time, we cannot afford to sacrifice Judicial Independence on the altar of linguistic and cultural rights. A balance is therefore needed to ameliorate the harsh effects of languages and cultures on the processes towards a fair delivery of justice." (Page 21)

GUIDELINES FOR THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT BY MAGISTRATES (2003) in Artz, L. (2003) Magistrates and the Domestic Violence Act: Issues of Interpretation. Institute of Criminology, University of Cape Town: South Africa.

These guidelines are intended to assist and guide magistrates in implementing the Domestic Violence Act in a way that ensures both legal consistency and legal uniformity. The guidelines were drafted by a representative group of magistrates from across South Africa and are based on the experiences of magistrates presiding over domestic violence cases and are therefore cognisant of the day-to-day realities of magistrates in our courts:

"Preamble: Domestic violence is the most common and pervasive human rights abuse in South Africa. Every day, women are murdered, physically and sexually assaulted, threatened, and humiliated by their partners, within their own homes. Organisations who provide support and assistance to victims of domestic violence, estimate that one out of every six women in South Africa are regularly beaten by their partners. In at least 46% of these cases, the men involved also abuse the children who live with the women concerned. Another study reported that one woman is killed by her partner every six days in Johannesburg. We also know that domestic violence is the most under-reported crime in the country." (Page 61)

"Guiding Principles: In light of the above social and legal context of domestic violence, magistrates presiding over cases of domestic violence should: i). treat each case seriously, fairly, expeditiously and with sensitivity to the race, class, gender and culture of the parties involved; ii). treat cases with the appropriate urgency that each case demands; iii). consider the potential lethality of domestic violence; iv). fully interrogate and consider each case; and should v). seriously consider the "perceived risk" of the applicant." (Page 61)

SELECTED JUDGMENTS

MKIZE V S [2010] JOL 26473 (GSJ)

This was an appeal against conviction and sentence - the appellant was convicted of kidnapping and multiple counts of rape. He was sentenced to an effective 20 years' imprisonment. The central points in dispute were (a) whether the complainant was forced or coerced to go with the appellant, and (b) whether the sexual intercourse took place with or without consent.

"I have carefully considered the appellant's version on the same aspects, and I remain unimpressed with the veracity and/or truthfulness of his version thereon. There are even instances where I would have preferred the complainant's version on aspects, as her version is more probable on them than that of the appellant. For an example, I am inclined to believe that the appellant indeed sped off the scene after the complainant threw herself out, and that there is no reason to disbelieve the evidence of the constable who arrested him. However, even this criticism does not detract from the fundamental aspect that the respondent needs to prove each and every element of the crime beyond reasonable doubt, and that there is no onus on the appellant to prove his innocence. It is not necessary for me to believe him, or believe him in every material respect. It is sufficient if the court finds that his evidence is reasonably possibly true, to acquit him." [Paragraph 40]

"I am thus of the view that the respondent failed to prove that the complainant was forced to go with the appellant to any of the places they went to." [Paragraph 41]

"For the same reasons or considerations, mutatis mutandis, I am of the view that the respondent failed to prove that the complainant was forced to engaged in sexual intercourse with the appellant. In fact, I find that it is more probable than not that the sexual intercourse occurred with the consent and active participation of the complainant. The appellant's explanation that he slept in clothes on Monday night (the night on which no sexual intercourse took place) and the complainant queried why he did so, whilst the complainant testified that they were both naked, is more probable and consistent with the other proven objective facts." [Paragraph 42]

"Added to the above, in respect of both charges, are the following factors: There were many material contradicting and/or unsatisfactory features and/or inconsistencies in the evidence of the complainant in relation to what her report was to Captain Motshoane. For an example, she told her that the threat to go and kill her happened as they left Soweto, whereas she testified in court that the threat only came as a change of mind after they had arrived back in Vosloorus after he went past where she was supposed to get off. She told the Captain that he took a cloth and a knife then in Soweto to go kill her, but she made no mention of this fact in court. The significance of this contradiction lies in the fact that the complainant's said explanations relate to why she threw herself out of the moving vehicle. If the threat to kill her was indeed done, it is important to determine when such threat was made. On the available evidence, it is impossible to say when such threat was made; in Soweto or in Vosloorus. She is contradicted by her husband regarding the sequence of the telephone calls and the nature of the discussion on the phone." [Paragraph 43]

"Applying the cautionary rule to the evidence of the complainant, I find that the appellant's version, whilst not without its own problems, cannot be dismissed as not being reasonably possibly true. The fact that he ran away when pursued by the police may well have been an act of panic. After all, the complainant had all the hallmarks of a skilful manipulator. She could cheat on her husband without

detection, and even when she left the common home on Saturday she pretended she was going to buy groceries. After all, it is clear, from the circumstances of this case that she had to offer some dramatic explanation for her to be accepted back by her husband with impunity. It is thus not only unfair, but also wrong to place undue weight on the fact that she performed an apparently life threatening stunt. Life is riddled with examples of some people actually going to the extremes of committing suicide when confronted with certain challenges." [Paragraph 49]

"This Court need not even believe the appellant in order to acquit him; it is sufficient in order to acquit him if the court finds that his version, albeit not without criticism, is reasonably possibly true. Where there exists doubt, like as to the reason why the appellant ran away when pursued by the police, the benefit of such doubt has to accrue in favour of the appellant." [Paragraph 51]

The appeal against both convictions and sentences was upheld, and the appellant was found not guilty and discharged (Tsoka J concurring).

Dissenting judgment by Mokgoatlheng J:

"In my view, an analysis and evaluation of the complainant's version shows that in its essential features it has the hallmarks of the truth as to how the concatenation of events on that fateful weekend played themselves out, it is too detailed to lend itself to fabrication. The defining salient features of her evidence are consistent with her testimony that she was deprived of her liberty and forced to have sexual intercourse without her consent." [Paragraph 74]

"I concur with the court a quo's conclusion that:". . . the complainant never deviated from her version, that the appellant's counsel's thorough cross-examination had no adverse effect on her testimony, that she stood rigidly by her evidence." In contradistinction, the court a quo correctly found that the State had proven the case against the appellant beyond reasonable doubt, and correctly rejected the appellant's version as false beyond reasonable doubt." [Paragraph 75]

"In the premises it is my view that the appeal both on the conviction and the sentence should have been dismissed." [Paragraph 76]

SETLAWANE V STATE, UNREPORTED JUDGMENT, CASE NO. A390/2010 (9 DECEMBER 2010)

This matter was an appeal against sentence and conviction. The appellant was convicted of theft of goods belonging to his employer and was sentenced to two years imprisonment with one year suspended; hence he was effectively sentenced to one year imprisonment. Counsel for the appellant submitted that as regards the conviction the magistrate erred by failing to take into account that the state relied on the evidence of a single witness to whose evidence the cautionary rule applied and effectively failing to apply the cautionary rule, and that there was no evidence directly implicating him in the commission of the offence. As regards sentence, it was submitted that the magistrate erred in imposing the sentence which is "shockingly inappropriate': particularly in the light of the fact that the appellant was a first offender at the age of 33 years, gainfully employed, married and being a father of two minor children entirely dependant on him for maintenance. It was further submitted that the magistrate erred in overemphasizing the seriousness of the offence as well as the deterrence and retributive aspects of sentencing. In considering the judgment by the magistrate, Motloung AJ held:

"It is trite law that a court of appeal will not interfere with the judgment of a trial court unless the trial court misdirected itself as regards either the facts or the law. Furthermore, an accused can be convicted on the basis of the evidence of a single case in appropriate circumstances in terms of section208 of the Criminal Procedure Act ..." [Paragraph 4]

"I am satisfied that the magistrate has correctly analyzed the evidence and correctly applied the law. The record also shows that the magistrate relied on the evidence of all three state witnesses in convicting the appellant. There is no merit to the submission that the conviction was based on the evidence of a single witness, even if this was so with respect to the evidence of the first state witness, which is in fact not the case, the magistrate applied sufficient caution with respect to the evidence of the first state witness. The magistrate even granted the appellant the point that he had demonstrated that the first witness might have had the motive to harm him or get even with him, as indicated above." [Paragraph 9]

"As far as the sentence is concerned, it is also trite that a court of appeal will not interfere with or tamper with a judgment of the court a quo unless it finds that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence invokes a feeling or sense of shock or outrage, or that the sentence is excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it is in the interests of justice to alter such sentence." [Paragraph 11]

"Theft from an employer is a particularly aggravated form of theft as one actually binds the hand that feeds and betrays the trust bestowed in one by the employer. Commerce, which is the essence of a good economy, can only thrive if employers can be able to trust their employers when it comes to looking after goods entrusted to them. A sentence of two years, of which a year has been suspended, imposes no sense of shock as sentences within this range have routinely been endorsed on appeal by this court and other appeal courts." [Paragraph 13]

Accordingly the appeal was dismissed.

SELECTED JUDGMENTS

CITY OF JOHANNESBURG V KAPLAN NO AND ANOTHER [2005] 2 ALL SA 25 (W)

The first respondent was the liquidator of a close corporation which owned property in the applicant municipality's jurisdictional area. In the course of his duties as liquidator, the first respondent sold the property, and to enable him to effect transfer, requested the municipality to issue a certificate in terms of section 118 of the Local Government Municipal Systems Act. At the time the certificate was requested, the first respondent was indebted to the municipality for service fees, property rates and various other charges. Furthermore, a mortgage bond in favour of the second respondent (the bank) existed over the property. The issue for determination was whether the amount owing to the municipality enjoyed preference over the amount owing to the bank. This necessitated an interpretation of section 118, and in particular, section 118(3) of the Act. Section 118 of the Act prevented the registrar of deeds from registering the transfer of a property until the relevant municipality has furnished a certificate stating that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been paid. In terms of sub-section (3), an amount due for any of the above fees is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property. The main question was whether the words "an amount" as used in section 118(3) of the Act should be limited to include only those amounts referred to in section 118(1) of the Act, or whether the words also include amounts falling outside the two-year period provided for in section 118(1):

"The difference between a simple embargo provision and one fortified by a provision elevating same to a charge against the land seems to lie therein that, irrespective thereof whether the registered owner of the property is solvent or not, the simple embargo provision will go no further and have no other benefit than ensuring that all money owing to the municipality/body corporate, and which fall within the embargo provision, must be paid before any transfer of land/unit in question may be executed. Accordingly and in the case of an insolvent estate no preference is created in favour of the municipality/body corporate upon concursus creditorum taking place. In such an event the amount required to be paid before transfer may be effected, will however form part of the costs of realisation as envisaged in section 89 of the Insolvency Act..." [Page 31]

"On the other hand and in the event of an embargo provision, duly fortified by a statutory provision elevating same to a charge against the land which enjoys preference above a mortgage bond, the municipality/body corporate, to whom money is owing, need not wait until the property/unit is actually required to be transferred. In the latter instance they will enjoy a secured claim for payment, which claim will be enforceable against the registered owner of the property and the case of insolvency against the estate. Such a claim will obviously also enjoy preference to any claims made by creditors whose claims may be secured by a mortgage bond" [Page 31]

"It is against the aforesaid background that I now turn to the provisions of section 118(3). In doing so, I must remain mindful thereof that I am constrained to an application of the words used in the statute and that I am not to concern myself with the policy behind the enactment. However and if a strict application of the words used in the section would lead to a manifest absurdity or an inconsistency or anomaly, I am enjoined to apply the rules of interpretation in an attempt to determine the true intention of the Legislature when enacting the section. When so interpreting section 118(3) I am required to read that

section in conjunction with the remainder of the Act. I may also have regard to the heading to section 118 (see Suid-Afrikaanse Geeneeskundige en Tandheelkundige Raad v Strauss en andere 1991 (3) SA 203 (A) ...; Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape1 2001 (3) SA 582 (SCA) ...)" [Page 33]

"As stated the distinction is real and quite clear. However, giving the word "an amount" as used in section 118(3) a wide meaning and not limiting its operation to the amount referred to in section 118(1), would in my view lead to the startling result that section 118(1) is, for all practical purposes, rendered superfluous. Clearly, by giving "an amount" a wider meaning so as to also include other amounts, than those amounts referred to in section 118(1), would lead to the inevitable result that whenever immovable property stands to be transferred the municipality would, by virtue of section 118(3), enjoy a first charge against the property of all amounts owing to it. This right the municipality will enjoy in preference to possible rights which a bondholder may enjoy. In my experience and as a general rule, it is required that all bonds, registered against a property's title deed, first be cancelled before any property may be transferred. However and adopting the wider interpretation contended for by applicant, before the bondholders will be entitled to receive payment of whatever may be due to them, the municipality will, by virtue of the wide interpretation of section 118(3), enjoy the right to first receive payment of all amounts which are owing to them. In practice this would have the startling result that notwithstanding the provisions of section 118(1) no property will be transferred successfully unless the municipality has been paid in full." [Page 34]

"The restraint or embargo on the transfer of property is exactly what section 118(1) deals with and if section 118(3) is restricted to only relate to those amounts referred to in section 118(1) then the relevant subsection seems to be correctly placed in the Act as it still only deals with matters ancillary to the embargo provision. However if "an amount" as used in section 118(3) is given a wider meaning to also encompass amounts falling outside the two-year period, then the subsection is no longer restricted to dealing with the restraint of transfer of properties, but is then also dealing with securities and/or legislative preferences which municipalities may enjoy. If it was the Legislature's intention that a wider meaning should be ascribed to the words "an amount" I would have expected the Legislature to place the relevant proviso under a heading of its own or a heading dealing with securities or something alike. After all, if it was the Legislature's intention that the provisions of section 118(3) should have no correlation to section 118(1) it can safely be inferred that the Legislature would have dealt with that provision under a different heading and in a context of its own. In my view, and having regard to the aforesaid, I am inclined to subscribe to the view that the words "an amount" as used in section 118(3) must be restrictively interpreted to only include those amounts dealt with and which fall under section 118(1).Such an interpretation would not only be in line with the legislative development preceding the enactment of section 118 of the Municipal Systems Act but would also respect and give due weight to the rights of creditors whose claims are secured by mortgage bonds, a form of security which has been part of our law for more than a century, and which have become part of the' backbone upon which financial institutions are often dependent to safeguard themselves against losses. If it is the Legislature's intention to compromise the security which a financial institution enjoys after the registration of a bond, then that should be specifically provided for using explicit terms. I would not have expected the Legislature, had that been the intention, to couch section 118(3) in its present form." [Page 35]

The application was dismissed.

MYEZA V METRORAIL, UNREPORTED JUDGMENT, CASE NO. A5028/06 (7 MAY 2007)

The appellant sustained injuries (loss of his leg) whilst attempting to board a moving train. In terms of Rule 33(4), the court a quo separated the question whether the respondent is liable to compensate the appellant in respect of the damages suffered by him from the remainder of the issues. The trial accordingly only proceeded on the question of negligence and causation. The respondent placed no evidence before the trial court explaining why it was neither possible nor practicable for the metro guard to adhere to the operating instructions. Although the evidence presented by the respondent seem to suggest that metro guards generally do adhere to the operating instructions, the metro guard who was on duty on the day in question was not called to explain what steps, if any, were taken by him to ensure that the doors of the train were properly closed before the train commenced its departure.

Stockwell AJ held:

"Having regard to the potential severe injuries, if not death, a commuter may sustain, I am of the view that in this modern day and age of technology, that a device could and should be fitted to a metro train to prevent a train from departing before the doors had been securely closed. At tine very least a device which warns the train driver and the metro guard that the doors are not properly closed should be fitted. However and as no evidence have been led on the viability and cost of such a system, I make no finding in this regard." [Paragraph 14]

"There can be no doubt that leaving the doors of a train open, or for that matter enabling passengers to keep any of the doors open when the train is departing, constitutes an open invitation to commuters to board the train after the train has commenced its departure. It can be taken as a given that commuters may, depending on the circumstances, more particularly their urge to board the coach at any given moment in time, proceed to board the train notwithstanding the inherent dangers involved in doing so. Similarly, and should a commuter lose his balance, whilst boarding a moving train, the injuries likely to be sustained by such person will inevitably fall in the severe category, as has been proven by the facts of this case." [Paragraph 20]

"!n my view there can be no doubt that the respondent and its employees fully appreciated that the respondent, by failing to close the doors of a metro train's coach before the train was set in motion, created a situation where the possibility of a person being injured and suffering a loss was not only probable but real" [Paragraph 22]

"As previously indicated both parties are to blame for the injuries suffered by the appellant. This then bring one to the question of how to apportion the respective degrees of blame to be placed on each of the parties. Although there is no doubt that the respondent was negligent in failing to ensure that all the doors of the coach had been properly closed, which constituted an invitation for the like of the appellant to board the train after the train had already been put in motion, the appellant is the person who willingly ran towards the moving train and attempted to board came. ... What is of paramount importance, is that the appellant well being aware of his disability and whilst being urged by Mpongose to desist from his attempt to board the train, foolishly persevered with his attempt to board the train whilst it was gathering speed." [Paragraph 30]

"In the circumstances of this case the majority of blame clearly falls to be placed upon the appellant. Having carefully considered the respective conduct of the parties I am of the view that the appellant

contributed 70 per cent and the respondent 30 per cent towards the damages suffered by the appellant." [Paragraph 31]

The appeal was upheld and the order amended accordingly.

SELECTED JUDGMENTS

MAJALI V THE MINISTER OF SAFETY AND SECURITY ET AL, UNREPORTED JUDGMENT, CASE NO. 2009/37292 (2 DECEMBER 2009)

The Applicant was aggrieved by the decision of the National Prosecuting Authority (NPA) to prosecute him on the grounds of his alleged implication in procurement irregularities. The applicant sought relief to prevent him being charged or arrested in relation to being arraigned on these charges. An additional prayer sought a final interdict prohibiting the NPA from prosecuting the applicant on grounds of money laundering and or corruption, the foundational rationale for the warrant of arrest. Sutherland AJ held the view that the idea that the court can interdict a decision to institute a criminal prosecution on the grounds that no crime had been shown to have occurred to be unsound:

"In order to address such a question, a court would have to interrogate the allegations made and the weight of the evidence offered in support of the allegations. This is the very point of a criminal trial. There is no room in logic, policy or law for such a procedure of second guessing the NPA, who are empowered to make such assessments in terms of section 179(2) of the Constitution." [Paragraph 13]

"The other ground for interdicting the prosecution per se is the NPA's alleged breaches of the prosecutorial policy. The gravamen of the complaints relate to the failure of the NDPP or any of his subordinates to be impressed by the comprehensive representations advanced by the applicant on the subject matter of the charges. Other persons charged have already appeared in court and await trial." [Paragraph 15]

"My attention was expressly drawn to several passages. It is unnecessary to cite them in full. The theme they all deal with is that a prosecutor is possessed with a power that can harm the innocent and that great care is appropriate in deciding whether or not to prosecute and that unless there is a solid basis to conclude that justice requires it, a prosecution need not follow as a matter of course. Thus, the version of the potential accused person, if known, must be honestly weighed, especially in 'borderline cases'. It is not incumbent to actually prosecute every 'provable case'. Alternatives to prosecution may be appropriate especially with juveniles and 'less serious matters'. It was not argued that the charges relevant here are not serious. The NPA contend that they are serious." [Paragraph 19]

"The function of a judicial officer to whom application is made for a warrant of arrest is not to make a judgment on the strength of the respective cases of the State and an accused person. The legal requirement that the Police may not themselves arrest persons at their own discretion, except in prescribed circumstances, is to protect the public from imprudent arrests because the thesis believed in by the Police may be unsound. Hence judicial intervention performs the function of a filter in respect of that thesis. If the thesis of the Police is plausible the issue of a warrant is appropriate." [Paragraph 35]

"Ordinarily, a litigant who is aggrieved about a decision that is indeed subject to judicial review can and often does obtain an order suspending the putting into effect of the controversial decision pending the review of the decision. But that is not the relief sought in this application; the prayer relates only to the warrant. Ought the relief sought to be interpreted to be, in effect, a suspension of the decision to prosecute, (not the suspension of the warrant) pending the review? The difficulty in concluding this is that the decision to prosecute is not necessarily carried into effect only by way of a warrant of arrest; arresting a potential accused is an optional means to secure attendance, and is quite separate from the decision to prosecute per se." [Paragraph 42]

"Thus, to summarise, I dismiss the application for setting aside the decision to prosecute, and the application for the invalidation of the warrant of arrest. I grant declaratory relief about the settlement agreement which I hold to be binding on both parties and in terms of which the applicant is in default of his obligation to report to a court as directed by the NDPP. The NDPP has an election to invoke the warrant or enforce the agreement through contempt proceedings. Lastly, I grant an order of suspension of the decision to prosecute pending the outcome of the review application, rather than simply suspension of the warrant of arrest." [Paragraph 47]

LENTSANE & OTHERS V HSRC [2002] JOL 9975 (LC)

The three applicants were retrenched by the respondent. They filed a statement of claim on 5 December 2001. According to the Rules of Court within ten days thereof, that is to say on 20 December 2001 the respondent was obliged to serve a statement of defence. It failed to do so; instead it filed its statement of defence on 25 March 2002. This application seeks condonation of that late filing:

"Mr Wesley urged on me to take seriously the injunctions mentioned in A Hardrodt (South Africa) (Pty) Limited v Behardien and Others (unreported) (LAC); ... In that matter Nicolson JA had occasion to consider the considerations pertinent to the granting of condonation in respect of the late bringing of a review to set aside an award of a commissioner of the CCMA. He referred with approval to the decision in Oueenstown Fuel Distributors CC v Labuschagne NO and others (2000) 21 ILJ 166 (LAC), in which Conradie JA had considered the principles which should prevail. In that decision Conradie JA pointed out that the principles of condonation should be much stricter than those which were applied "in normal circumstances". This remark I understand to be an endeavour to distinguish the considerations pertinent to challenging an award granted by a commissioner of the CCMA, in relation to other litigious issues, such as for example an application for condonation of the late referral of a statement of case or of defence. The policy reasons for that distinction are clear. Once a party has an award in his or her favour, the failure to respond within the six-week period to challenge that award gives rise to considerations which are absent at the outset of litigation, where the table is being set for debate. I am not of the view that the decision in the Hardrodt case or for that matter the Queenstown Fuel Distributors' case assists the applicant in its resistance to the relief sought by the Respondents in this matter, where non-compliance with a rule of court is the controversy. I prefer to draw inspiration for the approach to be adopted in a case such as the present, from Melane v Santam (supra) where is was held ... that: "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation."" [Paragraph 14]

"The fact that the Rules of Court furnish ten days to a respondent in which time to file a statement of defence does no more than create a prima facie reasonable time within which that task is to be completed. Some time period must be laid down, and the policy choice is that ten days will be that period. This establishes no more than a default period by which the other party can expect a reply. However, it is a matter of practical experience in litigation that from time to time matters are of such complexity that a practitioner cannot prudently perform his professional duties within the time periods prescribed, or particular circumstances arise which it make unreasonably difficult to comply. When that occurs in practice practitioners liaise with one another and arrange on a common sense basis extensions

and indulgences in relation to the rules, in order for them to attend to their professional responsibilities with the appropriate degree of diligence and prudence. Independently of such practical arrangements which take place, a party who is unable for good cause to comply with the ten day period, is left with the option to seek condonation upon proper explanation of its reasonable incapability of complying with the ten-day period." [Paragraph 18]

"A distinction of importance is that whereas the Labour Relations Act prescribes a period within which a statement of case must be filed, and failure to do so requires formal condonation, the time period for the filing of a statement of defence is regulated solely by the rules. The Act regulates the initial referral because the referral is a jurisdictional event. The rules exist to facilitate disciplined litigation and their role as servant of that process is the point of departure for any examination of non-compliance." [Paragraph 19]

"Mr Wesley contends that a generous indulgence had already been granted to the respondent in respect of the period from 20 December 2001 to 14 January 2002. This period accommodated the month during which Mr Carman was out of his office on holiday. When I invited Mr Wesley to consider that traditionally South African culture resulted in the entire country virtually coming to a standstill during the December/January holiday period, he reminded me that the Rules of this Court do not provide for dies non as is the case in the High Court. In my view the omission of such an institution in the Rules of this Court is lamentable. It is not necessary for one to approve of the near complete collapse of national enterprise during the traditional year end holiday period, but is seems to me to be manifestly obvious and sensible that any legal practitioner who institutes an action in the first week of December must appreciate that there will be considerable hardship, done unnecessarily, if individuals who are required to respond have, at the last moment, to rearrange their family and other commitments. An attorney who in December seeks an indulgence until he returns from holiday in the new year, is not acting unreasonably and should not be left to believe that his request for such an indulgence is in the least degree unprofessional. No case is made out in this matter that the relief sought by the applicants is required on a genuinely urgent basis that would require personal sacrifice from not only the practitioners involved, but also from other individuals on the other side." [Paragraph 24]

Condonation was granted in respect of the late filing of respondent's statement of defence.

ULDE V MINISTER OF HOME AFFAIRS & ANOTHER [2008] JOL 21433 (W)

This was an urgent application whereby the applicant sought orders that his detention in the Lindela Detention Centre was unlawful and that the respondents should forthwith release him from their custody. The Court considered whether or not the detention was lawful related to the proper application of sections 8, 34 and 41 of the Immigration Act and examined the circumstances in which the applicant was detained:

"In my view, there is indeed a constitutional guarantee that the lawfulness of a deprivation by the State of the personal liberty of any person may be brought before a court without any intermediary procedure being compulsory. The source of that guarantee is to be found in section 12(1)(a) of the Constitution which provides that:"Everyone has the right to freedom and security of person, which includes the right- . . . not to be deprived of freedom arbitrarily or without just cause", read with section 34 of the Consitution, which provides:"Everyone has the right to have any dispute that can be resolved by the

application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum."" [Paragraph 15]

"More to the point, the Immigration Act contains no alternative procedure to deal with a challenge to the lawfulness of a decision to detain, pending any further decision on status. Sections 34 and 41 of the Act authorise arrest and detention at the instance of an official of the respondents. It will remain a question for a court in any given case to decide whether or not the act of detention is lawful. If the officials rely on section 34 or 41 to detain and are bona fide in invoking those powers then it behoves them to demonstrate that as a fact. If they fail to prove that fact, a court may set aside the detention. If they succeed to prove that fact, the detention will be lawful." [Paragraph 16]

"In any event, the primacy of the exhaustion of internal remedies is just that, a preferable remedy. The court is expressly vested with a discretion to excuse non-compliance in the interests of justice. It seems to me that the topic of personal liberty is likely to properly justify the excusing of non-compliance with an internal remedy. It would [be] rare that it did not. The approach taken on the application of section 7(2)(a) and (c) hitherto has been pragmatic (Earthlife Africa (Cape Town) v Director-General, Department of Environmental Affairs & Tourism 2005 (3) SA 156 (C) ... Western Cape Minister of Education v Governing Body, Mikro Primary School 2005 (3) SA 504 (C); 2006 (1) SA 1 (SCA) ..." [Paragraph 17]

"Mr Omar's failure to refer to Jeebhai and his enthusiastic reliance on Khan was criticised by me at the time. I digress from the merits of the matter to address his conduct and what is to be expected from counsel who appear before the courts." [Paragraph 36]

"In my view, it is the obligation of counsel to never mislead a court. Care must be taken that this does not occur through ignorance or negligence. It is self-evident that to deliberately mislead a court is a very serious breach of that obligation. A judge is entitled to take counsel at their word. When an argument is advanced and authority is cited, there is a tacit representation by counsel that no contradictory authority is known to him. Where such a representation is made and there exists a reported superior court's decision in point disapproving the authority cited in support of a proposition, counsel commits an act of negligence if he is ignorant thereof. Where counsel has actual knowledge of the superior court's decision, and remains silent and relies on the disapproved dictum, in my view, counsel misleads the court." [Paragraph 37]

"In my view, an apology does not address the gravamen of the conduct. It is true that this particular instance of the suppression of important authority in point and the reliance on an authority that had been expressly disapproved did not occur in an ex parte proceeding; if it had happened under those circumstances, the misconduct would have been simply aggravated. The suppression did take place in the Motion Court devoted to urgent matters, a court which functions under pressure and on little or token notice to other parties and to the presiding judge. It is a court that, for those reasons, is ever reliant on the integrity of counsel for assistance. It will be rare that a judge is familiar with every branch or topic of law. Counsel really is required to research the law and present an honest account of the law. Counsel is at liberty to try to persuade a court to prefer one decision over another, or to distinguish cases, or to offer novel interpretations, but can never deliberately suppress a reference to an authority that disfavours his case, and even more obviously, counsel can never rely on a dictum in a decision which, to his certain knowledge, has itself been compromised by a superior court's disapproval." [Paragraph 40]

"In my view, the application was meritless and launched recklessly inasmuch as it relied on false premises for the relief sought. The respondent was furthermore required to prepare an answer over the weekend

to meet the urgency of an alleged unlawful detention in haste and at considerable inconvenience. I have already expressed a view on the impropriety of Mr Omar's conduct." [Paragraph 43]

SELECTED ARTICLES

'(A) VIEW FROM THE BAR (PRO BONO)', De Rebus 2006, (6) 16

The article discussed how access to justice can be blended with learning the craft of advocacy, particularly as shown by the synergy between The Bridge Group and the University of the Witwatersrand Law Clinic. Twelve years into our experience of a democratic legal order questions are still being asked about how people without resources can truly exercise their rights. Just as other aspects of our society cannot transform away from the legacy of apartheid without continuing activism, access to justice by the poor is the product of a systematic effort to achieve that aim. At the vanguard of this activism is the law clinic movement:

"A law clinic, such as the University of the Witwatersrand Law Clinic, is itself dependent on its ability to marshal resources, both in the form of money and legal skills. Over the past thirty years the universities have become the recognised providers of that service, and, within the bounds of funding, have with distinction supplied the offices, the administrative and managerial resources and much of the legal skills that are deployed." (Page 16)

"The involvement of practising lawyers in the work of the law clinics has been a theme of the clinic experience of these past thirty years, but it has been largely a minor refrain, often erratic, and not readily available when required. In general, at least among advocates at the Johannesburg Bar, there is no reluctance to undertake pro bono work. Often it has been poor logistics that is the explanation for an erratic active support by counsel, a legitimate cause of frustration to the clinics." (Page 16)

"Paradoxically, from the perspective of advocates, especially younger members of the Bar as yet unknown in the legal community, there are enormous advantages to being linked with a clinic and undertaking the work that it can offer. It is true that there is, usually, no fee to be earned. But in junior practice, practising the craft of advocacy, even pro bono, is a critical element in building up your personal professional credibility. Every opportunity to be in court, doing a proper job, and being seen to be doing a proper job, by the bench and other litigation lawyers is an important part of proving yourself. Moreover, the Bar, conscious of its vocational ethos and the appropriateness of its members regularly undertaking pro bono work, has framed a rule requiring members to perform a minimum level of public interest work each year. Advocates are now in search of means to access the work in order to comply with the rule." (Page 16)

"What is evident is that it is in the interest of advocates to be available to undertake briefs from a clinic, and that this self-interest serves the cause of access to justice, the very purpose for which the clinic exists." (Page 16)

SELECTED JUDGMENTS

TASK ACADEMY V MINISTER OF BASIC EDUCATION AND OTHERS, UNREPORTED JUDGMENT, CASE NO 46286/09 (30 SEPTEMBER 2010)

This was an application seeking relief for a mandamus compelling the first and second respondents to pay the second and the third tranches of the states subsidy allegedly owing to the applicant. The applicant school has been qualified and registered with the Department of Education for the past 15 years during which time it obtained the state subsidy. The fifth respondent withdrew the subsidy in 2009 because, according to the respondents, the applicant only achieved 47,67% pass rate for the 2008 grade 12 and not 51% as alleged by the applicant. This therefore resulted in the first and second respondents not paying the second and third tranches of the state subsidy allegedly due to the applicant:

Teffo AJ held:

"The respondents contend that in terms of Regulation 6, an independent school such as the applicant, which is aggrieved by the decision of the fifth respondent to withdraw the subsidy may within thirty days of receiving notice of such decision, appeal to the second respondent in writing setting out the ground of appeal." [Paragraph 18]

"They further contend that the applicant has not on its papers before court demonstrated any attempt to exhaust the internal remedy of the appeal referred to above." [Paragraph 19]

"The contention by the applicant that it has not received a written notification of the withdrawal of the state subsidy and that the respondents have not complied with the requirements of the regulations, viz that it also did not grant them the opportunity to make representations before withdrawing the state subsidy and that because of that the respondents cannot expect them to follow Regulation 6(1), does not take this matter any further." [Paragraph 23]

"I have already ruled that from the papers there is no indication that the applicant complied with Regulation 6(1). The applicant has also not established exceptional circumstances justifying an exemption referred to in section 7(2)(c)." [Paragraph 34]

"The word 'shall' has been used In section 7(2)(a) This means the applicant has to first exhaust the internal remedies provided for in Regulation 6(i) before it can invoke the provisions of PAJA." [Paragraph 35]

The application was dismissed.

KHUMALO V SOUTH AFRICAN RAIL COMMUTER CORPORATION LTD AND METRORAIL, UNREPORTED JUDGMENT, CASE NO 9236/10 (13 JUNE 2011)

The plaintiff brought an action for damages in respect of injuries suffered when he was allegedly pushed out of a moving train by an unknown fellow passenger. The plaintiff alleged that the defendants had failed in their duty to maintain adequate crowd control in and around the station, train and coach; and, furthermore they had failed to ensure that commuters did not fall from the moving train. The parties agreed to separate the questions of merits and quantum; deciding upon the issues of liability only.

Teffo AJ held:

"The contradictions between the plaintiff's evidence and that of his witness, Mr Dube, renders the plaintiff's version improbable. While both the plaintiff and Mr Dube testified that they did not see each other in the train when the incident that led to the plaintiff falling outside the moving train took place and while there was no evidence adduced to suggest that they met after the accident, one does not understand why when Mr Dube met the plaintiff with a plaster of paris on his leg on asking him what happened, how could the plaintiff say to him "it is the incident in the train"? If indeed Mr Dube had witnessed the incident in the train why would he ask the plaintiff what happened when he first met him after that incident. The evidence of Mr Dube to the effect that he reported the incident to the plaintiffs mother, which was not corroborated, while on the first day of his evidence in court he said he did not report the incident to anyone is not probable" [Paragraph 16]

"It is also not probable that metrorail security officers who are employed specifically to safeguard the security and safety of the commuters in the train, according to the plaintiff's version, even though they saw and witnessed what happened to him, did not report this incident to metrorail." [Paragraph 18]

"The plaintiff testified that he was injured after failing from a moving train. Even though the evidence is that there were no metrorail security officers at Geldenhuys Station, the fact that he did not report the incident to metrorail raises questions with regard to the credibility of his version. He could still have reported the incident where they buy tickets." [Paragraph 19]

"In the light of these discrepancies I find that the plaintiff has not adduced sufficient evidence to prove that the incident as alleged has indeed occurred." [Paragraph 21]

SELECTED JUDGMENTS

ANDILE ALAM V THE STATE, UNREPORTED JUDGMENT, CASE NO A354/2010 (13 May 2011)

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

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

"The effect of the amendment of 1 April 2010 to s 309(1)(a) of the CPA is thus that persons sentenced to life imprisonment by a regional court no longer have an automatic right of appeal unless, at the time of commission of the alleged offence, such person was (a) under the age of 16 years; or (b) 16 years or older but under the age of 18 years and sentenced to any form of imprisonment that was not wholly suspended." [Paragraph 9]

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

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

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

Cloete AJ then proceeded to deal with the merits of the appeal, considering the applicable law on the single evidence of competent witnesses, the cautionary rule in sexual assault cases, the evidence of children, the evaluation of evidence in criminal cases, the circumstances under which a court of appeal was entitled to interfere in a sentence passed by another court, and the circumstances under which a court was entitled to depart from a prescribed minimum sentence.

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

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

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

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

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

(Bozalek J concurred).

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

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

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

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

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

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

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

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

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

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

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

"Having regard to these two get-ups, my view is best expressed in the words of the court in the *Blue Lion Manufacturing* (*Pty*) *Ltd* case ..., namely that:

> ". . . when one has regard to the whole get-up, including the colours, the arrangements of matter and the letters, there is an immediate and striking similarity between the rival packaging."

Respondents' counsel (understandably) sought to persuade me that the distinctly different logos of the applicant and first respondent is the first difference that a consumer will recognise. That may be so for high-end products, but for frozen or add-value fish, a generally available, run of the mill commodity? I do not think so. And what concerns me greatly is the difficulty which I myself had in remembering which product was that of which competitor. ..." [Paragraphs 44 – 45]

"In my view, there is no doubt that the first respondent's get-up and mark of its *Oven Crunch* product are deceptively similar to that of the applicant's *Oven Crisp* product, and there is thus a reasonable likelihood that members of the public may be confused into thinking that the *Oven Crunch* product of the first respondent is that of the applicant's. This will clearly impact negatively on the applicant's goodwill, if not its reputation." [Paragraph 47]

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

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

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

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

THE 3 TENNERS PROPERTIES CC V TRUSTEES FOR THE TIME BEING OF THE ATLANTIC SEABOARD TRUST [2011] JOL 27145 (WCC)

Case head 8 March 2011, Judgment delivered 22 March 2011

Defendant took an exception to plaintiff's amended declaration, wherein plaintiff claimed that the parties had entered into an oral agreement regarding a height restriction servitude to be registered over the defendant's immovable property. Defendant argued that the oral agreement of servitude was unenforceable due to provisions of the Alienation of Land Act.

"... [T]he narrow issue which I am called upon to determine is whether the agreement as pleaded constitutes a donation or an exchange since, if this is so, the agreement is unenforceable against the defendant because it is not contained in a written deed of alienation as provided for in the Act." [Paragraph 8]

"An exception is a legal objection to an opponent's pleading. It complains of a defect inherent in the pleading; admitting for the moment that all of the allegations in a pleading are true, it asserts that even with such admission the pleading does not disclose a cause of action. Courts are reluctant to decide, by way of exception, questions concerning the interpretation of a contract. The onus rests on the excipient to persuade the court that the pleading is excipiable *on every interpretation that it can reasonably bear* (my emphasis)..." [Paragraph 10]

"...[T]he agreement as pleaded by the plaintiff does not constitute a donation, since the plaintiff agreed not to lodge any objections to the defendant's building plans. There is thus no reason to assume at the exception stage, without having had the benefit of hearing evidence in this regard, that the defendant was impelled by pure benevolence or sheer liberality." [Paragraph 16]

"Further, the defendant has erred in logic in asserting that the order sought does not provide for any counter-performance by the plaintiff and that therefore the agreement for the creation of the servitude constitutes a donation which would be an alienation as contemplated by the Act. This is so since the defendant contends that *because* the agreement (as pleaded) does not provide for any counter-performance, the agreement *would* constitute a donation. ... The absence of any counter- performance *does not* entail an absence of an expectation of any future advantage, *nor does it mean* that the defendant was acting out of pure benevolence or sheer liberality." [Paragraph 17]

"Accordingly, if the defendant wishes to assert that this was a donation, it must do so in its plea, and the question of whether or not it was a donation can then properly be canvassed at trial." [Paragraph 18]

Cloete AJ then considered whether the agreement constituted an exchange:

"The defendant argues that the acquisition of a servitutal right by the owner of the dominant tenement gives rise to a corresponding diminution of the rights of the owner of the servient tenement; there is accordingly an alienation of an interest in land, being the right in question. The defendant also contends that the agreement as pleaded constitutes an exchange ... because one interest in land is being exchanged for another." [Paragraph 21]

Cloete AJ rejected the argument that the right to object to plans constituted an interest in land:

"To my mind, the agreement as pleaded by the plaintiff reflects that each party would *forego* a right; neither is *transferring* a right to the other. ...

Simply put, what the parties agreed in the instant matter is not that either would transfer a personal right, but that each would abandon a personal right, and what the plaintiff seeks is an order to confirm the abandonment of that personal right by the defendant. ... [W]hether this leads ultimately to the registration of a servitude over the defendant's property in favour of the plaintiff's property (which would create a real right) does not affect the nature of the agreement as pleaded by the plaintiff. It is simply not a transfer of a right in land by the one party in exchange for the transfer of a right in land by the other." [Paragraphs 23 – 24]

Cloete AJ found, based on the decision in *Leonard Light Industries (Pty) Ltd v Wright & others* 1991 (4) SA 628 (W), that the oral agreement could not be an exchange, since the defendant would not receive anything in exchange for the servitude:

"The fundamental point of the *Leonard Light* judgment is that one cannot speak of an exchange, for purposes of the Act, where there is no undertaking by party B to transfer a thing to party A in return for the transfer by party A of a thing to party B. The fact that the agreement as pleaded by the plaintiff is a servitude creating agreement is irrelevant." [Paragraph 26]

"Defendant's counsel argued that the decision in the *Leonard Light* case is wrong and at variance with the purposes of the Act which are legal certainty, reducing litigation and the prevention of perjury and fraud ... I disagree. The premise from which the defendant appears to have reached this conclusion is that any contract pertaining to immovable property must be in writing, and that "alienation" should therefore be construed in such a way that all contracts pertaining to immovable property fall within its ambit. The Act does not define "alienate" as *including* to sell, exchange or donate; it specifically defines "alienate" *to mean* sell, exchange or donate. It is thus not so that the Act intended to cover all transfers of rights in land. ..." [Paragraph 27]

The exception was dismissed.

STELLENBOSCH WINE & COUNTRY ESTATES (PTY) LTD V SAFAMCO ENTERPRISES (PTY) LTD, UNREPORTED JUDGMENT, CASE NO. 10078/08 (3 DECEMBER 2010)

This application was an exception brought by a defendant/excipient to the plaintiff's/respondent's amended particulars of claim, relating to a contract of sale of immovable property. Defendant, the seller of the property, claimed that there was no sale because of an incomplete or uncertain description of the property in the contract, and because it had not been identified as accepting the offer of sale, but that its representative had accepted the offer in his personal capacity.

Cloete AJ held:

"An exception is a legal objection to an opponent's pleading. It complains of a defect inherent in the pleading; admitting for the moment that all of the allegations in a pleading are true, it asserts that even with such admission the pleading does not disclose a cause of action. Courts are reluctant to decide, by way of exception, questions concerning the interpretation of a contract. The onus rest [sic] on the excipient to persuade the court that the pleading is excipiable on every interpretation that it can reasonably bear. ..." [Paragraph 11]

"... In my view, ... it is clear that *ex facie* the contract the seller is indeed the defendant and it is thus not necessary for me to consider whether any extrinsic evidence should be led..." [Paragraph 25]

"I agree with the plaintiff's submission that certain incorrect detail given in the description of the property in the contract is not, in itself, destructive of the sale. This must surely be the correct interpretation of the principles enunciated in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd*... (AD). In my view, the dominant descriptive part of the property is to be found in the annexure to the contract. The fact that there are elements of incorrect description in the entire description of the property is capable of resolution by a court after hearing evidence which will not relate to the negotiations between the parties or an *ex post facto* attempt to discover their consensus, and without there being any breach of the parol evidence rule." [Paragraph 45]

Referring to *Swanepoel v Nameng* 2010 (SCA), Cloete AJ held: "... It should be noted that, inasmuch as the matter was decided on application, it was thus effectively decided on evidence since, in application proceedings, the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be lead at trial: see *Erasmus: Superior Court Practice* ...." [Paragraph 50]

"In my view, extrinsic evidence is indeed admissible in the instant matter in light of the view expressed by the court in *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 ... (SCA), namely that the objectively existing facts *ex facie* a deed of sale may be taken into account in order to decide whether the description of the property contained in the contract enables it to be ascertained on the ground, provided that it does not relate to negotiations between the parties or an *ex post facto* attempt to discover the consensus..." [Paragraph 55]

The exception was dismissed with costs.

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

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

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

Cloete AJ held:

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

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

"Our Courts are now required to interpret all legislation in the context of the provisions of the Constitution of the Republic of South Africa, and with due regard to the constitutional context in which

such legislation is set." [Reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (CC)]. [Paragraph 22]

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

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

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

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

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

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

SELECTED JUDGMENTS

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

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

Koen AJ held:

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

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

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

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

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

Koen AJ analysed various High Court decisions, and concluded:

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

The application was dismissed.

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

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

Koen AJ held:

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

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

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

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

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

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

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

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

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

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

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

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

Koen AJ held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SELECTED JUDGMENTS

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

This case was an appeal against the refusal of an eviction order sought under the Prevention of Illegal Occupation from and Unlawful Occupation of Land Act (PIE). First to Third respondents had occupied a house on the Appellant's farm with their parents, who were workers on the farm, and continued their occupation after their parents' death.

Mantame AJ held:

"It is trite law that eviction should be regulated in a lawful, dignified and humane manner. As such there are pieces of legislation that are in place to give effect to such regulation. ..." [Paragraph 20]

"It is common cause fact that First to Third Respondents have lived in the house for the past 27 years. They have not mushroomed from nowhere as suggested in the aforementioned definition [of an "unlawful occupier" in terms of the PIE Act, as argued by the Appellant]. If one had to interpret this definition ... it does not fit the situation that the Respondents are on currently. I am inclined to agree with the First to Third Respondents' argument in the court a quo that they receive their protection in terms of Section 8(4) of ESTA [the Extension of Security of Tenure Act]. It was incumbent upon the Appellant to find a humane and dignified way of dealing with this eviction that fits squarely within the confines of UBUNTU. ..." [Paragraph 22]

"... The fact that they [the Respondents] are alleged in the court a quo that they received their protection in terms of Section 8(5) is an all encompassing situation. If one reads the provisions of that Section, one would come to the conclusion that they received their protection by virtue of their parents being "occupiers" in terms of ESTA. It is difficult to comprehend that after both parents died, Appellant still regard the fact that they were "long-term occupiers" as presumed." [Paragraph 24]

"The attitude of the Appellant in this case is unfortunate. Parliament in its wisdom enacted the provisions of ESTA in order to protect the rights and dignity of those who fall prey to eviction. For the Appellant not to have taken into account the standard of living of the First to Third Respondents and the fact that they have lived in the said Labourers House almost for the rest of their lives is unfortunate. In societies where people live in abject poverty, like in this instance, farm dwellers, it is not uncommon for the members of the family to live communally in one household, notwithstanding their age group and be depended on their parents up until, in certain instances, they receive an old age grant. ... " [Paragraph 25]

"Surely "dependents" of a person who had a valid title under the ESTA are entitled to eviction notices and protection under the ESTA. UBUNTU which is one of the principal pillars of our constitution requires that such "dependants" be treated with dignity and respect, particularly where they had lived for so long on the farm and where their parents died whilst employed on such farm. Accordingly, it is my judgment that Respondents are entitled to 12 months notice under ESTA." [Paragraph 26]

The appeal was dismissed (Hlophe JP concurring).

FAIZEL HENDRICKS AND MOGAMAT SMITH V THE CITY OF CAPE TOWN, UNREPORTED JUDGMENT, CASE NO: 9376/2010

Case heard 12 April 2011, Judgment delivered 24 June 2011

Applicants, informal business traders, sought to review a decision by the Respondent to direct them to remove their permanent business structures and rebuild them daily on their trading sites. The case centred on the notices served on the Applicants by the Respondent, asking them to change their trading process. Applicants argued that they had previously enjoyed a cordial relationship with the Respondent, and had complied with requests to move and tidy their trading structures.

Mantame AJ held:

"This court is therefore requested to determine whether the "notices" as they stand constitute a decision for the purposes of review in terms of PAJA." [Paragraph 25]

"Further, though there has been no record filed in terms of Rule 53, but only "notices" were dispatched to Applicants, determination has to be made whether there is a decision to be reviewed." [Paragraph 26]

"It is my view that the notice that has been sent by the Respondent to the Applicants to comply with the by-law qualifies as a decision within the meaning of PAJA, in that the notices is making a demand or a requirement to be complied with. In the notice itself there are obviously certain consequences if the demand by the Respondent is not met. The notices were issued and served on the Applicants after a decision was taken by the Respondent. Regard has to be made to the fact that Applicants should have been given an opportunity to reply to the decision as the Respondent will take action once they do not comply with the notice." [Paragraph 29]

"[Counsel for the Respondent] argued that the Applicants have no rights in which to base this application to have the "*notices*" to be reviewed set aside in terms of PAJA. I am unable to agree ... . Although the respondent does not challenge Applicants right to trade, but at the same time, it is threatened. Therefore Applicants correctly pointed out that their right to trade will be affected by these notices, as the said notices will introduce change in the way they are currently trading." [Paragraph 32]

"Section 22 of the Constitution guarantees Applicants a right to trade. I am not in agreement with Respondent's argument that Applicants have no rights on which to base this review application." [Paragraph 33]

"The practice of a trade, occupation or profession may be regulated by law but may not be regulated in such a way that it deprives one of such a right, as is the case in this matter. Section 33 of the Constitution, coupled with PAJA, apply to and bind the entire administration, at all levels of government. It provides a set of coherent rules and principles for the proper performance of all administrative action within its ambit, it requires the giving of reasons for administrative action: and it sets out the remedies that are available if these rules are not complied with. The principle of legality requires the exercise of administrative power to be authorised by law. In other words, a law must authorise the administrator. Administrative action must also comply with the general requirements of PAJA. ..." [Paragraph 36]

"While it is true that the right to chose a trade may be regulated by law, at least the Applicants can rely in that right in support of their application to have the "*notices*" reviewed and set aside. Their right is, as in these proceedings, regulated by the law that Applicants are alleged to have contravened. It therefore

depends on further argument, in this case there has been none, on whether a limitation is justifiable in terms of Section 36 of the Constitution." [Paragraph 37]

"In my view, this matter is an administrative action, since the "*notices*" that have been issued to the Applicants constitute a decision that is instructing and making a demand or a requirement as defined in Section 1 of PAJA. ..." [Paragraph 38]

"It is therefore the duty of the Respondent to afford the Applicants sufficient opportunity to make representation, as their decision affects the day to day running of Applicants business and their right to trade. ..." [Paragraph 39]

"The authorities that have been referred to by the Respondents counsel do not address the issue at hand, as outlined above, though they might have come closer." [Paragraph 40]

"Even if I am wrong in coming to the conclusion that the Respondent's decision adversely affected the Applicants' right to trade, nevertheless such decision affected the Applicants legitimate expectation. It is well recognised in our law that a decision affecting a party's expectation must be preceded by a fair hearing. ..." [Paragraph 41]

"In casu, the Applicants legitimate expectation is justified since First Applicant has been trading thereat for a period of some thirty years and Second Respondent has been trading thereat since 1998." [Paragraph 42]

The decision to compel the Applicants to remove and rebuild their business structures, and the notices served on the Applicants, were reviewed and set aside.

FIRST RAND BANK LIMITED V NATIONAL PRIDE TRADING 148 (PTY) LTD AND ANOTHER, UNREPORTED JUDGMENT, CASE NO.: 565/2010 (30 MAY 2011)

An exception was raised by the Defendants against Plaintiff's summons in an action for the recovery of monies owing under a home loan agreement.

Mantame AJ held:

"I do agree with the submission that an exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. ..." [Paragraph 5]

"I do agree ... that the ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. ..." [Paragraph 6]

"This court is faced with a question of whether there has been an insufficient particularity to enable Defendants to plead. Defendants counsel has argued substantially that the pleadings as they stand are vague and embarrassing. They do not state the nature, extent and grounds of the cause of action as required by law. Plaintiff's counsel on the other hand conceded on some errors that Plaintiff has made, but argued that those are "minor blemishes that are irrelevant."" [Paragraph 15]

"I have no doubt in my mind that Ms. Smit for the Defendants has sufficiently pointed out the cause of complaints in Plaintiff's pleadings. If a pleading is vague and embarrassing, it is excipiable because of that quality." [Paragraph 17]

"... Defendants are entitled to know exactly what case to meet. It would therefore be unfair to require Defendants to plead on the Summons and Declaration that they have subsequently raised some issues with. Consequently, there is sufficient ground to uphold the exception ..." [Paragraph 18]

MABUTI MNQANTSHA AND VUYOLWETHU WITBOOI V THE STATE, UNREPORTED JUDGMENT, CASE NO: A355/2010 (3 MAY 2011)

The Appellants were convicted by a Regional Court on charges of robbery with aggravating circumstances, unlawful possession of a firearm, unlawful possession of ammunition and assault with intent to do grievous bodily harm. The appellants were each sentenced to thirteen years direct imprisonment [although at paragraph 9 of the judgment the sentence is described as being one of eighteen years], and appealed against conviction and sentence, although the appeal against conviction was not pursued.

Mantame AJ held:

"It was common cause that the minimum sentence regime ... was applicable to the robbery counts and the act prescribed 15 years as a minimum sentence in respect of each count. The court *a quo*, correctly in my view, found that substantial and compelling circumstances existed allowing it to deviate from the prescribed minimum sentences . ..." [Paragraph 4]

Mantame AJ noted the arguments of appellants' counsel, who submitted that the court *a quo* had erred by not taking into account the cumulative effect of the sentence imposed; by failing to take into account the totality principle of the criminal behaviour; by imposing a disproportionate sentence in that the effect of consecutive sentences negated the non-application of the minimum sentence; and by over-emphasising the interests of the community above the circumstances of the appellants.

"In my view, taking the facts of this case in its totality, this is not the matter whether the question of sentence need to be considered afresh. A sentence should only be altered if the discretion has not been judicially and properly exercised. The test is **R v Mapumulo 1920 AD 56 and S v Rabie 1975 (4) SA 855 (A)** was whether the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate or induces a sense of shock. This was not the case in this matter." [Paragraph 8]

"In my final analysis, the proper sentence is always the product of a balanced consideration of the personal circumstances, fairness to society and should be blended with a measure of mercy. In my view, the sentence of eighteen (18) years imprisonment for both Appellants is just in the circumstances of this matter." [Paragraph 9]

The appeal was therefore dismissed (Baartman J concurring).

SELECTED JUDGMENTS

SIPHENATHI QEYU V THE STATE, UNREPORTED JUDGMENT, CASE NO.: A700/2010 (11 MARCH 2011)

Appellant had been convicted by a Regional Court on two counts of rape and sentenced to 20 years imprisonment on the first count, and 18 years imprisonment on the second count. The trial court ordered that the sentences not run concurrently.

Moses AJ held:

"... The appellant contends that, given the circumstances of this particular case, more particularly the appellant's personal circumstances which, so it is submitted, were not properly and/or sufficiently considered ... these sentences are startlingly inappropriate and should be set aside and be replaced with a suitable sentence." [Page 2, 15-20]

"...[C]ounsel for the State's main contention was that, given the nature of the offence, namely a young 4-year old girl being raped within her own family and the societal interests, both of which outweighed the personal circumstances of the appellant, the sentences which the Magistrate imposed were appropriate in the circumstances. ..." [Pages 2 – 3, 25 – 5]

"In deciding this appeal ... this Court is guided by the well-established principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial Court." [Page 11 5 - 15]

Moses AJ cited the SCA decision in *S v Malgas* to establish the parameters for when an appeal court can interfere with the sentence of a lower court, and continued:

"... [T]his Court also agreed that the Magistrate was correct in finding that on the particular facts and circumstances of this case substantial and compelling circumstances existed. ..." [Pages 12 – 13. 20 - 5]

Moses AJ then turned to consider whether the trial Court had erred in exercising its discretion, and noted that counsel for the State conceded that the trial Court had not discussed the age of the appellant or the aspect of rehabilitation; nor how the practical effect of the sentence imposed differed from one of life imprisonment.

"With regards to the State's first-mentioned concession ... although the Magistrate has clearly considered the various reports, ... the Magistrate misconceived the import of the findings in respect of the J.88, exhibit B, and the recommendations of the probation officers ... and that of the correctional supervision report ... J. 88 reveals that [the complainant] suffered no serious and/or severe physical injuries upon a physical and gynaecological examination by the doctor. Despite the fact that the Magistrate accepted these findings, ... she used these physical injuries as a basis for the imposition of 20 years' imprisonment in respect of count 1." [Page 15]

Moses AJ then set out personal circumstances of the accused which, "seen in its proper perspective, are important mitigating factors" [pages 16 – 17], and continued:

"The Magistrate did not specifically refer to these personal circumstances of the appellant and its negative effect on the punishment to be imposed on the appellant at all. In the circumstances the Magistrate appeared to have paid limited regard to these material facts and in certain instances clearly gave inadequate weight to the relevant and important facts and circumstances reflected above. ... [I]t is

trite that all the relevant factors must be taken into account and that no fact may be overemphasised or underemphasised at the expense of other equally relevant factors. The Magistrate also appeared to have overemphasised the gravity of the effect of the actions on the child at the expense of other material facts and considerations. ... [T]he Magistrate appeared to overlook the entire aspect of the rehabilitative potential on the part of the appellant..." [Pages 17 – 18, 15 – 5]

"... The practical effect of these two sentences coupled with an order that these sentences "ought not to run concurrently" is that the appellant may in effect serve a sentence longer than a person who had been sentenced to life imprisonment. This is in circumstances where the Magistrate concluded that she was not obliged to impose the obligatory life sentences on the basis of having found the existence of substantial and compelling circumstances ... " [Page 18, 10 - 20]

"In the event the Magistrate clearly failed to consider the cumulative effect of the sentences. Her only reason for having imposed these sentences to run successively seems to be that the offences were committed three months apart. The result thereof was a sentence which cumulatively is potentially longer than a life sentence. This in my view is a clear misdirection." [Page 19, 15 – 20].

"In the circumstances I am satisfied that the Magistrate has misdirected herself in several respects, which misdirections were of such a nature that in effect she failed to exercise her discretion properly and reasonably and such as to vitiate her decision on sentence. ... In any event, the discrepancy between the Magistrate's sentences and that of this Court is so marked that it can only be inferred that she failed to exercise her discretion properly. Moreover ... the effective sentence imposed ... is shockingly and disturbingly inappropriate. ..." [Pages 19 – 20, 20 -10]

The sentences were therefore set aside and replaced by sentences of18 years on both counts, the sentences to run concurrently (Bozalek J concurring).

JOHAN HENDRIK BRUINERS V THE STATE, UNREPORTED JUDGMENT, CASE NO: SS675//2010

The Appellant had been convicted by a Regional Court on one count of rape and one count of indecent assault, and sentenced to 7 years imprisonment, both counts taken together for the purposes of sentence. On appeal against the conviction and sentence, it was argued that the Magistrate had failed to have proper regard to various discrepancies, contradictions and improbabilities in the complainant's evidence.

Moses AJ considered Supreme Court of Appeal cases and academic authority regarding the approach of a court on appeal, onus, and the evaluation of evidence, including the evidence of a single witness, and held:

"The Magistrate has convicted the Appellant on a charge of attempted rape, on the basis that it was a competent verdict on a charge of rape, ... The Appellant has not been charged with attempted rape. He has not been informed, before or during the trial, that he is required to answer the charge of attempted rape. ... The fact that the accused was legally represented does not absolve the prosecution of the duty to inform the accused of the charges that he/she is required to answer. In fact the Constitution is clear in that regard ... However because of the conclusion I have reached ... it is not necessary to decide this point, save to state that I regard it as a constitutional imperative that an accused person be advised and informed, timeously, of the charges he or she is required to answer." [Paragraph 35]

"... The absence of proof beyond a reasonable doubt linking the Appellant with this alleged semen found on the complainant, is wholly consistent with the Appellant's vehement denials and therefore, is not inconsistent with the reasonable possibility of his innocence. The Magistrate appeared to have overlooked this important aspect. ... [The Magistrate] overlooked the fact that the State did not prove beyond a reasonable doubt that (1) what was found on the complainant was indeed semen, and (2) that that semen was that of the Appellant. This, in my mind is a material misdirection. ... [T]he state has failed to prove beyond a reasonable doubt that the appellant committed the crime of attempted rape." [Paragraph 43]

Moses AJ then turned to deal with the conviction for indecent assault, and noted that, whilst the Magistrate had found the evidence of the complainant to be reliable, there were numerous inconsistencies and improbabilities in the evidence [paragraphs 45 – 50]. Whilst there were also numerous inconsistencies in the Appellant's evidence, on the totality of the evidence and having regard to the probabilities, Moses AJ found that there was some corroboration for aspects of his evidence [paragraphs 51 – 52].

"Importantly, the alleged semen, if it was semen, ... cannot be said and it was certainly not proven beyond a reasonable doubt, to be that of the Appellant. ... This aspect lies at the very heart of the appellant's numerous protestations about the negative results of the DNA analysis which was apparently done in respect of him in relation to this incident. ... [T]he lack of proof in this regard is wholly consistent with the Appellant's denial of having committed these acts..." [Paragraph 53]

"The Magistrate's failure to refer to and to deal with these probabilities and the inconsistencies in the complainant's evidence, ... in my mind, constitute a misdirection, serious enough to entitle this Court to interfere with her eventual findings and her conviction of the appellant, also in respect of count 2, the indecent assault." [Paragraph 54]

"The question to be asked and answered therefore is that given all the facts and circumstances of this case ... was the Magistrate justified in her finding that the Appellant's evidence was false beyond a reasonable doubt. I am not persuaded that this finding measure up to the stringent test as laid down in *R v Difford* ... and the other cases referred to above. ..." [Paragraph 56]

The appeal was upheld (Blignault J concurring).

LIVINGSTONE MONERA V THE STATE, UNREPORTED JUDGMENT, CASE NO: A 726/10

Appellant was convicted in a Regional Court on charges of attempted rape, robbery with aggravating circumstances, and theft. The Appellant denied having committed the offences, and raised an alibi defence. The appeal was directed at both the conviction and sentence.

Moses AJ held:

"...[W]hat was challenged, and is in dispute, is the identity of the assailant. In other words, what the State had to prove beyond a reasonable doubt was that the identification evidence was not only honest, but also reliable ... Since the Appellant's defence was also one of an alibi, the State was also required to negative that alibi beyond a reasonable doubt." [Paragraph 20]

"... Counsel for the Respondent was driven to concede however that the State did have ample opportunity to investigate the alibi of the Appellant and to tender evidence in that regard, which it failed to do. In the circumstances, the Appellant's evidence in that regard stands alone with no contradictory evidence being tendered by the State." [Paragraph 21]

"It is clear that the Magistrate, despite acknowledging that the onus rests on the State to disprove the alibi of the Appellant, has burdened the Appellant with an onus to prove his alibi. There is also no evidence, contradictory or otherwise, to support the Magistrate's reasoning and factual findings in this regard. ..." [Paragraph 24]

"...[T]he fact that the Magistrate subjectively disbelieved the Appellant's alibi evidence, is not the test to determine whether or not the State his discharged its onerous burden, that of proof beyond reasonable doubt. The test is whether, on the evidence before the court, the Appellant's evidence could be rejected as not reasonably possibly true ..." [Paragraph 25]

"Given the uncontradicted evidence of the Appellant, and the absence of any evidence by the State in this regard, the Appellant's version could not be rejected as not reasonably possibly true, as was done by the Magistrate. This was a material misdirection ... the Magistrate's findings in this regard can therefore not stand and ought to be set aside. ..." [Paragraph 27]

Moses AJ then turned to consider the identification evidence in respect of the first two counts:

"... To have found that the State has proved the Appellant's guilt in respect of both these counts beyond a reasonable doubt, despite this apparently contradictory evidence, is to my mind a material misdirection sufficient to entitle this court to interfere with the eventual findings of the Magistrate." [Paragraph 31]

"...[T]his contradictory evidence [of the complainant] was sufficient to have created a reasonable doubt about the correctness and reliability of her observations regarding her assailant, on the night of the incident. It follows, in the circumstances that the State has failed to prove the identity of the appellant beyond a reasonable doubt, ..." [Paragraph 32]

The convictions for attempted rape and robbery were thus set aside. The conviction for theft was not challenged and was upheld (Binns Ward J concurring).

SELECTED ARTICLES

'PAROLE: IS IT A RIGHT OR A PRIVILEGE', 19 South African Journal on Human Rights 263 (2003)

The article deals with nature and theoretical underpinnings of parole. It discusses parole in comparative jurisdiction, and considers the impact of the doctrine of legitimate expectation.

"In those cases where the issue of parole was considered, courts simply assumed and/or accepted that parole amounted merely to a privilege. ... [S]entenced prisoners under the Correctional Services act 8 of 1959 ... did not have a guaranteed constitutional right to legal representation, nor to such representation at State expense ... where any decisions and/or actions of a prison authority were challenged. ... Secondly, our courts have until recently, as in America, had little to do with the administration of the parole system. ... The new Correctional Services act ... contemplates, in stark contrast to its predecessor, much more direct and indirect judicial intervention, supervision and control at various levels of the prison administration ... " (Page 263)

"Parole, which direct affects the freedom of a prisoner, and which may be described as the ultimate objective of every prisoner, will increasingly be the subject of litigation at the instance of affected prisoners. It is submitted that our courts and/or other tribunals of competent and legal jurisdiction, will increasingly be confronted with the very notion of parole and its conceptual and theoretical bases in South African penal law. ... Its practice and existence ... may be justified primarily by reason of the fact that rehabilitation may be fostered through gradually facilitating the move from confinement in an artificially created environment to social reintegration and resocialisation. Parole may also be justified on the basis that it creates the necessary restraint to keep the parolee from committing further offences, and serves the function of deterrence by the mere fact that the parolee knows that breach of a condition may result in ... re-incarceration. From the perspective of the prison administration, it fulfils the very important role of creating the incentive for prisoners to obey the rules and to co-operate with prison authorities. ..." (Page 264)

The article then continues the comparative situation regarding parole in the United States, England, Australia, Canada, India and Europe.

"In summary, therefore, a person sentenced to life under English law, European Community law and American law never regains his right to liberty, except in the event of a free pardon or by Royal prerogative, even when released on license (parole). Under European Community Law and the Convention however, such a person does not loose his 'right to liberty and security of the person' ... Even if there are conditions attached to the release of such a prisoner, it only makes his freedom more circumscribed in law and more precarious than the freedom enjoyed by ordinary citizens, but those restrictions do not prevent the freedom of the prisoner from qualifying as 'a state of liberty'..." (Page 271)

The article then proceeds to consider the relationship between the concepts of legitimate expectation and parole.

"[P]arole in South Africa will necessarily involve a process whereby sentenced prisoners are assessed and considered by the relevant, legally authorised institutional bodies for the possibility of earlier release from prison into the community, before the expiration of the full term of imprisonment ... subject to the acceptance of appropriate conditions."

"Inasmuch as the release of prisoners on parole is not enforceable as a right, it cannot be said to only amount to a privilege either. Parole derives its concept, existence and practice from a statutory discretionary power ... That discretionary power must be exercised judicially, in accordance with the law, with due regard to the principles of fairness. The discretion must further not be exercised arbitrarily, illegally, irrationally, or suffer from procedural impropriety ... " (Page 272)

The article then dealt with the doctrine of legitimate expectation under the common law, and applying these principles to the concept and practice of parole, submitted that:

"

- A sentenced prisoner does not have a right to be released on parole prior to the expiration of his or her term of imprisonment.
- Such a prisoner ... has the right to be assessed and considered for release on parole ...
- Such a prisoner furthermore has the right and legitimate expectation to be assessed and considered for release on parole in a manner that is lawful, fair, non-arbitrary and without any procedural impropriety or irrationality...
- Where such a prisoner has displayed conduct which is indicative of his her rehabilitation, does not present an unacceptable risk to the broader community, and has substantially complied with the rules and regulations of the correctional facility ... and where ... such a person would in the normal course of events qualify to be placed on parole, a legitimate expectation is created as a enforceable legal right ... to be released on parole..."

"In this way, a duty is created on the part of the correctional facility or parole authority to act fairly and in accordance with the requirements of natural justice in their assessment and consideration of the parole application. Such a sentenced prisoner has acquired not only a right to be assessed and considered for parole ... but also a legitimate expectation to be assessed and considered for parole fairly and in terms of the principles of natural justice and to be released on parole 'if by that time no disciplinary award of forfeiture or remission has been made against him..." (Page 274)

The article finally considered provisions of the Interim and Final constitutions, as well as the Promotion of Administrative Justice Act, before arguing:

"It is submitted that the assessment and consideration of a prisoner for parole in terms of ... the Old [Correctional Services] Act constitutes an administrative action in terms of the relevant provisions of the 1996 Constitution, read with these provisions [Section 6] of Act 3 of 2000 [PAJA]. As such, assessment and consideration of a prisoner for parole must adhere not only to common law principles and provisions, but also to constitutional requirements."

"If remission and/or 'credits' are applicable to any sentenced prisoner, it may impact positively on a finding that a legitimate expectation to be released on parole existed, as an objective factor to be given 'due consideration'. Such remission or 'credits' moreover creates a 'liberty interest' which attaches to the prisoner in the sense that it impacts on the duration of such a prisoner's imprisonment. Once that 'liberty interest' is created and acknowledged, it becomes, in substance, an enforceable right attaching to the prisoner ..." [Page 276]

SELECTED JUDGMENTS

IRVIN & JOHNSON LTD V TRAWLER & LINE FISHING UNION & OTHERS 2003 (24) ILJ 551 (LC)

The applicant sought an order declaring that the voluntary and anonymous HIV testing it sought to offer to its employees was outside the ambit of s 7(2) of the Employment Equity Act, or alternatively that such testing was justifiable under s 7(2). The applicant would have access to the statistics resulting from the testing, but would not have access to the names of the employees who submitted themselves to testing, nor to the results of the test.

Rogers AJ held:

"Section 7 appears to contemplate that an employer may form and act on its own view as to whether medical testing for conditions other than HIV infection is justifiable, whereas the justifiability of testing for an employee's HIV status must be determined in advance by the Labour Court. … In Hoffmann v South African Airways … the Constitutional Court described people living with HIV/AIDS as "one of the most vulnerable groups in our society" ..., and the legislature's concern for this group is reflected inter alia in the more stringent requirements for HIV testing imposed by section 7(2)." [Paragraph 15]

"Section 7 forms part of a chapter dealing with the prohibition of unfair discrimination. One of the main purposes of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination ... In this context, the purpose of section 7 seems to me to be clear. An employer should not unfairly discriminate against an employee on the basis that the latter suffers from some or other medical condition. One of the ways of reducing the likelihood of such discrimination is to limit the circumstances in which an employer may ascertain the employee's medical condition through testing." [Paragraph 18]

"… [W]hen section 7(2) prohibits the "testing" of an employee to determine that employee's HIV status, what it is prohibiting is a test which is designed to enable, or which will have the effect of enabling, the employer to ascertain the HIV status of an employee. And it is clear from the language of section 7(2) itself that the testing will be prohibited only if the employer is thereby enabled to determine the HIV status of a particular employee (the expression used is "that employee's HIV status")… " [Paragraph 23]

"In the present case the testing does not have as its *purpose* to enable the applicant to ascertain the HIV status of any identifiable employees. Will this nevertheless be its *effect*? During argument I expressed to [counsel for the applicant] a concern that in certain of the job categories in the 16 to 25 age group the numbers were very small. In response, he stated that the applicant was willing to combine persons in the 16 to 35 age range in a single group for statistical purposes or alternatively to eliminate the distinction between shore-based and seagoing staff for purposes of receiving information on the age group 16 to 25. It seems to me that either of these adjustments would be sufficient to eliminate any reasonable possibility that an individual's HIV status could be deduced from the statistical information." [Paragraph 26]

"... By compulsory testing is meant, in this context, the imposition by the employer of a requirement that employees ... submit to testing on the pain of some or other sanction or disadvantage if they refuse consent. This is to be contrasted with voluntary testing, where it is entirely up to the employee to decide whether he wishes to be tested and where no disadvantage attaches to a decision by the employee not to submit to testing." [Paragraph 28]

"There is thus good reason to conclude that the legislature did not intend section 7 to apply to voluntary testing. ... Medical testing is not itself an act of discrimination. Section 7 is a preemptive measure designed to reduce the risk of discrimination on the grounds of a medical condition. Section 10, which deals with disputes concerning Chapter II of the Act, appears only to make provision for the referral to the CCMA of disputes concerning alleged unfair discrimination. … If the dispute remains unresolved it may be referred to the Labour Court ... In terms of section 50(2) this Court may order compensation or damages for unfair discrimination, but there is no jurisdiction to make such an award merely because a person has been medically tested. …" [Paragraph 33]

"I thus find that section 7 as a whole applies only to compulsory testing (in the sense described above) and does not apply to voluntary testing. Provided testing is truly voluntary, I do not believe it matters whether the initiative for testing comes from the employer or the employees. …" [Paragraph 36]

"I thus conclude that the anonymous and voluntary testing which the applicant wishes to arrange for its employees does not fall within the ambit of section 7(2) and that the applicant does not require the authority of this Court before allowing its employees to be tested." [Paragraph 42]

STANDARD BANK OF SOUTH AFRICA V HUNKYDORY INVESTMENTS 188 (PTY) LTD AND OTHERS 2009 (4) ALL SA 448 (WCC).

Case heard 27 May 2009, Judgment delivered 1 June 2009

Plaintiff sought summary judgment against the defendant on four mortgage bonds. The defendant raised an issue of the constitutionality of the National Credit Act (NCR) , which the High Court had rejected in a similar case, and for which leave to appeal had been refused by both the Supreme Court of Appeal and the Constitutional Court before this case was heard. Although the plaintiffs invited the defendants to abandon the constitutional challenge, the defendants declined to do so.

The defendant also raised the issue of whether s 228 of the Companies Act applied "to the registration of mortgage bonds over a company's main asset." [Paragraph 10]

Rogers AJ held:

"In short, to construe s228 as applying to mortgages is to extend its operation to cases where the transaction which could potentially result in the disposal of the company's assets is the borrowing of money or the incurring of debt. But was it the legislature's intention to provide shareholders with that protection? If so, why stop at mortgages? … [A]ny transaction whereby debt is incurred equal to a greater part by value of the company's assets exposes the greater part of the company's assets to the risk of forced disposal, even if no security is given. The mortgage is not the component of the transaction which creates the risk of forced disposal; the mortgage merely determines who benefits first from the forced disposal. The mortgage has significance for the creditors, not the debtor company (which would, if it ran into financial difficulties, face a forced disposal in any event)." [Paragraph 17]

"Accordingly, and accepting for the moment that in certain contexts the words "*dispose of*" might be given a wide meaning that could include hypothecation, I see no warrant for adopting the wide meaning in the interpretation of s228(1). The meaning I favour is the one espoused by the learned authors of *Henochsberg on the Companies Act* ... It is supported by the *prima facie* view expressed by Basson AJ in *Advance Seed Company (Edms) Bpk v Marrok Plase (Edms) Bpk* 1974 ... (NC) …" [Paragraph 23]

"Finally, … the simple summons in this case alerted the defendant to s26 of the Constitution which accords to everyone the right to have access to adequate housing. The summons stated, further, that if the order for execution would allegedly infringe the defendant's rights under s26 the defendant should place information before the court in that regard. Jansen [alleged] that he and his family live in the house and that his brother and family also live there from time to time. He says that if summary judgment were to be granted he would lose his family home and his place of business." [Paragraph 29]

"While I do not wish to minimise the distress which Jansen and his family may suffer if they have to vacate the property, s26 of the Constitution enshrines a right of access to "*adequate"* housing, not a right to continue living in the house of one's choice even though one cannot afford it … In the absence of more detailed information, which the defendant has chosen not to proffer, it is quite impossible to say that the granting of summary judgment would violate anybody's constitutional rights. Furthermore, Jansen has not disclosed by what arrangement he and his family occupy a house belonging to a company of which two trusts are shareholders. If there is a valid lease with the company, a sale in execution will not necessarily result in Jansen having to vacate the dwelling. The Constitutional Court in *Jaftha v Schoeman* … set out … the sorts of considerations which would typically be relevant in assessing whether execution against immovable property would be an unjustified violation of the occupier's s26(1) rights. The defendant has not begun to make out a case with reference to these types of considerations. (I should add that in considering this question I have assumed in the defendant's favour that s26 is potentially applicable on the basis that I can look through the defendant company and through the trusts to the individuals who live in the house. Since counsel did not address this aspect in their submissions, I express no opinion on the applicability of s26 to juristic persons.)" [Paragraph 30]

"As to costs, Mr Budlender submitted that although the courts do not generally order costs against a litigant who has unsuccessfully asserted fundamental rights against the State, there is no inflexible rule to that effect. The courts will not condone the raising of dilatory constitutional challenges (see *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 … (CC) …). Mr Budlender submitted that the defendant's conduct in persisting with the constitutional challenge after the Constitutional Court had refused leave to appeal … was unreasonable. I agree and this will be reflected in my order." [Paragraph 31]

INTERCAPE FERREIRA MAINLINER (PTY) LTD AND OTHERS V MINISTER OF HOME AFFAIRS AND OTHERS 2010 (5) SA 367

Case heard 8 and 9 June 2009, Judgment delivered 24 June 2009

This case concerned an application brought by several companies who occupied office space nearby a refugee reception office run by the Department of Home Affairs (DoHA). The applicants contended that the use of the premises by the DoHA contravened the zoning scheme of the Municipality of Cape Town (City) and constituted common-law nuisance. The applicants contended that a number of refugees attempting to be served by the DoHA on a daily basis occupied the entire street in front of the refugee office and brought with them litter, intensive noisy transport, illegal vending activity and even crime.

Rogers AJ held:

"Prior to the new constitutional era ... our courts adopted the rule that the State is not bound by legislation unless the enactment so provides expressly or by necessary implication. As can be seen from

two of the early leading cases ..., the presumption has ancient roots in English constitutional law, the position of the monarch and sovereign prerogative. ..." [Paragraph 96]

"In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another ...* 2001 ... (CC) Chaskalson P ... said that the question whether the legislation was binding on the State was one of importance and raised not only factual issues but a constitutional issue concerning the applicability of the common law presumption that the State is not bound by its own enactments except by express words or by necessary implication ... As far as I am aware the issue has not been judicially addressed at any level, though the presumption has in some instances been applied without attention to the question whether it is still applicable ..." [Paragraph 98]

"I venture to suggest that a reappraisal of the law on this topic is due. ..." [Paragraph 99]

"Under the Constitution a foundational value of our country is the supremacy of the Constitution and the rule of law ... The notion of a State which is not in general bound by legislation strikes one as antithetical to the rule of law. Even more anomalous is the proposition that the State in this country should, in its various manifestations under the Constitution, be assumed not to be bound by legislation merely because this was the position of the Crown developed over hundreds of years by the common law of England. ..." [Paragraph 100]

"However, as a judge of first instance I am hesitant to base my decision on a finding that the Constitution has altered the common law presumption, and I shall thus assume in the Ministers' favour that I must approach the question as laid down in *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1991 ... (A) ... Even on that basis I have come to the conclusion that the State is bound by LUPO." [Paragraph 102]

"... The purpose of town planning would, in my view, be frustrated if the State as a significant user of land were free to disregard zoning restrictions. Even if only a few pieces of land in a particular area were free to be used by the State contrary to the zoning for that area, the character of the area and the welfare of the members of the community in that area would be jeopardised and the planning objectives of the local authority (as approved by the province) frustrated." [Paragraph 105]

"...[I]n *Director of Public Prosecutions, Cape of Good Hope v Robinson* ... (CC) Yacoob J writing for a unanimous court held that the word "person" in s167(6) of the Constitution includes the State and he seemed to regard the contrary contention as involving a "narrow" interpretation of the word ..." [Paragraph 111]

"The fact that the [Urban Planning Committee (UPC)] was under a misapprehension that office use was permitted by the "Place of Assembly" definition and that such use is not in truth permitted in an industrial general zoning may mean that the UPC's decision was unlawful and substantively invalid but am I permitted so to find in these proceedings? I think not. ... [T]he principle which I extract from *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 ... (SCA) is that generally and in the interests of certainty the mere factual existence of a decision is a sufficient precondition for valid consequences unless and until the decision is set aside, the exception being those cases where coercive State powers are used against an accused or respondent on the strength of such decision. ..." [Paragraph 117]

"... I am of the view that the phrase "*as offices*" in the UPC's resolution … does not constitute an authorisation by the City for the Department to use the premises as a refugee office. In the light of the

application made to the City, that could never have been intended by the City nor could Cila ever have understood the City's permission to sanction such use." [Paragraph 123]

Rogers AJ also examined whether the "conditions of consent use" contained in the UPC's approval for the use of the premises by DoHA had been satisfied [Paragraph 124] and concluded that only two of the four conditions had not been met. [Paragraphs 130 and 133]

"In the context of the present case, the term "nuisance" connotes a species of delict arising from a wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference. Wrongfulness is assessed, as in other areas of our delictual law, by the criterion of objective reasonableness, where considerations of public policy are to the fore..." [Paragraph 142]

"[Counsel for the respondents] submitted that the Department cannot be held responsible for the fact that crowds gather in the road, and that it was for law enforcement agencies to deal with illegal activities in the street. I cannot accept that argument in the circumstances of the present case. It is not to be doubted that the cause of people gathering in the street is that the Department is conducting a refugee office ... If law enforcement agencies were as a fact clearing the streets and clamping down on illegal activity, the conclusion might conceivably be that there is no nuisance. But it is common cause that the law enforcement agencies are not doing so, and this despite repeated requests not only from the applicants but also from the Department itself. I cannot say whether the law enforcement agencies are at fault ... The activities of the refugee office would seem to require the almost permanent presence of police and traffic officials in order to prevent illegal parking, illegal trading and crowd disturbances. That hardly seems a reasonable duty for a land user to impose on the law enforcement agencies. Moreover... it has not been explained to me on what legal basis they could arrest or chase away people calling at the refugee office for assistance. Accordingly, and even if the law enforcement agencies had endless resources to devote to the environs of the refugee office, their presence would by no means eliminate the unsatisfactory conditions under which the applicants are currently operating." [Paragraph 154]

"I was urged … to take into account that the Montreal enclave is an industrial area and that the applicants could not expect the tranquillity of a leafy suburb. Naturally this is a relevant factor in assessing the reasonableness of the Department's activities ... However, the conditions to which the Department's activities have given rise are by no means typical of industrial use. The Department's activities are not characterised by the orderly coming and going of commercial traffic or the steady sounds of machinery. One does not reasonably expect in an industrial area the congregating of crowds in the street and the illegal parking and constant presence of taxis. On the contrary, such phenomena are inimical to the conduct of business in an efficient way. ..." [Paragraph 164]

"The … Department has not alleged that the proper implementation of the Refugees Act inevitably involves the creation of a nuisance. The sacrificing of individual rights in the public interest should ordinarily be governed by statute, and in the absence of such legislation a court should not readily regard an interference with individual rights as justifiable by public welfare ... Where interference with private rights is contained in a law of general application its constitutionality can be tested and it is open to the State to attempt to justify any derogation from fundamental rights on the grounds set out in s36 of the Constitution. ... In an individual case such as the present one which arises under common law, the court is not well-placed to explore all the issues relevant to the balancing of governmental objectives and

individual rights, and indeed neither side advanced the sort of evidence which could be expected if the constitutional validity of legislation were in issue." [Paragraph 166]

"However, and given the policy-based nature of the reasonableness criterion, I am willing to accept that the social utility of a respondent's conduct is one of the factors that can go into the scales, provided one guards against the temptation to use (or misuse) this factor so as to sanitise conduct which is otherwise clearly unreasonable and thereby effectively uphold a defence of statutory authority without properly examining the empowering legislation to ascertain whether the respondent has discharged the onus resting on it. … I accept that the activities of a refugee office have an important social utility, but in my view conditions … are so far in excess of what neighbours should have to bear that the social utility of the Department's conduct cannot neutralise the unreasonableness of its use of the premises. On the assumption that the Department's activities have a high social utility, the Government could be expected to apply the resources needed to conduct those activities in a way which does not materially disturb the lawful business activities of others. This might involve establishing a greater number of refugee offices, employing additional staff and locating the offices at more suitable sites." [Paragraph 167]

"In conclusion, I am satisfied that the extent and duration of the ongoing inconvenience which the applicants have been and are being made to suffer as a result of the Department's activities … are objectively unreasonable. ..." [Paragraph 168]

"The criticism of the Department implicit in my previous paragraph assumes that the Department has the resources and capacity to provide a service to asylum seekers in a way which does not infringe the rights of neighbours. The way this might conceivably be achieved is by having more refugee offices in the Cape Peninsula and/or locating the office (or offices) on larger sites .... I accept that this might require additional financial and human resources. Conceivably the Department is doing the best it can within the resources allocated to it. ... However, it is simply impossible for this court to assess matters of that kind in the current proceedings, nor is it the judicial function to tell the Department how to do its work. If the government concludes that it is not possible to comply with the country's obligations under the Refugees Act without creating conditions of the kind which now prevail … the resultant choices have to be made by the legislature or the executive, not the court. ... Legislation could notionally be passed which would curtail South Africa's obligations to asylum seekers or streamline and simplify the processes involved or which would sanction inroads on the rights of neighbouring land users. If such legislation were promulgated and challenged on constitutional grounds, that would be the occasion for the court to determine the extent of the inroads and to assess the justifiability thereof." [Paragraph 176]

"I am satisfied that I should not be swayed by the Ministers' assertion that the finding of alternative premises would take at least six months or even twelve months or more. If that is the usual period of time for procurement, the State will in this instance have to act with considerably greater alacrity. Procurement instruments ordinarily permit public bodies to depart from usual procurement policies in the public interest or on grounds of practicality." [Paragraph 185]

The order declared that the operation of the refugee office was unlawful because its use had not been approved by the Urban Planning Committee and that it constituted common-law nuisance. The DoHA was given just over three months to cease the said activities on the premises.

THE STATE V LOUIS THOMAS, UNREPORTED JUDGMENT

The accused was convicted by a regional court on one count of rape of a 14-year old girl. The Magistrate referred the case to the High Court for sentence under s52(1) of the Criminal Law Amendment Act 105 of 1997. Before the High Court, the defence argued that the age of the complainant had not been properly proved.

"...[T]he complainant testified that she was born on 26 July 1986. If this is so she was just short of her 15th birthday at the time of the alleged rape. However, it is trite that a witness's testimony concerning his or her own age is hearsay. ..." [Paragraph 5]

"... [T]he Law of Evidence Amendment Act does not re-define what is and is not hearsay. It regulates the circumstances in which hearsay evidence may ... be admitted. ... I rather doubt whether – if the prosecution had asked for the evidence to be received – such a ruling would have been warranted. The issue is one entailing serious consequences for the accused, and there is no suggestion that admissible evidence on age was not readily available." [Paragraph 6]

"The minimum sentences specified in s51 are only applicable where the accused has been "*convicted of an offence referred to*" in one or other of the Parts comprising Schedule 2 to the Act. Schedule 2 has not created new offences. Rather, it lists specific form of existing offences [reference to the SCA judgment in *S v Legoa*]. The specific attribute which brings the offence within the ambit of the Schedule must nevertheless be proved beyond reasonable doubt..." [Paragraph 12]

"In the present case the attribute which the State had to prove ... was that the victim was a girl under the age of 16. ... [T]his attribute was not proved beyond reasonable doubt." [Paragraph 13]

"This Court has jurisdiction ... only because the matter has been referred to the High Court under s52(1)(b)(i). ... [T]he regional court was only entitled to refer the case to this Court for sentence if the accused was convicted of an offence referred to in Part 1 of Schedule 2. Given the absence of admissible evidence of the complainant's age, the accused should not have been so convicted, and the matter should thus not have been referred to the High Court at all. ... The magistrate's judgment concludes with a formal conviction of rape without mention of Schedule 2. The only reference to the complainant's age is in the opening paragraph of the judgment, a paragraph which ... appears to me to be a summary of the charge rather than a formal finding on the complainant's age. ...[T]he regional court itself could not, after conviction, have heard further evidence to establish the complainant's age..." [Paragraph 17]

Rogers AJ then considered whether the High Court could hear evidence in the course of satisfying itself that a conviction was "in accordance with justice", and referred to the Constitutional Court decision in *S v Dzukuda and Others*, before concluding:

"Assuming ... that this Court has the power ... to call for evidence relating to the conviction, I do not consider that I should follow that course here. ... [T]he complainant's age should have been properly proved as part of the State's case prior to conviction. It would be unfair to the accused to allow this deficiency to be made good at this stage. ..." [Paragraph 21]

Rogers AJ held that he should refer the case back to the regional court to determine the sentence on the basis that it had not been proved that the complainant was under the age of 16 at the relevant time. [Paragraphs 22 – 23]

"...[T]he order I intend to make will neither confirm nor set aside the conviction on the charge of rape. Once the regional court has imposed sentence the accused will be free to exercise whatever rights of appeal he may have, based on the record of the proceedings in the regional court." [Paragraph 24]

SELECTED ARTICLES

'THE ACTION OF THE DISAPPOINTED BENEFICIARY' (1986) 103 SOUTH AFRICAN LAW JOURNAL 583

This article deals with the question of whether attorneys who prepare a will can be liable to a beneficiary of the will if, due to the attorney's negligence, the gift to the beneficiary is void. It notes two main categories of problems identified with the action of a disappointed beneficiary:

"First, there are certain perennial problems in the law of delict ... [including] issues relating to the recoverability of pure economic loss, liability for negligent advice and omissions, and the extent to which a party who is not privy to a contract may sue on the basis of an act which constitutes a breach of that contract.

Secondly, ... the loss complained of takes the form of a failure to obtain a benefit. ... [T]o establish his loss the disappointed beneficiary must prove that the testator intended to benefit him, and yet he must needs rely on something other than a valid will. ... And then there are the problems that have been thought to flow from the peculiar position of a potential beneficiary prior to the death of the testator, namely, that his interest is a mere spes successionis which ordinarily enjoys no protection from the law." [Page 584]

The article then examines case law from the United States, Canada, England, Australia, New Zealand and Germany, before concluding that "the action of the disappointed beneficiary has found favour in a number of foreign jurisdictions. The question that arises is whether this action could be accommodated in our law, where the matter is res nova." [Page 594]

The article considers and rejects the possibility that the contract between testator and attorney be treated as a stipulation alteri, before turning to consider a delictual action. It notes the importance of the decisions of the former Appellate Division in *Administrateur, Natal v Trust Bank van Afrika Bpk*, establishing that "a negligent misstatement causing pure economic loss is in principle actionable", and *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd*, confirming "that in cases of pure economic loss generally the wrongfulness of the defendant's conduct lies in the breach of a legal duty". [Page 595]. The article proceeds to analyse the elements of the action of the disappointed beneficiary, concentrating on the element of wrongfulness:

"The comparative survey ... has shown that the most controversial aspect of the disappointed beneficiary's action is the element of a duty of care ... In our law these are problems of wrongfulness, the issue being whether the attorney owes a legal duty to the potential beneficiary not negligently to frustrate his inheritance." [Page 596]

"...[I]t is important to bear in mind that wrongfulness will lie in the determination of whether an attorney owes a legal duty to the potential beneficiary not by negligence to frustrate his inheritance. If such a duty is found to exist, it will imply a correlative right enjoyed by the beneficiary, but the right need not be, in fact will not be, a subjective right. This fact is crucial to understanding why the fact that a beneficiary under an ambulatory will has a mere spes successionis is irrelevant to the question of wrongfulness. ... The right, if any, which the beneficiary has is not a vested right to an inheritance but the right not to have the prospect of an inheritance frustrated by professional negligence. Whether the infringement of this right has in fact resulted in any loss is a question of causation..." [Page 597]

The article then considers and rejects possible objections to the proposed action based on analogous case law, before considering the Appellate Division's decision in *Lillicrap* in further detail:

"In that case the defendants were civil engineers, but the court has expressly referred to cases concerning the delictual liability of attorneys as falling within the fresh ground the court was being asked to break. It is therefore probable that *Lillicrap's* case establishes in our law that an attorney's liability to his client is only in contract, and that there is no concurrent delictual action.

... [I]n [the English case of] *Ross v Caunters* the court attached some significance to ... an attorney's liability to his own client, and it was suggested that if this liability sounded only in contract, it would be odd to hold that the attorney could be under a duty in tort to a third party who was not his client. Whether this is so depends ... on the basis for excluding delictual liability to the client. If the exclusion of a delictual remedy is based solely on the ground that the relationship is already governed by contract, then the absence of a delictual remedy against the client with whom there is a contract is no reason to exclude delictual liability towards the third party with whom there is none. ..." [Page 600]

"... The reasoning of the court [the majority in *Lillicrap*] suggests that if a professional person ... provides some professional service without there being any contract with the recipient of the service ..., he is under no legal duty to act with care, at least not where the potential loss is of a purely financial nature. ... Does *Lillicrap* mean, ... as its reasoning apparently implies, that the disappointed beneficiary's action must fail because, there being no contract between him and the attorney, the attorney owes him no duty? It is submitted that it does not. The court's reasoning has been subjected to trenchant criticism. Certainly it is difficult to understand how it can be said at this stage in our legal development that a person who renders professional services to another cannot be liable to the latter in the absence of a contract. This was certainly not the attitude of Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk* nor of any of the judges in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*, and there is no indication that Grosskopf AJA saw himself as departing from the law laid down in those cases. If in *Lillicrap's* case there had in fact been no contract, and the action had been brought in delict, it is inconceivable that the action would have failed." [Page 601]

"Thus it is almost certain the ratio of *Lillicrap* will be restricted will be restricted to the proposition that where a relationship is governed by contract, a concurrent delictual action for the recovery of pure economic loss will not lie. ...

This ... leaves the way open to recognise a duty in delict towards a third party whose relationship with the professional is not governed by contract. ...

If the submissions made so far are correct, then the courts are free to give full consideration to the 'general criterion of reasonableness' in determining whether the attorney is under a legal duty to the beneficiary. This is primarily a matter of policy. ..." [Page 602]

The article then considered policy factors in favour of such liability, and rejected a possible objection that allowing the action would undermine the Wills Act [Pages 602 – 603].

"It is therefore submitted that, notwithstanding the caution which our courts have been enjoined to show in extending Aquilian liability to a new case, policy considerations justify the recognition of a legal duty resting on an attorney to a beneficiary to ensure, by the exercise of reasonable diligence and skill, that the beneficiary's inheritance is not frustrated by defective execution. Recognition of such a duty implies a correlative right enjoyed by a potential beneficiary not to have a potential inheritance frustrated by the attorney's negligence, ... this right is not to be confused either with the notion of a vested right to the inheritance itself or with the notion of a subjective right." [Page 604]

After examining the additional elements of delictual liability, the article concluded that "the Aquilian action can and should be extended to allow the disappointed beneficiary's claim." [Page 614]

SELECTED JUDGMENTS

PHILLIPS V S (2011) JOL 27318 (WCC)

Case heard 20 May 2011, Judgment delivered 3 June 2011

The appellant had pleaded guilty to driving a motor vehicle while under the influence of intoxicating liquor. He was convicted on his plea of guilty, and was sentenced to three years' correctional supervision in terms of the Criminal Procedure Act. He appealed against his sentence.

Saba AJ found that the Magistrate had failed to give the accused's counsel the opportunity to address the court on the contents of the probation and correctional officer's reports before imposing sentence, and held further:

"Section 35(5) of the Constitution provides that, every person has a right to a fair trial which includes, inter alia, the right to legal representation and the right to adduce and challenge evidence. In S v Tshabalala ... Patel J ... stated the following:
'Section 35(3) of the Constitution forms the bedrock of the right to a fair trial. Inherent in that right is that criminal trial must be conducted in accordance 'with the notions of basic fairness and justice'…" [Paragraph 8]

"...In casu Mr Mihalik did not expressly waive his client's right to address the court on the reports of the probation officer and the correctional officer…..it can never be said that in such case the accused person had a fair hearing. This is because the right of the legal representative to address the court is not just a useless formality. Such right is so fundamental to the right to be heard fairly such that failure to accede to such a request is grossly irregular" [Paragraph 10]

"... [I]n De Beer NO v North-Central Local Council and South-Central Local Council ... the Constitutional Court said the following about the purpose of the fair hearing component in section 34 of the Constitution: 'A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair'" [Paragraph 14]

Saba AJ noted that the fact that the sentencing recommendations in the two reports were different would have given the appellant's counsel and opportunity to seek to persuade the court as to the appropriate sentence, and continued:

"The constitutional right of the accused to a fair hearing must be real and not illusory. The accused person has a right to a proper and effective hearing... Failure to allow Mr Mihalik an opportunity to address and or challenge what was contained in the reports before sentence was imposed was a serious irregularity which resulted in a failure of justice. It resulted in the magistrate not taking into account all the factors pertaining to sentence." [Paragraph 16]

The appeal was upheld. Saba AJ held that as the appellant had already undergone a thirteen week rehabilitation programme, he had "already served his sentence pursuant to the order of the court a quo and therefore, further punishment is unwarranted." [Paragraph 17] (Hlophe JP concurred).

LEWIES V THE STATE, UNREPORTED JUDGMENT, CASE NO: A 659/2010 (1 APRIL 2011)

The appellant was legally represented throughout the proceedings in the court a quo where he was convicted on two counts of fraud. He was sentenced to two years direct imprisonment, and appealed against the conviction and sentence. At the outset of the appeal, it was noted that the accused had pleaded not guilty to one main count of fraud, but that he had been convicted on two counts of fraud. Both parties agreed that this was an irregularity, and the appeal proceeded against the conviction on the main count, and against sentence.

Saba AJ held:

"This court is mindful that a trial court's findings of fact and credibility are presumed to be correct as the trial court has the advantage of seeing and hearing the witnesses and is in a far better position to determine their credibility…….in S v Hadebe 1997 (2) SACR 641 (SCA) ... the following was said:

> "in the absence of demonstrable and material misdirection by the trial court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong'" [Paragraph 12]

"The record shows that the magistrate considered the contradictions in the evidence of the state witnesses, especially in relation to the amounts given to the appellant, but found them not to be material. ..." [Paragraph 13]

Saba AJ considered Supreme Court of Appeal case law regarding discrepancies between a witnesses evidence and prior statements, and continued:

"...If one considers the level of the witnesses' education and sophistication ... their farms background, they would hardly be in a position to give the details of the amounts in the same manner as more sophisticated witnesses. It is highly unlikely that such witnesses would also have made up all the details surrounding the payments of these amounts to the appellant. The record does not indicate any motive on their part to falsely implicate the appellant. ... Further, I am also satisfied the magistrate did not unduly descend into the arena ... According to the record, the magistrate asked questions clarify matters that were not clear from the testimony of the witnesses and that did not amount to cross-examination. From a careful perusal of the record, I am satisfied that the magistrate was justified in finding accepting the version of the State witnesses and rejecting the appellant's version as not being reasonably possibly true. The magistrate, however, was clearly wrong in convicting the appellant on two counts of fraud. ..." [Paragraph 15]

Saba AJ found that the magistrate's sentence had been lenient, and that there was no reason for interfering with it.

The magistrate's order was thus substituted with an order convicting the accused on the main count of fraud. The appeal against sentence was dismissed (Saldanha J concurred).

MAYAMBELA AND ANOTHER V S, UNREPORTED JUDGMENT, CASE NO: A597/2010 (25 MAY 2011)

In this case the appellants were convicted on one count of robbery with aggravating circumstances. The first appellant was sentence to eight years imprisonment and second appellant to twenty five years imprisonment. The appellants' unsuccessfully applied for leave to appeal against conviction and sentence in the court a quo. After a successful petition to this court, the first appellant appealed against conviction and the second appellant against conviction and sentence.

Saba AJ held:

"The magistrate critically analyzed the evidence of all the witnesses and gave a well reasoned judgment." [Paragraph 11]

"It is trite that the evidence of an identifying witness must be approached with caution. The identifying witness evidence must not only be credible but must also be reliable…" [Paragraph 12]

"I am satisfied, having regard to all the evidence, that the appellants' versions cannot be reasonably possibly true and the state did prove its case beyond a reasonable doubt. It follows that the appeal against conviction cannot succeed." [Paragraph 16]

"With regard to sentence, the crime of robbery, where aggravating circumstances are found to be present, falls within the ambit of Part 11 of Schedule 2 of the Minimum Sentencing Legislation. ..." [Paragraph 16]

Saba AJ noted that the legislation prescribed, in such cases, a minimum sentence of 15 years in respect of a first offender and 20 years in respect of a second offender "of any such offence", and continued:

"It is not clear ... on what basis the magistrate decided to impose a sentence of twenty five years imprisonment on the second appellant. The second appellant has a list of previous convictions, i.e. three for theft, one for possession of firearms and ammunition and two for robbery. There is no indication that aggravating circumstances were found to be present on the previous convictions for robbery. The magistrate ... erred in treating the second appellant as a second offender ..." [Paragraph 17]

"This court is therefore at liberty to consider the sentence afresh. Having regard to the second appellant's circumstances, the magistrate was correct in finding that there were no compelling or substantial circumstances justifying a deviation from a minimum sentence prescribed. ... In respect of the first appellant, I cannot find any grounds for interfering with the sentence of eight years imprisonment." [Paragraph 17]

The appeals against conviction were thus dismissed, and the second appellant's appeal against sentence upheld and substituted with a sentence of eight years imprisonment (Le Grange J concurring).

S V KRUGER, UNREPORTED JUDGMENT, CASE NO: SS 31/ 2009 (JUDGMENT 20 FEBRUARY 2011)

The accused was charged with attempt to commit a sexual offence, assault with intent to do grievous bodily harm, and murder.

Saba AJ held:

"The complainant is a single witness regarding what took place before and during the time she was in the toilet. Section 208 of the Criminal Procedure Act ... provides that an accused may be convicted of any offence on the single evidence of any competent witness. It goes without saying that the single witness must be credible. A trial court should, therefore, guard against inherent in accepting the evidence of a single witness. With this in mind, I evaluate the evidence tendered." (page 31 – paragraphs 10-15)

Saba AJ then considered the first count, of attempt to commit a sexual offence:

"The complainant gave a clear account of what took place at the accused's house, despite the fact that she had consumed liquor. Her version was consistent and corroborated to a large extent ... I find her to be a competent and credible witness ..." [Page 31 paragraph 20 – page 32 paragraph 5].

"From the evidence tendered, it is my respectful view that when the accused asked the complainant to take off her panty, he inspired the belief that sexual violation was going to take effect. I, therefore, find that the state has succeeded in proving the guilt of the accused on the second alternative count to count 1 and the accused is, therefore, found guilty of contravening section 5(2) of the Criminal Law Sexual Offences & Related Matters Amendment Act 32 of 2002, which is the second alternative to Count 1." [Page 34 paragraph 1 – 10]

Saba AJ then dealt with the charge of assault with intent to do grievous bodily harm.

"...It is so that the complainant's evidence is that the accused chased her with a panga. The accused did not do anything else beyond chasing the complainant. He did not inflict any injuries on the complainant ..." [Page 34 paragraph 15]

"...I am of the view that had the accused wanted to cause any grievous bodily harm on the complainant, he could have done so while they were locked in the toilet. I am, therefore, not satisfied that he had an intention to cause grievous bodily harm on the complainant when he chased her to the backyard of the house. I, therefore, find that he merely inspired the belief that an impairment of her bodily integrity was immediately going to take place. In the circumstances he is not found guilty of assault with intent to do grievous bodily harm, but guilty of assault common." [Page 35 paragraph 5 – 10].

Saba AJ turned finally to deal with the count of murder, noting that "there is no direct evidence before court. The state relies on circumstantial evidence." After citing Appellate Division authority on assessing circumstantial evidence, Saba AJ rejected the accused's evidence as "lies, improbable and irreconcilable":

"... I find that all the evidence points to the accused as the murderer. The only reasonable and possible inference this court can draw from the aforementioned facts is that it is the accused who killed the deceased ..." [Page 40 paragraph 5]

Saba AJ found that the murder was planned, and convicted the accused on the count of murder.

S V KRUGER, UNREPORTED JUDGMENT, CASE NO: SS 31/ 2009 (SENTENCE 18 MARCH 2011-09-14)

This is the sentencing judgment in respect of the case summarised above.

Saba AJ held:

"In determining an appropriate sentence this Court has to take into account the well-known triad ... consisting of the crime, the offender and the interests of society. These three elements must be judicially and equilaterally applied without over emphasizing one to the detriment of the other. The Court will not forget the aims of punishment which are retribution, prevention, deterrence and rehabilitation." [Pages 1 -2 paragraphs 20 – 5]

"I do not need to emphasise that the crimes the accused has been convicted of are very serious. They were committed on young and defenceless women, the accused used very dangerous weapons in executing these crimes. Both victims looked upon the accused as their father ..." [Page 6 paragraphs 1 – 5]

"Section 51 of the Criminal Law Amendment Act ... prescribes a life imprisonment if a High Court has convicted a person of an offence referred to in part 1 of schedule 2. In our case murder found to have been planned or premeditated and where the victim was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act ..., that is unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence" [Page 6, Paragraphs 10 – 15]

"Both victims ... were below 18 years during the commission of the offences. Section 28 (2) of the Constitution of the Republic of South Africa 1996 provides that a child's best interest is of paramount importance in every matter concerning a child. This right definitely has to be taken into consideration for purposes of sentence" [Page 11 – paragraph 20]

"In S v Di Blasi 1996 (1) SACR 1 (A) at page 10 e – g the following was stated:

> 'The requirements of society demand that a premeditated callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime, but also deter others from similar conduct.'" [Page 12, Paragraphs 5 – 10]

"Taking into account the abovementioned circumstances the health of the accused alone cannot serve as a substantial and compelling circumstance justifying a departure from the minimum sentence. ... [T]he aggravating factors outweigh the mitigating factors in this case. I could also not find any factors that could be relied upon as constituting substantial and compelling circumstances justifying the imposition of a lesser sentence that the life imprisonment for murder." [Page 12, paragraphs 15 -20]

The accused was thus sentenced to 3 years imprisonment on count 1 (incitement to commit a sexual offence), 12 months imprisonment on count 2 (common assault), and life imprisonment on count 3 (murder), the sentences imposed on counts 1 and 2 to run concurrently with the sentence on count 3.